



Analyzing the Evolution: A comparative study of provisions related to 'Electronic Evidence' in the Old Statute and New Proposed Bill in India

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Abstract

This comparative analysis examines the legislative evolution in the treatment of electronic evidence, focusing on the Indian Evidence Act, 1872 (IEA), and the proposed Bharatiya Sakshya Bill, 2023 (BSB). As our global society becomes increasingly reliant on Information and Technology, novel business concepts and emerging technologies have led to an uptick in cybercrimes, necessitating the integration of electronic evidence in criminal investigations. The paper explores the IEA's recognition of electronic evidence and the challenges posed by Section 65B's procedural requirements. Turning attention to the BSB, currently under consideration, the study delves into its potential impact on the treatment of electronic evidence by expanding the definition of electronic records and categorizing them as primary evidence. This departure from the IEA could significantly influence the credibility and admissibility of electronic evidence in court proceedings. Examining key provisions of the BSB, specifically Sections 62 and 63, in comparison to the IEA, the paper underscores the role of forensic science in establishing the credibility of electronic evidence. Drawing inspiration from the Supreme Court's emphasis on scientific methods in criminal investigations, the study emphasizes the need for continued research to address emerging legal issues in the dynamic Information and Technology sector. In conclusion, the paper advocates for an effective criminal justice system rooted in sound investigation and evidence collection. Recognizing the challenges posed by current investigative processes, particularly concerning electronic evidence, the study calls for ongoing research to enhance our understanding and application of electronic evidence in legal proceedings. While the Information Technology Act, 2000 provides a foundational framework, continuous research is imperative to keep pace with evolving technologies and address emerging legal complexities.

Keywords: Electronic Evidence, Bharatiya Sakshya, Information and Technology

Introduction

We are living in a global village. Novel business concepts making use of Information and Technology such as E-commerce, Internet Banking, Unified Payments Interface, Virtual Reality, Artificial Intelligence, Data Science, Natural Language Processing, Non-Fungible Tokens, Blockchain Technology, Cryptocurrency, 3D printing technology, Meta Verse, etc., are emerging with a speed beyond our imagination.

With the increased use of technology for daily needs, the use of Information and Technology to commit crimes is increasing too. Where criminals are using science and modern technology to commit crimes, the use of scientific tools in the investigation has become indispensable for accurate and early discovery of the crime. The application of forensics is there in almost every criminal investigation, from collecting blood samples at the crime site to tracing digital footprints in case of online financial fraud. The scientific methods of a criminal investigation can prove as strong weapons to trigger conclusive evidence in a criminal trial if implemented properly. Hence, forensic activism is the solution to better crime management.

Digital forensics is the field of forensic science that is concerned with retrieving, storing and analysing electronic data that can be useful in criminal investigations. This includes information from computers, hard drives, mobile phones and other data storage devices. Electronic evidence can be in the form of E-mail, SMS / instant messaging applications such as WhatsApp, Hard-disk, Call Records,

Tape Recordings, Photographs, Compact Disc (CD), Statement of Account, etc.

In *D. K. Basu v. State of West Bengal* ^[1], the Supreme Court held that there is a need for developing scientific methods of investigation and interrogation of the accused, as the custodial deaths and torture are nothing but a blow at the rule of law. The need to use forensic methods in a criminal investigation was seriously recognized in India in the year 2010. Hon'ble Minister for Home Affairs, Government of India declared "the year 2010" as the "Year of Forensic Science" ^[2] The Information Technology Act, 2000, and the Indian Evidence Act, 1872 are the main legislations governing legal aspects of electronic evidence. The Bharatiya Sakshya Bill, 2023 (BSB) proposes to replace the Indian Evidence Act, 1872. It is one of the major criminal laws in India and one of the first few legislations enacted in India in British Raj after the Charter Act, 1833 and Indian Penal Code, 1862. After Independence the India received Constitutional morality on which today's legal system is based. Following is the comparative analysis of the provisions related to 'Electronic Evidence' in the Old Statute i.e., IEA and New Proposed Bill i.e., BSB.

