

Admissibility of electronic evidence in the courts of India and United Kingdom: A detailed analysis

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Abstract

Christopher Hitchens in his work *“God is Not Great: How Religion Poisons Everything.”* has most appropriately stated that *“[E]xceptional claims demand exceptional evidence.”* Henceforth, this paper aims at highlighting the admissibility of electronic evidences in the courts of India and United Kingdom. The laws governing the notion of electronic evidence differs from State to State thus, this paper will illustrate the existing legal provisions in various statutes in India including The Indian Evidence Act, 1872, The Information Technology Act, 2000 along with the provisions of legislations of United Kingdom comprising of The Police and Criminal Evidence Act, 1984, The United Kingdom Civil Evidence Act, 1995, Guidelines by Association of Chief Police Officers, 2012 and The Computer Misuse Act, 1990. Further, the paper discusses the landmark judgments pronounced by the Courts of India and United Kingdom on admissibility of digital evidence and shall be followed by a critical analysis of the notion of United Nations with respect to e-documents.

Keywords: electronic evidence, cyber law, information technology, admissibility

1. Introduction

With the advent of the changing societal structure the 21st Century has witnessed a paradigm shift from paper world to digital world hence, the notion of the cyber space has been playing a pivotal role in the arena of the judicial system in India and United Kingdom.

As quoted by Sam Harris *“If someone doesn’t value evidence, what evidence are you going to provide to prove that they should value it?”* Thus, in light of valuing electronic evidences in India The Information Technology Act ^[1] was enacted in 2000 which also led to amendment of the Indian Evidence Act, 1872 ^[2]. The Hon’ble Supreme Court of India in the case of USA V. Exim Aides Exporters, Bangalore ^[3] laid down that the enactment of Information Technology Act, 2000 ^[4] was due to the legislator’s intention to evolve the laws in India with respect to the developing technology within the Indian sphere. Similarly, in United Kingdom the Hon’ble Supreme Court relied upon the case of Penderhill Holding Ltd. AO V. Ioannis Kloukinas ^[5] and held that courts must be appropriately equipped with the evolving technology in order to render justice. Hence, in lieu of admissibility of digital evidence The Police and Criminal Evidence Act, 1984 ^[6], Guidelines by Association of Chief Police Officers, 2012 ^[7] and The Computer Misuse Act, 1990 ^[8] were interpreted to be inclusive of the same. As aptly put into words by Christopher Hitchens *“What can be asserted without evidence can also be dismissed without evidence”* ^[9]. This notion shall be further discussed in the paper.

2. Interpretation: Document and Evidence

Sir James Fitzjames Stephen drafted the Indian Evidence Act back in 1872 ^[10] and jotted the holistic interpretation of the word ‘document’ as *“any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter*

^[11].’ The credibility of this interpretation remains unaffected even today. Section 2 (t) of the Information Technology Act, 2000 throws light on the meaning of ‘electronic record’ as *‘means data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer-generated micro fiche’* ^[12]. Further, as per Section 3 of Indian Evidence Act, 1872 the term ‘evidence’ shall be inclusive of *‘(2) all documents including electronic records produced for inspection of court, such documents are called documentary evidence’* ^[13]. This clause was inserted via enactment of Section 92 of Information Technology Act, 2000 ^[14].

To understand the ambit of the word ‘document’ in United Kingdom Section 13 of the United Kingdom Civil Evidence Act, 1995 ^[15] shall be taken into account. The said Section was an outcome of the recommendations of The British Law Commission Report on The Hearsay Rule in civil proceedings. Section 13 of the United Kingdom Civil Evidence Act, 1995 aptly states the meaning of document as *‘anything in which the information of any description in recorded, and “copy”, in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly’* ^[16]. This interpretation shall also be inclusive of electronic records. The judiciary of United Kingdom has pronounced a vast scope to interpret the ambit of the term ‘evidence’ ^[17].

