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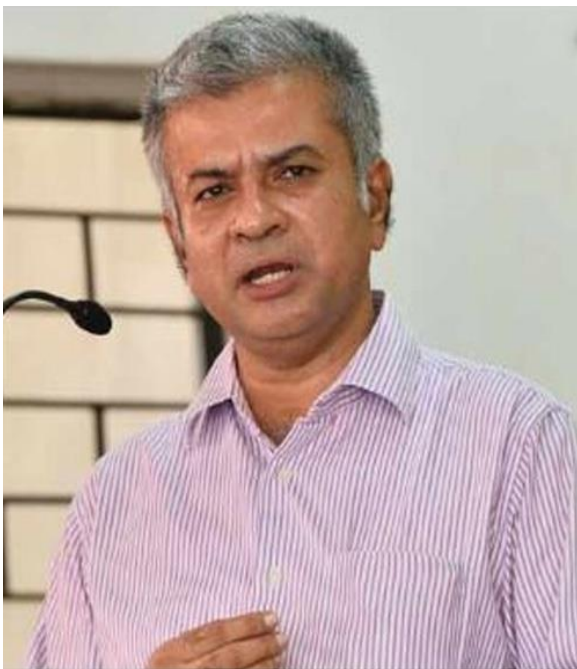
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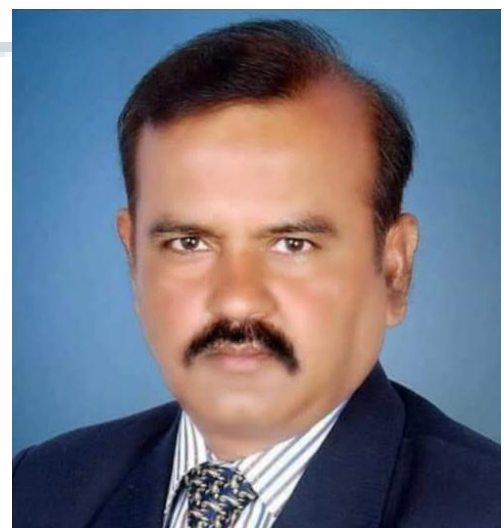
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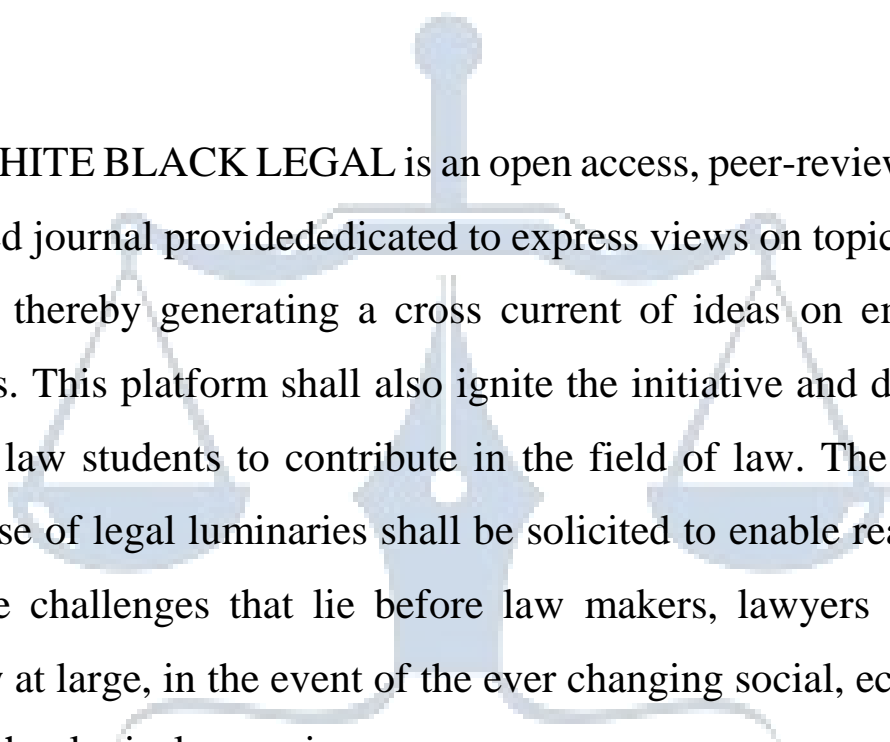