Concept of electronic evidence under Indian evidence ACT, 1872 (IEA)

Prior to the legal recognition granted to electronic evidence, Sections 63 and 65 of the Evidence Act majorly dealt with and provided for the conditions for admissibility of electronic evidence. As per these provisions, the electronic evidence gathered through various means by applying cyber

forensics was deemed as a "document" and the printed reproductions were considered secondary evidence, which required certification of authenticity from a competent signatory who was susceptible to cross-examination relating to the certified document. It provides guidelines on the admissibility and proof of electronic records in court proceedings^[3].

The Evidence Act was amended by virtue of Section 92 of the Information Technology Act, 2000 and the term "evidence" was amended to include "electronic record", thereby allowing for admissibility of the digital evidence. However, the omission of the word, "Electronic Records" in the scheme of Section 61 to 65 of Evidence Act; and the exclusion of electronic record under Section 59 of Evidence Act clearly signifies the clear and explicit legislative intention to not extend the applicability of Sections 59 and 61 to 65 of the Evidence Act to electronic record, in view of overriding provision of Section 65B of the Evidence Act, which deals exclusively with the admissibility of such electronic record.

Section 65A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B of the Evidence Act. Thus, any documentary evidence by way of an electronic record can be proved only in accordance with the procedure prescribed under Section 65B of the Evidence Act. Section 65B provides any information contained in an electronic record, whether it be the contents of a document or communication printed on a paper, or stored, recorded, copied in optical or magnetic media produced by a computer, it is deemed to be a document and is admissible in evidence without further proof of the production of the original, subject to satisfaction of the conditions set out in Section 65B (2), (5) of the Evidence Act. It provides for both technical conditions and non-technical grounds for admissibility of electronic evidence. The certificate is to be executed/signed by a person occupying a responsible position in relation to the device through which the data has been produced. The certificate must identify the electronic record containing the statement, describe the manner in which it was produced and also give such particulars of any device involved in the production of the electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer. The certificate must also deal with any of the matters to which the conditions for admissibility relate. The entire idea behind the certificate is also to ensure the integrity of the source and authenticity of the data, so that the Court may be able to place reliance on it. This is critical since electronic data is more prone to tampering and alteration.

Concept of electronic evidence under the Bharatiya Sakshya bill, 2023 (BSB) and Comparison With IEA

The Ministry of Home Affairs introduced three bills in the Lok Sabha and referred to Standing Committee dated 11/08/2023 namely, the Bharatiya Nyaya Sanhita Bill, 2023, the Bharatiya Nagarik Suraksha Sanhita Bill, 2023 and the Bharatiya Sakshya Bill, 2023^[4]. The bills are yet to be enacted into legislations and come in to force but it is significant to understand their impact on the administration of justice in India, to gaze into future of legal structure of Bharat. The Bharatiya Sakshya Bill, 2023 (BSB) introduced to amend the Indian Evidence Act of 1872, currently in force in India. The BSB deals with the admissibility of

evidence in the civil and criminal proceedings of the Indian Courts and shall replace IEA after its enactment. Following is the precise account of comparative analysis of BSB and IEA:

Changes in definitions

The BSB includes electronic records as a document in the definition of the draft bill under S. 2 (1)(c). Accordingly, "document" means any matter expressed or described or otherwise recorded upon any substance by means of letters, figures or marks or any other means or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter and includes electronic and digital records.

The illustration under the said clause elaborates the types of electronic records, which says that the electronic record on emails, server logs, documents on computers, laptop or smartphone, messages, websites, locational evidence and voice mail messages stored on digital devices are documents.

The BSB considers electronic evidence as documentary evidence. As per S. 2(1)(e) "evidence" means and include the documents including electronic or digital records produced for the inspection of the Court and such documents are called documentary evidence.

If compared with IEA, the term 'electronic evidence' defined as documentary evidence in interpretation clause under S. 3 is limited and not elaborated as in BSB. The BSB's definition provides a larger ambit of the term to include digital information and electronic devices.

Swing of primary and secondary evidence

The BSB considers an electronic record as primary evidence as per S. 57 of the Bill unlike the provisions of IEA which treats it as secondary evidence. As per S. 57 of BSB, 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. Hence as per BSB the electronic record can be itself produced for the inspection of the Court which is not possible under provisions of IEA which requires mandatory procedure under S. 65B in relation to admissibility of electronic records.