3. The Indian Perspective

1. Legislation Governing the Admissibility of Electronic Evidence in Court: The Indian Evidence Act, 1872 and Information Technology Act, 2000

The Information Technology Act, is based on the UNCITRAL Model Law on Electronic Commerce ^[18]. Various provisions of Information Technology Act, 2000 aim to give a legal sanction to the electronic documentary evidences ^[19]. Hence in the light of Section 92 of

Information Technology Act, 2000^[20] the Section 17 of the Indian Evidence Act, 1872 which defines the term 'Admission' was amended as '*An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference or as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, herein mentioned*'^[21].

To provide legal sanction to electronic evidences, Section 59 of the Indian Evidence Act, 1872 which provides for '*Proof of facts by oral evidence*' was amended by Information Technology Act, 2000 to be inclusive of electronic records as evidences^[22]. Further, Information Technology Act, 2000 lead to introduction of Section 65-A and 65-B in the Indian Evidence Act, 1872^[23]. Section 65-B of the Indian Evidence Act, 1872 provides for the conditions and procedure to be followed for admission of electronic records as secondary evidences under Section 65-A Indian Evidence Act, 1872^[24].

Section 65-B of the Indian Evidence Act, 1872 mandates conditions to be fulfilled with respect to legal credibility of computer output and its contents. It provides that computer output shall be produced during the regular usage of the computer for ordinary course of activities and such usage shall be by the person having lawful control over such computer. In addition, the output should be obtained only when the computer is operating properly and if not, then it shall be assured that the contents of the output remain accurate. Further, the Section also lays down the procedure to be adhered with in order to obtain certification of electronic record. The first step is to identify the content of the electronic record, followed by disclosing the source of production such electronic record and establishing the source as a computer. In addition, such electronic record shall be signed by appropriate authorized person which is true to his knowledge and belief^[25].

Section 4 of the Information Technology Act, 2000 lays down the essentials for legal recognition of electronic record which requires the record to be in an electronic form and to be accessible for reference^[26].

2. The Indian Judiciary in the Realm of Digital Evidence

In the case of Som Prakash V. State of Delhi^[27] the Honourable Supreme Court of India has laid down the liberal interpretation of the term '*scientific aids*' with respect to the admissibility of the electronic documents in the courts in order to prove the guilt. Similarly, in the case of State V. Mohd. Afzal and Ors^[28] it was held that admission of the electronic documents as evidence would be admissible at the time of trial only if it is proved by confirming the provisions of Section 65B of the Evidence Act. In State V. Navjyot Sandhu^[29] the Court emphasized upon the authenticity of the secondary evidence, that even if the certificate is not obtained under Section 65B (4) the Court may allow admission of such evidence under Section 63 and Section 65 of the Indian Evidence Act, 1872. This case was overruled by Anvar P.K. V. P.K. Basheer & Ors^[30] case where the Honourable Supreme Court of India applied the Maxim '*generalia specialibus non derogant*' and '*lex specialis derogat legi general*' where it was held that Section 65B of Indian Evidence Act, 1872 being a special law shall prevail over the general law of Section 63 and 65 of the Indian Evidence Act.

4. The United Kingdom Perspective

1. Legislation governing the admissibility of electronic evidence in court: the civil evidence acts, 1995, guidelines by a.c.p.o., 2012, p.a.c.e. Act, 1984 and the computer misuse act, 1990

The term evidence has a vast scope of interpretation under the purview of United Kingdom Legislations. In order to prove commission of an offence the prosecution needs to prove the accused guilty beyond reasonable doubt and to establish guilt, emphasis is laid upon credibility of the evidence. It is the '*procedure to be followed*' which plays a pivotal role with regards to the digital evidence hence, there is no formal litmus test to be passed in United Kingdom with respect to the admission of the digital evidence in the courts.

To throw light on admissibility of electronic evidence, Association of Chief Police Officers (A.C.P.O.) in its guidelines, 2012 laid down four principles along with and an explanation clause. These guidelines are applicable to the criminal courts of England, Wales and Northern Ireland but does not apply to criminal courts of Scotland and expands the scope of the *doctrine of documentary evidence* to be inclusive of electronic evidences. Section 2 of the Guidelines by Association of Chief Police Officers, 2012^[31] provide for the four principles of the Digital Evidence provided as follows-

'Principle 1: "No action taken by law enforcement agencies, persons employed within those agencies or their agents should change data which may subsequently be relied upon in court"^[32].

