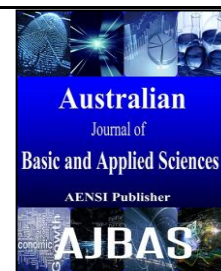




ISSN:1991-8178

Australian Journal of Basic and Applied Sciences

Journal home page: www.ajbasweb.com



Reception of Electronic Evidence from Islamic Perspective

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ARTICLE INFO

Article history:

Received 13 June 2015

Accepted 5 August 2015

Available online 12 August 2015

Keywords:

electronic evidence, authenticity, Islamic law

ABSTRACT

Islamic law of evidence acknowledges electronic evidence as documentary evidence or al-kitabah. It is in line with the Malaysian Law perspective since electronic evidence is one form of documentary evidence. It is stored and retrievable from electronic devices such as computer and smartphones to name a few. However, the fragile nature of electronic evidence, makes it prone to damage and alteration as well as destruction or when there is improper handling of such evidence. Since, it can easily be tempered or self-deteriorate, establishing authenticity, reliability and accuracy of electronic evidence are quite challenging to ensure such evidence is admissible and weighty. In order to ensure such evidence is admissible and carry the expected weightage, the parties must first prove the authenticity of such evidence, and subsequently on the contents' reliability and accuracy. Therefore, this article discusses what is documentary evidence under Islamic law known as al-kitabah and how the Islamic jurists treated it as a mode of proof it then discuss whether al-kitabah would include electronic evidence. Hence, this article explained the nature of electronic evidence as understood now based on several modern statutes and the requirement for its admissibility such as authentication of both the document as well as the content.

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To Cite This Article: Mursilaili Mustapa Sa'di, Abdul Rani Kamarudin and Zulfakar Ramlee., Reception of Electronic Evidence from Islamic Perspective. *Aust. J. Basic & Appl. Sci.*, 9(26): 30-35, 2015

INTRODUCTION

Electronic devices such as computer and internet are 'gigantic' innovation and improvement to the human lifestyle before which was unimaginable (Bachmair, 2007). Their increasing portability and efficiency has enable humans to communicate with ease cannot be denied. It dramatically improves and enhances the quality of life. Nowadays, people choose to keep their data in electronic appliances or devices in computer and smartphone or electronically than on paper. Literature shows that more than 90% of the documents in an organisation originate in digital format, and 70% from that digital format were never printed (Gillespie *et al*, 2004). However, with the nature of electronic evidence being easily altered or manipulated, authentication is the first step for its admissibility before the contents are proven (Lekala, 2011). It must be emphasised that authenticity is one thing, and relevancy is another thing. For the electronic evidence to be admissible, other than it is authentic, it too must be primary evidence, legally relevant, and not hearsay evidence. For its contents, it should not have been tempered by establishing its proper handling and custody to ensure there has been

no break in the chain of evidence. These matters, however, are not part of scope of discussion. Therefore, this paper will only discuss on the reception of electronic evidence from the Islamic perspective.

Nature Of Electronic Evidence:

Electronic evidence is any data that is associated with electronic devices whether created, stored, manipulated or transmitted in digital format. Electronic evidence is also known as digital evidence, computer evidence, computer generated document or computer related document. The prime element of electronic evidence is that it is created, stored, can be manipulated or transmittable in digital format with the advancement of technology tool.

Malaysia does not have specific definition on electronic evidence, but it could be figured out from four different statutes, namely Electronic Commerce 2006, Computer Crime Act 1997 (CCA), Evidence Act 1950 (EA), Syariah Court Evidence (Federal Territories) Act 1997 (SCEA). Electronic Commerce Act 2006 in section 5 defined electronic as "the technology of utilizing electrical, optical, magnetic, electromagnetic, biometric, photonic or other similar

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technology". From this definition, electronic means any technology that can be used by various functions which is related to the technology. It could be computer and other devices such as a smart phone, tablet, ipad etc.

While for 'computer output' is described in section 2(1) of the CCA as:

"a statement or a representation whether in written, printed, pictorial, film, graphical, acoustic or other form-(a) produced by a computer; (b) displayed on the screen of a computer; or (c) accurately translated from a statement or representation so produced".

