



APPROACH OF PAKISTANI COURTS REGARDING ADMISSIBILITY OF MODERN DEVICES OR TECHNIQUES IN EVIDENCE

Aliya Saeed

PhD Fellow at School of Law
University of Karachi
Karachi – Pakistan
aaliasaeed@yahoo.com

Prof. Liaquat Abro

Professor at School of Law
University of Karachi
Karachi – Pakistan
liaquatabro75@gmail.com

Dr. Ghulam Dastagir

Associate Professor of Law
Metropolitan University
Karachi - Pakistan
chanasar@gmail.com

ABSTRACT

Electronic evidence's notion and meaning are correlated in this article, which covers the whole rank and file. Until this point, the fundamentals of the Evidence Act have been broken down and clarified by many changes in electronic evidence. When discussing whether or not electronic evidence should be admitted into court, several rulings from Pakistan's highest court have been referenced as precedents. In conclusion, we will discuss the precautions and procedures that the Pakistani judicial system has implemented in order to promulgate electronic evidence. In every one of the world's legal systems, post-modern devices and techniques in evidence are recognized and accepted and it is now requirement of modernistic evidence philosophy. The courts attach much weight to such kind of evidence. This paper analyzes the approach of Pakistani courts regarding admissibility of modern devices or techniques in evidence.

KEYWORDS: Admissibility, Digital Evidence, Evidentiary Value, Legal System, Pakistani Law.

INTRODUCTION

A technological revolution occurred at the turn of the 21st century that captivated Pakistan and the



entire world. Everyone, not just members of large groups, can gain access to and utilize computers with the tap of a finger. Everything that requires human effort is becoming more straightforward, thanks to IT. As the use of computers has increased, so has the development of new technologies in this age of cyberspace. Cyberspace emerged in 1996 due to developments in IT; today, everyone has equal possibilities to utilize the internet for research, communication, and data storage. In Pakistan, the increasing use of electronic means of communication, e-government, e-commerce, and digital information storage has unquestionably generated the need to modify information technology legislation and rules of admissibility of electronic evidence in civil and criminal actions. Pakistani law needs to be updated to include criteria for the admissibility and weighting of digital evidence in light of the widespread use of computers, the pervasive impact of information technology on society as a whole, and the ease with which data may be preserved and gathered digitally. The modern devices and techniques in evidence are now globally welcomed. These modern devices and techniques are critical not only in internet-based crimes but also vital in cases range from terrorism to fraud. Every single case now requires modern technique in evidence. The courts now in all over the world apply modern evidence so that the cases can be decided promptly without following other sort of evidence.

These techniques include DNA testing, fingerprint analysis, cell tower data, poly-graphic tests, fax, email, surveillance footage, tape recorder, video film, video cassettes, etc. But one point is that these devices and techniques are often misused for wrongful gains and ulterior motives in courts. It has now become easier to fake up evidence by tampering audio, video cassettes and CDs in civil, criminal, and commercial litigations. These fabricated and fake claims are established to snub the rivals in the courts. This kind of behavior not only helps in destabilizing the social structure of the society but also promotes immorality. Anyway, the positive use of these modern devices and their evidentiary value is now recognized by all world legal systems. In the end, this paper presents the most critical findings from the research and recommendations for making the most of these cutting-edge tools and methods. The Information Technology Act, 2000 and its changes were based on the model Law on Electronic Commerce created by the United Nations Commission on International Trade Law (UNCITRAL).

The (IT) Act of 2000 was amended to allow the admission of digital evidence in court. The Indian Evidence Act, the Indian Penal Code, and the Banker's Book Evidence Act of 1891 have all been modified to give the legal foundation for electronic transactions. Due to the new rules, Pakistani courts have developed case law addressing the admissibility of digital evidence. Judges have also demonstrated awareness of the evidence's inherent "electronic" component, comprehending the regulations controlling its admissibility and the filing requirements for such evidence. Evidence that is produced in court that has been preserved or transmitted in digital format is referred to as "digital evidence" or "electronic evidence." "Probable information acquired or communicated in binary form" is the definition of "digital evidence." Digital devices such as telephone or electronic multimedia devices may also be utilised as evidence in addition to PCs. Emails, digital photos, ATM transaction logs, word processing documents, IM chat histories, spreadsheets, databases of internet browser history, computer memory contents, backups, printouts, GPRS trails, hotel electronic door lock records, digital video or audio files, and so forth. Digital evidence is typically more reliable, difficult



to destroy, adaptable, replicable, possibly more evocative, and more publicly available than analogue evidence.