Principle 2: "In circumstances where a person finds it necessary to access original data, that person must be competent to do so and be able to give evidence explaining the relevance and the implications of their actions"^[33].

Principle 3: "An audit trail or other record of all processes applied to digital evidence should be created and preserved. An independent third party should be able to examine those processes and achieve the same result"^[34].

Principle 4: "The person in charge of the investigation has overall responsibility for ensuring that the law and these principles are adhered to"^[35].

Thus, we infer through these principles that duty has been imposed upon the investigating officer to ensure compliance with the laws and principles. The principles restrict any law enforcement agency to alter data which maybe of relevance before court and in case of necessity if any authorized person accesses such data he shall provide for reasons for the same. Further, the principles require a third party, which shall be an independent party to examine the processes applied to records.

Part VII of the Police and Criminal Evidence Act, 1982 (P.A.C.E.)^[36] lays down the provisions related to '*Documentary Evidence in Criminal Proceedings*.' Section 69(1) provides for the conditional requirement for a computer produced document to be admissible as evidence^[37]. The conditions state that there must not exist any reasonable ground to doubt the accuracy of the document and the document obtained pertains to period when the computer was operating properly^[38].

The Computer Misuse Act, 1990 under Section 3 provides for list of unauthorized acts in relation to a computer either with awareness and intention or without awareness and intention of the unauthenticity of the act^[39]. The section also penalizes person found guilty of such offence^[40].

2. The United Kingdom Judiciary in the Realm of Digital Evidence

The meaning and notion of the term 'document' was laid down in the case of *Senior V. Holdsworth* [41] by Justice Lord Denning MR. A wider interpretation of the term 'document' was laid down in the case of *Grant V. Southwestern and County Properties Ltd* [42], where the Honourable Supreme Court of United Kingdom decided as to whether a tape recording would fall within the ambit of the meaning and interpretation of the term 'document'. It was held by the Honourable Supreme Court of United Kingdom that tape recording was indeed a document as it fulfilled all the ingredients and essentials of the same. Thus, it has been aptly penned down by Hon'ble Coram: "*it seems to me that the simplest and most foolproof method of inspection in these cases is for the party giving discovery to play the tape to the party to whom discovery is being given, and for that party to make his own recording as it is played*" [43]. A similar ratio decidendi was also laid down in the case of *Hastie and Jenkerson V. Mc Mohan* [44].

Further, in the case of *Derby V. Weldon* [45], Justice Vinelott in the judgment has pronounced that computer data base is also a significant segment of the term 'document' and also mentioned in the judgment that it is not necessary for a document to be tangible. On the other hand a divergent view was laid down in the case of *Beneficial Finance Corporation V. Convey* [46] where the judgment stressed on the notion that it is evident for a document to be tangible. Thus, Hon'ble Coram has mentioned: "*the mere interposition of necessity of an instrument for deciphering the information cannot make any difference in principle. A litigant who keeps all his documents in microdot form could not avoid discovery because in order to read the information extremely powerful microscopes or other sophisticated instruments would be required*" [47].

However, in the light of the above cases the case of *Rollo V. H.M. Advocate* [48] has also played a pivotal role since in the concerned case electronic diary was admitted to be a document in the Court of Law and a similar ratio was also laid down in the case of *R V. Spiby* [49] and also a parallel interpretation has been laid down in the case of *Public Prosecutor V. Ang Soon Huat* [50] where the honourable court has held that the computer printout shall be considered to be document in the court of law.

5. The Notion of E-Documents with Respect to United Nations

The growing advent of electronic trade and commerce brought in an evolution in the commercial and information technology sector. UNCITRAL in its Commission's 17th Session held in 1984 championed the notion of 'Legal aspects of automatic data processing' which paid significance to the legal issues faced in valuing the computer records [51]. Article 5 of the model law 'Legal recognition of data messages' [52], which emphasizes that information in the form of data messages cannot be solely denied legal admissibility on the grounds of it being in electronic form [53]. Thus, it may be interpreted that the combination of law and information technology is significant in order to combat the offences in the international arena. United Nations Commission on International Trade Law's Model on Electronic Commerce with Guide to Enactment 1996 has played a pivotal role in the arena of electronic data which has been derived from

'travaux preparatoires' of the Model Law whose objective is to provide a set of international rules which can be enforced by nations to overcome legal obstacles and security issues regarding electronic commerce [54].

