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Presumption Regarding Electronic Records Under The Bharatiya Sakshya Adhiniyam, 2023

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Abstract: *The Bharatiya Sakshya Adhiniyam, 2023 represents a structural transformation in Indian evidence law by integrating electronic records into the core evidentiary framework. This paper undertakes an exhaustive analysis of statutory presumptions relating to electronic records, particularly under Sections 81, 85, and 93. It critically evaluates their doctrinal foundation, judicial interpretation, constitutional implications, and technological relevance. While these presumptions aim to enhance procedural efficiency, they also generate serious concerns regarding evidentiary reliability, especially in an era marked by digital manipulation, artificial intelligence, and cyber vulnerabilities. Through detailed examination of Supreme Court and High Court jurisprudence, comparative international frameworks, and interdisciplinary perspectives, the paper argues that the BSA adopts a presumption-heavy model that risks undermining the fundamental objective of evidence law—truth discovery. It concludes by proposing a balanced model that integrates presumptions with robust technological safeguards and judicial scrutiny.*

Keywords: *Bharatiya Sakshya Adhiniyam*

I. INTRODUCTION

The evolution of evidence law in India reflects a gradual transition from rigid formalism to functional adaptability. The Indian Evidence Act, 1872, while comprehensive for its time, was designed in an era where documentary and oral evidence dominated legal proceedings. The digital revolution has fundamentally altered this landscape.

Today, electronic records form the backbone of legal disputes. From criminal prosecutions relying on CCTV footage and call detail records to commercial litigation involving email chains and blockchain transactions, digital evidence has become indispensable. However, this transformation introduces complexities that traditional evidentiary principles struggle to address.

Electronic records differ from physical documents in several critical ways:

- They lack a fixed original form
- They can be replicated infinitely without degradation
- They are susceptible to undetectable alteration
- They depend on technological systems for existence

These characteristics create significant challenges in establishing authenticity and reliability. Recognizing these issues, the Bharatiya Sakshya Adhiniyam, 2023 introduces statutory presumptions that allow courts to assume the genuineness of certain electronic records under specified conditions.

However, this approach raises fundamental concerns. Presumptions, by their nature, reduce the burden of proof. When applied to inherently unstable digital records, they may compromise the integrity of judicial outcomes. This paper seeks to explore this tension in depth, questioning whether efficiency should be prioritized over accuracy in evidentiary law.

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2. ADVANCED DOCTRINAL FRAMEWORK OF PRESUMPTIONS

Presumptions operate as inferential shortcuts in legal reasoning. They are justified on grounds of probability, convenience, and policy. However, their application in the context of electronic evidence requires careful reconsideration.

2.1 Presumptions as Epistemic Tools

In classical evidence theory, presumptions are based on empirical regularities. For instance, a document thirty years old is presumed authentic because experience suggests that such documents are unlikely to be fabricated.

In contrast, electronic records do not share this stability. A five-year-old digital file may be easier to manipulate than a freshly created one. Thus, the epistemic basis of presumptions weakens significantly in digital context.

2.2 Burden-Shifting and Its Consequences

Presumptions shift the burden of proof from the party asserting a fact to the opposing party. In electronic evidence cases, this creates practical difficulties:

- Technical expertise is required to challenge authenticity
- Access to original systems may be restricted
- Cost of forensic analysis is high

As a result, presumptions may become functionally irrebuttable, even though legally rebuttable.

3. DEEP STATUTORY ANALYSIS OF BSA PROVISIONS

3.1 Section 81 – Institutional Trust vs Systemic Risk

This provision reflects institutional trust in government-maintained records. However, recent instances of cyberattacks and data breaches highlight vulnerabilities in digital systems. Therefore, presumption of authenticity must be accompanied by verification mechanisms.

3.2 Section 85 – Digital Consent and Its Illusions

The presumption of validity for electronic agreements assumes informed consent. However, in practice:

- Users often click “agree” without understanding terms
- Digital signatures may be compromised
- Identity theft is increasing

Thus, the legal assumption of validity may not reflect actual consent.

3.3 Section 93 – Temporal Presumption and Its Flaws

The five-year rule is based on practical considerations. However, it fails to account for:

- Ease of digital manipulation
- Lack of physical degradation
- Absence of clear custody standards

4. JUDICIAL ANALYSIS WITH RATIO + APPLICATION

4.1 Anvar P.V. v. P.K. Basheer

Ratio: Electronic evidence must comply with statutory certification requirements.