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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you



CRITICAL ANALYSIS OF THE ADMISSIBILITY OF ELECTRONIC EVIDENCE UNDER BHARTIYA SAKSHYA ADHINIYAM, 2023

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ABSTRACT

Admissibility and Relevance are regarded as the cornerstones of evidence law. Law has influenced society, as society has also occasionally influenced law. Within the Indian judicial system, evidence is critical in establishing the claim and defence of both parties in a case. Evidence can take various forms, but its admission is determined by the court's discretionary powers exercised following the established procedures and standards. As technology advances, digital evidence, also known as electronic evidence, is deemed significant evidence by the Indian Judiciary. Electronic evidence can take different forms, including laptops, smartphones, pen drives, and other digital media. Its admissibility is determined by the specific circumstances of each case. It was generally not possible to admit digital information, devices, or electronic evidence as evidence in India, prior to the Information Technology Act, of 2000. The "Admissibility of Electronic Evidence of the Indian Evidence Act, 1872" had to be amended numerous times as the IT Act brought about new rules and regulations arising from the spread of technology. The Supreme Court periodically evaluates such new rules and regulations. The enforcement of the Bhartiya Sashya Adhiniyam in 2023 has brought about a broader change in evidence law as electronic evidence stands as primary evidence. While accepting electronic evidence has numerous advantages, managing such evidence in India is fraught with difficulties.

Keywords: Relevance, Admissibility, Evidence, Procedures, Digital Information.

INTRODUCTION

Over the 21st century, the swift rate of technological advancement and scientific breakthroughs remains remarkable. Laws have to be revised due to these advancements, particularly in artificial intelligence, making it harder to identify and prosecute criminals. With a primary focus on integrating technology, the Bhartiya Sakshya Adhinyam, 2023 marks a substantial advancement in India's criminal justice system. It expands the range of acceptable evidence and presents standards for managing electronic evidence. The primary objective of this legislation is to optimise the administration of justice by utilizing technological innovations without requiring a comprehensive reconstruction of existing frameworks.

The foundation of evidentiary law in India for a long time has been the Indian Evidence Act, of 1872. The IEA was based mainly on physical evidence because it was created before the advent of digital technology. Even though its provisions were extensive for the time, the weight of technological advances increasingly put strain on them. The Information Technology Act of 2000, which formulated Section 65B¹, and the regulations for the recognition of electronic documents were a significant step in narrowing this gap. However, the fragmented nature of this amendment typically revealed flaws that led to contentious interpretation as well as judicial ambiguity.

The newly enacted Bhartiya Sakshya Adhinyam, 2023 in India updates the admission of electronic documents and carefully analyses palimpsests like digital footprints, to make sure integrity and validity are maintained. BSA meticulously created a legislative framework that considers the nuances of electronic evidence as a tribute to the advancement of digitalization. It is an overhaul of the structure of the law in India because it supplants the IEA. This has come as a result of the need to update legal frameworks about the influence of increased digital technology on legal practices.

The BSA greatly expedites the acceptance of electronic evidence. According to Section 61², digital or electronic records are legally equivalent to traditional papers in terms of their validity, enforceability, and legal impact. In addition, Section 63³ describes the requirements for electronic records' acceptability, going beyond records created by computers to cover records

¹ Indian Evidence Act 1872, s 65B

² Bhartiya Sakshya Adhinyam 2023, s 61

³ Bhartiya Sakshya Adhinyam 2023, s 63

created by any kind of communication device or kept in any kind of electronic format.

RESEARCH OBJECTIVES

- To analyse the legal provisions on electronic evidence and its admissibility under BSA, 2023
- To identify the strengths and weaknesses in the current legal framework governing electronic evidence
- To critically analyse the challenges in the admissibility of electronic evidence

MEANING OF ELECTRONIC EVIDENCE

The word "electronic evidence," or "digital evidence" is regularly utilized to refer to "the data that is monitored extracted, or distributed, by any man-made machine, program or network system, through a communications process (including the performance of analogue devices or data in digital format) that can make the truthful record of either party more plausible or less likely than it would be without the evidence."⁴ So, electronic evidence relates to information or data that may be preserved and transmitted in any digital form, and it may become available for legal purposes. It includes various forms of digital matter and sources of data, and technological growth has made it increasingly relevant to today's legal scenarios. Contemporary legal systems cannot underestimate the importance of electronic evidence, as digital technology has permeated almost every lifestyle around the globe, and this importance reflects insights into behaviours, transactions, or communications.