Literature Review

In order to increase the judicial system's responsiveness to the public's interests, the Chief Justice of the Supreme Court established the National Judicial (Policy Making) Committee (NJPC) in May 2009. The NJPC then created the National Judicial Policy. The tactic puts a lot of pressure on civil and criminal courts to wrap up cases in a certain amount of time. The NJP, however, has failed to address significant issues with the court, particularly with the criminal justice system, by concentrating primarily on speed. A conviction rate that is already low could get considerably worse. Authorities should oppose hasty remedies and procedural short cuts, such as parallel court systems and informal conflict resolution procedures, even though poor service delivery is a serious problem. Anti-terrorism courts, for example, must continue to produce the desired results while eroding justice quality. The greatest and only long-term solution remains a reinforced and reformed criminal justice system. Digital evidence classification and category are similarly contested, with several arguments happening. The Pakistani parliament alters the QSO to include digital evidence as admissible evidence. The Electronic Transactions Ordinance is another regulation that clarifies Pakistan's position in this area. Using the court's decision on the admissibility of digital evidence during the case trial as an example, one may understand that there is still some uncertainty concerning the evidential value of digital evidence. Most courts still seek additional evidence to confirm digital evidence; it is impossible to imagine a judge relying exclusively on digital evidence.

In addition to bail, counsel, habeas corpus, representation, and appeal, the 1973 constitution also guarantees freedom of the press, of the law, and of religion. However, the constitution gives the government the right to impose restrictions on civil liberties in order to adhere to Islamic doctrine, maintain national security, and other considerations. Although stoning, lashing, or amputation are sometimes used as punishments outside of tribal areas in Pakistan, courts there have the power to sentence people to death. The legislative and executive branches frequently try to avoid judicial monitoring since the court is not completely independent from the executive branch. The judiciary is also hampered by a lack of resources, a high case backlog, low public confidence, and corruption.

The 1973 constitution, as amended, and Islamic law derived from English common law serve as the foundation for the legal system (sharia). The Supreme Court, provincial high courts, and lower courts hear criminal and civil cases. In accordance with the chief justice's proposal, the president appoints new justices to the Supreme Court as well as judges for provincial high courts. The Supreme Court is the only court with both original and appellate jurisdiction. Laws are evaluated by the Federal Shariat Court to see if they comply with Islamic tenets. Cases involving certain subjects, such as narcotics, business, and terrorism, are heard by special courts and tribunals. Tribal areas in Pakistan, where legislation is mostly based on tribal customs, are only partially covered by the penal code.



There have been various cases involving the admissibility of modern devices and methods in Pakistani courts' evidence approaches. One of the first reported cases on the subject is *Arif Hashwani v Sadruddin Hashwani*. In this case, the court found that audio and video recordings are admissible as evidence. In *Khanzada Inamullah Khan v Mst. Zakia Qutab*, the same concept was reinforced. Under Article 164 of the Qanun-e-Shahadat 1984, the court authorised the construction of electronic and print media reporting as modern technology in the case of *Dr Mobashir Hassan v. Federation of Pakistan*. Computer technology, as a modern instrument, falls clearly within the purview of Art. 164 of the Qanun-e-Shahadat 1984 in the case of *Raja Muhammad Nasir v Mahmood Shaukat Bhatti*. The video film falls under the genre of documentation and can be considered documentary proof. *Arshad Mahmood v Raja Muhammad Asghar* was the case.

