

The Bharatiya Sakshya Bill, 2023: An overview of the proposed changes to Indian Evidence Act, 1872 (3/3)

Introduction

1. The Bharatiya Sakshya Bill, 2023 (“**Bill/Evidence Bill**”) was introduced in the Lok Sabha¹ on August 11, 2023 with the aim to repeal and replace the existing Indian Evidence Act, 1872 (“**Evidence Act**”) along with two other bills intended to replace the Indian Penal Code, 1860 (“**IPC**”) and the Code of Criminal Procedure, 1973 (“**CrPC**”). This note summarizes the most notable changes to the Evidence Act which have been proposed in the Bill. The ‘Clauses’ as referred to in the Bill are referred to as ‘Sections’ in this note for ease of reference.
2. The most significant changes in this Bill pertain to consolidation of sections and removal of references from the colonial era, while maintaining a construct largely similar to that of the existing Evidence Act.

Definitions

3. In terms of notable changes, starting with Chapter I of the Bill and particularly Section 2 which sets out certain definitions, the definitions of ‘conclusive proof’, ‘may presume’ and ‘shall presume’ under Section 4 of the Evidence Act have been consolidated into one definition clause². Section 2(2) of the Bill provides for interpretation of words used under the Bill but not specifically defined under it to have the same meaning for the same words as defined under Information Technology Act, 2000 (“**IT**



Act”), Bharatiya Nagarik Suraksha Sanhita, 2023 and Bharatiya Nyaya Sanhita, 2023.

Closely connected facts

4. The provisions of Chapter II of the Bill, concerning ‘Closely Connected Facts’ (which includes provisions on evidence of facts in issue and relevant facts, relevancy of facts forming part of the same transaction, facts being occasion, cause or effect of facts in issue; facts showing existence of mind etc.) are identical to the Evidence Act. The language of Section 12 of the Evidence Act though (which provided the relevance of facts which enable the

¹ The three bills were introduced on the last day of the Monsoon session of the Parliament and has been sent to a Parliamentary Committee for scrutiny. The Bill will require to be passed by the Lok Sabha, Rajya Sabha and receive the assent of the President before it becomes law and takes effect.

² Section 2, The Bharatiya Sakshya Bill, 2023.

court to determine damages) has been modified slightly under Section 10 of the Bill, while remaining same in substance.

5. Similarly, provisions concerning ‘Admissions’³ (including illustrations) have been retained, with a few changes. For instance, ‘Admission by party to proceeding or his agent’ (under Section 16 of the Bill and corresponding to Section 18 of the Evidence Act) setting out admissions made by suitor in representative character is structured differently but remains identical in substance. Section 22A of the Evidence Act dealing with oral evidence as to contents has now been excluded from the Bill.

On confessions

6. Notably, in relation to the provisions pertaining to confession, a significant change has been made with respect to Section 24 of the Evidence Act (which provides that any confession made by an accused person if caused by inducement, threat or promise, is irrelevant). In Section 22 of the Bill, while retaining the earlier Section, two new provisos have been included which allow for certain types of confessions to be considered relevant.
 - a. As per the first proviso, a confession can become relevant if the inducement, threat, coercion or promise, has in the opinion of the court, been fully removed.
 - b. Secondly, a confession if otherwise relevant, does not become irrelevant merely because it was (i) made under a promise of secrecy; (ii) or is a consequence of a deception practised on the accused person for obtaining such confession; (iii) or if the accused person

was drunk; (iv) or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, (v) or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him. These provisos are likely to require further clarification to ensure that the right against self-incrimination is not affected.

7. Sections 25 and 26 of the Evidence Act pertaining to confession to a police officer and confession have now been clubbed together under Section 23 of the Bill, while adding a proviso⁴. As per this new proviso, whenever information is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of police, such information as it relates to the fact discovered, whether it amounts to a confession or not, may be proved. Simply put, by virtue of this provision, information received in custody may be used further for the purpose of investigation or corroboration of other evidence against such information.

On digital signatures

8. Section 39 of the Bill (which corresponds to Section 45 of the Evidence Act) dealing with opinion of experts, now stands modified to specify that the opinion of examiner of electronic evidence as per Section 79A of the IT Act shall be a relevant fact for information stored digitally. Further, Section 41 of the Bill has now clubbed provisions related to opinions concerning handwriting and digital signature previously contained under Sections 47 and 47A of the Evidence Act⁵ without change. Consequentially, it may be now open for courts to consider the opinion of

³ Section 16, The Bharatiya Sakshya Bill, 2023.

⁴ “Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact discovered, may be proved.”

⁵ Section 47, Evidence Act, 1872 - Opinion as to hand-writing, when relevant: When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Section 47A, Evidence Act, 1872 - Opinion as to digital signature, when relevant: When the Court has to form an opinion as to the [electronic signature of any person, the opinion of the Certifying Authority which has issued the [electronic Signature Certificate] is a relevant fact.]

persons acquainted with someone's handwriting as well as their digital signature.

