

Discussing The Discrepancies And Errors In The Bharatiya Sakshya Bill, 2023

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Union Home Minister on August 11, 2023 introduced three bills namely Bharatiya Sakshya Bill, Bharatiya Nyaya Sanhita Bill and Bharatiya Nagarik Suraksha Sanhita Bill, with the aim to overhaul the criminal laws of the country and abolish Indian Evidence Act, 1872, Indian Penal Code 1860 and Code of Criminal Procedure 1973. The bills are referred to parliamentary standing committee to hold deliberations on the bills and it is expected that the committee will table its report by the winter session of the Parliament.

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Bharatiya Sakshya Bill 2023 has 170 sections, while the Indian Evidence Act 1872 had 167 sections. The bill majorly contains provisions just like its predecessor, the Indian Evidence Act 1872. It can be seen that some provisions of the new bill presented before Lok Sabha suffers from flawed drafting. The flaws are mostly with respect to applicability of certain explanations to the sections; and wrong provisions being referred to in the sections making it incoherent.

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The errors and discrepancies in the Bharatiya Sakshya Bill 2023 are as follows:

1. Section 19 of Bharatiya Sakshya Bill 2023:

Proof of admissions against persons making them, and by or on their behalf –

Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases, namely:—

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(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under sub-section (2) of section 23;

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable;

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(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(b) A, the captain of a ship, is tried for casting her away. Evidence is given to show that the ship was taken out of her proper course. A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under sub-section (2) of section 23.

(c) A is accused of a crime committed by him at Kolkata. He produces a letter written by himself and dated at Chennai on that day, and bearing the Chennai post-mark of that day. The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under sub-section (2) of section 23.

The provision in Indian Evidence Act 1872 which was similar to section 19 of Bharatiya Sakshya Bill was section 21. Section 21(1) referred to section 32 of Indian Evidence Act 1872 (Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant). However, section 19(1) of Bharatiya Sakshya Bill 2023 instead of

referring section 26, which is replication of section 32 of Indian Evidence Act 1872, makes a reference to sub-section (2) of section 23 of Bharatiya Sakshya Bill, which deals with confession to a police officer. It has no relevance in this section. Instead, reference should have been made to section 26 itself (just like section 32 of Indian Evidence Act) or maybe section 26(2) of Bharatiya Sakshya Bill.

The same discrepancy can be found in the illustrations (b) and (c) of this section. Instead of referring to section 23(2), it should have made a reference to section 26(2) of Bharatiya Sakshya Bill.

2. Section 36 of Bharatiya Sakshya Bill: Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 31-Judgments, orders or decrees other than those mentioned in section 31 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies. The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

There is an error in this section. This section was section 42 in the Indian Evidence Act 1872, and the words used in section 42 were “other than those mentioned in section 41”. Section 41 of Indian Evidence Act 1872 was dealing with “Relevancy of certain judgements in probate, etc, jurisdiction.” However, section 36 of Bharatiya Sakshya bill states “other than those mentioned in section 31.” Section 31 has no relevance here as it talks about “Relevancy of statement as to fact of public nature contained in certain Acts or notifications” while section 35 of Bharatiya Sakshya Bill discusses “Relevancy of certain judgements in probate, etc., jurisdiction” and is similar to the section 41 of Indian Evidence Act 1872.

3. Section 50 of Bharatiya Sakshya Bill:

Character as affecting damages. -In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation. —In this and sections 46, 47 and 49, the word "character" includes both reputation and disposition; but, except as provided in section 59, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition has been shown.

This section was section 55 in the Indian Evidence Act 1872, and the words used in explanation of section 55 were “except as provided in section 54”. Section 54 of Indian Evidence Act 1872 was “Previous bad character not relevant, except in reply”. However, section 59 of Bharatiya Sakshya Bill is “Proof of documents by Primary evidence” and section 49 of Bharatiya Sakshya Bill is about “Previous bad character not relevant, except in reply” and it is section 49 which is similar to section 54 of the Indian Evidence Act 1872. Use of words “section 59” here seems erroneous, and it has no relevance in section 50 of Bharatiya Sakshya Bill.

4. Section 62 of Bhartiya Sakshya Bill 2023

Section 62: Special provisions as to evidence relating to electronic record- The contents of electronic records may be proved in accordance with the provisions of section 59.