The court determined in *Mir Tariq Mehmood Khetrani v Returning Officer* that "Article 164 of the Qanun-e-Shahadat Order, 1984 provides that Court may allow the production of any evidence that may become available through modern devices and, in the peculiar circumstances of the instant case, the evidence of NADRA would provide a more authentic and accurate account of what had transpired at the polling stations. In the case of *Baber Ahmad v. State*, "the evidence of CC TV footage is concerned, following required adjustment in Qanun-e-Shahadat and by insertion of Article-164 of Qanun-e-Shahadat, the evidence gathered using modern equipment is admissible as a legitimate piece of evidence," the court concluded. In *Collector of Customs and others v. Saeedur Rehman and others*, a Full Bench of the Hon'ble Supreme Court decided that the production of video cassette in evidence is acceptable, conclusive, and adequate in some instances but not in all, in light of Article 164 of Qanun-e-Shahadat. Even in the case of *Zafar Iqbal and others v. Bashir Ahmed and others*, the Hon'ble Supreme Court found that an audio tape could be admissible in evidence under Article 164 of the Qanun-e-Shahadat. Previously, in the case of *Islamic Republic of Pakistan v. Abdul Wali Khan*, taped remarks of some NAP leaders were declared to be admissible as evidence, and the same reports were permitted.

As a result of these rulings, I can not see why the learned Commissioner did not accept the evidence of the tape-recorded discussion, and the question was left for the Court to decide the same."

As the court explained in *Raja Muhammad Asghar et al. v. The State et al* "According to Article 164 of the Qanun-e-Shahadat Order, the court is permitted to accept and consider any evidence produced by means of contemporary technology. As such, it can only serve as corroboration for the solid evidence and not as proof in and of itself." It was stated that any evidence obtained through the use of contemporary tools and methods would be admissible in court. As was already mentioned, the video cassette provides no evidence that might be taken as supporting the prosecution's story. According to the court's ruling in *Ammar Yasir Ali v. The State*, "however, simply producing CCTV video as a piece of evidence and its watching in open court is not sufficient to be relied upon until and until verified and proved to be real." Someone mentioned how the authenticity of the video needed to be confirmed by other sources before it could be believed. The prosecution was obligated to call the cameraman as a witness, but they haven't even done that. The investigating officer who got



the footage has said flat out in his testimony that he got it from a witness who didn't want to give out his name or identity, and the prosecution hasn't even bothered to explain where they got it. In addition, he admitted during cross-examination that the CCTV footage is not credible evidence because nothing is seen or recognised in it.

It is not a novel practice to carry out DNA testing to demonstrate the veracity of an accusation of criminal activity. The courts are in an appropriate position to make a just verdict on a contested fact when DNA technology is utilized in the case. Due to the absence of a corresponding clause in the Evidence Act of 1872, the Court routinely refused to consider it as part of the evidence and did not base any convictions on its findings. However, this problem has been overcome because of Article 164 of the Qarnun-e-Shahadat Order from 1984. As a result of this provision, evidence previously inadmissible due to technological advances can now be presented in legal proceedings. Examining the provision as mentioned earlier reveals that the Evidence based on the DNA report compiled by the Punjab Forensic Science Agency is admissible per section 510 of the Criminal Procedure Code. Our decision is informed by the precedent set in the landmark case of "Salman Akram Raja and others v. Government of Punjab through Chief Secretary and others," which was decided by the Supreme Court of Pakistan. It was noted in this renowned ruling that

"In this context, it is important to observe that conducting DNA tests to ascertain whether an accusation of criminal activity is true is not a novel practice. Because DNA testing was initially so unreliable, the courts frequently refused to use it as part of the evidence and did not base any convictions on the results. However, there has been considerable advancement in DNA technology for the last decade or two, and the introduction of DNA profiling has completely transformed the field of forensic research. DNA testing has become a reliable method for the judicial system to use in determining the identities of those responsible for a crime. Because of the advancements in DNA testing, the judicial system is now in a stronger position to arrive at a verdict that will result in the conviction of the individuals who are responsible for the crime, the elimination of any potential suspects, and the vindication of those who have been wrongfully accused. One possible point of reference is the court case of United States v. Yee, in which the defendant was found guilty based on the findings of a DNA test."

