

THE NEW LAW OF EVIDENCE IN INDIA: SIMPLIFICATION, SENSITIZATION AND MODERNIZATION, OR SIMPLY REORGANIZATION?

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ABSTRACT

Aligning law with the social realities will enliven the entire legal system, and therefore law should change with the change in society. Law cannot remain static and needs to evolve with time to meet the needs of an ever-changing society. With the technological advancements and societal changes, there was an urgent need to re-tune the law of evidence in order to cover crimes beyond the territorial jurisdiction of India, include the digital space, and use of modern technologies within its ambit. The author in this article has dealt with some of the fundamental modifications viz. additions, deletions, integrations, substitutions and omissions to/of the key provisions introduced by the Bharatiya Sakshya Adhiniyam, 2023 (BSA), and analysed their constitutional and jurisprudential cohesiveness. Further, the author, through critical analysis, attempts to appraise the BSA's impact on the efficiency and fairness of the justice system in India, and assess the justification for the enactment of the Adhiniyam. Furthermore, the author has dealt in detail with the legalities, technicalities and the process connected with handling, presentation and interpretation of electronic and digital evidence with specific reference to the mandatory requirement of contemporaneous certificate under s.63, BSA.

Keywords: BSA, technological advancements, societal changes, constitutional and jurisprudential cohesiveness, electronic and digital evidences.

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1. INTRODUCTION

Justice dispensation system can be broadly classified into three parts viz. Investigation or Pre-trial, Trial and Post-trial. It is only at the stage of trial where there is a role of the Indian Evidence Act, 1872 (earlier) and now, the Bharatiya Sakshya Adhiniyam, 2023. Justice is best served only when it is based on truth. Therefore, the ultimate purpose of the Law of Evidence is to find the truth. It is the law which helps the court in finding the reality, by offering reasonable opportunity to both the sides to present their case and confirming the basis on which the action is taken against one of them.

The Bharatiya Sakshya Adhiniyam, 2023 (hereinafter referred to as BSA) has replaced the Indian Evidence Act, 1872 (hereinafter referred to as IEA) on July 1, 2024. However, IEA still applies to the pending application, trial, inquiry, investigation, proceeding or appeal commenced before 1 July, 2024. BSA is an adjective law to define the pleadings and methodology by which the substantive and procedural laws are operationalized. The *preamble* of the Adhiniyam states: “To consolidate and to provide for general rules and principles of evidence for fair trial”. Thus, it deals with the rules and principles on how evidence should be presented and interpreted inside the courts? i.e., What has to be proved? How it has to be proved? Who will prove it? The most basic reason to bring BSA is to address the technological advancement undergone in the country during the last few decades. Replacing IEA by BSA has three-fold objectives:

One, *simplify* i.e., renumbering and integration of like provisions e.g., provisions in relation to confession to police officer, and in police custody (ss. 25,¹ 26² and 27,³ IEA) are now clubbed together as one section (s. 23, BSA⁴). Further, ss. 24,⁵ 28⁶ and 29,⁷ IEA are now included under s. 22, BSA (Confession caused by inducement, threat, coercion or promise, when irrelevant in criminal proceeding). Similarly, provisions in relation to public and private documents (ss.74 and 75, IEA respectively) are put

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1. Evidence Act 1872 (Act 1 of 1872), s 25 (Confession to police officer not to be proved).
 2. *ibid* s 26 (Confession by accused while in custody of police not to be proved against him).
 3. *ibid* s 27 (How much of information received from accused may be proved).
 4. Sakshya Adhiniyam 2023 (Act 47 of 2023), s 23 (Confession to police officer).
 5. Evidence Act 1872, s 24 (Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding).
 6. *ibid* s 28 (Confession made after removal of impression caused by inducement, threat or promise, relevant).
 7. *ibid* s 29 (Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc).

together as one (s.74, BSA⁸). Also, s. 146, BSA⁹ includes all the provisions in relation to leading questions, which were earlier contained in ss.141,¹⁰ 142¹¹ and 143,¹² IEA. Due to the modifications in BSA i.e., introduction of one section (s. 61, BSA), removal of 5 sections (ss. 22A, 82, 88, 113 and 166, IEA) and other changes like addition, deletion, substitution of certain words or provisions, etc., a lot of sections, almost all, are renumbered and the new BSA consists of 169 sections in total whereas the old IEA consisted of 167 sections.

Two, *sensitize* i.e., use of politically correct terms e.g., use of the term ‘unsoundness of mind’ instead of ‘lunacy’ in explanation to s.124 (Who may testify).