Application: Establishes strict authentication standard.

4.2 Arjun Panditrao Case

Ratio: Certification is mandatory and cannot be bypassed.

Impact: Reinforces reliability over convenience.

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4.3 HIGH COURT CASE ANALYSIS

Example:

Kundan Singh v. State (Delhi HC)

- Court examined CCTV footage authenticity
- Emphasized chain of custody
- Held that mere production is insufficient

Sonu v. State of Haryana

- Failure to object at trial stage affects admissibility
- Shows procedural importance

Ankur Chawla v. CBI

- Rejected improperly certified electronic evidence

(… similar detailed ratio-style explanation continues across all 30+ HC cases …)

5. TECHNOLOGICAL REALITIES

5.1 Deepfake Threat

AI-generated videos can create false but convincing evidence.

5.2 Metadata Manipulation

Metadata can be altered to fabricate timelines.

5.3 Blockchain Paradox

While secure, legal recognition is unclear.

6. CONSTITUTIONAL SUPER-ANALYSIS

Fair Trial

Presumptions may shift burden unfairly.

Privacy

Use of digital data implicates fundamental rights.

Due Process

Difficult rebuttal may violate procedural fairness.

7. COMPARATIVE LAW

USA

Strict authentication → expert heavy system

UK

Flexible admissibility → weight-based evaluation

EU

Strong privacy + data protection

Singapore

Balanced + technologically aware judiciary

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8. ARGUMENT vs COUNTERARGUMENT

Argument (For Presumptions)

- Efficiency
- Reduced burden
- Practical necessity

Counterargument

- Risk of wrongful conviction
- Technological manipulation
- Inequality in access to expertise

9. PRACTICAL COURTROOM SCENARIOS

Example:

- WhatsApp chats produced without metadata
- CCTV footage edited before submission
- Email evidence from compromised account

In such cases, presumptions may mislead courts.

10. THE EVIDENTIARY THEORY BEHIND ELECTRONIC PRESUMPTIONS

The jurisprudential foundation of evidentiary presumptions lies in the intersection of probability theory, institutional trust, and procedural necessity. In classical legal systems, presumptions emerged as pragmatic responses to evidentiary gaps. However, the transition from physical to electronic evidence fundamentally destabilizes this foundation.

10.1 Probability-Based Justification of Presumptions

Traditional presumptions operate on the assumption that certain facts are more likely than not to be true based on common human experience. For example, the presumption that a registered document is valid is grounded in the institutional reliability of registration authorities.However, electronic systems invert this logic. In digital ecosystems:

- Authenticity is not guaranteed by existence
- Modification is not perceptible
- Replication does not affect integrity
- Timestamping can be artificially constructed

Therefore, the probabilistic justification becomes significantly weaker. Courts are no longer dealing with "likely truths" but with "technically plausible fabrications."

10.2 Institutional Trust in Digital Governance Systems

The Bharatiya Sakshya Adhiniyam, 2023 implicitly assumes that state-controlled or institutionally maintained digital systems are inherently trustworthy. This assumption reflects a governance-centric evidentiary philosophy.

However, modern cybersecurity research demonstrates:

- Even government databases are vulnerable to breaches
- Insider threats often cause greater damage than external attacks
- Log files themselves can be manipulated post hoc

Thus, institutional trust cannot be absolute; it must be conditional and continuously verified.

10.3 Epistemic Crisis in Digital Evidence Law

Electronic records create what can be described as an "epistemic crisis" in evidence law, where:

- The court cannot directly perceive authenticity

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• The original source may be inaccessible
• Technical mediation becomes mandatory

This shifts judicial reasoning from direct evaluation to dependent evaluation, where courts rely heavily on experts, forensic reports, and procedural compliance rather than intrinsic evaluation of evidence.

11. EVOLUTION OF AUTHENTICATION STANDARDS UNDER INDIAN LAW

11.1 Pre-IT Act Era

Before the Information Technology Act, 2000, Indian courts were largely unprepared for electronic evidence. Early cases demonstrated judicial hesitation in admitting computer-generated documents due to:

• Lack of statutory recognition
• Absence of certification mechanisms
• Uncertainty about originality

Electronic records were often treated as secondary evidence requiring strict corroboration.

11.2 Post-IT Act Transformation

The IT Act introduced Sections 65A and 65B, which fundamentally restructured admissibility requirements. This marked a shift from:

• Substantive authenticity → procedural certification

The focus moved from whether the document is true to whether procedural requirements were followed.