The definition covers all types of statement or representation, including translation that is produced by a computer and displayed on the screen. Section 3 of MEA provides the meaning of evidence and document. 'Evidence' by that Act means:

a) 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;

b) all documents produced for the inspection of the court: such documents are called documentary evidence;

While under section 3 of SCEA included bayyinah (evidence which proves a right or interest and includes qarinah) and syahadah (any evidence adduced in Court by uttering the expression "asyhadu" to establish a right or interest) as an additional of the meaning of evidence compared than in MEA.

Document in the similar section means:

"any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of—

a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;

b) any visual recording (whether of still or moving images);

c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;

d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or (c),

or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter.

An illustration in the section 3 of MEA and SCEA give further understanding what is document which includes any writing, words printed, lithographed or photographed, a map, plan, graph or sketch, an inscription on wood, metal, stone or any other substance, material or thing, a drawing,

painting, picture or caricature, a photograph or a negative, a tape recording of a telephonic communication, including a recording of such communication transmitted over distance, a photographic or other visual recording, including a recording of a photographic or other visual transmission over a distance, a matter recorded, stored, processed, retrieved or produced by a computer. Hence, electronic evidence is a form of documentary evidence.

Electronic Evidence From Islamic Perspective:

Document in Islam are called *al-kitabah* or *al-khat*, *muharrar*, *asnad*, *hujaj* and *auraq*, *sukk*, *hujah*, *mukhadar*, *sijil* and *wathiqah* (Ismail & Ramlee, 2013), (al-Zuhaily, 1994). Before this, document in Islam is confined to what is written on paper or parchment manuscript. Jurists have given a small scope as to what is a document by confining it to any physical written document only. Their definition was based on their observation, need and situation at that time. However, the most important thing is the contents it can give or the information it provides. In today's age, with technology and dynamic telecommunication and gadget, Islamic scholars would willingly expand the scope of documentary to include digital and electronic document for as long as the data is readable, useful and contain information (Yunus, 2006). For example, the meaning of 'document' was broadly defined by amending section 3 of the SCEA to include electronic evidence. It could probably be to keep paste with the Malaysia Evidence (Amendment) Act which is in 1993 incorporated in its definition of documentary evidence to include electronic evidence such as any disc, tape, film, soundtrack or other devices. Hence Islamic law is malleable as far as *al-kitabah* is concerned to the extent that it would include electronic evidence.

Al-Kitabah or document can be divided into two categories. The first one is the document with the sign, symbol, letter, and the second that has sound recording. Both contain information, data and news for the purpose of expressing, describing or representing any matter. It shows that *al-kitabah* encompasses data in any format whether in electronic format or digital format, signs or symbols format as can be seen in pyramids. These are data in a format that is readable, useful and contain information though, they may require deciphering before it can be read, seen in tangible and understandable form. The difference between data in digital format and non-digital format is that in the former, the medium used to create, process and store the data is associated with the appropriate electronic devices as opposed to pen and paper. Therefore, definition of electronic evidence would fall fully within the Islamic scope of documentary evidence (*al-kitabah*) as long as the data is readable, can be seen, and contains relevant information.

Basis of al-kitabah:

The legal basis of *al-kitabah* can be found in al-Qur'an and the Sunnah. Allah said in al-Qur'an in chapter al-Baqarah verse 282:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَى أَجَلٍ مُسَمًّى فَاكْتُبُوهُ وَلْيَكُنْ مِنْكُمْ كَاتِبٌ يَعْلَمُ مَا يَقُولُ وَلَا يُبْذَلُ عَلَيْهِ الْغَىُّ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا يَبْخَسَ مِنْهُ شَيْئًا فَإِنْ كَانَ الَّذِي عَلَيْهِ الْحَقُّ سَفِيهًا أَوْ ضَوِيعًا أَوْ لَا يَسْتَطِيعُ أَنْ يُبَيِّنَ لَهُ فَلْيُمْلِلْ عَلَيْهِ رَجُلَيْنِ مِنْ أَهْلِ بَيْتِهِ يَكْتُبَا لَهُمَا فَتُنَكِحَ أَحَدُهُمَا الْآخَرَ وَلَا يَأْبَى الشَّهَادَةُ إِذَا أَمَدَّ عُوا وَلَا تَسْمَعُوا أَنْ تَكْتُبُوهُ صَغِيرًا أَوْ كَبِيرًا إِلَى أَجَلٍ ذَلِكُمْ أَقْسَطُ عِنْدَ اللَّهِ وَأَقْوَمُ لِلشَّهَادَةِ وَأَدَقُّ الْأَثَرُ وَإِنْ كُنْتُمْ مِنْكُمْ أَصْرَةً شُرَيْكُوهَا بَيْنَكُمْ فَلْيُدْشِرْ عَلَيْهِمْ جُنَاحُ الْوُكُوفِ وَأَشْهَدُوا إِذَا نَبَا بَعْثُكُمْ وَلَا يُضَاكَ كَاتِبٌ وَلَا شَهِيدٌ وَإِنْ تَقَاعُوا فَلْيَمْلِكْ بِكُمْ وَاتَّقُوا اللَّهَ وَاللَّهُ يَعْلَمُ مَا تَعْمَلُونَ