Three, *modernize* i.e., a) removal of outdated and colonial references (like Act of the Parliament of the United Kingdom; Provincial Act; Crown Representative; London Gazette; the Government Gazette of the Dominion, colony or possession of his Majesty; British Crown; Queen’s Printer; Her Majesty) have been deleted from ss. 31,¹³ 52,¹⁴ 77¹⁵ and 80,¹⁶ BSA. b) inclusion of electronic and digital records under evidence and its admissibility e.g., “evidence” now, means and includes all statements including statements given electronically, and all documents including electronic or digital records (s. 2(1)(e), BSA); “document” includes electronic and digital records. Recognizing the challenges involved in repetitive physical appearance in courts, this update acknowledges the shift to electronic communication and data storage from traditional paper-based documentation. It offers a viable alternative by permitting the appearance of victims, witnesses, accused, and experts to depose their evidence through electronic means while minimizing the necessity for any kind of physical travel and reducing related expenses. This has logical connection to s. 530 of Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)¹⁷ providing for examination of complainant and witnesses in electronic mode by use of

8. Sakshya Adhinyam 2023, s 74 (Public and private documents).

9. *ibid* s 146 (Leading questions).

10. Evidence Act 1872, s 141 (Leading questions).

11. *ibid* s 142 (When they must not be asked).

12. Evidence Act 1872, s 143 (When they may be asked).

13. Sakshya Adhinyam 2023, s 31 (Relevancy of statement as to fact of public nature contained in certain Acts or notifications).

14. *ibid* s 52 (Facts of which Court shall take judicial notice).

15. *ibid* s 77 (Proof of other official documents).

16. *ibid* s 80 (Presumption as to Gazettes, newspapers, and other documents).

17. Nagarik Suraksha Sanhita 2023 (Act 46 of 2023), s 530 (Trial and proceedings to be held in electronic mode).

electronic communication or by audio-video electronic means. c) expansion of the scope of evidence i.e., Definition of secondary evidence has been expanded by including 3 new categories of secondary evidence (clauses vi, vii and viii, s. 58, BSA). Presently, secondary evidence also encompasses oral and written admissions as well as evidence provided by individuals skilled in examining certain technical and voluminous documents that cannot be easily examined in court. d) omission of outdated provisions e.g., s. 22A, IEA (When oral admissions as to contents of electronic records are relevant) has been completely removed from the law of evidence for, electronic certificates have come into picture now. Hence, no requirement of oral admissions as to their contents. Other fully removed provisions are s. 82, IEA (Presumption as to document admissible in England without proof seal or signature), s. 88, IEA (Presumption as to telegraphic messages), s. 113, IEA (Proof of cession of territory) and s.166, IEA (Power of jury or assessors to put questions).

Apart from these key changes, the core principles under the law of evidence remain the same i.e., there is no change to fundamental concepts like Facts in Issue, Relevancy, Admissibility, Confessions, Dying Declaration, Burden of Proof, etc.

2. FROM ACT TO ADHINIYAM: DE-COLONISATION OR RE-ORGANISATION?

Pt. Jawahar Lal Nehru¹⁸ was well aware about the fact that the society cannot remain static forever, and therefore, during the Constituent Assembly Debates, he emphasized the importance of art. 368 of the Constitution of India¹⁹ by stating:

“While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in a Constitution. ... If you make any Constitution rigid and permanent, you stop the nation’s growth, the growth of a living, vital, organic people.”

His vision was very clear in the sense that while the Constitution should be respected, it should not be treated as unchangeable for, it should evolve with time, ensuring that democracy, justice and social progress are upheld.

18. (1889-1964), Pt Jawaharlal Nehru was one of the most important leaders of the Indian national movement for independence, and became the first Prime Minister of independent India.

19. Constitution of India, art 368 (Power of Parliament to amend the Constitution and procedure therefor).

The same goes with any other law (Law of Evidence, for that matter), and until and unless such amendments or enactments are at par with the constitutional values and principles, and are not done recklessly, the change should be welcomed and respected.

The jurisprudential essence behind the new law of evidence lies in the fact that society evolves like a biological organism and this evolutionary process involves increasing complexities and specialisation as it progresses. With such development in social structure, the law should evolve over time.

As far as the jurisprudential perspective is concerned, one theory is not applicable in totality but some element of each is taken. The same goes for law of evidence and its evolution from the Act to Adhinyam as it has never developed in isolation and thus no one theory can explain and justify the change in full. Rather the evolution can be explained through various theories by adopting favourable elements of the same. It is a law which developed with the passage of time along with the progress of society. Therefore, its evolution can be justified by associating the following schools and theories with the law of evidence:

2.1 Philosophical School

The State and law are both the consequences of evolution, as opined by Hegel.²⁰ As per Hegel,²¹ law was made in order to conform to the clashing egos in the society. The amalgamation of selfish consciousness of each ego helps to achieve universal consciousness.²² The union of family and civil society makes up the State.²³ For meeting the requirements of time, both the society and law have been changing with time. Therefore, it is necessary that laws reconcile to the dynamic moderations in society for attaining the purpose of human excellence.²⁴

It is an undeniable statement that the shift from IEA to BSA is the result of finding solutions to the challenges which have arisen due to the advancement in technology. It proves to be a complete law on evidence in

20. V D Mahajan, *Jurisprudence and Legal Theory* (5th edn, Eastern Book Company, Lucknow 2014) 515.

21. (1770-1831), Georg Wilhelm Friedrich Hegel, was a German philosopher who developed a dialectical scheme that emphasised the progress of history and of ideas from thesis to antithesis and thence to a synthesis.