TYPES OF ELECTRONIC EVIDENCE

- Emails: Messages sent via email services, along with metadata like timestamps and sender/receiver info.
- Digital Documents: These are files created and stored on computers or devices, like word processing files, spreadsheets, and PDFs.
- Text Messages and Instant Messages: Communication using messaging apps and SMS.
- Social media content: posts, messages, images, and videos shared on Facebook, Twitter, Instagram, and LinkedIn. Computer Files and Databases: Computer, server, and cloud data storage as logs or records.

⁴ Vivek Dubey, "Admissibility of electronic evidence: an Indian perspective", (2017) 4(2) Forensic Research and Criminology International Journal 58.

- Multimedia Files Relevant digital audio, video, and images for a case.
- Website Data: Information available from websites, including activity logs, server logs, and content.
- Digital Evidence: Data from smartphones, tablets, computers, and other devices, including browser history and app data.
- Network Logs: Records of data transmissions and activity, including firewall logs and intrusion alerts.

ADMISSIBILITY OF ELECTRONIC EVIDENCE

The Bhartiya Sakshya Adhiniyam, 2023 has expanded the definition of "document to include any digital or electronic record, including voice mail messages saved on digital devices, electronic records on emails, server logs, documents on computers, laptops, or smartphones, websites, and locational evidence."⁵ As a result, electronic evidence is now categorized as primary evidence. "This update acknowledges the shift from traditional paper-based documentation to electronic forms of communication and data storage in contemporary India. It helps ensure that the legal system is equipped to handle cases involving digital evidence."⁶ With some necessary adjustments, Sections 62 and 63 of the BSA, which correspond to Sections 65A & B of the IEA, retain the standards for the admissibility of electronic evidence. In terms of admitting electronic evidence in court, it must be authenticated, relevant, and properly preserved. There should be a clear chain of custody to maintain the integrity and reliability of the evidence. The fundamentals of the admissibility of electronic records are provided in Section 63⁷, which replaces the complicated Section 65B of IEA.

KEY COMPONENTS OF SECTION 63 OF BSA

1. Computer Output as a Document: "Computer output" means any information that came out from an electronic record like printed, stored, or copied media platforms. This is considered a document if it fulfils certain requirements set out under the given section.

2. Conditions for Admissibility:

- **Use of Devices Regularly-** The electronic record must have come out from a computer

⁵ Bhartiya Sakshya Adhiniyam 2023, s 2(1)(d)

⁶ Namrata Banerjee, "Paradigm Shift in India's Criminal Justice System: Dissecting Bharatiya Sakshya Adhiniyam, 2023", (SCCONLINE, 29 April 2024) <https://www.sconline.com/blog/post/2024/04/29/paradigm-shift-in-india-criminal-justice-system-bharatiya-sakshya-adhiniyam-2023/> accessed 4 September 2024.

⁷ Bhartiya Sakshya Adhiniyam 2023, s 63

or communication device that was used regularly for creating, storing, or processing information for a specific period. The person or entity using these devices must have control over it lawfully.

- **Input of Information Regularly-** The information in the electronic record must have been entered on a regular basis into the computer or device as part of daily routine activities.
- **Functioning Properly-** The device must have been operating properly during the relevant period. If there were any breakdowns, it must not have affected the accuracy and authenticity of the electronic record.
- **Accurate Information-** The information in the electronic record should reflect accurately or be derived from data regularly fed into the computer or device.

3. Multiple Devices as One: If data or any information was created, stored, or processed by various devices, all those devices will be considered as a single one under this section. This applies whether the devices were used, as part of a network individually, or through intermediaries.

4. Requirement of Certificate: A certificate of authenticity must be given with the electronic record when it is presented as evidence in court. This certificate will-

- Recognise the electronic record and explain how it was produced.
- It will give details about the other devices that are connected to demonstrate that the record meets the required conditions.
- Talk about any issues that are related to the working and use of the devices during the relevant period.

