

LEGAL CONSIDERATION ON TEXT MESSAGES SENT VIA SOCIAL MEDIA

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Abstract

Digital text messages are of great importance considering the technological progress of the majority of dealing with individuals, companies, and banks, which prompted them to use messages. These text messages have imposed themselves as electronic documents in many areas of our daily electronic dealings. These text messages became a means of expressing will in an electronic form.

This paper deals with some legal issues related to text messages sent through social media, including the controls for presenting them as evidence before the courts and their power in proof, how to find a balance between the plaintiff's right to proof and the sender's right to privacy. This paper also deals with the legal consequences of disclosing it to a third party without the sender's permission.

1. Introduction

Accelerated technological advances in communications prompted digital text messaging to gain increasing significance for individuals and businesses alike.

Our daily electronic interactions are hugely dependent on text messaging as electronic documents, which become a mean of expressing wills in electronic formats.

This paper addresses legal issues and implications related to text messages sent via social media, including the restrictions of presenting text messages as evidence before the courts, and their power to prove. It also examines how to strike a balance between the plaintiff's right to proof and the message parties' right to privacy.

This paper studies legal consequences of disclosing messages to a third party without the message parties' permission.

2. Definition of messages Sent Via Social Media Networks

Social media networks are increasingly prevailing in our recent times. Examples of these platforms include Facebook, Twitter, Snapchat, Instagram, WhatsApp, and YouTube, and some that have a professional aspect like LinkedIn.

There is almost no household with no social media users. Social media networks allow messages exchanged between users. Some networks allow messages to be exchanged on messengers as an additional feature for account holders, while others,

like WhatsApp, primarily allow exchange of messages and calls but with additional features related to social networking, including user status.

2.1 Definition of social media networks

Social media networks are websites and applications designed to facilitate human communication all over the world. People can interact on social media networks using posts, chats, and voice and video calls, etc. Social media networks are means to build and allow communication amongst communities by sharing people's interests, activities, and opinions over such applications.

2.2 Definition of Electronic Text Messages from a Legal Perspective

According to the European Directive¹ An e-text message can be defined as on a community framework for electronic signatures defines text messages as “data in electronic form which are attached to or logically associated with other electronic data, and which serve as a method of authentication”

The name of an e-text message may vary from law to law

Some legislations address electronic documents sent by one person to another as data messages, while others address the same as electronic messages.²

Egyptian legal definition of an electronic message reads as “a data message that includes information created, generated, stored, sent, or received partially or wholly via electronic, digital, optic, or any other similar means.”³

While the Emirati legislator, in the Federal Law 1/2006 on electronic transactions and commerce, approved use of “electronic message” defined as “electronic information sent or received via electronic means regardless of the nature of extraction at the recipient end.”⁴

What's important is that text messages on automatically processed information:

Nonetheless, it is safe to say that electronic text messages, whether termed as data messages or electronic documents, include information that are machine-processed when they are created, stored, sent, or received via electronic, digital, optic, or any other means that may be used in the future

Whatever term used to label, it is established that electronic text messages are

¹ Art. 2(1), Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a community framework for electronic signatures. EUR-Lex. European Union. 1999. Retrieved 3 August 2014.

² Shamsuddin, A.(2006). Electronic Document Criminal Protection, comparative stud , (1st ed.). Cairo, Egypt, Dar Al Nahda Al Arabia,Pg. 32.

³ Article 1 of Law 15/2004 on regulation of electronic signatures and establishment of authority for development of information technologies.

⁴ The UAE legislator, in this definition, thus means that an electronic message is not described as such unless otherwise it is sent or received via electronic means, regardless of the mean used to produce the message at the place where it is received.

electronically written documents that contain information sent or received via modern electronic means, including social media applications and websites.

3. Rules Regulating Messages as Evidence

Documents are of two types: formal and informal. Formal documents are written or caused to be written by public officers in their capacity to write them. Whenever a document loses the formal capacity, it becomes informal. Examples of official editors such as; Formal marriages contracts, documents authenticated by the official notary and police transcripts

Informal documents are documents written by regular people without a public officer interfering in producing them. Usually, people write informal documents to settle conflicts that may arise. They neither cover undertakings associated with formal documents nor are conditioned to take a specific form.

According to the UAE Federal Law No. (10) of 1992 On Evidence in Civil and Commercial Transactions, informal documents can be of two types: informal documents produced as evidence, which are signed by those who use them as evidence; and informal documents that are not produced as evidence, including messages, which are not conditioned to be signed by the sender. Nonetheless, these messages are given the power of evidence, whether high or low power, as per elements of evidence that they contain.