22. Dr N V Paranjape, *Studies in Jurisprudence and Legal Theory* (8th edn, Central Law Agency, Allahabad 2016) 81.

23. Mahajan (n 20).

24. Paranjape (n 22) 82.

the sense it deals with not only with the oral and documentary evidences but also the electronic evidences.

2.2 Historical School

The Transformation of Society to the progressive stage has been elaborately discussed by Sir Henry Maine.²⁵ According to him, law evolves with the advancement of society, leading to the gradual development of an individual over time. In a static society, the rights of an individual would have been determined based on existing practices, whereas in a progressive society, legal development occurs through new mechanisms, rooted in the concept of equity, legal fiction, and legislation.²⁶ The widespread use of technology in collecting evidence and acknowledging the same by bringing new provisions under the BSA is a progressive development in law. Four explanations have been added to s. 57, BSA in order to incorporate the provisions on electronic evidences and electronic records as primary evidence. This has in turn increased the scope of primary evidence manifolds, and have given the stakeholders numerous options to present an electronic evidence in the court of law.

2.3 Sociological School

Social engineering, as proposed by Roscoe Pound,²⁷ focuses on balancing the interests of individuals and society to prevent conflicts. Pound's theory is known as *functional theory* due to its emphasis on the law's role in harmonizing these conflicting interests promptly to avoid disputes. Crime is a wrong against both the individual and society and therefore, the state prosecutes under the criminal justice system thereby doing balancing of interests, which is not possible until and unless there is an apposite law to deal with the crime. This reiterates the urgency to have a proper legal framework to deal with the crime in digital space, and thereby achieving the balancing of interest.

Eugen Ehrlich,²⁸ one of the prominent figures associated with sociological schools of jurisprudence believes in spontaneous evolution of

25. (1822-1888), Henry James Sumner Maine, was a British jurist, historian, anthropologist, pioneered the study of comparative law, notably primitive law and anthropological jurisprudence.

26. Paranjape (n 22) 63.

27. (1870-1964), Roscoe Pound, belonged to social school of thought, a prolific writer and propounded theory of social engineering, interest theory.

28. (1862-1922), Eugen Ehrlich, was an Austrian legal scholar and teacher generally credited with founding the discipline of the sociology of law.

law. He has given the concept of *living law* and argues that just as society evolves naturally through interaction and relationships of its members, law too should emerge from these social practices and norms, rather than being imposed solely through formal statutes and regulations by the state. This clearly hints to having a robust legal framework where one can deal with evolving and concerning digital aged electronic or digital evidences.

As per the *biological evolution theory*, Herbert Spencer²⁹ draws an analogy between the society and biological organism, where he emphasizes that the society, like an organism, develops continuously with time. In order to cater the needs of evolving society, law also needs to develop with time. Therefore, the enactment of the Adhiniyam is in consonance with the *biological evolution theory*, considering the societal and technological advancements.

2.4 Realist School

As far as the realist school of jurisprudence is concerned, Karl Llewellyn,³⁰ says that society changes faster than law and therefore, there is a constant need to examine how law meets the contemporary social problems. He further emphasised on sustained and pragmatic evaluation and examining of law in terms of changing circumstances. This theory advocates highly for the need of having a robust and contemporaneous legal framework to deal with evidence, especially electronic or digital evidence.

As per Richard Posner,³¹ formalism should not be separated from realism for, excessive formalism leads to redundancy of law. Law should be empirical in nature, and it needs to focus on the practical outcome. Considering the *legal pragmatism* given by Richard Posner, the Adhiniyam 2023 fits well in the current real-time scenario where not everything is documented rather recorded via electronic means.

In a nutshell, in order to evolve with the society and stay topical, the law of evidence in India has transformed by incorporating the much required

29. (1820-1903), Herbert Spencer, was a sociologist and influencer of the structural functionalist perspective, one of the principal proponents of the evolutionary theory in the mid-nineteenth century, his synthetic philosophy, political thought primarily for the defense of natural rights was popular.

30. (1893-1962), Karl Nickerson Llewellyn, was an American jurisprudential scholar associated with the school of legal realism.

31. Richard Allen Posner, is an American legal scholar and retired United States circuit Judge who served at the US Court of Appeals for the Seventh Circuit from 1981 to 2017.

changes in the existing law prior to July 1, 2024.³² It includes: addition and amendment of provisions in relation to technological advancements and societal changes; removal of outdated provisions referring to colonial era; integration of certain provisions of the same kind; removal of non-functional provisions and changes necessitated on account of changes in IPC³³ and CrPC³⁴ *mutatis mutandis*.

However, as far as the scheme of Law of Evidence is concerned, there is hardly any change except the change in numbering of the provisions. It can still well be classified into three parts i.e.,

- (i) Relevancy of Facts (What has to be proved?): Part I, from ss. 3 to 50, BSA (earlier, from ss. 5 to 55, IEA).
- (ii) Mode of Proof (How will you prove it?. How are the relevant facts to be proved?): Part II, from ss. 56 to 100, BSA (earlier, from ss. 51 to 103, IEA).
- (iii) Production and Effect of Evidence (Who will prove it?. By whom and in what manner must the evidence be produced?): Part II, from ss. 101 to 167, BSA (earlier, from ss. 104 to 169, IEA).