Facts which need not be proved

- Chapter III of the Bill, dealing with 'facts which need not be proved' includes an amended Section 52 which deals with facts of which judicial notice has to be taken. Section 52(1)(a) (corresponding to Section 57(1) of the Evidence Act) includes within it all laws operating within the territory of India having extra territorial operation. Further, Section 52(1)(b) includes international treaties, agreements and conventions with countries by India, apart from decisions made by India at international associations and other bodies. Notably, Section 52 excludes references to seals, proceedings, sovereign concerning the United Kingdom and limits the scope to similar authorities of India. This brings treaties and other authorities concerning India at an international level at par.

Primary evidence

- In Chapter V of the Bill, under Section 57 pertaining to primary evidence (corresponding to Section 61 of the Evidence Act), new explanations have been added recognizing (i) where documents made using a uniform process such as printing, lithography or photography where each is primary evidence of the contents of the rest; but where they are copies of a common original, they are not primary evidence of the contents of the



original; (ii) where electronic or digital records are recorded or stored, each file is a primary evidence; (iii) where electronic or digital record is produced from proper custody, such record is primary evidence unless disputed; (iv) where a video recording is stored in electronic form or transmitted, each of the stored recording is primary evidence; and finally (v) where an electronic record is stored in multiple storage spaces in a computer resource, each such automated storage including temporary files is primary evidence.⁶

Secondary Evidence

- Section 58 of the Bill, concerning 'secondary evidence' (corresponding to Section 63 of the Evidence Act) has been amended and expanded to include additional

⁶ *Explanation 4.* - 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.

Explanation 5. - Where an electronic or digital record is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed.

Explanation 6. - 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.

Explanation 7. - 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.

categories such as oral admissions⁷, written admissions⁸ and evidence of a person examining a document within the meaning of secondary evidence⁹.

- Section 58 of the Bill therefore has a broader scope as opposed to secondary evidence under the Evidence Act, as it now includes oral admissions, written admissions and evidence taken by a skilled person from an original document which cannot be examined by the court. To apply and to qualify as secondary evidence however, the oral or written evidence must relate to the original and not a copy thereof. Such additional categories of secondary evidence are expected to assist courts in determining admissibility of documents.
- Further, Section 60 of the Bill which relates to cases in which secondary evidence of documents may be given, has been modified to include clause (h) which provides that secondary evidence may be given if the genuineness of the document itself is in question. However, this proviso may require to be clarified since the Bill presently lacks an explanation in this regard.

Electronic Evidence

- Section 61 of the Bill (corresponding to Section 65B of the Evidence Act) simplifies the existing section and provides that admissibility of electronic or digital record (on the ground that it is an electronic or digital record) shall have the same legal effect, validity and enforceability as paper records.

Public documents

- Section 74 of the Bill has been modified to cover both public and private documents, thereby clubbing the contents of Sections 74 and 75 of the Evidence Act while remaining identical in substance.

Presumptions as to documents

- Further, Section 81 of the Bill has adopted a broader version of Section 81A of the Evidence Act dealing with presumption of Gazette in electronic form with the addition of a new explanation by which the purport of 'proper custody is explained'.
- Section 82 of the Evidence Act dealing with presumption about documents admissible in England, has now been excluded from the Bill. Similarly, Section 88 of the Bill modifies the scope of Section 86 of the Evidence Act which dealt with presumption as to certified copies of foreign judicial records to exclude reference to dominions of Great Britain and adopts a nomenclature to indicate documents from any country beyond India. Further, Section 90 of the Bill sets out the presumption with respect to electronic messages, as opposed to telegraphic messages as specified in Section 88 of the Evidence Act.

Examination of witnesses

- Section 142, of the Bill, dealing with examination of witnesses is based on Section 137 of the Evidence Act, which though structured differently is identical in substance. Further, Section 146, of the Bill concerning 'leading questions'¹⁰ now stands modified to include specific circumstances which shall be leading questions, as opposed to Section 141 of the Evidence Act which was generic and relied on the 'suggestive' character of questions. Subsequently, Section 165 of the Bill concerning production of documents stands modified by adopting the proviso which bars the production of any privileged communication between ministers and the President of India.

⁷ Section 58(6), The Bharatiya Sakshya Bill, 2023.
⁸ Section 58(7), The Bharatiya Sakshya Bill, 2023.
⁹ Section 58(8), The Bharatiya Sakshya Bill, 2023.

¹⁰ Section 146(1) to (4), The Bharatiya Sakshya Bill, 2023.

Conclusion

19. In summation, the primary intent changes as discussed above appears to be to consolidate provisions dealing with different aspects of the same subject matter such as the clubbing of different provisions concerning admissions before police and in custody under one broad section. The Bill pitches for uniform interpretation and application of similar standards

to the same subject matters, such as the inclusion of subsection (2) of Section 2 of the Bill and bringing experts of electronic evidence at par with other experts for determining relevant facts. However, the effect of certain provisions particularly relating to confessions is required to be examined and tested in greater detail given the nature of the intended change.

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