3.1 Messages and telegrams as an example of informal documents not produced as evidence

Because senders of messages do not take prudent or vigilant measures necessary for any other document originally produced as evidence, and because messages contain very personal matters, judicatures give discretion authority to judges to decide on their binding force as evidence.⁵

Telegrams are given the power of evidence of letters if:

1. The original of the telegram is signed by the sender; and
2. The original of the telegram is deposited at the dispatch office.

Few laws provide for a basic legal presumption that a telegram is deemed true copy unless otherwise the contrary is proved.

In the event where the original telegram is lost, the copy is not assumed evidence but rather informatory, and the telegram is deemed an informal document that can be challenged for forgery.

Article 14 of the UAE Federal Law 10 of 1992 On Evidence in Civil and Commercial Transactions provides that “signed correspondence has the same probative force as an informal document. The same probative force will apply to telegrams if the original, left at the office of dispatch, is signed by the sender; a telegram is presumed to be a true copy of the original until the contrary is proved. If

⁵ Ramadan, S. (2007). Responsibility arising from breach of confidentiality, (1st ed.). Cairo, Egypt, Dar Al Nahda Al Arabia, P.26.

the original of the telegram does not exist, the telegram will be regarded as merely informative.”

3.2 Probative force of messages as evidence

Although messages are not originally produced as a mean of evidence for what they contain of personal matters, they have the binding force of evidence that varies according to whether the message is signed or not signed by the sender. ⁶

If a message bears the sender’s signature and contains information, the provisions of informal documents that is signed are applicable to such message, according to the UAE law.⁷

Here, messages need to be differentiated in terms of their binding force over the sender, over the recipient, and over third parties.

First: Binding force of messages over the sender

Messages have a binding force over the sender in two folds:

1. In terms of that they are produced by the sender when they are signed, without challenging authenticity of signature or handwriting.
2. In terms of the message content: all information provided for in the message are a binding force on the sender.

Second: When is it appropriate for the recipient to hold on to the content of a message as evidence?

The recipient may hold on to the message sent by the other litigant when it contains information that support the recipient’s position in litigation, for example, it includes a clearance or the like. The right to use the message as evidence is transferable to the heirs of the recipient.

Third: Can third parties hold on to a message as evidence?

Third parties in this context mean any person other than the sender, the recipient, or their heirs.

If a message is a proof for an interest of a third party, such party has the right to request to bind whoever possesses the message to present the same to the court or to present the message if such party rightfully possesses the message. If the party possesses the message unrightfully, such party have no right to use the same as a proof.

Third parties may use a message as evidence if:

1. The message is possessed rightfully, and
2. Presenting the message violates no confidentiality of correspondences guaranteed under the constitution. Confidentiality of the message is subject to the discretion of the judge as it is relevant to the subject of the message.

⁶ Rushdi, M. (2013). *The Authenticity of Modern Means of Communication*, (1st ed.). Cairo, Egypt, Dar Al Nahda Al Arabia, P.14.

⁷ This is no different from the Egyptian law. The Egyptian Court of Cassation ruled that messages have the force of evidence (the avowal in the message is extrajudicial, and therefore, in this form, shall be subject to the discretion of the judge, who can sever it, take parts of it, and leave out others.) Appeal No. 546 of 43 Legal, session 28 November 1968.

4. Applicability of Rules Regulating Paper Messages as Evidence to Electronic Messages

It is safe to say that electronic writings and documents originally have the same binding force established for formal writings and documents. A recipient has the right to hold on to the contents of an electronic message as evidence that support the recipient's position in litigation against a sender. That includes an acquaintance, defamation, slander aggression, or other matters that happen in electronic messages.

Postal messages use as evidence is conditional to only being containing evidence against sender beneficial to the recipient or third parties. If a message contains no evidence, it may not be used.

In order for a text message sent via social media networks to have a binding force, it needs to meet specific conditions, some of which are related to its electronic nature, others are common with paper messages.

Conditions of controls over securing electronic documents and trust in authenticity as evidence

These conditions are related to security controls over electronic text messages and putting in place regulations that ensure authenticity so that it can be used as evidence. These conditions are necessary because of the differences between electronic evidence and paper evidence in terms of ability of parties to an electronic exchange to introduce changes (additions and deletions) to the content of such evidence without leaving behind any material trace of such changes.