6. Summation

In a nutshell it is to be concluded that as mentioned in the case of *Som Prakash V. State of Delhi* the Apex court of India laid down the liberal interpretation of digital evidence in the courts of India [55] and in United Kingdom the Hon'ble Supreme Court relied upon the case of *Penderhill Holding Ltd. AO V. Ioannis Kloukinas* and held that courts must equip themselves with the evolving technology for combating offences [56]. In order to render justice guilt shall be proven beyond the reasonable doubt and thus, inadmissibility of the electronic records would lead to gross injustice and thus United Kingdom in 1980s and India in 2000s began to draft legal framework with regards to the electronic evidences in order to safeguard the natural rights of every person. This signifies the holistic development with respect to the 'cohabit' working of the law and the information technology in the international arena. The enactment of the Information Technology Act, 2000 [57] in India and Misuse of Computers Act, 1990 [58] in United Kingdom led to laying down of various computer-based crimes and also mentioning in detail the penalties for the same. As the society progresses the laws also need to evolve with the changing societal structure and thus the notion of Information Technology and legal spectrum have come to play a significant role.

References

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2. Indian Evidence Act, supra note 3.
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5. *Penderhill V. Holding Ltd. AO V. Ioannis Kloukinas*, Civil Appeals 319/11 and 320/11, 13 January, 2014.
6. Police and Criminal Evidence Act, supra note 5.
7. Guidelines by Association of Chief Police Officers, supra note 7.
8. The Computer Misuse Act, supra note 8.
9. Supra note 1.
10. Indian Evidence Act, supra note 3.
11. Section 3 of the Indian Evidence Act, interprets the term 'Document, 1872.
12. Information Technology Act, supra note 4 at § 2(t) – "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer-generated micro fiche.
13. Indian Evidence Act, supra note 3 at § 3 – "Evidence" means and includes – (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence; (2) [all documents including electronic records produced for the inspection of the Court], such documents are called documentary evidence.
14. Id. (Substituted by Act 21 of, S. 92 and Sch. II, for "all documents produced for the inspection of the Court" (w.e.f. 17-10-2000), 2000.
15. United Kingdom Civil Evidence Act, supra note 6 at §

- 13 - “document” means anything in which information of any description is recorded, and “copy”, in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.
16. Id.
 17. United Kingdom Civil Evidence Act, supra note 6 at § 13 - “oral evidence” includes evidence which, by reason of a defect of speech or hearing, a person called as a witness gives in writing or by signs; “the original statement”, in relation to hearsay evidence, means the underlying statement (if any) by— (a) in the case of evidence of fact, a person having personal knowledge of that fact, or (b) in the case of evidence of opinion, the person whose opinion it is; and “statement” means any representation of fact or opinion, however made.
 18. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in, 1998. (1996), https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf
 19. Information Technology Act, supra note 4.
 20. Supra note 22.
 21. Indian Evidence Act, supra note 3 at § 17 – An admission is a statements, [oral or documentary or contained in electronic form], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.
 22. Indian Evidence Act, supra note 3 at § 59 – All facts, except the [contents of documents or electronic records], may be proved by oral evidence, (Substituted by Act 21 of, S. 92 and Sch. II, for “contents of documents” w.e.f 17-10-2000.), 2000.
 23. Indian Evidence Act, supra note 3 at §§ 65-A, 65-B.
 24. Id.
 25. Indian Evidence Act, supra note 3 at § 65-B - (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.
 26. Information Technology Act, supra note 4 at § 4 - Legal recognition of electronic records.-Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is- (a) rendered or made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference.
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 31. Guidelines by Association of Chief Police Officers, supra note 7 at § 2.
 32. Id. at Principle 1.
 33. Id. at Principle 2.
 34. Id. at Principle 3.
 35. Id. at Principle 4.
 36. Police and Criminal Evidence Act, supra note 5.
 37. Id. at § 69(1).
 38. Id.
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 51. UNCITRAL Model Law on Electronic Commerce, supra note 26.
 52. Id.
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