3. WHAT HAS TO BE PROVED?

How does the rain occur? It doesn't occur in isolation. There is a phenomenon behind it and a process which is interconnected with each other. First, there is increase in the atmospheric temperature which results in evaporation of water from lakes, oceans, rivers and other water bodies. Next, the water vapours rise into the air and form cloud. Next, the water droplets in the clouds grow and get dense through the process of condensation. Last, due to the heaviness of the droplets, they fall to the ground as rain. In the similar way, whenever something happens, there is a sequence in which it happens. It does not happen out of the blue. The same logic is used as a fundamental basis in the law of evidence for calling a fact to be relevant, and under the BSA or IEA, only those facts are required to be proved, which are either facts-in-issue or relevant facts in relation to the facts-in-issue.

32. The commencement date of BSA is 1 July 2024.

33. Penal Code 1860 (Act 45 of 1860).

34. Criminal Procedure Code 1973 (Act 2 of 1974).

There will be some incidents surrounding the main fact which will have some logic connection between all the circumstances, and these form circumstantial evidences. These circumstances together, if chain of surrounding circumstances is complete, are said to be logically relevant. There is no specific mention of such logical relevancy under the law of evidence. There is only one relevancy i.e., legal relevancy that relates to the relevancy under the BSA or IEA. If a fact is declared to be relevant under s. 4 till s. 50, BSA or s. 6 till s. 55, IEA, it is called as legal relevancy or legally relevant fact. This is declared under the s. 3, BSA/ s. 5, IEA as to what has to be proved.

In the law of evidence, the position is such that the every legally relevant fact is also logically relevant. Theoretically, it is not necessary that every logically fact is legally relevant also, however, practically, there is a complete overlapping i.e., logically relevant fact is legally relevant and vice versa is also true.

As per the law of evidence, one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of the Adhinyam/Act relating to the relevancy of facts, viz:

- a) Facts logically connected with facts in issue (ss. 4-14, BSA/ ss. 6-16, IEA)
- b) Admissions and confessions (ss. 15-25, BSA/ ss. 17-31, IEA)
- c) Statements by non-witnesses (ss. 26-27, BSA/ ss. 32-33, IEA)
- d) Statements under special circumstances (ss. 28-32, BSA/ ss. 34-38, IEA)
- e) Judgement in other cases (ss. 34-38, BSA/ ss. 40-44, IEA)
- f) Opinion of third persons (ss. 39-45, BSA/ ss. 45-51, IEA)
- g) Evidence as to character (ss. 46-50, BSA/ ss. 52-55, IEA)

This part of the Adhinyam has been introduced with a very few notable changes. One is the addition of the word 'coercion' to s. 22³⁵ pertaining to confessional statement. This word has not been defined

35. Sakshya Adhinyam 2023, s 22 (Confession caused by inducement, threat, coercion or promise, when irrelevant in criminal proceeding).

under the Adhinyam or, under the BNS or BNSS or IT Act³⁶ from where the definitions of words used but not defined in the Adhinyam may be imported.³⁷ In common parlance, it refers to an act of persuading someone forcefully to do something that they do not want to do. The addition of the word ‘coercion’ has widened the scope of irrelevancy of confession, however, such addition was uncalled for as the term ‘threat’ was wide enough to include ‘coercion’. Next is the addition of ‘Explanation II’ to s. 24.³⁸ The explanation has been added for the commencement of joint trial even if the accused has absconded or declared a proclaimed offender, and to ensure that their trial is not stalled. The third major change is the addition of the words ‘or any other field’ to s. 39.³⁹ As a response, definition of experts has become more expansive and help of more experts in fields hitherto unknown can be taken.

4. HOW IT HAS TO BE PROVED?

The second part of the Adhinyam has undergone significant changes in the sense that now, electronic or digital evidences have been made par with documentary evidences, as stated under the brand-new provision i.e., s. 61 of the Adhinyam. There is no such corresponding section under the IEA. This section clearly acknowledges the significance of electronic or digital evidences thereby recognising their legal effect, validity and enforceability as similar to paper records.

How are the relevant facts to be proved? The answer to this question lies in Part II of the Adhinyam/ Act i.e., Chapter III to VI – ss. 51 to 103, BSA/ ss. 56 to 100, IEA. Generally, a fact-in-issue or relevant fact may be proved by oral or documentary evidence (including electronic evidence).⁴⁰ However, after the coming of the BSA, such facts may be proved by oral or documentary or electronic evidence, where electronic or digital evidence is all together a distinct and exclusive category.

36. Information Technology Act 2000 (Act 21 of 2000).

37. Sakshya Adhinyam 2023, s 2(2) (Definitions) which reads:

“Words and expressions used herein and not defined but defined in the Information Technology Act 2000, the Nagarik Suraksha Sanhita 2023 and the Nyaya Sanhita 2023 shall have the same meanings as assigned to them in the said Act and Sanhitas.”