Section 59: Proof of documents by primary evidence- Documents shall be proved by primary evidence except in the cases hereinafter mentioned.

Section 62 of Bhartiya Sakshya Bill 2023 replaces section 65A of the Indian Evidence Act 1872, which was ***“Section 65A. Special provisions as to evidence relating to electronic record. —The contents of electronic records may be proved in accordance with the provisions of section 65B.”***

As per it, the manner of proving electronic evidence is mentioned in section 65B and section 65B discusses the admissibility of electronic records. In other words, how an electronic record can be made admissible before the court of law is mentioned in section 65B. It mentions certain requirements which must be fulfilled and then only electronic evidence can be made admissible.

It is section 63 (Admissibility of electronic records) of Bhartiya Sakshya Bill which replaces section 65B (Admissibility of electronic records) of Indian Evidence Act 1872 and not section 59 (Proof of documents by primary evidence.) Mentioning section 59 in section 62 appears to be a discrepancy because now the definition of document as per section of Bhartiya Sakshya Bill 2023 includes “electronic and digital records.” Hence, they can be admitted as primary evidence under section 59. But Section 62 of Bhartiya Sakshya Bill 2023 is a special provision for the succeeding section 63, which talks about the manner which is to be followed (“may be proved in accordance with”) for proving electronic evidence. It is section 63 of Bhartiya Sakshya Bill 2023 which has provisions discussing in detail the manner for proving electronic evidence and not section 59.

If section 62 is to be considered correct, then there is no point of having section 63 because if all electronic records may be proved in accordance with the provisions of section 59, then what is the purpose of having section 63 altogether? Hence, this seems to be a discrepancy which may be rectified by replacing section 59 with section 63 in section 62 of the Bhartiya Sakshya Bill 2023.

5. Section 81 of Bharatiya Sakshya Bill:

Presumption as to Gazettes in electronic or digital record.

The Court shall presume the genuineness of every electronic or digital record purporting to be the Official Gazette, or purporting to be electronic or digital record directed by any law to be kept by any person, if such electronic or digital record is kept substantially in the form required by law and is produced from proper custody.

Explanation.— For the purposes of this section and section 96 electronic records are said to be in proper custody if they are in the place in which, and looked after by the person with whom such document is required to be kept; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render that origin probable.

This provision was section 81A in the Indian Evidence Act 1872, and there was no explanation in this section. However, section 90A (Presumption as to electronic records five year old) of Indian Evidence Act 1872 (which is now section 93 of Bharatiya Sakshya Bill) had an explanation which was made applicable to section 81A. The same explanation has now been removed from section 93 of Bharatiya Sakshya Bill and now added in section 81 and it has been made applicable to section 93 of Bharatiya Sakshya Bill. Some words in the explanation have been changed from “and under the care of the person with whom, they naturally be;” to “and looked after by the person with whom such document is required to be kept;”.

The explanation in section 81 has incorrectly been made applicable to section 96 (Exclusion of evidence to explain or amend ambiguous document). It has no application there as there is no reference to any electronic record or custody of documents.

6. Section 92 Of The Bharatiya Sakshya Bill, 2023:

Presumption as to documents thirty years old.- Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation to section 83 shall also apply to this section.

It has been mentioned in this section that “Explanation to section 83 shall apply to this section”. Interestingly, section 83 has no explanation.

Section 92 of Bharatiya Sakshya Bill was section 90 of Indian Evidence Act 1872. Section 90 of Indian Evidence Act 1872 is reproduced below.

Section 90 of Indian Evidence Act 1872:

90. Presumption as to documents thirty years old. — Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.— Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81.

If we see in section 90 of Indian Evidence Act 1872, there is an explanation which has been made applicable to section 81 of Indian Evidence Act 1872. In the Bharatiya Sakshya Bill, section 80 (Presumption as to Gazettes, newspapers, and other documents) replaces section 81 of Indian Evidence Act 1872 but with some changes including deletion of words “private acts of Parliament”.

