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BLOG

OLD WINE, NEW BOTTLE? TEXTUAL CONTINUITY AND THE LIMITS OF THE BHARATIYA SAKSHYA ADHINIYAM AS EVIDENTIARY REFORM

~D. KAVIN

THE PROMISE AND THE TEXT

The Bharatiya Sakshya Adhiniyam, 2023 (BSA), introduced in August 2023 and revised in December 2023, came into force from 1 July 2024¹ with the promise of a radical change i.e., a decolonised and modern law of evidence that seeks to replace the Indian Evidence Act, 1872 (IEA). However, the actual text tells a different story. Most of the provisions of the IEA remain unchanged; novel elements are found mostly in the secondary and electronic evidence sections, and the fundamentals, such as relevancy, burden of proof, presumptions, and examination of witnesses, remain the same.² The decolonisation of the text amounts to rhetoric rather than actual change, with the Crown, the Privy Council, and Lahore nowhere to be seen in the illustrations.³ This blog claims that the BSA is just old wine in a new bottle, and the bottle leaks.

According to Kunal Ambasta, James Fitzjames Stephen's Act was a project of reform itself. Stephen aimed to improve rather than to simply codify the tangled areas of the common law related to the distinctions between fact and evidence, hearsay, and relevancy. Ambasta claims that this intention has been misinterpreted by the courts and scholars but it lasted for one and a

¹ Pranav Verma, *Unmasking the Rhetoric of Reform – The Bharatiya Sakshya Adhiniyam 2023 in Context*, 36 Nat'l L. Sch. India Rev., art. 2, pt. I (2025).

² *Id.* pts. I, III, IV.

³ *Id.* pt. II.C.1.

half centuries without any structural changes.⁴ An act that purports to overhaul this inheritance must have taken some position on it. The BSA takes no position.

WHEN COPYING CHANGES THE LAW

The Section 23 of the BSA can be considered the most illustrative example of how copying and pasting of a statutory text resulted in a modification of the law. Because it combined in one provision three different rules from the old IEA - the bar on confessions to police officers, the bar on custodial confessions made outside a Magistrate's presence, and the discovery exception.⁵ The wording has stayed almost the same as before, while the punctuation has changed. There is now a full stop at the end of sub-section (1), a colon at the end of sub-section (2), and the discovery exception right after sub-section (2). Legal scholar Pranav Verma claims that this specific punctuation combination makes the discovery exception to apply to sub-section (2) only, thus making the ban of police confessions in sub-section (1) absolute. It contradicts decades of Supreme Court decisions that treated Section 27 as an exception to Sections 25 and 26.⁶ It is still unclear whether lawmakers did it intentionally or it was just a mistake that Parliament did not manage to detect in the course of its Standing Committee procedure.

However, this drafting issue is very important because the ban of police confessions in Section 23(1) is the fundamental legal principle rather than a technicality. In the famous case *Tofan Singh v. State of Tamil Nadu*, the Supreme Court stated that all confessions made to a police officer are automatically considered to be made under duress.⁷ Therefore, the Court concluded that officers authorized to conduct investigation under Section 53 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act can be considered as "police officers" under Section 25 of IEA, thus confessions made to them cannot be used in evidence.⁸ The Supreme Court emphasized that using such confessions without necessary protection would violate fundamental constitutional rights of individuals (Articles 14, 20(3), and 21).⁹ The reason for such rule is found in a report of 1856 colonial commission.¹⁰ It means that a colonial origin of legal protection is not an argument to make this protection invalid anymore. Since Section

⁴ Kunal Ambasta, *One Hundred (and Fifty) Years of Solitude: The Indian Evidence Act 1872 as a Lost Project of Law Reform*, Indian L. Rev. 1, 1, 18 (2023), <https://doi.org/10.1080/24730580.2023.2283644>.

⁵ Bharatiya Sakshya Adhiniyam, 2023, No. 47 of 2023, § 23 (India); Indian Evidence Act, 1872, SS 25–27 (India).

⁶ Verma, *supra* note 1, pt. II.A.1(b).

⁷ *Tofan Singh v. State of Tamil Nadu*, (2021) 4 SCC 1, ¶ 29 (India).

⁸ *Id.* ¶ 158.1.

⁹ *Id.* ¶ 155.

¹⁰ *Id.* ¶ 30.

23(1) replicates Section 25 word for word, the *Tofan Singh* case is the starting point of interpretation of the text, as it should be. But preservation of laws by copy-editing alone cannot be considered as legal reform.

THE ONE REAL INNOVATION

In Section 63, the BSA replaces the provisions in section 65B IEA. Here, the document should include a certificate in one of the prescribed Schedules. In this regard, the parties will include information about the characteristics of the record - the hash value in Part A and the opinion from the expert in Part B.¹¹ This is a serious attempt to provide authentication meaningful, since the certification required by the practice under section 65B was no more than an affidavit. However, as pointed out by Verma, such a result could have been obtained through amendments to the IEA and the UK abolished its certification scheme of section 65B as early as 1995.¹² In addition, as the drafting of the First Bill shows, it could have been amended to eliminate the tension between the primary evidence status of the electronic records and their certificate.¹³

This change did not provide certainty. In *Pune Bar Association v. Union of India* (2026), the Supreme Court confirmed the constitutionality of section 63(4), interpreting the hash value as an electronic fingerprint and reading together sections 39(1) and 39(2) to confirm that Part B may not be signed only by a section 79A Examiner, though the question of whether it can be left open.¹⁴ Even the flagship reform does not come with certainty regarding the meaning of the central term "expert."

WHAT REFORM WOULD HAVE REQUIRED

In its 69th and 185th Reports, the Law Commission has recommended solving the conflict between section 29 of the IEA and section 164(2) of the Code of Criminal Procedure about the confession made by witnesses recorded without the necessary warning. The BSA includes section 29 word-for-word into it.¹⁵ The definition of the "Magistrate" in section 23(2), about which there was uncertainty on the High Courts, is also retained without any change.¹⁶ The BSA addresses none of these problems.

¹¹ Bharatiya Sakshya Adhiniyam § 63(4) & sched.; Verma, *supra* note 1, pt. II.B.2.

¹² Verma, *supra* note 1, pts. I, II.B.2(a), IV.

¹³ PRS Legislative Research, *The Bharatiya Sakshya (Second) Bill, 2023*, <https://prsindia.org/billtrack/prs-products/update-on-the-bill>.

¹⁴ *Pune Bar Association v. Union of India*, 2026 SCC OnLine SC 1297, ¶¶ 4–7 (India).

¹⁵ Law Comm'n of India, *Review of the Indian Evidence Act, 1872*, Report No. 185, at 181–84 (2003) (discussing Report No. 69); Verma, *supra* note 1, pt. III.A (BSA S. 22, second proviso).

¹⁶ Bharatiya Sakshya Adhiniyam S. 23(2); Verma, *supra* note 1, pt. III.D.

Considering the above, the BSA is just a rebranding of the IEA. All the changes made could have been achieved through the amendments, and one of them could reflect the difference in the punctuation of the law. The name of the statute was changed, but it was not reformed.