According to the UNCITRAL Model Law on Electronic Commerce (1996), these conditions can be met if text messages are maintained and their contents are accessible so that they can be used later in the same form in which they are created, sent, or received or in the same form that can be proved to be accurately presenting the information that are created, sent, or received.⁸

In the same context, the French legislator affirmed the same in Article 1316/2, providing that in order for an electronic document to have the binding force of paper documents, it needs to have integrity.⁹

In addition, electronic document must be trusted in terms of being free of alterations or omissions. This condition is not exclusive to electronic documents. It is consistent with the well-known traditional evidence where the original of the paper evidence is required.¹⁰

An electronic message can be trusted because it has double records, one on the phone or device of the sender, and one on the phone or device of the recipient. This is where the principle of trust in a message is originated as an element of evidence. A

⁸ Article 10, UNCITRAL Model Law on Electronic Commerce (1996).

⁹ L. Grynbaum, LA PREUVE LITTÉRALE. - Dispositions générales. - Écrit électronique, Fasc. 10, Juris Classeur Civil Code, 19 décembre 2011, N28.

¹⁰ Les décrets n° 2001-272, du 30 mars 2001 (Journal Officiel 31 mars 2001, n° 77, p. 5070. - H. Bitan, Un décret fixe les conditions de fiabilité de la signature électronique : Comm. com.électr. 2001, chron. 19. - L. Jacques, Le décret n° 2001-272 du 30 mars 2001 relatif à la signature électronique : JCP G 2001, act. p. 160.

message as evidence is trusted because of the technical feature that renders it unusable without the knowledge of the person against whom it is used.¹¹

In a different context, in case the purpose of presenting an electronic message is proving a contractual relationship, there should be a proof of receipt of the electronic message, as well as a proof of place and time of the electronic contract. An electronic message is deemed sent by the sender, where the recipient acts on such assumption, if it is sent by the sender or by a person acting on behalf of the sender, or otherwise if the recipient uses an electronic information system that is agreed upon with the sender for such purpose. In the event where a sender conditions the impact of an electronic message to the confirmation of receipt by the recipient, the message is deemed undelivered until receiving such confirmation. If the sender requests in the electronic message a receipt confirmation from the recipient or otherwise both parties previously agreed to do so, then any action by the recipient, either by confirming receipt to the sender via electronic means or via any other mean, or by doing an action indicating the receipt of the electronic message, is deemed a response to such request or agreement unless otherwise the sender and recipient agree that the confirmation must take a specific form.

A receipt confirmation of an electronic message sent by the recipient to the sender is never a proof that the contents of the message received by the recipient match the contents of the same message sent by the sender unless otherwise the confirmation covers the content of such message.

The time a message is received is the time of the message entering any electronic system at the recipient end, even if the recipient never actually read it.

To put this into effect, the Egyptian Court of Cassation ruled a very significant judicial principle that the binding force of electronic messages is conditional to definite time and date of messages and that their source can be technically verified. Other than that, these messages have no binding force. This principle is unconventional given that electronic messages may neither be legally dismissed, nor the originals thereof are requested for submission. They can only be challenged for forgery.

5. Challenges to Binding Force of Electronic Messages Sent via Social Media Networks as Evidence

It is legally established that letters and telegrams are originally not valid as evidence due to their confidential contents and personal matters, especially when many constitutions establish that postal and telegram communications¹², as well as phone calls and other communication means, have special sanctity. Their confidentiality are guaranteed. They may be neither confiscated, accessed, nor controlled without a judicial order according to the law.

¹¹ Abdul Sadiq, M. (2016). Social Networks and Risks of Violation of the Right to Privacy, Cairo, Egypt, Dar Al Nahda Al Arabia. P.73.

¹² Such as article 40 of the Egyptian Constitution, article 31 of the UAE Constitution and article 40 of the Saudi Constitution.

The UAE law, and other laws, dedicates an article that establishes the binding force of evidence to postal letters and telegrams and assigns to them the force of informal documents if they are signed by the sender.

Every human has the right to privacy protected against all violations. This right to privacy covers communications pertaining to all matters, including family, home, contacts, and anything related to honor and reputation. Any intervention to privacy must be subject to and governed by law.

Therefore, when messages are used as evidence, despite their private, personal content, and these messages have no intended evidence, then whoever uses such messages is liable under laws and constitutions to the penalty of violating sanctity of messages.

There must be no conflict between laws on evidence that messages are a binding force from one hand, and provisions of constitutions that messages and telegrams have special sanctity on the other.

In this regard, the Egyptian Court of Cassation ruled, “sanctity and privacy guaranteed to postal messages under Article 45 of the constitution is relevant to the messages in possession of postal services. However, after being delivered to and received by the recipient, the recipient and other parties may use them as support or evidence, unless otherwise they contain confidential information under protection of laws or senders.¹³

Based on that, messages are originally not intended as evidence for their private and personal content. A message is an informal document attributed to the sender when it bears the signature of the sender and contains information.