“O you believe! When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you. Let not the scribe refuse to write as Allah has taught him, so let him write. Let him (the debtor) who incurs the liability dictate, and he must fear Allah, his Lord, and diminish not anything of what he owes. But if the debtor is of poor understanding, or weak, or is unable himself to dictate, and let his guardian dictate in justice. And get two witnesses out of your own men. And if there are not two men (available), then a man and two women, such as you agree for witnesses, so if one of them (two women) err, the other can remind her. And the witnesses should not refuse when they are called on (evidence). You should not become weary to write it (your contract), whether it be small or big, for its fix term, that is more just with Allah; more solid as evidence, and more convenient to prevent doubts among yourselves, then there is no sin on you if you do not write it down. But take witnesses whenever you make a commercial contract. Let neither scribe nor witness suffer any harm, but if you do (such harm), it would be wickedness in you. So be afraid of Allah; and Allah teaches you. And Allah is the All-Knower of each and everything.

al-Qur'an also stated that Prophet Solomon wrote a letter to Queen of Balqis which is mentioned in chapter al-Naml 27, verses 28-30:

أَذْهَبَ بِكِتَابِي هَذَا فَأَلْقِيهِ إِلَيْهِمْ ثُمَّ تَوَلَّ عَنْهُمْ فَانْظُرْ مَاذَا يَرْجِعُونَ ﴿٢٨﴾ قَالَتْ يَأْيُهَا الْمَلَأُ إِنِّي أُلْقِيَ كِتَابٌ كَرِيمٌ ﴿٢٩﴾ إِنَّهُ مِنْ سُلَيْمَانَ وَإِنَّهُ بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ ﴿٣٠﴾

“Go you with this letter of mine, and deliver it to them, then draw back from them, and see what (answer) they return. She said: “O chiefs! Verily! Here is delivered to me a noble letter, Verily! It is from Sulaiman (Solomon), and verily! It (reads): In the Name of Allah, the Most Beneficent, the Most Merciful”

Prophet Muhammad ﷺ had once given an order about writing a will. This was narrated by Abdullah bin Umar: Allah's Apostle said: “It is not permissible for any Muslim who has something to will to stay for two nights without having his last will and testament written and kept ready with him.” (al-Bukhari, Muslim & al-Tirmidhi).

It is clear that *al-kitabah* is a mode of proof to describe and explain something. Therefore, it is evidence in solving dispute or in determining obligation, right and liabilities between disputing parties or what the parties intended for example in dispute concerning money or valuable things.

Documentary evidence plays an important role in establishing right. Jurists agreed that *al-kitabah* is admissible in reference to the collection of hadiths, fiqh etc (al-Zuhaily, 1994). However, jurists have different views with regard to admissibility of documentary evidence or *al-kitabah* as a mode of proof (al-Zuhaily, 1994; Bek 1985). The jurists who do not accept *al-kitabah* as a mode of proof is because *al-kitabah* can be subject to falsification and forgery. This mean that they do not reject documentary evidence as a mode of proof but they were being cautious. But if the document can be authenticated, there is there no reason to reject *al-kitabah*. For example hadith or tradition of the prophet written in authentic books such as Sahih Muslim and Sahih Bukhari are accepted as a source of law.

