

## CHAPTER 3

### THE EXISTING LAW ON THE APPLICATION OF DIGITAL DOCUMENT

#### 3.1 Introduction

This chapter discusses the second research question, which is the use of digital documents that existing law provides for the acceptance of digital documents as evidence under the Syariah and civil courts. This section will also discuss cases related to provisions in the acceptance of digital documents in court. The final section will analyse the legal basis in the use of digital documents.

Digital documents are one of the types of evidence widely used in Malaysia and their usage is growing in both the civil and Syariah courts. According to Mursilaili Mustapa (2020), in both civil and criminal cases, the evidence should not only be legally relevant, but should also be significantly credible or else it will require corroboration. The admissible evidence could be oral or documentary. Documentary evidence is now frequently created or transmitted electronically.

As a result, to verify the validity of a digital document, it should be assessed in such a way as to prevent the evidence from being tampered with or altered, by applying processes for the admissibility of digital evidence in the civil court. The need for digital documents to be applicable and trustworthy in court are key elements of their admissibility as evidence.

#### 3.2 The Law of the Digital Document under the Malaysian Civil Court

In Malaysian court proceedings, the admissibility of digital document as primary evidence was recognized. In the age of globalisation, the use of digital documents fulfils

the demand of the world. On the other hand, the based rules can resolve concerns with digital evidence (Granja & Rafael, 2017).

Digital documents are admissible as documentary and main evidence in Malaysia under Section 3 and 62 of the Evidence Act 1950 [Act 56]. Computer means according to Section 3 of the Evidence Act 1950 [Act 56]:

“Any device for recording, storing, processing, retrieving or producing any information or other matter, or for performing any one or more of those functions, by whatever name or description such device is called; and where two or more computers carry out any one or more of those functions in combination or in succession or otherwise howsoever conjointly, they shall be treated as a single computer.”

The Evidence Act of 1950 broadens the definition of the term "computer" by considering the capabilities of the device. Any device that is capable of recording, storing, processing, retrieving, or generating information is considered a computer. A single computer is defined as any networking or combination of functions between two or more computers (Mohamed, 2011).

For instance, as we know, Section 3 Evidence Act 1950 [Act 56] recognised and regarded many computers as a single computer when they were used in its production (Mohamad, 2019). In the case of *PP v Hanafi Mat Hassan*, an electronic bus ticketing machine, a thermalcycler, and a DNA analyser were ruled to be devices for recording, storing, and creating information within the jurisdiction of the definition of computer in Section 3 Evidence Act 1950 [Act 56] (Radhakrishna, 2016).

Besides, in Section 62 of the Evidence Act 1950 [Act 56] stated:

“Primary evidence means the document itself produced for the inspection of the court.

Explanation 1—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the contents of the original.

Explanation 3—A document produced by a computer is primary evidence”

Furthermore, Section 62 of the Evidence Act 1950 [Act 56] defines primary evidence as "the document itself produced for the investigation of the court," and Explanation 3 of the section states that "primary evidence" includes "the document itself produced for the court's investigation."

In the case of *PP v N* [2020] 1 LNS 1106, this case concerns a rape incident that occurred in Trong, Taiping, in February 2016. Both the accused and the victim were child, as befitting a court of children. The offender N, who was 15 at the time of the occurrence and was a child, reportedly raped the victim, who was also a child, at her home in Trong. The medical report must be produced in court for review as primary evidence, according to section 62 Evidence Act 1950. The testimony of victim, on the other hand, is less credible in view of the gaps and inconsistencies. As a result, the order of acquittal and discharge has been confirmed.

Then, in the Section 63 of the Evidence Act 1950 [Act 56] have mentioned regarding the secondary evidence, which are:

Secondary evidence includes—

- (a) certified copies given under the provisions hereinafter contained;

(b) copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(c) copies made from or compared with the original;

(d) counterparts of documents as against the parties who did not execute them;

(e) oral accounts of the contents of a document given by some person who has himself seen or heard it or perceived it by whatever means.

