

Legislative Brief

The Bharatiya Sakshya (Second) Bill, 2023

The Bharatiya Sakshya Bill, 2023 was introduced in Lok Sabha on August 11, 2023. It repeals the Indian Evidence Act, 1872. The Bharatiya Sakshya (Second) Bill, 2023 was introduced on December 12, 2023 after the earlier Bill was withdrawn. The Standing Committee on Home Affairs had examined the earlier Bill.

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Highlights of the Bill

- ◆ The Bharatiya Sakshya (Second) Bill, 2023 (BSB2) replaces the Indian Evidence Act, 1872 (IEA). It retains most provisions of the IEA including those on confessions, relevancy of facts, and burden of proof.
- ◆ The IEA provides for two kinds of evidence - documentary and oral. Documentary evidence includes primary (original documents) and secondary (that proves the contents of the original). The BSB2 retains the distinction. It classifies electronic records as documents.
- ◆ Under the IEA, electronic records are categorised as secondary evidence. The BSB2 classifies electronic records as primary evidence. It expands such records to include information stored in semiconductor memory or any communication devices (smartphones, laptops).
- ◆ The BSB2 expands secondary evidence to include: (i) oral and written admissions, and (ii) the testimony of a person who has examined the document and is skilled in the examination of documents.

Key Issues and Analysis

- ◆ The Supreme Court has recognised that electronic records may be tampered with. While the BSB2 provides for the admissibility of such records, there are no safeguards to prevent the tampering and contamination of such records during the investigation process.
- ◆ Currently, electronic records must be authenticated by a certificate to be admissible as documents. The BSB2 retains these provisions for admissibility. The BSB2 also classifies electronic evidence as documents (which may not need certification). This creates a contradiction.
- ◆ Under the IEA, a fact discovered due to information received from an accused in police custody may be provable. The BSB2 retains this provision. Courts and Committees have noted that facts may be discovered in police custody by coercion, without adequate safeguards.
- ◆ The IEA (and the BSB2) allows such information to be admissible if it was obtained when the accused was in police custody, but not if he was outside. The Law Commission recommended to remove this distinction.
- ◆ The Law Commission has made several recommendations, which have not been incorporated. These include the presumption that the police officer caused the injuries if an accused was injured in police custody.

PART A: HIGHLIGHTS OF THE BILL

Context

The Indian Evidence Act, 1872 (IEA) governs the admissibility of evidence in Indian Courts. It applies to all civil and criminal proceedings. Over the years, the IEA has been amended to align with certain criminal reforms and technological advancements. In 2000, the IEA was amended to provide for the admissibility of electronic records as secondary evidence.¹ In 2013, it was amended to add provisions related to consent in cases of rape. It shifted the onus on the accused to prove that consent was given, and added that the character of the victim and her sexual history will not be relevant when determining consent.¹

The Law Commission has examined the IEA on multiple occasions and suggested amendments on matters such as custodial violence, admissibility of police confessions, and cross-examination. For more details on key recommendations made by the Law Commission, see Table 1.^{2,3} The Bharatiya Sakshya Bill, 2023 (BSB) was introduced in Lok Sabha on August 11, 2023. It seeks to replace the IEA. The Standing Committee on Home Affairs examined the Bill.⁴ The Bharatiya Sakshya (Second) Bill, 2023 was introduced on December 12, 2023 after the earlier Bill was withdrawn. It incorporates most of the suggestions made by the Standing Committee on Home Affairs.

Key Features

The Bharatiya Sakshya (Second) Bill, 2023 (BSB2) retains most of the provisions of the IEA. These include:

- **Admissible evidence:** Parties involved in a legal proceeding can only present admissible evidence. Admissible evidence can be classified as either ‘facts in issue’ or ‘relevant facts’. Facts in issue refer to any fact that determines the existence, nature, or extent of any right, liability, or disability claimed or denied in a legal proceeding. Relevant facts are facts that are pertinent to a given case. The IEA provides for two kinds of evidence – documentary and oral evidence.
- **A proved fact:** A fact is considered proven when, based on the evidence presented, the Court believes it to either: (i) exist, or (ii) its existence so likely that a prudent man should act as if it exists in circumstances of the case.
- **Police confessions:** Any confession made to a police officer is inadmissible. Confessions made in police custody are also inadmissible, unless recorded by a Magistrate. However, if a fact is discovered as a result of information received from an accused in custody, that information may be admitted if it distinctly relates to the fact discovered.

