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THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF: ASSESSING THE HUMAN-RIGHTS IMPLICATIONS OF THE BHARATIYA SAKSHYA ADHINIYAM, 2023

-BHAKTI PATEL

ABSTRACT

The Bharatiya Sakshya Adhiniyam, 2023 (BSA) replaced the Indian Evidence Act, 1872 (IEA) and transformed Indian Evidence Law while maintaining all the establishing rules concerning burden of proof and treatment of presumptions. This research blog examines the relationship between burden of proof rules and presumption of innocence, with particular attention to reverse-onus provisions and electronic evidence. The central argument is that the Bharatiya Sakshya Adhiniyam, 2023 (BSA) does not, as a general rule, transfer the prosecution's overall accountability for proving the prosecution case. Concurrently, provisions placing a burden on an accused in certain instances can have significant actionable consequences. These consequences become significant where the defence must challenge electronic material whose authentication, attribution, integrity, or relevance is disputed. The reasoning in the case of *Noor Aga v. State of Punjab* provides useful guidance on the limits of reverse burdens. This blog argues that a rights-consistent application of the BSA requires courts to distinguish the prosecution's ultimate burden from any evidential burden placed on the accused, satisfy the statutory conditions for presumptions, and ensure that the defence has a meaningful opportunity to test all the electronic evidence.

KEYWORDS: *Bharatiya Sakshya Adhiniyam 2023, presumption of innocence, burden of proof, reverse burden, Article 21, electronic evidence, fair trial.*

1. INTRODUCTION

The Bharatiya Sakshya Adhiniyam, 2023, came into force on 1 July 2024 and replaced the Indian Evidence Act, 1872. Its statutory provisions on the burden of proof substantially preserve the structure of the former law, while its provisions on electronic records restructure and expand the statutory treatment of digital material.¹

The presumption of innocence provides the beginning point for that inquiry. In a criminal trial, the prosecution ordinarily bears the burden of establishing the ingredients of the offence, and

the accused is not required to simply prove innocence. Article 21 of the Constitution requires a fair, just, and reasonable procedure, while Article 14(2) of the International Covenant on Civil and Political Rights expressly recognizes the presumption of innocence.²

The existence of statutory presumptions does not necessarily contravene that principle. The important question is how a particular presumption operates. What facts activate it, which party bears the resulting burden, and whether the accused has a meaningful opportunity to rebut it. The Bharatiya Sakshiya Adhiniyam, 2023 (BSA) therefore requires analysis at the level of individual provisions rather than a general conclusion that every reverse burden is inconsistent with the presumption of innocence.

This blog first examines sections 104–108 of the Bharatiya Sakshiya Adhiniyam, 2023 (BSA), which contain the principal burden of proof rules. It then considers the Supreme Court's reasoning in *Noor Aga v. State of Punjab*, 2008. The blog then considers electronic evidence, including the statutory presumption in section 86, before proposing safeguards for a rights-consistent application of the Act.

2. BURDEN OF PROOF

Section 104: *“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist, and when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”*

Illustrations.

(a) A desires a court to give judgment that B shall be punished for a crime which A claims that B has committed. A must prove that B has committed the crime.

(b) A desires a court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true. A must prove the existence of those facts.

It states the general rule that a person who seeks a judgment dependent on facts asserted by that person must prove those facts. Section 105 identifies the party that bears the burden, where the question is which party would fail if no evidence were given. Section 106 deals with the burden relating to a particular fact, while section 107 concerns facts that must be proven before other evidence can be presented.⁴

These provisions should be differentiated from the special rules in Sections 108 and 109.

Section 108: *When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Bharatiya Nyaya Sanhita, 2023, or within any special exception or proviso contained in any other part of the said Sanhita, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.*

Illustrations.

(a) A, accused of murder, alleges that he did not know the nature of the act because of unsoundness of mind. The burden of proof is on A.

(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control. The burden of proof is on A.

(c) Section 117 of the Bharatiya Nyaya Sanhita, 2023 provides that whoever, except in the case provided for by sub-section (2) of section 122, voluntarily causes grievous hurt, shall be subject to certain punishments. A is charged with voluntarily causing grievous hurt under section 117. The burden of proving the circumstances bringing the case under sub-section (2) of section 122 lies on A.

It places burden on an accused of proving circumstances and bringing the case within specific general or special exceptions, and directs the court to presume the absence of those circumstances. Whereas Section 109 places the burden of proving a fact especially within a person's knowledge on that person.⁵

The distinction between the prosecution's ultimate burden and an evidential or issue-specific burden is therefore significant. A statutory rule may require the accused to establish a particular matter without making the accused accountable for proving the entire prosecution case. Section 108 explains this distinction more clearly: By clarifying that the accused bears the burden concerning an exception, but that does not by itself eliminates the prosecution's burden concerning the elements of the offence.