Exceptions

The admissibility of electronic records has certain exceptions as well. If the computer or any electronic device was not functioning correctly during a certain period, and this crash affected the authenticity and accuracy of the electronic record, it might not be admissible as evidence in court. Also, without the required certificate or if the certificate is defective, the record may not be admissible.

Introduction of Online Appearances in BSA

The BSA, 2023 introduces a ground-breaking modification that enhances judicial accessibility and efficiency by allowing online appearances. Under Section 63 of the BSA, electronic

recordings such as virtual testimonies have the same evidentiary value as traditional papers. The use of digital records and virtual testimonies under Sections 2(1)(e)⁸ and 63 of the BSA is an essential aspect of modernizing the legal system. The IEA's inadequacies are addressed by this advancement, as it failed to foresee the need for the profitability of virtual courts. Furthermore, this new BSA clause conforms with BNSS Section 530⁹, which allows for the electronic interrogation of witnesses. However, it is essential to preserve the etiquette and honesty of online proceedings.

SIGNIFICANCE OF ADMISSIBILITY OF ELECTRONIC EVIDENCE

In establishing the facts of a legal procedure, electronic evidence can be very crucial. By utilizing several digital formats, electronic evidence greatly simplifies the process of locating and utilizing information. We can refer to this as electronic discovery. It enables us to gather pertinent information for circumstances. When compared to the traditional method of going through mounds of paperwork, digital data is preferable. One can promptly locate the necessary information by employing keywords or specific terms. Gathering proof is a lot simpler than gathering tangible papers. Managing everything manually and dealing with a ton of paperwork is made easier by digital evidence, which makes things more efficient. This results in less manual labour, less printing, and less physical storage capacity needed. It also lessens the overall expense of the legal process.

Experts can conduct more precise investigations with the use of digital evidence such as timestamps, metadata, and other digital imprints. It presents organized data so that a more thorough understanding of the case can be obtained. This makes it easier to comprehend the flow of events and obtain additional case-related data. The digital evidence's additional information will also aid in fact-checking. This may include information such as geographical data, device identification, and user authentication details. The evidence will become more authenticated because of these details. This will strengthen its credibility in legal proceedings. There is a new provision that will allow for virtual or online appearances, which will prove to be of the most significant assistance in lessening administrative and financial burdens of physical court procedures. This will not only facilitate judicial efficiency but also access to justice in terms of authorization for participation irrespective of distance and other factors.

⁸ Bhartiya Sakshya Adhiniyam 2023, s 2(1)(e)

⁹ Bhartiya Nagarik Suraksha Sanhita 2023, s 530

Although BSA provisions are overwhelmingly progressive and meant to be beneficial, there nonetheless lie vast difficulties in their practical implementation. Although the BSA is hailed for its innovative approach to electronic evidence admissibility, it is not beyond criticisms and concerns.

CRITICAL ANALYSIS

Despite this exponential growth and advancement, the digital space of India has somehow still been affected by issues of data integrity, cybersecurity, and uneven levels of digital literacy. Electronic evidence needs a strong technological base and robust protocols of cybersecurity concerning data integrity.

One of the greatest challenges to electronic evidence is **susceptibility to manipulation and variation**. The BSA does a tremendous job of making electronic records equivalent to primary evidence but does not provide any robust procedure for properly vetting their authenticity. This omission poses a grave threat because it invites the possibility that instances will arise in which fabricated digital evidence is deployed, thus undermining the administration of justice.

In a significant decision, “the Supreme Court clarified the necessity of a certificate under Section 65B (4) of the IEA, 1972 for the admissibility of electronic documents in **Anvar P.V. v. P.K. Basheer and Ors.** The Supreme Court ruled that for electronic documents to be admitted as evidence, they need to be accompanied by a certificate that complies with Section 65B (4).”¹⁰ “In the **Shafhi Mohammad vs. State of Himachal Pradesh** case, An apprehension was expressed on the question of applicability of conditions under Section 65-B(4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position about operation of the relevant device or the management of relevant activities.”¹¹ “The principles established in **Anvar P.V. v. P.K. Basheer** were later confirmed by the Supreme Court in the major ruling **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**, which emphasized the requirement of a certificate under Section 65B (4) for the admissibility of electronic evidence.”¹²

However, the exercising of the provisions could lead to protracted technical appraisals by the

¹⁰ AIR 2015 SC 180
¹¹ (2018) 2 SCC 801
¹² AIR 2020 SC 4908

court whenever the certificate is litigated to **potentially delay trials** and further access to justice by the parties. Furthermore, although this process is supposed to ensure the legitimacy and authenticity of such documents, it may turn out to be a bureaucratic hurdle that might even cause delays and uneven certification requirements between jurisdictions. Though this process needs to be consistent and efficient, different parts of India may have **varying capacities in terms of technology**, which would lead to different standards and practices.