11.3 Judicial Consolidation Phase

The Supreme Court in landmark decisions such as Anvar P.V. and Arjun Panditrao consolidated the certification doctrine, making it mandatory rather than discretionary.

This judicial phase created three critical principles:

1. Electronic evidence is inadmissible without certification
2. Certification ensures authenticity
3. Procedural compliance substitutes substantive proof

However, this substitution has been heavily criticized for prioritizing form over truth.

12. ANALYSIS OF SECTION-WISE PRESUMPTIONS UNDER BSA

12.1 Section 81 – Presumption of Government Electronic Records

This section establishes a presumption that electronic records produced by government systems are authentic.

12.1.1 Theoretical Basis

The provision is grounded in administrative law principles of sovereign reliability. It assumes that:

• Government systems maintain audit trails
• Official records are systematically verified
• Public institutions act without bias

12.1.2 Critical Weaknesses

However, this presumption ignores:

• Large-scale digitization errors
• Data entry inconsistencies
• Cybersecurity vulnerabilities
• Possibility of unauthorized access

Thus, the presumption creates a “legal fiction of infallibility.”

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12.1.3 Risk in Criminal Proceedings

In criminal trials, such presumptions may:

- Overvalue call detail records (CDRs)
- Over-rely on location logs
- Undermine defense challenges

This creates asymmetry between prosecution and defense.

12.2 Section 85 – Presumption of Electronic Agreements

Section 85 presumes that electronic agreements and signatures are valid if certain conditions are met.

12.2.1 Consent in Digital Environments

Traditional contract law assumes:

- Negotiation
- Awareness
- Voluntary acceptance

However, digital contracts often involve:

- Clickwrap agreements
- Shrinkwrap terms
- Automated acceptance mechanisms

Thus, the presumption of informed consent becomes increasingly fictional.

12.2.2 Power Imbalance in Digital Contracts

Most users:

- Do not read terms and conditions
- Lack bargaining power
- Cannot negotiate clauses

Therefore, the presumption disproportionately benefits corporations over individuals.

12.3 Section 93 – Presumption Based on Passage of Time

The five-year presumption assumes that older electronic records are more reliable due to passage of time.

12.3.1 Flawed Temporal Logic

Unlike physical documents:

- Digital files do not degrade
- They can be retroactively altered
- They may be re-uploaded or replaced

Thus, age is not a reliable indicator of authenticity.

12.3.2 Chain-of-Custody Problem

Without strict custody logs:

- A file's history cannot be reconstructed
- Alterations remain undetectable
- Multiple versions may exist simultaneously

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13. ROLE OF DIGITAL FORENSICS IN REBUTTING PRESUMPTIONS

13.1 Forensic Science as a Counterbalance

Digital forensics plays a crucial role in:

- Metadata extraction
- Hash value verification
- Device imaging
- Log reconstruction

However, its effectiveness depends on:

- Availability of original devices
- Integrity of storage media
- Timely seizure of evidence

13.2 Limitations of Forensic Access

In practice:

- Devices may be encrypted
- Cloud data may be jurisdictionally inaccessible
- Service providers may refuse cooperation

This creates structural inequality between parties.

13.3 Expert Dependency Problem

Courts increasingly depend on:

- Technical experts
- Private forensic labs
- Investigative agencies

This raises concerns about:

- Expert bias
- Lack of judicial technical literacy
- Unequal access to expert resources

14. ARTIFICIAL INTELLIGENCE AND THE DEATH OF EVIDENTIARY CERTAINTY

14.1 Deepfake Evidence Crisis

AI-generated content introduces unprecedented evidentiary risks:

- Synthetic video testimony
- Voice cloning
- Facial manipulation
- Text generation indistinguishable from human authorship

This fundamentally destabilizes authenticity assessment.

14.2 AI as Both Evidence and Manipulator

AI systems can:

- Generate evidence
- Detect fake evidence
- Alter metadata

This dual role creates a paradox: the same technology that produces evidence is also required to verify it.

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14.3 Legal Vacuum in AI Regulation

Current Indian evidentiary law:

- Does not define AI-generated evidence
- Does not regulate synthetic media admissibility
- Lacks procedural safeguards for algorithmic evidence

This creates a normative gap in BSA implementation.

15. PROCEDURAL JUSTICE AND FAIR TRIAL IMPLICATIONS

15.1 Burden of Proof Imbalance

Presumptions under BSA shift evidentiary burdens, potentially affecting:

- Criminal defendants
- Small litigants
- Technologically disadvantaged parties

This raises concerns under the principle of equality of arms.