This section discussed documentary evidence that can be used as secondary evidence in court, such as certified copies, mechanical copies, copies made from or compared to the original, contemporaries of documents against parties who did not execute them, and oral accounts of document contents given by someone who has seen or heard the document or whatever techniques were used to see it. In placing more emphasis, primary evidence is an oral statement of the original evidence or a witness who witnessed something and reports it to the court, or the original document itself or the original thing when presented in court. A report or an oral account of the original evidence, a copy of a document, or a model of the original thing is considered secondary evidence. It also added that secondary evidence should not be accepted unless there is a compelling justification for the non-production of the original. (Sarkar & Awatshi, 2001).

Section 90A, 90B, and 90C of the Evidence Act 1950 [Act 56] govern the admissibility of the digital document as evidence in Malaysian courts. Section 90A of the Evidence Act 1950 [Act 56] with seven subsections that contained the admissibility of documents produced by computers have stated:

(1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or

not the person tendering the same is the maker of such document or statement.

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

(3) (a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.

(b) A certificate given under subsection (2) shall be admissible in evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate.

(4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

(5) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention.

(6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

(7) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the person who is charged with an offence in such proceeding the person so charged with the offence being a person who was—

(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or

(b) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

A computer-generated document, or a statement contained therein, may be admissible as evidence of any fact stated therein in any criminal or civil proceeding if the document is presented by a computer during normal use, and the person offering the document or statement is also the maker of the document or statement, according to Section 90A (Radhakrishna, 2012). It can be seen in the case of *PP v Azilah Hadri & Anor* [2012] 1 CLJ 358 refd(4) admitted that call logs from a mobile phone were taken, based on a comprehensive description by Celcom's engineer on how the call logs were extracted. Similarly, in *Lim Pang Cheong v Tan Sri Dato' Dr Rozali Ismail & Ors* [2012] 2 CLJ 849, text messages were deemed to meet the requirements of section 90A (1) after being confirmed by the oral testimony of relevant witnesses (Radhakrishna, 2016).

While in the Section 90B of the Evidence Act 1950 [Act 56] regarding the weight to be attached to document, or statement contained in document, admitted by provide of section 90A, stated:

“In estimating the weight, if any, to be attached to a document, or a statement contained in a document, admitted by virtue of section 90A, the court—

(a) may draw any reasonable inference from circumstances relating to the document or the statement, including the manner and purpose of its creation, or its accuracy or otherwise;

(b) shall have regard to—

(i) the interval of time between the occurrence or existence of the facts stated in the document or statement, and the supply of the relevant information or matter into the computer; and

(ii) whether or not the person who supplies, or any person concerned with the supply of, such information or the custody of the document, or the document containing the statement, had any incentive to conceal or misrepresent all or any of the facts stated in the document or statement.”

Similarly, section 90B specifies the weights that must be applied to relevant computer evidence, permitting the court to make any reasonable inference from the circumstances of a document or statement, such as its creation method and purpose, or its accuracy or otherwise. This comprises the document's construction technique and purpose, as well as its originality. The section has specified the timeframe between the existence or presence of the facts stated in the document or statement and the input of the relevant data or information into the computer; and if the person providing such information, or anyone connected with the provision of such information, or the storage of the document, or the document containing the statement, has any motive to conceal or distort all or any of the facts stated in the document. Furthermore, according to Radhakrishna (2016), this section addresses the weight or admissible in court value that should be given to a document or statement included in a document accepted under section 90A. The clause is critical to understanding the purpose of section 90A of Evidence Act 1950.

In the Section 90C of the Evidence Act 1950 [Act 56] stated:

“The provisions of sections 90A and 90B shall prevail and have full force and effect notwithstanding anything inconsistent therewith, or contrary thereto, contained in any other provision of this Act, or in the Bankers’ Books (Evidence) Act 1949 [Act 33], or in any provision of any written law relating to certification, production or extraction of documents or in any rule of law or practice relating to production, admission, or proof, of evidence in any criminal or civil proceeding.”

Section 90C, on the other hand, provides that sections 90A and 90B have full power and authority despite anything in this Act that is inconsistent with or opposed to them, or in the Bankers' Books (Evidence) Act 1949, or in any rule of law. -laws or procedures dealing to the production, processing, or proving of evidence in any criminal

or civil proceeding, or any provision of written legislation dealing to document certification, production, or extraction.