This is a drastic change in the legal provisions for admissibility of electronic evidence in the Court of law. If the bill is enacted with this approach, it shall be revolutionary step in the criminal jurisprudence of India as it will make the electronic /digital record as a credible and viable piece of evidence in the Court of law while adjudicating a trail.

Especially in the criminal trial, where the investigation agencies face difficulty in discovering substantive physical evidences which are conventionally primary in nature and the defence side gets benefit of doubt due lack of primary evidence even in the presence of electronic evidence. There is a need to study various types of forensic findings and evidences in general and electronic evidences in particular, to critically analyse the criteria which can make the electronic evidence, credible and conclusive in deciding the matter before Court of law. Making the electronic evidence as primary evidence under BSB can be taken as positive sign towards establishment of better administration of legalities surrounding electronic evidence in future.

Admissibility of evidence

Considering various aspects of electronic evidence, the changes proposed by the BSB are significant so as to provide an elaborated definition of electronic record, to admit the electronic or digital records as primary evidence are the prominent changes amongst others. Admissibility of Electronic Evidence is the crucial aspect to understand while proposing the reforms in BSB. When compared S. 65B of IEA with S.63 of BSB, some crucial changes to the provisions governing admissibility of electronic records required to be noted.

As per S. 63(1) of BSB the term 'Information' also includes electronic record stored, recorded or copied in the semiconductor memory. The term 'computer' includes the output from any communication device or otherwise stored, recorded or copied in any electronic form.

As per S. 63(4) BSB, when it is required to give statement in the electronic evidence, the certificate for admissibility of such electronic evidence shall be submitted at the time of submission of such record for the admission. S. 65B (4) IEA has no such clarity.

As per S. 65B (4) of IEA, such certificate is to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities, whereas, S. 63(4)(c) provides that such certificate shall be signed by a person in charge of the computer or communication device and an expert as per specified format.

This is a positive change clarifying the procedural aspect but the term 'whichever is appropriate' retains in BSB same as in IEA leaving the ambiguity about the signing authority.

The Standing Committee observed that, the provisions related to the certificate by an expert or in charge of electronic record required for the admissibility of electronic record, has some shortcomings which may jeopardise the authenticity, reliability, and integrity of the electronic and digital records submitted as evidence, making them susceptible to tampering.

The committee has observed that the electronic evidence is prone to tampering hence recommended to insert a mandatory provision to handle the electronic records securely and processed through proper chain of custody during investigation to safeguard authenticity of electronic evidence. This is essential in BSB as it recognises the electronic record as primary evidence. The recommended safeguards are necessary to value credibility and conclusiveness of electronic evidences when produced as the original documents in the Court of law.

As per the IEA, electronic records must be authenticated by a certificate. The Committee noted that the BSB specifies that electronic records must be proved by primary evidence (S. 59). However, the Bill also retains the section from the IEA on the admissibility of electronic record (S. 63), which requires a certificate authentication.

Conclusion

A crime-free society is based upon a sound criminal justice system and, successful and fair investigation is the main ingredient of the sound justice system. Legal reform is the only solution to answer drawbacks and shortcomings of the existing legislations. Considering, omnibus nature of digital records in every legal case in the era of science and technology, there is immense need for reforms in the legalities dealing with electronic evidence. The BSB shows

legislators' intentions to address the issue for admissibility of electronic evidence but it has certain shortcomings.

The Standing Committee submitted its report on the Bharatiya Sakshya Bill, 2023 and addressed the shortcomings and recommended certain changes in draft BSB. Eight members of the Committee have submitted dissent notes for all the three Bills such that the Bills are mostly the same as the existing laws having Hindi- only names, the Bills may violate the Constitution, and the proposed Bills lacked sufficient consultation with experts and the public.

A study of various types of forensic findings and evidences in general and electronic evidences in particular is essential to critically analyse the criteria which can make such electronic evidence, credible or the reasons which make such electronic evidence nonconclusive in the Court of law. Information Technology Act, 2000 is the only special legislation dealing with the intricacies of electronic evidences, there is more to research upon in the field of electronic evidences to answer the emerging legal issues in the information and technology sector.

References

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