Since 2002, with the help of the Asian Development Bank, thirteen separate reform committees have worked to strengthen the judicial system. While some progress has been achieved, the judicial system as a whole did not function well, thus undermining faith in the Rule of Law. There has been a rise in support for alternatives to the current judicial system due to the inefficiency with which the current system deals with an ever-increasing crime and violence rate. Some people have taken the law into their own hands, while others advocate for more liberal interpretations of Islamic law. A legal system that is not up to the task of protecting the people's safety and restoring public faith in government contributes to a vicious cycle of rising extremism and violence.



PROBLEM STATEMENT

As a solution to doubts regarding the credibility of digital evidence presented in court, a formal procedure recognised by law was created. "Before digital evidence is accepted as criminal evidence before the courts," it must be verified as genuine and linked to the crime at hand by IT professionals and technicians. The paper claims that the world's rapid transformation into the digital era presents significant challenges for criminal law and forensics. Legislation limiting the use of electronic evidence is necessary as a necessary and immediate response to these changes. In particular, given the scale of the problem in Pakistan, legislation on electronic evidence is required; such a law should outline procedures for collecting digital evidence. Also included should be the entities responsible for this area of law as well as the procedures that must be followed to get electronic evidence.

RESEARCH QUESTIONS/HYPOTHESIS

1. What challenges do judges and attorneys confront when considering whether or not digital evidence should be admitted into court?
2. How do judges evaluate the reliability of digital forensic evidence versus that of tangible objects?
3. In what types of cases, and of what types of digital evidence, do judges and attorneys anticipate its use at trial?
4. How may digital evidence be most persuasively presented in court?
5. To what extent may the credibility of witnesses' testimony about digital evidence be established by the information available to judges and attorneys?
6. When it comes to digital evidence and the digital forensics procedure, how well-versed are judges and lawyers?

MAJOR FINDING

Also poorly trained, prosecutors rarely participate in the inquiry process. Pretrial proceedings are already compromised by corruption, intimidation, and external influence, especially from military intelligence services. Police and prosecutors rely heavily on inadmissible confessions from suspects because they lack access to scientific evidence collection procedures and trustworthy witness protection programmes. Large-scale criminals and militants are frequently given bail, and their trials can drag on for years while they plot attacks from behind bars. Unfortunately, this trend also holds true in the realm of terrorism prosecutions.

The repeated failures of the prosecution to secure convictions in high-profile cases, such as the bombings of the Danish embassy in June 2008, the Marriott Hotel in Islamabad in September 2008, and the attack on a police academy in Lahore in March 2009, have eroded public confidence in the state's capacity to combat terrorism. Despite the growing need for reform, Pakistan's police and criminal justice system continue to focus primarily on maintaining public order rather than tackling



21st-century crime. According to Article 164 of the Qanun-e-Shahadat, if the court so chooses, it may permit the introduction of evidence gathered using modern technological or other methods (1984). Simply put, the court has the jurisdiction to mandate the production of evidence if it is possible to do so due to scientific and technological advancements.

Court decisions were made using digital evidence despite the fact that it was not handled the same way as analogue evidence. Some academics in the field of law have echoed these sentiments, stressing the need to involve IT specialists in the investigation of cybercrimes. Professionals with expertise in computer forensics are needed to track down criminals, compile evidence, and present it to the courts for punishment. Assistance from computer scientists is available in the form of copies of the original evidence and the use of rigorous scientific methodologies to the collection of unmodified digital proof. This makes it more difficult to remove or alter evidence in a digital forensics investigation.

Because of the rise of cybercrime, the Pakistani criminal proceedings law and other laws need updating. Those investigating these offences and trying to apprehend their offenders should have legal backing in their quest for technological evidence. Likewise, it must detail the legal methods that will be used to process electronic evidence at each level of the investigation and prosecution process, as well as during the inspection of IT infrastructure and the management of electronic devices.

DISCUSSION AND ANALYSIS ON FINDINGS

However, the difficulties of the democratic transition have had an impact on the criminal justice system. Constitutionalism and the rule of law have been undermined by military regimes' periodic suspension of the constitution, which was followed by significant reforms to centralise power and bolster their civil supporters, particularly the religious right. The courts of other countries have handled digital forensic evidence with little difficulty, despite the lack of legislation and local and formal procedures in some countries regarding information technology and computer science offences. This tendency is largely due to the effectiveness of modern computer systems and technology, as well as the capacity to connect digital forensic evidence and its effects to the specific crime under investigation. Jurisdictions outside of the United States have benefited from the accessibility of digital evidence sources through measuring its impacts as well as the clarity and precision of electronic evidence in linking the accused to the crime.