In Malaysia, expert witnesses play a major and key feature in the trial of actions. Expert evidence is used in most civil and criminal cases now being contested. Most witnesses are only allowed to testify about facts under the law, but expert witnesses are the only individuals who are allowed to testify about their opinions (Rajamanickam & Abdul Rahim, 2014). In addition, according to Ariffin and Ishak (2008), the Malaysian Evidence Act 1950 [Act 56] does not specifically address the issue of the admissibility of the digital document as evidence. However, in relation to the admissibility of expert evidence under the Act, the acceptance of the digital document may be easily allowed.

In Section 45 of the Evidence Act 1950 [Act 56] stated:

“(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.

While the illustration is:

(a) The question is whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died are relevant.

(b) The question is whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The opinions of experts upon the question whether symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. The opinions of experts on the question whether the two

documents were written by the same person or by different persons are relevant.”

According to Wan Ismail et al. (2015), expert opinions or forensic experts are frequently called to in civil courts to aid judges in making fair judgements, including assessing record validity. This is because expert testimony is far more convincing than other types of proof. In the case of *PP v NG Cheng Hui* [2021] 1 LNS 1045, under the Dangerous Drugs Act of 1952, the accused was charged with and prosecuted for trafficking in dangerous drugs. The prosecution called the Chemist to testify about the first ingredient, saying that the examination of the drugs found revealed hazardous narcotics of the type Methamphetamine weighing 271.65 grams, as listed in the First Schedule of the Dangerous Drugs Act 1952. This Court is further satisfied that Chemist is duly competent to give his evidence as a Chemist and thus as an expert under Section 45 of the Evidence Act 1950 [Act 56] because the defence did not make any objections or present any evidence to challenge or dispute the expertise of the Chemist.

In courts, determining the relevance and credibility of electronic evidence is extremely difficult. As a result, appropriate security measures need be implemented to maintain the document to be authentic. As shown in legal proceeding described above, who produces digital, or computer evidence must either produce a certificate guaranteeing the validity of the evidence or call a witness to offer oral testimony or ask the expert opinion on the evidence or document presented in court. In the case of *Hanafi Mat Hassan v PP* [2006] 4 MLJ 134. This was a rape case in which the victim was sexually assaulted on a bus. On the basis that the bus ticket purchased by the victim was not made by a computer, the defence objected to the prosecution presenting it.

Augustine Paul (2010) stated that if the clause in Section 90A (2) is applied, the ticketing machine might be considered a computer. It is also possible to say that the bus

ticket was created using standard computer software. He went on to clarify that if the bus ticket was not produced in the regular course of business, Section 90A (6) gives a solution for that as well. Based on case *Gnanasegaran a/l Pararajasingam v PP* [1997] 3 MLJ 1, the ticket bus and DNA profiling result that inadmissible before, were accepted as evidence.

### **3.3 The Law of the Digital Document under the Malaysian Syariah Court**

Recently, several research has been conducted on digital documents as a form of evidence in civil courts. However, previous authors still need to adequately achieve studies on the rules, particularly in the Syariah court, regarding the admissibility of digital documents. According to Wan Abdul Fattah et al. (2019), there were no specific debates on the admissibility of digital document as evidence generally. Document verifications from previous cases are not merely proper research; it was supported by the holy Quran, hadiths and the practise of the companions RA.

In Islamic law, digital evidence is permissible in some circumstances if it is genuine and authentic. Although this evidence has different names than conventional evidence, they share several similar qualities. They are also quite fragile and could be highly manipulated. As a result, the issue of the digital document authenticity is significant as evidence (Mursilalaili Mustapa, 2020).

According to Mursilalaili Mustapa and Abdul Rani (2020), digital evidence was provided, admitted and used in court to determine whether a defendant is innocent or

guilty should be verified to protect the innocent and punish the guilty. The problem arises when the Syariah court has yet to be exposed to the challenge of digital document forgery and authenticity, which might have an indirect effect on decisions and judgements. Therefore, we should verify and produce strict guidance for legal practitioners and Syariah judges.