3. STATUTORY PRESUMPTIONS AND REVERSE BURDENS

The Bharatiya Sakshiya Adhiniyam, 2023 (BSA) also distinguishes between 'may presume', 'shall presume' and 'conclusive proof'. These expressions are defined under section 2 of the Act. A 'shall presume' formulation requires the court to consider the relevant fact as proved unless it is disproved, whereas a 'may presume' formulation leaves the court with a choice to presume or require proof.⁶ The distinction matters because it determines the degree of judicial discretion and the prospects to rebut a conclusion.

Noor Aga v State of Punjab, 2008 is particularly relevant to the constitutional scrutiny of reverse burdens. The Supreme Court upheld the relevant reverse-onus provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985, but emphasised that the prosecution must first establish the foundational facts required to trigger the statutory presumption. Only after that threshold is satisfied then the reverse burden operates.⁷ Meaning that the ultimate burden of establishing guilt is upon the prosecution throughout the trial. But the statutory presumption shifts only the evidential burden to the accused, requiring the accused to rebut the presumption on a standard of preponderance of probabilities. Once the accused successfully rebuts the presumption or raises reasonable doubts regarding the presumed fact. Then the prosecution

must establish the relevant facts through reliable evidence and satisfy the ultimate standard of proof beyond reasonable doubt.

The significance of Noor Aga for the Bharatiya Sakshiya Adhiniyam, 2023 (BSA) is as a constitutional and evidentiary principle concerning the relationship between foundational facts and reverse burdens. A court applying a presumption should therefore identify the statutory pre-conditions and determine whether they have been proved before relying upon the presumption.⁸

State of West Bengal v. Mir Mohammad Omar addresses a related but different situation. The Supreme Court considered the rule concerning facts especially within the knowledge of the accused and forewarned that the prosecution's primary burden should not be displaced merely because a particular fact is within the accused's knowledge.⁹ The corresponding rule is now found in section 109 of the Bharatiya Sakshiya Adhiniyam, 2023 (BSA).¹⁰

4. ELECTRONIC EVIDENCE AND THE PRACTICAL BURDEN

The BSA's treatment of electronic evidence creates a further dimension to the burden-of-proof question. Section 86 provides a presumption concerning secure electronic records: where the provision applies, the court 'shall presume', unless the contrary is proved, that the secure electronic record has not been changed since the point of time to which its secure status relates. The section also contains a parallel presumption concerning secure electronic signatures.¹¹

SECTION 86: PRESUMPTION AS TO ELECTRONIC RECORDS AND ELECTRONIC SIGNATURES.

(1) In any proceeding involving a secure electronic record, the Court shall presume unless contrary is proved, that the secure electronic record has not been altered since the specific point of time to which the secure status relates.

(2) In any proceeding, involving secure electronic signature, the Court shall presume unless the contrary is proved that-(a) the secure electronic signature is affixed by subscriber with the intention of signing or approving the electronic record;(b) except in the case of a secure electronic record or a secure electronic signature, nothing in this section shall create any presumption, relating to authenticity and integrity of the electronic record or any electronic signature.

That provision should not be read as establishing every theory that may be drawn from a digital record. The statutory presumption concerns the matters specified by section 86. Questions of authorship, attribution, context and criminal intention may require additional evidence, depending on the issue before the court. Treating the existence of a digital record as equivalent to proof of authorship or intention would extend the statutory presumption beyond its terms.

The practical difficulty is greater where the defence has limited access to technical expertise or independent investigation. A formally rebuttable presumption may be difficult to contest where the accused cannot practically examine the source, preservation, integrity or attribution of

electronic material. This makes the availability of meaningful legal assistance relevant to the practical operation of evidentiary burdens, even where the statutory text itself remains formally neutral.

5. ASSESSING THE HUMAN-RIGHTS BALANCE

The Bharatiya Sakshiya Adhiniyam, 2023 (BSA) can be read consistently with the presumption of innocence because it does not create a general rule requiring an accused to establish innocence. Instead, sections 104–109 disseminate burdens according to the nature of the fact in issue and the circumstances identified by the statute.¹² The constitutional question therefore depends on the application of distinct provisions rather than on the mere existence of statutory burdens.

The stronger safeguard is to require courts to identify the factual foundation for any presumption and to explain the legal consequence of that finding. Noor Aga supports this approach in the context of reverse burdens.¹³ Mir Mohammad Omar, read alongside section 109, supports a narrower proposition: where a fact is especially within a person's knowledge, the law may require that person to prove it, but the rule should not become a reserve for proof of the prosecution's essential case.¹⁴

The same reasoning applies to electronic evidence. Section 86 basically creates limited presumptions concerning secure electronic records and signatures; it does not establish a general presumption that all electronic material is authentic, attributable to a certain person, or evidentiary of criminal intention.¹⁵ The evidentiary value of a digital record must therefore remain connected to the thesis for which it is tendered.

