

FROM INSTITUTION TO INNOVATION: THE SHIFT FROM THE INDIAN EVIDENCE ACT TO THE BHARATIYA SAKSHYA ADHINIYAM

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ABSTRACT

The Indian Evidence Act, 2023 (BSA) replaces the longstanding Indian Evidence Act, 1872 (IEA), introducing significant changes in the legal framework governing evidence in court proceedings. This article examines these major changes and provides a comparative analysis of between BSA and IEA. The BSA addresses important interpretations and incorporates amendments to reflect the evolution of the legal and social landscape from India's colonial past. While many policies will not change, their impact will be reflected through future judicial decisions. The Indian Evidence (II) Bill (BSB2) proposed modernization, particularly in the admissibility of electronic evidence. However, there are concerns about the protection against tampering and the admissibility of such evidence. BSB2 also raises questions about the adequacy of asset policing. Despite these challenges, BSB2 represents a step forward, highlighting the need for best practices in the use of electronic evidence and the review of confession procedures to provide a statutory framework for how it is strong and just. Overall, the BSA, as developed with the IEA, introduces significant updates to better align with today's regulatory requirements.

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INTRODUCTION

The ¹Indian law of testimony dates back to Vedic times when theology adopted it to prove the truth. This principle was important in Islamic governance for establishing the facts of legal matters in a historical context. Over time, these traditional policies gradually gave way to the Indian Evidence Act of 1872, creating centuries of change. The IEA has long been a cornerstone of admitting evidence in Indian courts. However, technological advances and the development of legal topics for research are needed. The Indian Evidence Bill 2023 (BSB),

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¹ 'HISTORICAL BACKGROUND of the INDIAN EVIDENCE ACT, 1872 on JSTOR' (*Jstor.org*2024) <https://www.jstor.org/stable/43950171> accessed 5 July 2024

proposed in August 2023, was set to replace the IEA. After careful scrutiny by the Standing Committee on Home Affairs, a revised version known as the Indian Certificate (II) Rules (BSB2) was introduced in December 2023. Most of the amendments contain recommendations from the committee including the IEA. Installation is also included Key changes introduced by BSB2 include increasing the role of electronic records and expanding the scope of admissible evidence. But this new information raises potential concerns and areas for further research, such as protecting electronic evidence from tampering, handling admissible confessions in police custody, and recommendations if not yet provided by the Law Commission inclusion will require ongoing adjustments to ensure order.

HISTORICAL BACKGROUND

The establishment of legal principles in ancient India dates back to the Vedic period when theology embraced the concept of true determination. This principle remained central to Islamic governance, guiding the courts. Over time, these old systems evolved, culminating in the passage of the Indian Evidence Act of 1872, a change that lasted for centuries. In ancient India, religious observance, which was part of a comprehensive moral code, was important even to kings. Legal principles were taken from such sources as the Vedas, Smritis (holy writings), and Achar (customary law), Manu was the first legislator of Hindu law The subcontinent was divided into several independent regions, with rulers dedicated to observance of religious principles including truth and observed every one of them Brahmanas were often consulted on matters of law, which proceeded through the jury system rather than as a single judge or lawyer, a Dharma Sutra and other texts guide him. Under this policy, civil and criminal disputes were settled, complainants filed complaints, and after preliminary review, the defendant's burden of proof was called to the side of the finding of the jury whose findings were to be supported by evidence. Hindu law recognizes two types of evidence: divine (through witnesses) and human (witness testimony, documents, and circumstantial evidence).

Development and Codification of Indian Evidence Act, 1872

- Many principles of Muslim law were discarded by Western thoughts long ago, with Warren Hastings criticizing it as a 'barbarous construction.'
- In 1723, Royal courts were established in the three presidential towns, but they did not have jurisdiction over Indian subjects.

- The Regulation Act of 1773 significantly changed the judicial system by setting up courts outside Bengal and establishing the Supreme Court of Judicature in Calcutta.
- A dual justice system existed in presidencies and mofussil through the acts of 1781, 1801, and 1823.
- It became necessary to harmonize procedural laws before substantive laws in this dual system.
- The First Law Commission Report, under Sir Macaulay in 1833, led to several enactments. The first enactment concerning the law of evidence was Act 10 of 1835, applied in all courts, both provincial and mofussil.
- Subsequent acts such as Act 19 of 1837, Act 5 of 1840, Act 7 of 1844, Act 15 of 1852, Act 19 of 1853, Act 10 of 1855, Act 8 of 1859, Act 25 of 1861, and Act 15 of 1869 were important precursors to the Indian Evidence Act of 1872.
- English judges in India implemented English law in cases that were not covered by existing acts, rather than applying Islamic Law.
- Key cases like ²*Zamindar of Karvetinugar v. Venkatadri* and ³*Kazi Gulam Ali v. H.H. Aga Khan* significantly influenced the evolution of evidence law before the Indian Evidence Act of 1872.
- The Third Law Commission of India commissioned Sir Henry Maine to draft the Indian Evidence Act, which initially faced rejection for being considered unsuitable for India.