The second view accepted *al-kitabah* as a mode of proof between disputing parties or in criminal prosecution to ensure fairness and avoid miscarriage of justice (al-Zuhaily, 2002; Ibn Farhun, Ibn Qayyim; Ibnu Muflih, 2003; Ibn Nujaim, 2002). Their opinion was based on al-Qur'an, hadith and intellectual observation. Allah in the Holy Qur'an strongly urged that those who entered into a debt transaction to write down the terms of the contract. al-Zuhaily (1996) in his book *al-Fiqh wa Adillatuh* mentioned that Imam Malik accepted *al-kitabah* as a mode of proof in *hudud* (public rights) and *qisas* (private rights) cases.

However, even though *al-kitabah* is accepted as a mode of proof, it has been authenticated by calling the maker or the person who witnessed it (al-Zuhaily, 2002). This can be understood from the verse which says “take witnesses when you conclude a contract. Let no scribe be harmed or any witness. For if you do so, indeed, it is [grave] disobedience in you. And fear Allah. And Allah teaches you. And Allah is knowing of all things”. Al-Zuhaily (2002) said that from the above verse, it shows that the way to authenticate documentary evidence is through witnesses or to corroborate. From the above verse, Allah clearly teaches us that witness is one of the methods to authenticate *al-kitabah*. Such words imply a great deal, if one takes into account that in the era of Prophet Muhammad ﷺ not everybody has an ability to write, and the probability of forging a document is quite difficult. Still a witness is required for

authenticating the written document. Its importance is emphasised by having two witnesses for back up purposes as far as authentication is concerned.

A witness is also required to prove other facts in addition to the documentary evidence. For example in *Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris* ([2014] MLJU 177, 9 MLJ 605), the defendant denied that he is an author of all articles in any blog that has a URL in www.papagomo.com and he refuted being the owner of that blog. The defendant was accused for publishing defamatory contents of the plaintiff through the website www.papagomo.com. As far as the electronic evidence in the website is concerned it is authentic and admissible provided the rules to admissibility are complied ie it is primary evidence, is not hearsay the maker is called to authentic the document or tendering of the requisite certificate. However, the issue who operate the blog cannot be resolve by the evidences of al-kitabah alone in this case. Who the operator or the blog owner has to be establish separately other mode. In this case there was a credible witness testimony (Mohd Fauzi bin Mohd Azmi (SP1)), who can established the defendant as papagomo as he had met the defendant at the Bloggers United Malaysia Conference on 16 May 2009 in the Lake View Garden, Subang Jaya and had taken the defendant's photograph. At that time, defendant informed the witness that he was the blogger 'Papagomo'. The defendant denied that he is the person in the photograph, but the court believed that person in the photo and defendant is the same person which is based on the observation of the court. The defendant need to pay RM800,000.00 to the plaintiff because the defamatory statement were extreme and were published widely.

It is clear that without credible witness (Mohd Fauzi bin Mohd Azmi), it is difficult to prove the responsible person or defendant being the author and owner of the blog without the testimony from the witness. The defendant could easily denied he is papagomo that published the defamatory statement of the plaintiff through the website www.papagomo.com due to the anonymity of the virtual activity by internet user. The user only can be identified by Internet Protocol (IP) address and not by the person itself. Even though, IP address is unique, but it can be duplicated easily. Cybercriminal can be hiding behind the IP address as an anonymity user. Cybercriminal does not use their real identification when committing cyber offences. Therefore, testimony of the witness can corroborate the electronic evidence.

Since electronic evidence is prone to alteration (Kuntze & Rudolph, 2011) other than the witness statement or testimony it may warrant the testimony of an expert to authenticate whether the data is fabricated or doctored and to decipher the contents into a form that is readable, understandable or can be seen as to what it mean. MEA too under section 90A

required that for computer generated document authentication may be done by calling the maker or the person who is in charge of the computer to tender certificate that the document was printed from the computer under his care and that the computer was in good working order.