38. Sakshya Adhinyam 2023, s 24 (Consideration of proved confession affecting person making it and others jointly under trial for same offence).

39. *ibid* s 39 (Opinions of experts).

40. Introduced by the Information Technology Act 2000.

As documentary evidence may be proved via primary and secondary evidences, similarly, electronic or digital evidences may be proved by either submitting the primary electronic record itself or through its copy accompanied by the certificate mentioned under s. 63(4), BSA. Also, the best evidence rule is followed with the same effect in case of electronic or digital evidence i.e., primary evidence is preferred over secondary as given under s. 59, BSA/ s. 64, IEA.⁴¹

The issue of digital or electronic evidence in new criminal justice system revolves around two kinds of digital or electronic evidences. One, the evidence already available which is to be searched and seized during investigation. Two, the digital evidences produced through audio-video recording of procedure of search, seizure, statements, etc. Section 105, *Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)* relates to the recording of search and seizure through audio-video electronic means.⁴²

Under BSA, any data/record directly saved in any storage media and produced from the proper custody, shall be admissible as primary evidence unless disputed. However, its contents shall be proved in the court as evidence with a certificate as provided under s.63(4), BSA. This essentially relates to the contemporaneous certificate for, at every instance or stage, including: collecting of evidence by the investigating officer; securing it at Malkhana of the police station; scrutiny by the forensic experts (at Central Forensic Science Laboratory/State Forensic Science Laboratory) and presenting it in the court of law, a new certificate is required to be submitted with its record duly mentioned in the chain of custody form and the case diary. Thus, considering the importance of producing contemporaneous certificate at every instance, one of the inferences would be: the storage media containing data/ record directly produced by the computer device is primary evidence but when it is reproduced in human understandable form from such media as evidence, it requires certification being a secondary data.⁴³

41. Proof of documents by primary evidence.

42. Delhi Police Academy, Handbook on *Bharatiya Sakshya Adhiniyam* (Annexure I: A note on search and seizure of digital evidence in amended criminal laws, January 2024) 31 <https://training.delhipolice.gov.in/PDF/PublicData/NOTICE_20240614145717214.pdf> accessed 14 March 2025.

43. Delhi Police Academy, Handbook on *Bharatiya Sakshya Adhiniyam* (Annexure I: A note on search and seizure of digital evidence in amended criminal laws, January 2024) 31 <https://training.delhipolice.gov.in/PDF/PublicData/NOTICE_20240614145717214.pdf> accessed 14 March 2025.

The importance of digital or electronic evidence and the acknowledgment of the same by the new Adhiniyam can be gauged by the intent of including the following four new categories of primary evidence:

Category I: Explanation IV, s. 57, BSA:⁴⁴ storage that occurs simultaneously or sequentially in multiple files e.g., email threads, backups and archives, website content, chat logs, data being saved in an iPhone and its iCloud linked to it, etc.

Category II: Explanation V, s. 57, BSA:⁴⁵ produced from the custody e.g., mail from secured server (official mails in the custody of a University's IT department), CCTV footage from secured recorder, social media posts from service provider's server, etc.

Category III: Explanation VI, s. 57, BSA:⁴⁶ video recording simultaneously stored and transmitted or broadcasted or transferred e.g., live streaming being broadcasted and recorded at different storage media, video conferencing calls being recorded by different participants, CCTV recordings and cloud backup, etc.

Category IV: Explanation VII, s. 57, BSA:⁴⁷ stored in multiple storage spaces in a computer resource e.g., recovered deleted files, web browsing history, etc.

Though, it is a primary class of evidence, however, there is still ambiguity as to whether a certificate under s. 63(4)(c) would still be required in case electronic and digital data is maintained and presented in court in the manner as mentioned under the above-mentioned explanations to s. 57?

44. Sakshya Adhiniyam 2023, explanation 4, s 57, which reads:

“Where an electronic or digital record is created or stored, and such storage occurs simultaneously or sequentially in multiple files, each such file is primary evidence.”

45. *ibid* explanation 5, s 57, which reads:

“Where an electronic or digital record is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed.”

46. *ibid* explanation 6, s 57, which reads:

“Where a video recording is simultaneously stored in electronic form and transmitted or broadcast or transferred to another, each of the stored recordings is primary evidence.”

47. *ibid* explanation 7, s 57, which reads:

“Where an electronic or digital record is stored in multiple storage spaces in a computer resource, each such automated storage, including temporary files, is primary evidence.”

An attempt to answer this ambiguity was made by the court in *Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal*⁴⁸ where a 3 Judges Bench of the Supreme Court commented that the admissibility of an electronic evidence is to be governed only by ss. 65A⁴⁹ and 65B,⁵⁰ IEA 1872, and s. 65B is complete code in itself. The court emphasized on the point that if an 'original' device is produced, it shall be a primary evidence, however, if copy, in any form, is made (out of the original) and produced, it is secondary evidence. The court further emphasized that certificate under s. 65B(4) is mandatory for secondary evidence, and oral evidence cannot suffice in place of s. 65B(4) certificate i.e., in-charge of the computing device cannot give an oral evidence in place of certificate under s. 65B.