Electronic evidence though plays a critical role in cybercrime investigations, at the same time, it also poses **risks to the right of privacy** of people. “Every citizen has the right to life and liberty; **Article 21**”¹³ Safeguards these rights. “In the case of **Justice K.S Puttaswamy v. Union of India**”¹⁴, the same rationale was maintained. Electronic evidence, for example, functions similarly to a detective tool and will be utilized to apprehend cybercriminals. It is capable of monitoring and analyzing online activity. On the other hand, this can be abused to violate someone's rights. Since it is obvious that tracking someone's internet activities without their consent violates their privacy.

The court only accepts electronic evidence if the means used to get it comply with legal procedures. The issue occurs when electronic evidence is collected without the proper authority. Another issue is obtaining evidence **without a proper search warrant**. In circumstances where the procedural standards outlined in the Criminal Procedure are not met, the defence can dispute the admission of the evidence. Failure to follow established protocols, such as keeping and handling a complete documented record of evidence, might result in questions about the **evidence's credibility**. For example, if the police seize a suspect's mobile phone without following legal processes properly, the defence may argue that such action violates the person's rights.

The authenticity of digital evidence is typically established by forensic analysis. But fast-advancing technology might also present difficulties. During the examination, **outdated forensic tools provide a barrier** that could affect the court's confidence in the veracity of digital evidence. Experts in digital forensics need to stay current to meet these issues and guarantee that forensic practices comply with applicable laws on the admissibility of evidence.

¹³ The Constitution of India, 1950, Art. 21

¹⁴ AIR 2018 SC (SUPP) 1841

So, even while the BSA's provisions are ambitious, they might be excessive for the already overburdened legal system. The shift from the traditional dependence on tangible or physical evidence to electronic and digital evidence requires comprehensive training for forensics experts, legal professionals as well as judges. **Inadequate knowledge and resources** could hamper the efficient application of new provisions, which would result in slowing down the administration of justice.

CONCLUSION

Owing to the exponential growth of digital technology, the extent of electronic evidence is expanding. By accepting electronic evidence in several significant cases, the Indian judiciary has provided it with legal recognition. There are several situations where digital or electronic evidence is utilized. Electronic evidence surpasses traditional evidence in cases involving fraud or cybercrime. So, Bhartiya Sakshya Adhiniyam, 2023, was enacted with the addition of the admissibility of electronic evidence after realizing the significance of such evidence.

According to BSA, 2023, Electronic evidence is now considered primary evidence. However, digital evidence comes with its own set of difficulties. It is crucial to use strong passwords and other digital security measures to protect and preserve this evidence. Cybercrime, cyber fraud, cyber hacking, and software piracy are some of the major issues that digital evidence is already dealing with. These issues must be addressed by updating the laws regularly by legal systems. The government needs to give specific guidelines and create awareness about electronic evidence. The use of technology leads to an increasing amount of information stored on digital devices. It can lead to the frequent misuse of technology which leads to crimes. As much as legal professionals and judges need to be aware of the proper handling and application of this digital evidence in the legal system, cooperation between parties is required to ensure justice and ethical application of electronic evidence.

The judicial system of India needs to be proactive. It can happen by being updated on the latest technologies, associating with experts in the field of cybersecurity and digital forensics, and regular training for judges, lawyers, and court staff. In such a scenario, the courts would be able to provide fair and efficient administration of justice in the digital era. In conclusion, while the BSA places great importance on electronic records in judicial proceedings, many issues still arise in dealing with and consequently clarifying some points in establishing further

development. Hence, the courts have to grapple with the volatile aspect of cyberspace and attend to functional issues involving electronic evidence. Thus, it will result in gaining confidence to apply electronic records effectively in performing justice business.

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