WHY WAS THE BHARATIYA SAKSHYA ACT (BSA), 2023 PASSED?

1. Technical Requirements: Modern society has advanced so much in technology and science that it is pointless to rely on codes written centuries ago. The rise of e-courts has largely replaced the traditional court system, with all procedures from pleading to evidence now being recorded electronically and as a result, an Evidence Act had to be developed and updated to keep pace with these technological advances. For example, BSA section 61 recognizes only electronic records and evidence. Removal of colonial provisions:

² 'Venkatasubbaraya Chetti and Anr. Vs Zamindar of Karvetinagar on 18 September, 1896' (*Indiankanoon.org*2024) <https://indiankanoon.org/doc/312004/> accessed 18 July 2024

³ Wikipedia Contributors, 'Aga Khan Case' (*Wikipedia*21 June 2024) https://en.wikipedia.org/wiki/Aga_Khan_case accessed 18 July 2024

2. **Colonial-Era Provisions:** The Indian Evidence Act of 1872 contained several colonial-era provisions, including the presumption that certain documents were recognized in England without a handwritten witness or stamp entered into force is valid, as well as requiring Indian courts to recognize any laws enacted by the British Parliament. The BSA aims to eradicate all such remnants of colonialism.
3. **Specific provisions for integration and inclusion:** BSA seeks to integrate many similar components. For example, instead of dealing with confessions in separate sections as in the Indian Evidence Act (Sections 24-30), the BSA has refined these provisions into just two or three.
4. **Changes due to amendments in IPC and CRPC:** The Indian Evidence Act of 1872 refers to the provisions of the Indian Penal Code (IPC) and the Criminal Code (CRPC) as these acts have been replaced by new laws

HIGHLIGHTS OF THE BILL

1. **Technological Advances:** The world is now very advanced, so laws that were formulated centuries ago need to be updated. With the proliferation of e-courts and electronic documents from the filing of a case to the presentation of evidence, the Evidence Act must reflect these technological advances. For example, section 61 of the BSA recognizes that electronic records are primary evidence.
2. **Abolition of colonial provisions:** The Indian Evidence Act of 1872 contained several colonial-era provisions. The aim of the BSA is to repeal these, such as the presumption of the validity of a document recognized in England without evidence, and to require Indian courts to recognize British Statutes
3. **Combining and adding provisions:** The BSA combines similar provisions, such as combining multiple provisions into a few provisions in a confession. This streamlining process improves legal clarity and efficiency.
4. **Acceptable evidence:** The Indian Evidence Rules (BSB) contain a fundamental distinction between 'facts in question' and 'relevant facts. 'Issue facts' relate directly to the construction of rights or liabilities in a case, and are at the heart of the legal dispute. In contrast a 'relevant fact' is one that indirectly contributes to the proof or disproof of a disputed fact, provides important context, and provides corroborating evidence Under the BSB, the standard for a fact deemed to have been proved is based on the court's belief in its existence
5. **Revealed facts:** The BSB determined that a fact is considered proven when the court believes that it exists based on the evidence presented or that its existence is reasonably

probable based on the judgment. This standard ensures that judicial decisions are based on credible and reliable evidence.