Key changes proposed in the BSB2 include:

- **Documentary evidence:** Under the IEA, a document includes writings, maps, and caricatures. The BSB2 adds that electronic records will also be considered as documents. Documentary evidence includes primary and secondary evidence. Primary evidence includes the original document and its parts, such as electronic records and video recordings. Secondary evidence contains documents and oral accounts that can prove the contents of the original. The BSB2 retains this classification.
- **Oral evidence:** Under the IEA, oral evidence includes statements made before Courts by witnesses in relation to a fact under inquiry. The BSB2 allows oral evidence to be given electronically. This would permit witnesses, accused persons, and victims to testify through electronic means.
- **Admissibility of electronic or digital records as evidence:** Documentary evidence includes information in electronic records that have been printed or stored in optical or magnetic media produced by a computer. Such information may have been stored or processed by a combination of computers or different computers. The BSB2 provides that electronic or digital records will have the same legal effect as paper records. It expands electronic records to include information stored in semiconductor memory or any communication devices (smartphones, laptops). This will also include records on emails, server logs, smartphones, locational evidence and voice mails.
- **Secondary evidence:** The BSB2 expands secondary evidence to include: (i) oral and written admissions, and (ii) the testimony of a person who has examined the document and is skilled to examine the documents.
- **Joint trials:** A joint trial refers to the trial of more than one person for the same offence. The IEA states that in a joint trial, if a confession made by one of the accused which also affects other accused is proven, it will be treated as a confession against both. The BSB2 adds an explanation to this provision. It states that a trial of multiple persons, where an accused has absconded or has not responded to an arrest warrant, will be treated as a joint trial.

PART B: KEY ISSUES AND ANALYSIS

The admissibility of electronic records as evidence

Act:
Sections
45A, 60 to
65B
Bill:
Clauses 39,
56 to 63.

Under the IEA, documentary evidence can be classified as primary or secondary evidence. Primary evidence refers to the original document, while secondary evidence includes documents that can prove the contents of the original. Secondary evidence may be required under various conditions, such as when the original has been destroyed, or is with the person against whom the document must be proved. Documents include writings, maps, and caricatures. The BSB2 retains these provisions and adds electronic records to the definition of documents.

The IEA allows electronic records to be admitted as secondary evidence and specifies the procedure to admit such evidence. The BSB2 amends this to clarify that electronic records produced from proper custody will be considered primary evidence, unless disputed. If electronic records are stored in multiple files, each file will be considered as primary evidence. It also expands the definition of electronic records to include information stored in semiconductor memory or smartphones (including emails, location and voice mails).

Admitting electronic records as primary evidence raises two issues. We discuss them below.

Tampering of electronic records

In 2014, the Supreme Court recognised that electronic records are susceptible to tampering and alteration.⁵ It stated that without adequate safeguards, if the whole trial is based on proof of electronic records, it may lead to a travesty of justice.⁵ The BSB2 provides for the admissibility of electronic records and gives the Court discretion to consult an Examiner of Electronic Evidence to form an opinion on such evidence. However, no safeguards have been provided to ensure that electronic records are not tampered with during the search and seizure or investigation process. The Standing Committee on Home Affairs (2023) noted the importance of safeguarding the authenticity and integrity of electronic and digital records as they are prone to tampering.⁴ It recommended mandating that all electronic and digital records collected as evidence during investigation be securely handled and processed through proper chain of custody.

In 2021, the Karnataka High Court introduced guidelines for minimum safeguards during the search and seizure of electronic records.⁶ These include: (i) ensuring that a qualified forensic examiner accompanies the search team, (ii) prohibiting the Investigating Officer from using the seized electronic device during search and seizure of electronic records, and (iii) seizing any electronic storage device (such as pen drives or hard drives) and packing them in a Faraday bag.⁶ Faraday bags block the transmission of electromagnetic signals, which can disrupt or destroy data stored in the device.

In the European Union, the Draft Directive Proposal for a Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings aims to establish uniform minimum standards for the use of electronic evidence.⁷ Key principles include: (i) mandating the use of electronic evidence only if there is sufficient evidence that it has not been manipulated or forged, (ii) ensuring that evidence is sufficiently secured against manipulation from the time of production to the chain of custody, and (iii) requiring the involvement of IT experts at the request of the accused.⁷ In the United States, the proponent must provide sufficient evidence to prove the authenticity of the record.⁸ In case of records generated by an electronic process or system, and data copied from such process or system, the record or data must be certified by a qualified individual.