Nevertheless, it is in the best rightful interest of the recipient to hold on to the message sent by the other litigant as evidence that support the recipient’s position in litigation with the sender when the message contains information that support the recipient’s position in litigation. That includes an acquaintance, defamation, slander aggression, etc. The right to use the message as evidence is transferable to the heirs of the recipient.

It is worth noting that the judicial system in France correlates between confidentiality of communications and the theory of personal rights, which is the base for protecting the concerned person. The idea freely expressed by the writer of the message is independent from the person who writes it. However, such message may not be published or disseminated if its nature is confidential.

Here, a question arises. How to address the conflict between the sender’s right to privacy and the recipient’s right to evidence contained in the message sent to the recipient?

To answer this question, it is safe to say that courts have never reached a general rule to decide on whether or not a message is confidential. It is purely subjective, and the subject judge ultimately has the discretion to decide whether or not a message is private and confidential, and that publishing leads to great harms due to the

¹³ Appeal No. 763 of 43 judicial, hearing 26 May 1980.

surrounding circumstances or leads to harms to the person who writes it him/herself. Considering the right to keep confidentiality of communications as private rights results in correlation to legal characteristics related to such right. It is non-obsolete, non-disposable, non-waivered right because it is a non-financial right itself.

Similarly, it is established for a person other than the recipient to refer to the message if it contains an interest for a third party (a person other than the sender and the recipient). In this case, the third party may ask whoever possesses the message to present the same to the court. The third party him/herself may also present such message as evidence if he/she rightfully possessed the message. If the message is unrightfully possessed by a third party, such message may not be used as evidence, otherwise, presenting such message leads to breach of confidentiality of communications.¹⁴

Moreover, by applying such general rules of electronic text messages, including messages sent via social media networks, we find that because senders of messages do not take prudent or vigilant measures necessary for any other document originally produced as evidence, and because messages contain very personal matters, judicatures give discretion authority to judges. The judge then values the message as evidence. The Egyptian Court of Cassation ruled that “a contract is reached by establishing offer and acceptance in one document. If the judgment is based on proving vessel chartered based on sequence of telegrams and letters exchanged between parties, and on its conclusion that the charter is accepted, the judgment reached on the basis of proved chartering is in no breach of law.”

May the recipient disclose a message to third parties?

Privacy protection of the sender raises an issue about the permissibility of the recipient publishing a message sent via social media networks.

The justice system and jurisprudence affirm respect of privacy of undisclosed information and data of private lives of individuals. The jurisprudence associates respect of private lives to undisclosed private events and confidentiality. It termed out the confidentiality of private lives, which is the right of individuals to keep confidential of all news and information originated from the freedom to live a private life.

It is noticeable that the justice system and jurisprudence reaffirm that confidentiality is essential for private lives. This is reflected in the conclusion made by the Constitutional Council in France about associating violation of confidentiality with aggression on private lives. The French judicial rulings also aligned with such direction by considering violation of confidentiality as an aggression on privacy.

In the same context, the Egyptian Court of Cassation ruled that the acknowledgement provided for in the letter is unjudicial, and therefore is subject to the discretion of judge who can sever it, take parts of it, and leave out others.

¹⁴ Annie Blandin, Gilles, (2011, Juin) *Dedessus le Moustier et Ludovic Lombard Reseaux sociaux et droit project URSO, Etude mencee par Telecom Bretagne*, p.12.

It is also worth noting that legal issues and challenges related to the binding force of messages sent via social media networks are not regulated under any international treaties despite the international nature thereof.

6. Conclusion

This paper addresses legal issues related to text messages sent via social media networks and concludes that such messages are subject to the same legal rules regulating paper messages in terms of their acceptability as evidence. However, due to their electronic nature, there are additional conditions associated with accepting such messages as evidence.

This paper also addresses challenges of how to strike balance between the right of the plaintiff to evidence and the right of the sender to privacy. It is clear now that there are no criteria that can achieve such balance. Whether a message is confidential or not is left to the judge's discretion, as confidentiality is a current matter and is left to the discretion.

The paper addresses the issue of disclosing messages either by social media networks or by making them accessible for third parties.

It is concluded that legal issues related to the binding force of messages sent via social media networks as evidence and the challenges in this regard are not regulated by international treaties despite the international nature of such issues. It is imminently important that an international treaty be reached to regulate the issue of evidence related to text messages sent via social media networks, more especially in terms of contractual relationships.

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