6. SAFEGUARDS FOR A RIGHTS-CONSISTENT APPLICATION

6.1 THREE SAFEGUARDS FOLLOW FROM THE STATUTORY SCHEME AND THE CASE LAW

Firstly, courts should identify and strictly examine the foundational facts required before a reverse-onus presumption is activated. This is consistent with the reasoning in Noor Aga.¹⁶

Secondly, courts should differentiate the statutory presumption applicable to an electronic record from other questions that the prosecution seeks to establish through that record. Section 86 should not be treated as a substitute for evidence concerning authorship, attribution or intention where those matters remain disputed.¹⁷

Thirdly, the defence should have a realistic opportunity to test technical evidence. This does not require the law to eliminate legitimate evidentiary burdens; it requires the procedural setting to permit those burdens to be discharged or rebutted in a meaningful way. The concern is particularly relevant where a case depends substantially on digital evidence.

7. CONCLUSION

The Bharatiya Sakshya Adhiniyam, 2023 (BSA) does not generally transfer the prosecution's entire burden of proving guilt to the accused. Sections 104–109 establish a tailored system: the ordinary burden remains with the party asserting the relevant facts, while particular burdens arise in defined circumstances. Sections 108 and 109 are therefore better understood as specific evidentiary rules rather than a wholesale reversal of the presumption of innocence.¹⁸

Noor Aga and Mir Mohammad Omar provide useful principles for applying those rules. The former emphasises the importance of foundational facts before a reverse burden is activated; the latter recognises that some facts may appropriately be placed upon the person who is especially able to explain them. Neither principle should be used to relieve the prosecution of proving the essential elements of its case.¹⁹

Electronic evidence makes this differentiation practically significant. Section 86 creates specified presumptions concerning secure electronic records and signatures, but those presumptions should not be expanded into assumptions about authorship, attribution or intention.²⁰ A rights-consistent application of the BSA therefore depends on careful statutory interpretation, proof of the facts that activate presumptions, and a genuine opportunity for the defence to challenge the evidentiary basis of the prosecution case.

FOOTNOTES AND CROSS-REFERENCES

1. Bharatiya Sakshya Adhiniyam 2023, ss 104–109 and s 86; see also Bureau of Police Research and Development, *The Bharatiya Sakshya Adhiniyam, 2023* (Ministry of Home Affairs, 2024) (official explanatory material comparing the BSA with the Indian Evidence Act).
2. Constitution of India 1950, art 21; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 14(2).
3. *Noor Aga v State of Punjab* (2008) 16 SCC 417; *State of West Bengal v Mir Mohammad Omar* (2000) 8 SCC 382. See also nn 7–10 below.
4. Bharatiya Sakshya Adhiniyam 2023, ss 104–107. Section 104 states the general burden of proof; s 105 addresses the party who would fail if no evidence were given; s 106 concerns a particular fact; and s 107 concerns facts necessary to make other evidence admissible.
5. Bharatiya Sakshya Adhiniyam 2023, ss 108–109. Section 108 corresponds in substance to s 105 of the Indian Evidence Act 1872; s 109 corresponds in substance to s 106 of the Indian Evidence Act 1872.
6. Bharatiya Sakshya Adhiniyam 2023, s 2 (definitions of ‘may presume’, ‘shall presume’ and ‘conclusive proof’).
7. *Noor Aga* (n 3) 417, especially the Court’s discussion of foundational facts and the operation of reverse burdens. The Supreme Court has subsequently reiterated that a reverse burden operates only after the prosecution’s initial burden is satisfied: see, eg, recent Supreme Court discussion reproducing the principle in *Noor Aga*. See also nn 8 and 16 below.
8. *Noor Aga* (n 7). The application of the principle to the BSA is an analytical extension; *Noor Aga* itself concerned the NDPS Act and should not be cited as though it directly interpreted the BSA.
9. *State of West Bengal v Mir Mohammad Omar* (2000) 8 SCC 382. See also the Supreme Court’s later discussion of the case in *Trimukh Maroti Kirkan v State of Maharashtra* (2006) 10 SCC 681.
10. Bharatiya Sakshya Adhiniyam 2023, s 109; see n 5 above.
11. Bharatiya Sakshya Adhiniyam 2023, s 86. The statutory presumption is expressly limited to the matters stated in that section and applies to ‘secure’ electronic records and secure electronic signatures.
12. Bharatiya Sakshya Adhiniyam 2023, ss 104–109; see nn 4–5 above.
13. *Noor Aga* (n 7); see also n 16 below.
14. *Mir Mohammad Omar* (n 9); Bharatiya Sakshya Adhiniyam 2023, s 109; see nn 9–10 above.
15. Bharatiya Sakshya Adhiniyam 2023, s 86; see n 11 above.

16. Noor Aga (n 7); see also nn 8 and 13 above.
17. Bharatiya Sakshya Adhiniyam 2023, s 86; see n 11 above.
18. Bharatiya Sakshya Adhiniyam 2023, ss 104–109; see nn 4–5 and 12 above.
19. Noor Aga (n 7); Mir Mohammad Omar (n 9); see nn 13–14 above.
20. Bharatiya Sakshya Adhiniyam 2023, s 86; see nn 11 and 15 above.