The admissibility of electronic records may be ambiguous

Act:
Sections
45A, 60 to
65B
Bill:
Clauses 39,
56 to 63.

The BSB2 includes electronic records in the definition of documents. It retains the provision from the IEA that all documents must be admissible as primary evidence, unless it qualifies as secondary evidence (original has been destroyed, or is with the person against whom the document must be proved). However, it also retains the provision that requires a certificate authentication of all electronic records be admissible as documents. This has overriding effects over other provisions. These changes may raise an ambiguity regarding the admissibility of electronic records.

Challenges to facts discovered in police custody

Information obtained in police custody using coercion may be provable

Act:
Section
27
Bill:
Clause
23

The IEA provides that if a fact is discovered as a result of information received from an accused in police custody, that information can be admitted if it distinctly relates to the fact discovered. The BSB2 retains this provision. Over the years, the Supreme Court and various Law Commission reports have highlighted that facts may have been discovered in custody due to the accused being subject to duress and torture.^{2,3,9} The Law Commission (2003) recommended that fact discovered in police custody using threat, coercion, violence, or torture should not be provable.³

Admissibility of fact depends on whether it was obtained outside or within police custody

Under the IEA, information received from an accused in police custody is admissible if it relates to a fact discovered, whereas similar information is not admissible if it was received from an accused outside police custody. The BSB2 retains this distinction. In 1960, the constitutionality of this provision was challenged on the grounds that it creates an unjustifiable discrimination between persons in and outside custody.¹⁰ The Court upheld the constitutionality stating that the legislation had made a reasonable differentia by enacting different rules for those outside and within police custody. The Law Commission (2003) had suggested re-drafting the provision to ensure that information relating to facts should be relevant whether the statement was given in or outside police custody.³

Recommendations of various Committees and Courts

Table 1 provides a list of key recommendations of the Law Commission and various Committees constituted by the central government to advise the government on criminal reforms.

Table 1: Key recommendations of various Committees and the Supreme Court on the IEA

Main recommendations	Whether incorporated
Police custody; Confessions to police	
<i>Malimath Committee:</i> Repeal sections on confessions to police officers (IEA. S.25-29). ¹¹	No. Original provisions retained in Clause 22, 23
<i>Law Commission:</i> Facts discovered using any threat, coercion, violence or torture in consequence of information received from accused in police custody should not be provable. ³ Facts should be relevant whether discovered in police custody or outside custody. ³	
<i>Law Commission:</i> Insert a new provision which states that if a person in police custody is injured, it is presumed that the police caused the injuries. The burden of proof will be on the authority. ¹²	
<i>Law Commission:</i> Insertion of a new provision relating to the prosecution of a police officer for causing bodily injury to a person in police custody. The Court will presume that the officer caused the injury. ¹³ The Court will consider the following before drawing a presumption: (i) period of the custody, (ii) statements made by the victim about the injury, (iii) examination by a medical practitioner, and (iv) any recorded statements by a magistrate.	
Authentication of electronic records	
<i>Supreme Court:</i> A certificate is not required if the original document is produced in Court by the owner of the device. ¹⁴ However, if the device is part of a computer system or network that cannot be physically brought, then the certificate must be provided.	Distinction not addressed.
Government privilege in evidence	
<i>Law Commission:</i> IEA s. 123; Unauthorised access to unpublished official records related to state affairs is prohibited without permission from the head of the relevant department. ¹⁵ Permission can be denied if it is against public interest, and the officer must provide reasons for the denial. The Court can request additional affidavits and issue summons for the production of the records. It has the authority determine the admissibility of the evidence.	No. Original provisions retained in Clause 129, 130
<i>Law Commission:</i> IEA s.124; Public officers cannot be forced to reveal communications made to him in official confidence, if the Court decides it would harm public interest. ¹⁵ If a public officer objects to answering a question that may require disclosure, the court must privately inquire about the nature and reasons for the objection before rejecting it.	
Cross examination	
<i>Law Commission:</i> IEA s.145; Cross-examination of previous statements in writing- should also include oral statements. ^{2,3}	No. Original provision retained in Clause 148
Criminal liability for conspiracy	
<i>Supreme Court:</i> IEA s.10; Under the IEA, anything said, done, or written by any of individual(s) acting/ acted in conspiracy <i>in reference</i> to the conspiracy is considered a relevant fact. Such a fact can be used as evidence against each person believed to be part of the conspiracy to prove its existence and their involvement. The Supreme Court has emphasised on several occasions that the expression <i>in reference</i> to should be interpreted to mean <i>in furtherance</i> of the common intention. ^{16,17,18,19}	No. Original provision retained in Clause 8
Other	
<i>Law Commission:</i> IEA s.21; The IEA provides for admissions that can be proved. It should deal with admissions that can be proved and those that cannot be proved. Provision should be split into two parts providing detailed information on admissions that can be proved and those that cannot. ²	No; Original provision retained in Clauses 19, 60, and 79
<i>Law Commission:</i> IEA s.65; Cases in which secondary evidence for documents may be given- should include individuals who are in possession of a document (not bound to produce it) but also refuses court orders to produce the document. ²	
<i>Law Commission:</i> IEA s.80; Presumption of documents produced as record of evidence- Should include statement recorded by a magistrate under S. 164 of CrPC (BNSS cl. 183) and dying declaration (last words of a dying person). ²	
<i>Law Commission:</i> New provision for establishing credit of witness by independent evidence. ³	