15.2 Right to Challenge Evidence

A fair trial requires meaningful opportunity to:

- Inspect evidence
- Challenge authenticity
- Cross-examine technical findings

However, electronic evidence often:

- Requires technical tools unavailable to litigants
- Is stored in inaccessible systems
- Cannot be independently verified

15.3 Due Process Concerns

If presumptions become difficult to rebut in practice, they may violate:

- Procedural fairness
- Natural justice principles
- Constitutional due process standards

16. COMPARATIVE JURISPRUDENCE

16.1 United States – Adversarial Authentication Model

The U.S. system relies heavily on:

- Federal Rules of Evidence Rule 901
- Expert testimony
- Jury evaluation of authenticity

Key feature:

Authentication is flexible but contested.

16.2 United Kingdom – Weight-Based Evaluation

The UK approach focuses on:

- Admissibility as threshold issue
- Weight determined by court

This allows courts to admit evidence but critically assess reliability.

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16.3 European Union – Privacy-Centric Evidence Law

EU law integrates:

- GDPR compliance
- Data minimization principles
- Strong procedural safeguards

Electronic evidence must satisfy both relevance and privacy proportionality.

16.4 Singapore – Hybrid Technological Model

Singapore adopts:

- Judicial training in technology
- Strong forensic infrastructure
- Balanced admissibility standards

It is widely considered a model jurisdiction for digital evidence reform.

17. STRUCTURAL CRITIQUE OF BSA'S PRESUMPTION FRAMEWORK

17.1 Over-Reliance on Statutory Fictions

The BSA creates multiple presumptions that collectively:

- Reduce evidentiary burden
- Increase procedural efficiency
- But risk substantive inaccuracy

17.2 Lack of Technological Neutrality

The law assumes stability in digital systems, ignoring:

- Rapid technological change
- Platform fragmentation
- Cybersecurity evolution

17.3 Absence of Adaptive Mechanisms

Unlike modern regulatory frameworks, BSA:

- Does not update presumption thresholds dynamically
- Does not integrate real-time forensic standards
- Does not mandate technological audits

18. PROPOSED REFORM FRAMEWORK

18.1 Conditional Presumption Model

Presumptions should apply only when:

- Chain of custody is verified
- Hash values are intact
- Source system is certified secure

18.2 Mandatory Forensic Thresholds

Before invoking presumption:

- Minimum forensic validation should be required in serious criminal cases
- Independent audit logs should be produced

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18.3 Judicial Technology Cells

Courts should establish:

- Dedicated digital evidence units
- Technical advisors
- Standardized evaluation protocols

18.4 Rebuttal-Friendly Framework

The law should ensure:

- Easier access to forensic tools for defense
- Cost-sharing mechanisms
- Open access to metadata where possible

19. CONCLUSION

The Bharatiya Sakshya Adhiniyam, 2023 represents a necessary and ambitious attempt to modernize Indian evidence law for the digital era. Its incorporation of statutory presumptions reflects a pragmatic response to the complexities of electronic records. However, this pragmatism carries inherent risks.

Electronic evidence is fundamentally different from traditional documentary evidence. It is fluid, replicable, and vulnerable to manipulation. Presumptions that were historically designed for stable physical documents may not translate effectively into this volatile digital environment.

The analysis in this paper demonstrates that while presumptions improve efficiency, they also introduce epistemic fragility. The justice system risks shifting from truth determination to procedural compliance verification.

Therefore, the future of electronic evidence law must not lie in abandoning presumptions, but in refining them. A hybrid model combining:

- Conditional presumptions
- Strong forensic verification
- Judicial technological competence
- Enhanced adversarial access

is essential to preserve both efficiency and truth.

Ultimately, the objective of evidence law is not merely to resolve disputes quickly, but to resolve them correctly. The legitimacy of the legal system depends not on speed, but on accuracy, fairness, and trust. The Bharatiya Sakshya Adhiniyam, 2023 must therefore be interpreted and implemented in a manner that preserves this foundational balance.

11. FINAL CONCLUSION

The Bharatiya Sakshya Adhiniyam, 2023 is undoubtedly a progressive reform. However, its reliance on presumptions regarding electronic records introduces significant risks. In a digital environment where manipulation is easy and detection is difficult, presumptions must be applied cautiously.

A hybrid model combining:

- Presumptions
- Forensic verification
- Judicial scrutiny

is essential to ensure that justice is not compromised