



## Implementing Bharatiya Sakshya Adhiniyam

This editorial is based on [“E-evidence, new criminal law, its implementation”](#) which was published in The Hindu on 01/03/2024. The article discusses various changes made to provisions concerning criminal laws in India, with a specific emphasis on electronic evidence in the proposed Bharatiya Sakshya Adhiniyam, intended to replace the Indian Evidence Act of 1872.

**For Prelims:** [Bharatiya Nyaya Sanhita, 2023](#), [IPC \(Indian Penal Code\)](#), [Code of Criminal Procedure \(CrPC\)](#), [Indian Evidence Act, 1872](#), [Supreme Court](#), [Adultery](#), [National Judicial Data Grid](#), [Sedition](#), [Parliamentary Standing Committee](#), [Organized Crime](#), [Sexual Offences Against Women](#).

**For Mains:** Evolution of Criminal Justice System in India, Current Issues Related to the Criminal Justice System in India.

The three newly-enacted criminal laws, the [Bharatiya Nyaya Sanhita](#) (to replace the [Indian Penal Code-IPC](#)), the [Bharatiya Nagarik Suraksha Sanhita](#) (to replace the [Code of Criminal Procedure- CrPC](#)) and the [Bharatiya Sakshya Adhiniyam](#) (to replace the [Indian Evidence Act, 1872](#)) are to come into force on July 1, 2024.

The contents of the Indian Evidence Act (IEA), 1872 have changed little as far as the Bharatiya Sakshya Adhiniyam (BSA) is concerned. The scope of secondary evidence has been slightly broadened and some changes have been made in the provisions relating to electronic evidence in the BSA.

### Note

#### **Evolution of Criminal Justice System:**

- Throughout India's history, different criminal justice systems have evolved and gained prominence in different regions under different rulers.
  - During British rule, criminal laws were codified in India, which remained largely unchanged until recently.
- IPC is the official criminal code of India drafted in 1860 in the wake of the first [law commission](#) established in 1834 under the [Charter Act of 1833](#), and became effective from January 1st, 1862.
- The IEA, originally passed in India by the Imperial Legislative Council in 1872, during the British Raj, provides a set of rules and allied issues governing admissibility of evidence in the Indian courts of law.
  - In line, CrPC provides procedures for administering criminal law in India. It was enacted in 1973 and became effective from 1st April 1974.
- The Parliament, in December 2023, passed three pivotal Bills: Bharatiya Nyaya (Second) Sanhita, 2023; Bharatiya Nagarik Suraksha (Second) Sanhita, 2023; and Bharatiya Sakshya (Second) Bill, 2023 to overhaul the criminal justice system.

# Changes proposed in criminal laws

Union home minister Amit Shah has introduced three key bills in the Lok Sabha that, if approved, will overhaul India's criminal justice system. A look at key aspects of the bills



## THE BHARATIYA NYAYA SANHITA (BNS) BILL, 2023 Proposed to replace **Indian Penal Code (IPC), 1860**

The IPC, which was framed by the British, is the official criminal code of India that lists various crimes and its punishments

### KEY TAKEAWAYS

- Seditious deleted, but another provision **penalising secessionism**, separatism, rebellion and acts against sovereignty, unity and integrity of India brought in
- Provision of **death penalty** for gang rape of minors and for mob lynching
- **Community service introduced** as one of the punishments for the first time



## THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023 Proposed to replace **Code of Criminal Procedure (CrPC), 1973**

The CrPC lays down the procedure for investigation, arrest, court hearing, bail and punishment in criminal cases

### KEY TAKEAWAYS

- **Time-bound investigation**, trial and judgment within 30 days of the completion of arguments
- **Video-recording** of the statement of sexual assault victims to be made mandatory
- New provision for **attachment of property and proceeds** of crime



## THE BHARATIYA SAKSHYA BILL, 2023 Proposed to replace the **Indian Evidence Act, 1872**

The IEA applies to all judicial proceedings in the country and defines the particulars of evidence produced and admissible in courts

### KEY TAKEAWAYS

- **Documents to also include** electronic or digital records, e-mails, server logs, computers, smart phones, laptops, SMS, websites, locational evidence, mails, messages on devices
- **Digitisation of all records** including case diary, FIR, charge sheet and judgement
- Electronic or digital record shall have the same legal effect, validity and enforceability as paper records

## What are the Different Provisions of BSA, 2023?

- The BSA, 2023 retains most of the provisions of the IEA, 1872. 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 Proven 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 Incorporated in BSA, 2023:**
  - **Documentary Evidence:** Under the IEA, a document includes writings, maps, and caricatures. The BSA 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 BSA 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.
  - **Oral Evidence:** Under the IEA, oral evidence includes statements made before Courts by witnesses in relation to a fact under inquiry. The BSA 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.
  - **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 BSA 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.