In placing more emphasis, the difficulty of using a digital document as evidence derives from problems in its trustworthiness, relevance and authenticity. Another debate is whether or not the digital document is accepted in Islam as well as how it functions. The admissibility of digital evidence as evidence in a court of law could be questioned due to the weight or trustworthiness of the evidence provided during a trial. Through relevancy and trustworthiness, these crucial elements affect the admissibility of digital document as evidence (Paul, 2010).

Generally, in the Syariah courts, a summary of this digital document is used in Malaysia to assist in divorce, marriage declaration and *nafkah* proceedings. Digital evidence is also employed in the investigation of Syariah offences, such as accusations of unlawful intercourse and *khalwat* (Wan Abdul Fattah et al., 2020), as in the case of *Ahmad Faozi Bin Mansor vs Norhafzah Binti Ahmad*, file case no: (14002-058-0001-2004).

Although the Syariah rules of digital documentary described did not state the definition or admissibility of this evidence, it is a type of description that is particularly important in the context of proving cases of mal and Syariah offences. This is because such digital documents support the reinforcement of facts or evidence (Wan Abdul Fattah et al., 2019).

The judge will depend on the evidence and analyse whether it is weak or strong, according to Section 3 and Sections 5–16 of the Syariah Courts Evidence (Federal Territories) Act 1997 [Act 561] and other sections of the Syariah Courts Evidence Enactments. If there is any doubt, an expert in digital forensics should authenticate the evidence by referring to Section 33 of the Syariah Courts Evidence (Federal Territories) Act 1997 [Act 561]).

Documentary evidence is just as important as *al-bayyinah* and as part of the *fiqh jinayat* in attempting to prove the digital document as evidence. It is necessary for Muslims to justify justice according to the holy Quran and Sunnah (Saharudini et.al, 2019). Most of the time, the objective of using a digital document as evidence is not stated clearly in the holy Quran or al-Hadith. The admissibility of the digital document as evidence relates to a broad range of evidence acceptance (Wan Abdul Fattah et al., 2018). Moreover, Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] defined the meaning of *al-bayyinah*:

“*Bayyinah* means evidence, which proves a right or interest and includes *qarinah*.”

According to the definition of *al-qarinah*, “anything that has a meaning that is drawn from terminology, situations, acts, or omissions that appeared under Section 3 and Sections 5-16 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] and other parts of Syariah Courts Evidence Enactments”. Furthermore, digital evidence can be used to transport data to a disc or hard drive to clarify a specific issue (Wan Abdul Fattah et al., 2015).

Digital evidence is a type of primary evidence and also an element of documentary evidence. Nevertheless, digital evidence is a part of the admissibility of

*al-qarinah* in Islamic law and it can be used as evidence in judicial situations since it is circumstantially legitimate as significant facts. Besides, the meaning of document can be found in Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561].

Therefore, digital documents can be classified as documents under Section 3 of the Syariah Courts (Federal Territories) Evidence Act 1997 [Act 561]. Generally, document descriptions are any documents submitted in court as evidence of a claim, accusation, or defence. Digital document descriptions are documents that are created using electronic devices as a medium.

According to Mohamad Khairudid and Ahmad (2019), digital forensics is linked to Islamic law of evidence to provide justice in the provision of judgement. As a consequence, digital forensic professionals provided a framework for the acceptance of digital documents as evidence, particularly in Syariah courts. In the case of *Halijah binti Abdul Rahman v Zambree bin Baharom* [2009] 1 CLJ (SYA) 402, the defendant used a mobile phone to send a short messaging service (SMS) for divorce on 12 January 2008. Unfortunately, the woman broke the *taklik* on 13 March 2008. The Port Dickson District Syariah subordinate court found both parties guilty of divorce after hearing their arguments. Even if the husband did not plan to divorce his wife, it was permissible to establish that SMS was used as proof of divorce in this scenario. Based on the judgement, the researcher believed that SMS was one of the digital documents that might be accepted as proof to improve the case conviction in the Syariah court. This shows that the Syariah courts have been using digital documents as evidence in courts, such as receipts, phone bills, photos, closed-circuit television (CCTV) and others since 2004 (Wan Abdul Fattah et al., 2021b).