Processing of Decades of military control, punctuated by brief and intermittent experiences with democratic governance, have stifled progress in the field of law in Pakistan. Due to its roots in the colonial system introduced by the British, many people do not hold the law in high regard. Particularly in the more outlying provinces and regions, the common law system that has been passed down through the generations and the Islamic law that is founded on the Quran do not always get along. A growing number of doubts about the legitimacy of the system can be traced back to its low efficiency, pervasive delays, poor quality of legal training, corruption, and the idea that the judicial system is a weapon for delaying justice, influenced by rich and/or powerful groups in society.



Varied international legal systems have different standards for the admissibility of digital evidence. Several Brother Muslim republics, like Egypt, Syria, and Lebanon, have adopted a judicial system based on the principle of freedom of proof, as have other Western democracies like France. The judge in a criminal case can decide how heavily to weigh various pieces of evidence. As a result, the judge is free to make their own rulings on how much weight to give to evidence gathered with the help of computers and other forms of IT.

Verifying the identification of those charged is essential in legal proceedings. The complainant's claims of considerable preparation, upgrades, and tactical delays can be verified through scientific investigation. Although this method of investigation can speed up the resolution of some problems, it also means that many valid concerns are disregarded. Article 164 of the Qanun-e-Shahadat Order, 1984 establishes that evidence based on modern technology and methodology is now admissible, hence we can safely say that the matter is now closed. We think it's hard for a man to hide his identity in today's world, given the prevalence of science and technology.

The concept of "freedom of proof," which gives the presiding judge considerable latitude to analyse evidence after proving its reliability and application, has been widely accepted in many legal systems and bodies of law. The judge is authorised to determine whether or not digital evidence is reliable. New research published in 2017 by Mason and Seng supports these conclusions.

The admissibility of electronic evidence is not specifically addressed by French law, but rather is left to the discretion of the presiding judge.

Judges in Germany, Luxembourg, and Greece, like their American counterparts, are not obligated to accept electronic evidence. This allows judges to make judgements when digital evidence conflicts with the background of a crime.

Today's courts have an immediate need for CS/IT knowledge when dealing with technologically complicated crimes. Experts in this field will examine data and programme processing methods to better assist law enforcement in securing convictions. Specialists in this field will greatly aid investigators in gaining access to and organising digital evidence (ILO, 2018).

Law 175 of 2018 gives Egyptian courts the authority to issue warrants to search electronic records, databases, and other information storage media for proof of crimes.

The United Arab Emirates follows the principle of freedom of proof, which gives judges leeway to draw inferences regarding guilt based on the weight they give to circumstantial evidence. Articles in Federal Penal Procedures Law No. 35 of 1992 that contain language with the quality of publicity demonstrate this. The accused shall be searched for any evidence of the offence that may be found on



his person, in his clothing, or in his baggage, in accordance with Article 51.".”¹

CONCLUSION AND RECOMMENDATIONS

Pakistan's local, regional, and international security is all negatively impacted by the country's flawed criminal justice system. The federal government of Pakistan, along with the four province administrations, must priorities the reform of the country's chaotic criminal justice system, given the severity of the country's internal security threats. In judicial system of Pakistan, it has always been tried to apply evidence available via modern devices and techniques so that the requirements of justice can be fulfilled. In some cases corroboration was required for such kind of evidence and in some cases plea of corroboration was rejected. The application of this sort of evidence is common in all modern judicial systems of the world. But Pakistan is far behind regarding applicability of such evidence because of insufficiency of technical skill and requisite capacity. Due to paucity of work force and scientific substratum, such valuable evidence is often lost. In this regard, capacity building of the investigating agencies should be enhanced. The judiciary in Pakistan should encourage the investigating agencies to present the modern evidence so that the cases can promptly be decided. The courses regarding applicability of modern evidence must be made part of the training of the judges in judicial academies. It is now need of the hour that proper scientific infrastructure should be developed in Pakistan for preservation of modern evidence failing which would result in fiasco of justice. More than ever before, the government must invest political and financial resources into modernizing the criminal justice system in order to keep up with the scale of today's violence.