## What are the Various Crucial Changes Introduced in BSA, 2023?

- **Precise Definition of “Document”:** An illustration to the definition of “document” (which includes electronic and digital records) says that an 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.
- **Clarity With Respect to Primary (Electronic) Evidence:** It says that where a video recording is simultaneously stored in electronic form and transmitted or broadcast or transferred to another, each of the stored recordings shall be primary evidence.
  - This may help the investigating agencies in fixing culpability of a cyber-criminal even if he destroys his original electronic record to deny the allegations as it may be collected from other sources without its value getting diminished.
- **Synchronisation with IT Act, 2000:** Section 63, which deals with admissibility of electronic records, includes terms such as ‘semiconductor memory’ and ‘any communication device’ for better visibility.
  - However, this does not change the impact of the provision because the definition of ‘electronic form’ given in the [IT Act, 2000](#) includes information generated, sent, received or stored in ‘computer memory’.

## What are the Different Concerns with Respect to Provisions of BSA, 2023?

- **Issues Regarding Electronic Records:**
  - **Tampering of Electronic Records:**
    - In 2014, the [Supreme Court](#) recognised that electronic records are susceptible to



tampering and alteration. 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.

- **Ambiguity in Admissibility of e-Records:**
  - The BSA 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.
  - The BSA 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).
- **Information Obtained in Police Custody May be Provable:** 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 BSA 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.
- **Discrimination Between Accused Within or Outside 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 BSA retains this distinction.

## What Steps Need to be Taken to Make BSA More Effective?

- **Report of Standing Committee on Home Affairs:** 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.
  - It recommended mandating that all electronic and digital records collected as evidence during investigation be securely handled and processed through proper chain of custody.
- **Guidelines Framed by Karnataka High Court:** In 2021, the Karnataka **High Court** introduced guidelines for minimum safeguards during the search and seizure of electronic records. These include:
  - ensuring that a qualified forensic examiner accompanies the search team,
  - prohibiting the Investigating Officer from using the seized electronic device during search and seizure of electronic records,
  - seizing any electronic storage device (such as pen drives or hard drives) and packing them in a Faraday bag.
    - Faraday bags block the transmission of electromagnetic signals, which can disrupt or destroy data stored in the device.
- **Incorporating Directive Proposal of EU:** In the **EU**, 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. Key principles include:
  - Mandating the use of electronic evidence only if there is sufficient evidence that it has not been manipulated or forged,
  - Ensuring that evidence is sufficiently secured against manipulation from the time of production to the chain of custody, and
  - Requiring the involvement of IT experts at the request of the accused.
- **Recommendations of Law Commission, 2003:**
  - Facts discovered using any threat, coercion, violence or torture in consequence of information received from accused in police custody should not be provable.
  - Facts should be relevant whether discovered in police custody or outside custody.
  - 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.
  - 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. 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
    - (iv) any recorded statements by a magistrate.

- **Recommendations of Malimath Committee, 2003:** To revamp the criminal justice system, it made recommendations covering various aspects. Some of the key recommendations were:
  - Introducing a new category of offences called 'social welfare offences' for minor violations that can be dealt with by imposing fines or community service.
  - Replacing the adversarial system with a 'mixed system' that incorporates some elements of the inquisitorial system such as allowing judges to play an active role in collecting evidence and examining witnesses.
  - Reducing the standard of proof required for conviction from 'beyond reasonable doubt' to 'clear and convincing evidence'.
  - Making confessions made before a senior police officer admissible as evidence.

## Conclusion

The Bharatiya Sakshya Adhiniyam introduces clarity in the definition and admissibility of electronic records, particularly emphasising the importance of expert certification and hash algorithms for secure use of electronic mediums. However, this may pose challenges for cyber laboratories, as the workload is expected to increase substantially.

It is crucial for enforcement agencies to raise awareness about encryption methods and ensure the necessary infrastructure is in place before the laws come into effect. Overall, these changes reflect a commitment to modernising criminal laws in India to address emerging challenges in the digital age.

### **Drishti Mains Question:**

How does the Criminal Justice System in India ensure fairness and effectiveness in delivering justice? Discuss with reference to recent reforms and challenges.

## **UPSC Civil Services Examination, Previous Year Question (PYQ)**

### **Mains**

**Q.** We are witnessing increasing instances of sexual violence against women in the country. Despite existing legal provisions against it, the number of such incidences is on the rise. Suggest some innovative measures to tackle this menace. **(2014)**

**Q.** Mob violence is emerging as a serious law and order problem in India. By giving suitable examples, analyze the causes and consequences of such violence. **(2015)**