6. **Police confessions:** Generally, confessions given to police officers under the BSB are inadmissible unless recorded by a magistrate to ensure the authenticity of such confessions but may be admissible as information obtained from the accused is incarcerated directly leads to additional findings, including a report of imprisonment that requires adequate evidence and a balance of potential benefits
7. **Written evidence:** The BSB expands the definition of written evidence to include electronic records, which reflect modern methods of communication. Primary evidence includes original documents and electronic records, while secondary evidence includes original documents and oral statements to ensure adequate coverage of all types of documents
8. **Oral evidence:** BSB can provide oral evidence electronically, facilitating remote testimony of witnesses, accused, and victims. These modern features provide accessibility and efficiency in court proceedings.
9. **Electronic evidence:** BSB equates electronic or digital records with paper records, including information stored in semiconductor memory or communication channels, such as emails, server logs, and voicemails, and is recognized by this inclusion of the importance of digital evidence in modern law.
10. **The second proof:** The BSB expands secondary evidence to include oral and written admissions and expert testimony in the form of document examinations. It also addresses the need for secondary evidence when the authenticity of a document is questioned, providing a more robust framework for evidence verification

PARLIAMENTARY JOURNEY OF THE BHARTIYA SAKSHYA BILL (2023)

1. **August 11:** On August 11, 2023, the Indian Evidence Act 2023 was introduced by Home Minister Amit Shah in the Lok Sabha, the Indian Parliament. This formally launched the legislative process for the Bill, providing a forum for debate, discussion, and revision. With the introduction of the Act, its purpose was explained along with the need to update the existing law of evidence to incorporate technological advances and modern legal principles
2. **December 12:** On December 12, 2023, the original Indian Evidence Act was repealed, and a revised version called the Indian Evidence Act 2023 was introduced in the Lok

Sabha. This step was taken to address any concerns, suggestions, or important changes identified during the initial discussions and committee review. The revised code likely included changes to make it comprehensive and bring it into line with current legal and technical conditions. The withdrawal and reintroduction of the amended law show that the government is willing to amend the bill to ensure its effectiveness and adoption.

3. **December 21:** The Indian Evidence (II) Act was passed by the Rajya Sabha on that same day, December 1, 2023 the quickness with which this law was passed by the Rajya Sabha demonstrated its popularity; the Members were unanimous as to its provisions. The swiftness of the government's approval demonstrates how urgently and importantly changes in the legislation need to be made. Passage of a Bill in the Rajya Sabha means that it has been approved by both Houses of Parliament and satisfies an important constitutional requirement.
4. **December 25:** It became law on December 25, 2023 when the President of India approved The Indian Evidence (II) Act, 2023. The last presidential assent is what signifies that a bill has thus been passed into law after going through all these stages. The Indian Evidence Act, of 1872 replaced the current Indian Evidence Act signed by the President in 2023. Thus from introduction to passage, this statute's journey shows a complete legal process including scrutiny, deliberation, and amendment. Accordingly, promptness and necessity for intervention are evident at every stage indicating that now is the time when evidence law should be revised to the modern demands of the justice system.

EVIDENCE LAW AND THE BHARATIYA SAKSHYA ADHINIYAM (BSA)

Evidence Law

- **Attributive law:** Substantive and procedural laws involve the 'attributive' law, the substantive aspect presents the rights and obligations of people and respective ways and means for executing substantive or procedural laws legally as well as in courts; on the other hand, procedural legislation is responsible for procedures related to securing these rights. Attributive law, however, looks at modalities governing how to make use of legal materials such as evidence for example by stipulating its presentation and admissibility This section discusses the contribution of evidentiary standards towards the effective application of substantial procedural rules throughout judicial proceedings.

- **Technological Advances:** The Indian Evidence Act (IEA) of 1872 has not reflected the technological advances of the last few decades. The legal system has traditionally relied on physical documents and personal evidence, but the rise of digital technology has changed the way information is collected, communicated, and presented. The Indian Evidence Act aims to technologically transform this will modernize the law of evidence.

B.S.A

- **Electronic reports:** The BSA encourages the filing of electronic reports, enabling them to be filed by those involved in legal proceedings, such as witnesses, accused, experts, and victims. This includes techniques such as video conferencing and digital presentations. This system recognizes the convenience, efficiency, and flexibility provided by modern technology, and allows individuals to testify or give evidence without having to physically go to court. This is especially useful in remote cases, health, or other factors make it difficult to go to court.
- **Digital Records as Evidence:** The BSA explicitly recognizes that electronic and digital records are valid evidence, giving them the same legal standing as traditional paper documents. This shift reflects an increasing reliance on digital communication and records in various domains of life, from personal communication to business communication. By formally recognizing digital records as admissible evidence, the BSA ensures that the regulatory framework can effectively handle issues related to electronic data, email, digital contracts, and other types of digital documents.
- **Expanded Secondary Evidence:** The BSA broadens the definition of secondary evidence to include:
 - ❖ **Mechanically produced copies of documents:** These are reproductions made through machines, such as photocopies, which can be used as evidence when the original document is not available.
 - ❖ **Copies that have been compared with the original:** These copies are verified against the original document to ensure accuracy and authenticity.
 - ❖ **Counterparts of documents against parties who did not execute them:** These are duplicate documents that are considered valid against parties who did not originally sign them.