5. HANDLING, PRESENTING AND INTERPRETING ELECTRONIC AND DIGITAL EVIDENCE

Considering the topicality of the Adhinyam, one needs to be well versed with the technicalities, implementation and the process in connection with the electronic or digital evidence, along with the legalities associated therein.

As far as the technicalities are concerned, evidence includes every kind of electronic or digital data/ information which can be saved in the electronic/ digital media storage. e.g., computers, mobile devices, applications, emails, audio/video files, cloud storage, etc.

It is important to ensure integrity of electronic or digital evidence as it is very volatile and fragile in nature which may be corrupted remotely. Therefore, the saved data in non-volatile medium should be first mirrored/ imaged i.e., bit by bit copy of memory with the help of write blocking. Write blocker works as valve in order to prevent any accidental or intentional modification of data on a storage device.

Once the process of write blocking is over, it is important to ensure that both the original media as well as mirrored copy of the media have absolutely the same data by matching the hash value. This process is called hashing. Hashing is a method of creating a unique fingerprint of any digital data (file, folder, or entire media of data) by applying a mathematical

48. *Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal* (2020) 7 SCC 1 : AIR 2020 SC 4908.

49. Evidence Act 1872, s 65A (Special provisions as to evidence relating to electronic record).

50. *ibid* s 65B (Admissibility of electronic records).

algorithm to generate an alpha-numeric string of characters of a definite length which would only change with the slightest modification of the data set, changing the hashing value entirely. In other words, hash value is the output of hash function which is nothing but a computer algorithm to convert digital file (digital record) into a unique alpha-numeric value. Hashing is facilitated by hashing algorithms e.g., MD5 (Message Digest 5), SHA-1 (Secure Hash Algorithm 1), SHA-2 (Secure Hash Algorithm 2), SHA-3 (Secure Hash Algorithm 3), etc. and tools e.g., Hash Check, Hash Tab, Hash My Files, MD5 Hash Generator, SHA-256 Online, Cyber Chef, etc.

Next in line comes the implementation. In order to present electronic or digital evidence, it is not only essential to prove the fact but also to establish the source and destination of such evidence. The source could be any computer/digital device belonging to the accused/victim/witness of the crime. Every digital file/folder contains identification details within its metadata along with the device detail being printed on the body. Metadata provides information about the author, date of creation, modification, and file size among other details. To ensure authenticity, both metadata of the electronic/digital evidence must be documented along with the device used for producing such evidence as a part of the evidence that is to be produced in the court.

Once the write blocking is done, and hash value and metadata of the evidence are known, the final step is documentation i.e., maintaining a sequence or chain of custody. 'Sequence of Custody' or 'Chain of Custody' is chronological documentation of seized articles detailing the evidence possession, control, place of keep, transfer, analysis and disposal of the seized article during investigation and trial process. This is imperative for preserving the evidentiary value of the seized article by keeping its integrity intact compared to the time it was lawfully seized. Any missing link in sequence of custody may be fatal to prosecution of the case.⁵¹ Chart of documentation pertaining to chain of custody of the seized electronic device or 'Chain of Custody Form' shall be attached in case diary, and shall be included in the report of police officer on completion of investigation as required under s. 193, BNSS.⁵²

51. Crime Investigation Department, 'Crime Branch Circular No.13/2025: Chain of Custody of Electronic Evidence and Electronic Evidence' (Odisha Police, February 2025) <<https://odishapolicecidcb.gov.in/sites/default/files/SOP%2013-2025.pdf>> accessed 13 March 2025.

52. Nagarik Suraksha Sanhita 2023, s 193 (Report of police officer on completion of investigation).

To present an electronic or digital record as evidence in a legal proceeding, one needs to submit a certificate along with the records. The certificate should contain/ certify the description of electronic or digital record being certified (e.g., printouts of screen shots, video clips, images or text files written on a CD/DVD or copied in a Pen Drive, etc.); computer system or communication device involved (i.e., description of the machine with manufacture's name, model, serial number, etc.); the period when the output was produced; details of the certifying person who is in lawful control over the computer system (i.e., whether they have purchased it for personal use, do the maintenance of it as assigned by their employer, uses it for official purpose allotted by their organization, etc.); the purpose of use of the computer system or communication device involved; etc. The certificate must be signed by a person in charge of the computer or communication device (or relevant activities), and an expert. It is sufficient for the matter to be stated based on their knowledge and belief.