¹ Ibrahim Abed, Peter Hellyer. *United Arab Emirates: A New Perspective*. (Cape Town: Trident Press Ltd, 2001), 145.



REFERENCES

- Ahmad, A. (1964) *Islamic Modernism in India and Pakistan, 1857-1964*. New York: Oxford University Press.
- Ahmad, M., (1980) ed. *Contemporary Pakistan: Politics, Economy and Society*. Durham, North Carolina: Carolina, Academic Press.
- Criminal Amendment Act (IV of 2017).
- Criminal procedure code, 1898 s 2, s 117, s 154 to 155, s 173, s 241 to 250, s 265 a to 265 n.
- Electronic Transaction Ordinance, 2002. Preamble, s 16(3) e, s 4 a.
- Kerr, D., (2007). GEOINT Symposium, US Geospatial Intelligence foundation, Online at: https://www.dni.gov/files/documents/Newsroom/Speeches%20and%20Interviews/20071023_speech.pdf (Last assessed 10 December, 2021).
- PLJ 2011 Sh.C-AJ&K 1.
- PLJ 2002 Cr.C 1421.
- Rana Imran Latif v. State (2017) PLJ Cr.C 966 (Islamabad).
- The NIJ special report, electronic crime-scene investigation, a guide for 1st responder (2nd edn) < www.ojp.usdoj.gov/nij> (Last accessed 08 December 2021).
- The Doha Declaration promoting a culture of lawfulness (UNODC), computer related offences<<https://www.unodc.org/e4j/en/cybercrime/module-2/keyissues/computer-related-offences.html> (Last accessed 08 January, 2022).
- The investigation for fair trial Act, (2013) s 16 to 21.
- The Police Act, (1861).
- The Qanun-e-Shahadat Order QSO, (1984). Preamble, Arts. 2e, 78-A.
- The UK Criminal Procedural rules, (2015).
- Tubrazi, S. J. (2017). Law of digital forensic, Chapter 1, the evolution of forensic technology, March.



UNODC, use of digital forensic in counter terrorism cases <
<https://www.unodc.org/pakistan/en/use-of-digital-forensics-in-counter-terrorismcases.html>> (Last
accessed 10 October, 2021).

Usman bin Farooq v. State etc. (2018) PLJ Cr.C 58 (Lahore).

Whitcomb, C.M., (2012). "An historical perspective of digital evidence: a forensic scientist
view". International journal of digital evidence. volume /issue 1.

Yasir Ayyaz etc. v. State etc. (2019) PLJ Cr.C 352 (Lahore) Fazal Karim, *Jurisdiction and Judicial
review: a study of the concept of jurisdiction, its relation with the power of judicial review and
the extent and scope of the power of judicial review*, Lahore, Pakistan Educational Press, 1985.

Geor Buechner, *Danton's Death*, translated by Victor Price, (Oxford: Oxford University Press, 1971.

Ghori, U. H. (2018). Military courts in Pakistan: A critical analysis. In D. Ireland-Piper, & L. Wolff
(Eds.), *Global governance and regulation: Order and disorder in the 21st century* (pp. 261-
277). Oxon: Routledge.

Hamid Khan, *Constitutional and Political History of Pakistan*, (New York, Oxford University Press,
2005

Justice (Retd) H. R. Khanna, *The Judicial System of British India*

MP Jain, *The Envolving Indian Administrative Law*, Bombay: S.P. Dhawan, 1983.

Nathan J. Brown, *Constitutions in a Nonconstituitional World: Arab Basic Laws and the Prospects
for Accountable Government*, (New York: State University of New York Press, 2002.

Thomas D. Grant, *Admissions into the United Nations: Charter Article 4 and the rise of Universal
Organization*, (Netherlands, Koninkliye Brill NV, 2009.

V.D. Kulshreshtha, *Landmarks in Indian Legal and Constitutional History*