- ❖ Oral accounts from individuals who have seen the original documents: Testimonies from people who have directly observed the original documents can be used as secondary evidence.

KEY ADDITIONS AND ALTERATIONS

1. **Expert opinion:** The BSA extends the scope of IEA section 45 on expert opinion. Previously, expert opinion was limited to areas such as handwriting, science, art, foreign law, and fingerprinting. The BSA now allows courts to consider expert opinion in any area, recognizing the important role of modern science and other areas of expertise in adjudication. This amendment recognizes the increasing importance of expert testimony in the growing fields of digital forensics, medical science, and other fields, and provides courts with the knowledge they need to make informed decisions
2. **Inclusive Language:** The BSA replaces outdated and offensive terms like "madman" with more respectful and inclusive language such as "person of unsound mind." This change encourages a more dignified approach to individuals with mental illness and reflects contemporary understandings and attitudes toward mental health issues. It helps reduce stigma and creates a respectful and inclusive legal environment.
 - Colonial-era Terms: Terms associated with India's colonial past, such as "His Majesty's sovereignty," have been replaced by modern equivalents such as "any country other than India." This shift reflects India's sovereignty and current international relations, moving away from colonial terminology and towards language that is more appropriate and appropriate in a contemporary context.
3. **Technological Integration:** BSA recognizes electronic and digital records as "documents" under Section 2(d), reflecting the shift to digital communication and record keeping This shift accommodates the fact that more updated information is stored and transmitted electronically, and ensures that the legal system can handle digital documents effectively
 - Electronic Statements: Recognizing the pervasiveness of digital communication in modern society, the definition of evidence has been expanded to include electronic data. This includes emails, text messages, and other digital communications, ensuring they can be admissible in court.

- Section 61: Imposes provisions to ensure that electronic evidence cannot be considered inadmissible in electronic form alone. This policy reinforces the admissibility of digital evidence in legal proceedings, ensuring that electronic documents and records are treated with the same fairness as traditional paper documents

4. Other Relevant Changes: The BSA amends sections 115-117 of the IEA, specifically in providing for the prohibition on issuing a landlord's license. Under Section 122 of the BSA, tenants cannot refuse the landlord's title even after the lease has ended, extending the estoppel effect beyond the lease. This amendment ensures that the tenant cannot take possession of the property and challenge the ownership of the landlord.

- Judicial notice: for the purpose of section 52, BSA inserts one more sub-section that includes international pacts and decisions, including those in courts made by India in global organizations. The aim is to make sure that relevant treaties and decisions are brought to the court's attention.
- Secondary evidence: Section 58 of BSA makes changes hence the inclusion of oral and written admissions expert examination about documents, it also contains a comprehensive provision regarding secondary evidence. This change allows the court to consider a wider range of evidence, including expert analysis and testimony.
- Communications: The provision of Section 165 does not require courts to introduce communications between ministers and the President of India, and ensures confidentiality in high-level official communications. This amendment protects sensitive government communications and has been disclosed in court.
- Coercion: Adds coercion to the list of acts listed in Section 22 which nullifies the confession by an accused person. It means that any confession obtained through coercion cannot be admitted as evidence during trial. This amendment protects individuals from being forced to make a false allegation.

CONCLUSION

The Indian Evidence Act 2023 (BSA) replaced the Indian Evidence Act 1872 (IEA), which was a significant change in the Indian law relating to the admission of evidence. The new act seeks to modernize the law on evidence in line with current needs, technological advances, and social dynamics. Nonetheless, despite these progressive changes such as the acceptance of

electronic records as documents and marginal evidence if any provided for in BSA, there are still some unresolved questions. For instance, the lack of strong safeguards against tampering with electronic records is a concern since subsequent confessions obtained have been ruled out by courts even after providing a clear chain of custody for the evidence though admissibility of imprisonment has remained a controversial topic that could help ensure that such kind of evidence should occur. In general, it can be argued that the Indian Evidence Act 2023 is a groundbreaking legal development that combines the need for modernization with the reservation of principles tested over time. Its success will depend on its usage and interpretation by courts as well as its capacity to address issues such as evidence destruction and harsh pressures from police cells



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