Note: This is an illustration of recommendations made by various Committees and the Supreme Court on the IEA for the sake of brevity. Sources: see endnotes; PRS.

Drafting issues

Table 2 provides an illustration of drafting issues in the BSB2.

Table 2: Drafting Errors in the BSB2

Drafting issues	
Clause	Issue
58	The BSB2 adds oral admissions as secondary evidence. However, an illustration of Clause 58 of BSB2 provides that neither an oral account of a copy compared with the original nor an oral account of a photograph of the original is secondary evidence of the original.
26	Illustration (a) reads: “ <i>The question is, whether A was murdered by B; or A die of injuries received in a transaction in the course of which she was raped. The question is whether she was raped by B; or the question is, whether A was killed by B under such circumstances that a suit would lie against B by A’s widow. Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration, are relevant facts</i> ”. What is the gender of A, given that A is referred to as ‘she’ and is ‘raped, but has a ‘widow’, and then is referred to as ‘his or her’?.

Sources: The Bharatiya Sakshya (Second) Bill, 2023; PRS.

- [1. The Information Technology Act, 2000, The Criminal Law \(Amendment\) Act, 2013.](#)
- Report No. 69, ‘The Indian Evidence Act, 1872’, Law Commission of India, 1977, [Part I](#), [Part II](#), and [Part III](#).
- Report No. 185, ‘[Review of the Indian Evidence Act, 1872](#)’, Law Commission of India, 2003.
- [Report No. 248](#), ‘The Bharatiya Sakshya Bill, 2023’, The Standing Committee on Home Affairs, Rajya Sabha, November 10, 2023.
- Civil Appeal No. 4226 of 2012, [Anvar P.V v P.K Basheer](#), Supreme Court, September 18, 2014.
- Writ Petition No. 11759 of 2020, Mr. Virendra Khanna v. State of Karnataka, Karnataka High Court, March 12, 2021
- [ELI Proposal for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings](#), The European Law Institute.
- Rule 901-902, [The Federal Rule of Evidence](#), The United States of America,
- Appeal (crl.) 664 of 2000, [Sanjay @ Kaka Shri Nawabuddin @ Nawab Vinod Kumar v. The State of NCT of Delhi](#), Supreme Court, February 7, 2001.
- 1960 AIR 1125, [State of U.P v. Deoman Upadhyaya](#), Supreme Court, May 06, 1960.
- [Committee on Reforms of Criminal Justice System: Report: Volume I](#), 2003, Ministry of Home Affairs.
- [Report No. 273](#), Law Commission of India, 2017.
- [Report No. 113](#), Law Commission of India, 1983.
- Civil Appeal No. 20825-6, [Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal](#), Supreme Court, July 14, 2020
- [Report No.88](#), Law Commission of India, 1983.
- [State of Gujrat v. Mohammad Atik](#), Supreme Court, April 3, 1998.
- 1957 AIR 747, [Sardul Singh Caveeshar v State of Maharashtra](#), Supreme Court, May 23, 1957.
- AIR 1940 PC 176, Mirza Akbar v. King Emperor, Privy Council, 1940.
- AIR 1929 Patna 145, Indra Chandra Narang v. Emperor, Patna High Court, 1929.

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