6. WHO WILL PROVE IT?

The third and the last part of the Adhinyam relates to the production and effect of evidence i.e., by whom and in what manner must the evidence be produced? This portion of the Adhinyam i.e., Part III, from Chapter VII to XI – ss. 104 to 169, BSA/ ss. 101 to 167, IEA, has undergone the minimum changes and in particular, cosmetic changes. The basic principles regarding the burden of proof, and shall, may and conclusive proof are still the same. As far as the burden of proof i.e., ss. 104 to 109, BSA/ ss. 101 to 106, IEA, is concerned, party who asserts the fact will prove it, and who deny the fact, will disprove it. Regarding the *shall, may and conclusive proof*, there is no substantive change except their numbering:

- (a) *May presume*, where the court presumes a fact but may call for prove of it or allow evidence to disprove it, is now defined in s. 2(1)(h), BSA. The relevant provisions in this context are ss. 88 – 90, 92, 93, 110, 111, 117 and 119 under BSA which corresponds to ss. 86 – 88A, 90, 90A, 107, 108, 113A and 114 under IEA.
- (b) *Shall presume*, where the court presumes a fact or allow evidence to disprove it, is now defined in s. 2(1)(l), BSA. The relevant provisions in this context are ss. 78 – 87, 91, 108, 118 and 120 under BSA which corresponds to ss. 79 – 85C, 89, 105, 113B and 114A under IEA.
- (c) *Conclusive proof*, where the court on proof of one fact regards the other as proved and shall not allow evidence to disprove it, is now

defined in s. 2(1)(b), BSA. The relevant provisions in this context are ss. 35 and 116 under BSA which corresponds to ss. 41 and 112 under IEA. However, s. 113, IEA which relates to ‘proof of cession of territory’ finds no place under the Adhiniyam for, the provision has become outdated and has no relevance in the contemporary world.

It is a matter of surprise that even under the new Adhiniyam, the scientific ways of ascertaining the parentage of a child like DNA testing are not recognised as an exception to the rule of conclusive proof of legitimacy of child born during marriage.⁵³ Therefore, till date, the deciding factor in cases of conflict between a conclusive proof and scientific advancement remains the same i.e., the judgement of Supreme Court in *Nandlal Wasudeo Badwaik v Lata Nandlal Badwaik*⁵⁴ Here, the Supreme Court observed:

“s.112 of the IEA was enacted at a time when the modern scientific advancements with DNA as well as RNA tests were not even in contemplation of the legislature. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. When there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advance accepted by the world community to be correct, the latter must prevail over the former.”

However, at the same time, it is also essential that the above-mentioned factor to answer the conflict between a conclusive proof and scientific advancements, as mentioned in the *Nandlal Wasudev Badwaik* case, should only be considered, after a detailed deliberation for, DNA testing may violate fundamental rights under art. 20(3)⁵⁵ (Protection against

53. Sakshya Adhiniyam 2023, s 116 (Birth during marriage, conclusive proof of legitimacy) which reads:

“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate child of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”

54. (2014) 2 SCC 576 : AIR 2014 SC 932.

55. Constitution of India, art 20(3) (Protection in respect of conviction for offences) which reads:

“No person accused of any offence shall be compelled to be a witness against himself.”

self-incrimination) and 21⁵⁶ (Protection of life and personal liberty) of the Constitution. Further, it should not be opted for religiously but cautiously.

An important change in this part of the Adhiniyam is with respect to s. 138, BSA⁵⁷ (earlier, s. 133, IEA⁵⁸). Earlier, formulation of law was in conflict with the illustration (b) of s. 114, IEA⁵⁹ (now, illustration of s. 119(1), BSA⁶⁰). This has now been rectified by replacing the words ‘uncorroborated testimony’ with ‘corroborated testimony’.⁶¹

7. CONCLUSION

“Certainty of law is a myth”-----Jerome Frank⁶²

Law has to be evaluated continuously in order to check if it deals with the contemporary societal issues. Following the principle of *legal pragmatism* as given by Richard Posner,⁶³ the Indian law has undergone a lot of changes lately which includes the law on triple talak,⁶⁴ decriminalization of

56. *ibid* art 21 (Protection of life and personal liberty) which reads:

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

57. Sakshya Adhiniyam 2023, s 138 (Accomplice) which reads:

“An accomplice shall be a competent witness against an accused person; and a conviction is not illegal if it proceeds upon the corroborated testimony of an accomplice.”

58. Evidence Act 1872, s 133 (Accomplice) which reads:

“An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.”

59. *ibid* illustration (b), s 114 (Court may presume existence of certain facts) which reads:

“the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars”.

60. Sakshya Adhiniyam 2023, illustration (b), s 119(1) (Court may presume existence of certain facts) which reads:

“the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars”.

61. Constitution of India, art 368 (Power of Parliament to amend the Constitution and procedure therefor).

62. (1889-1957), Jerome New Frank, was an American legal philosopher and author who played a leading role in the legal realism movement. He was Chairman of the US Securities and Exchange Commission, and a Judge of the United States Court of Appeals for the Second Circuit.

63. Richard Allen Posner, is an American legal scholar and retired United States circuit Judge who served at the US Court of Appeals for the Seventh Circuit from 1981 to 2017.

64. Muslim Women (Protection of Rights on Marriage) Act 2019 criminalises triple talaq, making it a non-bailable offense punishable with up to three years in prison. The law

homosexuality⁶⁵ and adultery,⁶⁶ contemporary and purposive interpretation of s. 125, CrPC⁶⁷/ s. 144, BNSS,⁶⁸ etc. This explains one of the reasons for the enactment of the new Adhiniyam 2023.