A forged document is one of the barriers to admitting a digital document as evidence. As a result, the court acknowledged the importance of appointing an expert to investigate the relevance of digital evidence. Furthermore, legal practitioners should identify the approaches used by forensic experts for verifying digital evidence during the authentication process, as it is critical to establish a legal forensic standard for Syariah court legal proceedings (Wan Abdul Fattah & Asutay, 2017).

Therefore, digital evidence should be supported by other evidence, such as expert's opinion, as stated in Section 33 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]. The objective is to achieve an expert's approval of the digital document admissibility in court. Section 33 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] is as follows:

“(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger impressions, or relating to determination of *nasab*, the opinions upon that point of persons especially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting, or finger impressions, or relating to determination of *nasab*, are *qarinah*.

(2) Such persons are called experts.

(3) Two or more experts shall be called to give evidence where possible, but if two experts are not available, the evidence of one expert is sufficient. If two experts give different opinions, a third expert shall be called to give evidence.

It is illustrated as follows:

The question is whether a certain document was written by A. Another document is produced, which is proven or admitted to have been written by A.

The opinions of experts on the question of whether the two documents were written by the same person or by different persons are *qarinah*.”

After being validated by a digital expert (*ra'yu al-khabir*) to verify the trustworthiness of the document issued, the evidence presented by this digital document is admissible in a Syariah court (Wan Abdul Fattah et al., 2019). Section 33 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] provided the type of testimony used to confirm the admissibility of digital document in Syariah court. The admissibility of digital description was uncertain in the matters of Ajmawati's divorce claim in the case of *Ajmawati binti Atan v Moriazi bin Mohamad* [2005] 1 CLJ (SYA) 415, resulting in the case being ordered to be heard again with the submission of supporting witnesses. The evidence was also admissible in court if it was backed up by an expert's testimony that verified the authenticity of the document.

Additionally, the courts usually examine identical copies if the original digital document was destroyed; therefore, the parties should verify the copies' legality and originality (Mountrakiks & Ionno, 2019). Consequently, Section 50 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] discussed the use of secondary document. It stated that:

“Secondary evidence includes:

- (a) certified copies given under the provisions hereinafter contained;
- (b) copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies;
- (c) copies made from or compared with the original;
- (d) counterparts of documents as against the parties who did not execute them;
- (e) oral accounts of the contents of a document given by some person, who has himself seen or heard it or perceived it by whatever means.

It is illustrated as follows:

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared if it is proven that the photographed item was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original is secondary evidence, but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.”

According to Syariah law studies, the Syariah court recognises the use and admissibility of digital documents as a method of proof. According to the findings, the numerous cases reported about the admissibility of digital documents as evidence indicated that this type of proof is beginning to be accepted in the courts.

As seen in the legal proceeding above, digital evidences were clearly admissible and recognised in Syariah courts. The admissibility is limited to situations involving family or personal matters, such as marriage, divorce and child support. Briefly, although the acceptability of documents generated by conventional or electronic means is not an issue, there are conflicts over how to prove their authenticity with the abovementioned provision.

### **3.4 Conclusion**

Technology has the potential to transform the landscape as well as the technique of establishing computer evidence. As a result, the laws should be able to maintain with

technological advancements. There may be more complex issues in the future, making tracing electronic or computer evidence more challenging.

In conclusion, the findings showed the importance of the existing law on the use of digital document as evidence, particularly in court cases, as previously discussed. In general, there are specific provisions under the Syariah law and civil law regarding the acceptance of digital document as evidence in court. However, legal practitioners should have implemented the rules from the civil law to the Syariah court. There were many cases involving digital documents in the Syariah courts, but most were limited cases. This is the gap of differences in the existing provisions related to digital document as evidence under Syariah and civil laws. In the next chapter, the researcher will analyse the rules in admitting digital document as evidence in the Malaysian Syariah court compared to the civil court process.