Data in digital format could be understood with the assistance of the expert. Islam does not deny the opinion from an expert. Anas ibn Malik narrated that the Prophet ﷺ passed by some people who were cross-pollinating and he said, "If they were not to do so, it may be good." The product then was of very poor quality and the Prophet ﷺ passed by them and said, "What is with your date palms?" They replied, "You said such and such." The Prophet ﷺ then told them, "You have more knowledge of your worldly matter." (Muslim) That hadith show that Islam accepted expert opinion and acknowledge their competency in their field.

Malaysian Evidence Act has classified electronic evidence as documentary evidence. It is in line with Islamic law of evidence. Document in Islam is something that can be read, or otherwise deciphered for its relevant information (Arbouna, 1999; Anwarullah, 1999). It could be in a form of writing, figure, sign, map, photograph, or soundtrack. How the contents are embedded an expressed is not important because technology changes with time. From cassette, tape to diskette, and subsequently compact disc and in small memory card the size of a small sim card in smartphones. Tape or film does not exist in the age of Prophet Muhammad ﷺ do the electronic appliances to operate them. Nowadays, people choose to keep their data in electronic format in computer and smartphone or other electronic gadget than in conventional way like on a paper. However, they are still documentary evidence or in Islam is called *al-kitabah* since the data whether stored in smartphone sim card they are readable, useful and contain information. It is conceded at the time of prophet Muhammad there was no electronic data and their respective devices but Islam recognised documentary evidence as a mode of proof which include electronic evidence so long as they are relevant and has been authenticated.

Expert opinion is important in electronic evidence because electronic evidence is a combination between technical and law (Brenner & Clarke, 2005). Therefore, authenticating its contents too has to be through expert witness ie a computer forensic investigator. Islam like Malaysia depends on expert to authenticate the electronic evidence whether it has been doctored or fabricated. Expert opinion also be need to decipher to extract the relevant information into something that is tangible for reading or seeing. There are some countries that inserted a new section concerning expert opinion on authentication of electronic evidence. India for example, inserted a new section 79A in The Information Technology (Amendment) Act 2008 which provided that expert opinion as an examiner of

electronic evidence of any possible alteration during the process of searching, collecting, analyzing and presenting the data to the court (Pradillo, 2011). In *Kennedy v Baker* ([2004] FCA 562), Branson J., said that "Computer data can be easily altered and merely turning a computer on causes data stored within the computer to change. A principal objective in the forensic examination of a computer system is to ensure that data on the computer system is not altered by the examiner during the examination process."

A computer forensic investigator is a suitable person for establishing the authenticity of electronic data. They can preserve and ensure from the first step of electronic evidence collecting till the evidence produced in court. It means that computer forensic expert assist the judiciary system to implement justice concerning to the techniques of investigation in order to authenticate of electronic evidence (Haneef, 2006). At the same time, expert can clarify whether *al-kitabah* is authentic or not (al-Syirazy; al-Hasfakiyy, 2000). It is similar with electronic evidence which a computer forensic expert can determine whether the digital data is authentic.

Conclusion:

Electronic evidence is acceptable and recognized in Islam as documentary evidence or *al-kitabah*. In Islam, calling a witness and expert are some of the modes in order to ensure its authenticity and its contents too. Electronic evidence is thus documentary evidence under Islamic law being one of the modes of proof. To be admissible, it must be proven that the electronic evidence is authentic otherwise the data or the contents of the document cannot be relied upon. For authentication of electronic evidence the modern requirement under the Malaysia Evidence Act requiring the maker to be called or the person in charge of the computer generated document to tender the certificate that he was in charge of the computer in question and the computer is in a good working order. This modern means in establishing authenticity can be adopted and is free from doubt as far as Islamic law is concern. For admissibility it to must be subject to legal relevancy, is not hearsay and is primary evidence.

In ensuring the authenticity and credibility of the contents of the electronic evidence, the chain of custody should not be broken to ensure against tempering. No doubt what the contents are, what they mean whether they need to be deciphered, decrypted or otherwise to be tangible and can be understood may require expert opinion. However, that would be separate issue from the issue that *al-kitabah* includes data in whatever documentary format be they in digital format or non-digital format. It is heartening to see that Syariah Court Evidence (Federal Territories) Act 1997 definition of documentary evidence has included electronic evidence. This is evident that Islamic law is malleable and can keep itself relevant then now and in the future.

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