Most of the sections of the Indian Evidence Act, 1872 have been adopted in the *Bhartiya Sakshya Adhiniyam* as verbatim, and some with minor alterations. Major alteration is the inclusion of electronic and digital evidences.⁶⁹ In order to further justify the enactment of the Adhiniyam, two questions need to be answered: First, was it required? and second, are the requirements fulfilled? Regarding the first question, there is a possibility that there could have been requirement of certain modifications, but by no stretch of imagination one could consider the colonial terminologies as part of the existing lacunae in the 1872 Act. Changing Calcutta to Kolkata or Lahore to Ladakh or Attorney to Advocate alone cannot justify the enactment of this Adhiniyam. Apart from it, from the view point of the enforcement agencies, advocates, law scholars, etc., where the section number plays a crucial part, the re-numbering of the sections has caused unnecessary and excessive burden. Every such person will instantly associate s. 32 of the Indian Evidence Act with Dying Declaration, but after the commencement of this new law, they will have to make an unnecessary attempt to associate the same content to a new section number i.e., s. 26, BSA.

Now, coming to question no. 2, it can be said that the requirement of bringing new law of evidence, is partially fulfilled in the sense that the scope of entire law of evidence has been widened by introducing new categories of electronic or digital evidence as a primary evidence under explanations 4 to 7 of s. 57, BSA, and recognising their legal effect, validity

came into effect in September 2019.

65. In *Navej Singh Johar v Union of India* (2018) 10 SCC 1 : AIR 2018 SC 4321, the Supreme Court struck down s 377, IPC 1860, which criminalised “carnal intercourse against the order of nature”, effectively decriminalising consensual homosexual acts between adults.
66. In *Joseph Shine v Union of India* (2019) 3 SCC 39 : AIR 2018 SC 4898, the Supreme Court struck down s 497, IPC 1860, which criminalised adultery, finding it to be archaic, discriminatory against women, and a violation of fundamental rights.
67. Criminal Procedure Code 1973, s 125 (Order for maintenance of wives, children and parents).
68. *Nagarik Suraksha Sanhita 2023*, s 144 (Order for maintenance of wives, children and parents).
69. Delhi Police Academy, Handbook on *Bharatiya Sakshya Adhiniyam* (January 2024) <https://training.delhipolice.gov.in/PDF/PublicData/NOTICE_20240614145717214.pdf> accessed 13 March 2025.

and enforceability as similar to any other document within the realm of the Adhiniyam.⁷⁰ However, adding illustrations to each explanation would have certainly helped in ascertaining what exactly constitutes primary electronic evidence.

There is still ambiguity as to whether a certificate under s. 63(4)(c), BSA would still be required in case electronic and digital data is maintained and presented in court in the manner as mentioned under the above-mentioned explanations to s.57? There is no explanation provided to this under the Adhiniyam, and one has to rely on SOPs or handbooks on BSA provided by Departments like CBI, Delhi Police, etc. Apart from it, there are a lot many concerns associated with the Adhiniyam. One, there exists a practical difficulty in submitting an electronic and digital data as a primary evidence. Therefore, almost every primary electronic and digital evidence becomes secondary as and when a certificate along with the evidence is submitted. Two, the certificate provided under the schedule to the Adhiniyam refers to hash algorithms like SHAI, SHA256 and MD5, and other legally acceptable algorithms. This in turn refers to the hastiness and lack of forethought on the part of legislation for, the mentioned algorithms may become redundant in the coming time, and would create confusion in ascertaining the standard of legally acceptable algorithms. Third, there is no specific provision on handling of electronic or digital evidence. At least, a provision ensuring a documented chain of custody could have been included.

In order to get away with the above-mentioned ambiguity, various states are coming up with their own SOPs (in consonance with the SOP on Audio-Visual Recording of Scene of Crime, by BPR&D, MHA)⁷¹ on handling the electronic and digital evidence, resulting in numerous but non-uniform SOPs. The hon'ble Supreme Court in *Ram Ramaswamy v Union of India*⁷² has clearly stated that till the time uniform guidelines in relation to the search and seizure of electronic or digital evidences/ devices are not notified, the BPR&D SOP shall be followed by all government agencies.⁷³

70. Sakshya Adhiniyam 2023, s 61 (Electronic or digital record).

71. Ministry of Home Affairs, Government of India, Standard Operating Procedure for Audio-Visual Recording of Scene of Crime, Bureau of Police Research & Development <<https://bprd.nic.in/uploads/pdf/SOP%20of%20Audio%20Video%20Recording%20of%20Scene%20of%20Crime.pdf>> accessed 13 March 2025.

72. 2023 SCC OnLine SC 1703.

73. Delhi Police Academy, FAQs on the Nyaya Sanhita, the Nagarik Suraksha Sanhita and the Sakshya Adhiniyam <https://training.delhipolice.gov.in/PDF/PublicData/NOTICE_20240911143445490.pdf> accessed 14 March 2025.