Now, section 81 of Indian Evidence Act, 1872 had no explanation but section 80 of Bharatiya Sakshya Bill has an explanation, which is being made applicable to section 92 (Presumption as to documents thirty years old.) of Bharatiya Sakshya Bill. This seems to be erroneous as section 80 of Bharatiya Sakshya Bill is specifically stating that its explanation is applicable to section 92, whereas section 92 is stating that explanation of section 83 is to be followed.

7. Section 93 of Bharatiya Sakshya Bill:

Presumption as to electronic records five years old.

Where any electronic record, purporting or proved to be five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the electronic signature which purports to be the electronic signature of any particular person was so affixed by him or any person authorised by him in this behalf.

Explanation to section 84 shall also apply to this section.

It has been mentioned in this section that “*Explanation to section 84 shall also apply to this section.*” Section 84, however, has no explanation.

Section 93 of Bharatiya Sakshya Bill was section 90A of Indian Evidence Act, 1872. Section 90A of Indian Evidence Act, 1872 is reproduced here:

Section 90A of Indian Evidence Act 1872:

90A. Presumption as to electronic records five years old. — Where any electronic record, purporting or proved to be five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the [electronic signature] which purports to be the [electronic signature] of any particular person was so affixed by him or any person authorised by him in this behalf.

Explanation. — Electronic records are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they naturally be; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable.

This Explanation applies also to section 81A.]

In the Bharatiya Sakshya Bill, this explanation has been added in section 81 and it has been removed from section 93 of Bharatiya Sakshya Bill, which was section 90A earlier in Indian Evidence Act, 1872.

Section 81 of Bhartiya Sakshya Bill:

Presumption as to Gazettes in electronic or digital record.

The Court shall presume the genuineness of every electronic or digital record purporting to be the Official Gazette, or purporting to be electronic or digital record directed by any law to be kept by any person, if such electronic or digital record is kept substantially in the form required by law and is produced from proper custody.

Explanation. — For the purposes of this section and section 96 electronic are said to be in proper custody if they are in the place in which, and looked after by the person with whom such document is required to be kept; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render that origin probable.

Now, section 81A of Indian Evidence Act, 1872 had no explanation but section 81 of Bharatiya Sakshya Bill has an explanation, which is being made applicable to section 96 (Exclusion of evidence to explain or amend ambiguous document) of Bharatiya Sakshya Bill. This seems to be erroneous on two counts, firstly, explanation of section 81 of Bharatiya Sakshya Bill is specifically stating that its explanation is applicable to section 96, whereas section 96 has no relevance here.

Section 81 needs to be rectified by replacing the word section 96 with “**section 93.**”

Secondly, it is the explanation of section 81 of Bharatiya Sakshya Bill which needs to be made applicable here and not that of section 84, which has no explanation at all.

8. Section 108 of Bharatiya Sakshya Bill:

Burden of proving that case of accused comes within exceptions. - 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.

Illustration.

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. 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 325 of the Bharatiya Nyaya Sanhita, 2023 provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments. A is charged with voluntarily causing grievous hurt under section 115. The burden of proving the circumstances bringing the case under said section 120 lies on A.

There is an error in illustration (c) of section 108. Bharatiya Nyaya Sanhita, 2023 has replaced section 325 with section 115 and section 335 with section 120. These changes should be made in the first part of illustration (c).

9. Bhartiya Sakshya Bill 2023 Section 3 is exactly the same as the Section 5 of old IEA (Evidence maybe given of facts in issue and relevant facts) but with one change.

Illustration (b) in old IEA uses the word Code of Civil Procedure while Bhartiya Sakshya Bill uses "Bhartiya Nagarik Suraksha Sanhita 2023."

Section 5 Illustration (b) Indian Evidence Act 1872:

(b) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

Section 3 illustration (b) of Bhartiya Sakshya Bill 2023:

(b) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Bharatiya Nagarik Suraksha Sanhita 2023.

This seems to be a discrepancy as there is no difference between section 3 of Bhartiya Sakshya Bill and section 5 of Indian Evidence Act, hence, Civil Procedure Code should have been mentioned here and not Bharatiya Nagarik Suraksha Sanhita 2023, the way it was mentioned in Indian Evidence Act 1872. Also, this illustration relates to civil suits then how come “the conditions prescribed by the Bharatiya Nagarik Suraksha Sanhita 2023” can be followed here. It seems to be a discrepancy which may be rectified.

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