

CHAPTER 2

THE CONCEPT ON THE ADMISSIBILITY DIGITAL DOCUMENT IN CIVIL AND SYARIAH COURT

2.1 Introduction

This chapter explores the general view of digital document as evidence from both Syariah and civil basis. The following chapter explains how far digital document could be used as evidence in both the Malaysian Syariah and civil courts. Furthermore, the researcher addresses the concept of digital document in Malaysian legislation.

Several digital evidence issues emerged in previous decades, whereby people began using technology to store information and data electronically and then recovered them for some reasons (Wan Abdul Fattah et al., 2020). According to Wan Abdul Fattah et al. (2021b), the need for a digital document as evidence is designed to strengthen other forms of proof.

Thereafter, the court will analyse whether digital evidence is required or admissible in a procedure involving digital evidence based on the admissibility requirements established in the current law legislation and the availability of any procedures (Mohamad Khairudid & Ahmad, 2019). Therefore, it is necessary to verify that the digital evidence used in information and communication technology is as accurate as possible in storing information. It is also important that information or data can be extracted from the equipment in a method that ensures its validity.

2.2 General View on the Admissibility Digital Document as Evidence in Malaysian Legislation

In Malaysian court cases, digital document was ruled to be admissible as documentary and primary evidence. In this age of globalisation, the utilisation of digital documents meets the region's demand. However, the suggested method in the admissibility of digital document should be capable to address the issue relating to digital evidence. The issues will not be handled adequately if nothing improves in terms of resolving digital evidence problems, particularly those connected to operations and the economy.

The meaning of document in the Essential Law Dictionary is a piece of written, recorded, printed, or photographed information or evidence; a physical object or instrument on which information is recorded in letters, numbers, symbols, or images, including maps, letters, photographs, prints, x-rays, contracts, deeds, receipts, accounts, etc. Nowadays, digital evidence is extremely significant and becoming a wide-ranging issue, such as crimes committed, movement of suspects and criminal associates for investigation and prosecution on various types of crimes.

In today's information and communication networks, digital evidence is becoming more frequent and is mostly used by organisations to store, obtain and share relevant digital documents as legal evidence in investigations, inquiries and prosecutions (Volonino, 2003). In placing more emphasis, Mohamad Ismail (2013) stated that electronic and digital evidence is generally considered relevant and authoritative as evidence in many other national legal frameworks.

Additionally, in Malaysia, there are many cases relating to the admitting of digital evidence in court. Because of the increased use of digital content, the amount of digital evidence used as evidence has increased significantly. As a result, any lawyer should look at digital data sources to see how data is created, stored, transmitted, destroyed, or removed (Volonino, 2003). The admissibility of digital documents as evidence in the Malaysian courts is also allowed by Syariah courts, and it is commonly used in the civil courts, as the legal standards for such evidence are less stringent (Duryana & Zulfakar, 2014).

The number of cases related to digital documents is quite surprising as it continues to increase. Judges have a role in ensuring the reliability, accuracy and authenticity of digital documents, as evidence. Therefore, the court needs to ensure that the judge has the integrity to understand and practice the procedure as prescribed to ensure that the judge is prepared to carry out the functions of the procedure. It is because it aims to ensure judges are qualified to justify cases related to digital documents as evidence and improve justification in the court itself. Therefore, judges should receive digital documents in court by verifying the relevance of the evidence before appearing in court.

Acceptance of digital documents as evidence is based on two criteria, which are applicability and reliability. Since any evidence from digital documents may be connected to many more computers and networks and may be tampered, this issue becomes tough. It is considered that technology can reinforce the law's effectiveness, and without such reinforcement, it would either become a blank text or be poorly served by classic judicial procedures that are neither rapid nor effective (Duryana & Zulfakar, 2014). The weight or dependability of the evidence might be used to dispute the acceptance of the proof.

Moreover, the distinction between validity and admissibility has yet to be acknowledged by courts or lawyers, especially regarding computers that produced documents and became digital documents (Radhakrishna, 2012). Therefore, the admissibility of digital documents depended on the approval from legal experts and judges in court to support legal practitioners, who dealt with digital evidence during the court proceeding.

2.2.1 In Civil Law

Documentary evidence, which is generated and transferred electronically, is now relatively straightforward. As a result of improvements in science and technology as well as changes in human behaviour, digital documents have become one of the most common types of documents in our daily lives. Computers are one of the technologies for storing data or information. This information may be accessed later for a specific reason. The information contained in the printed copy is admissible as evidence in Malaysian courts (Duryana & Zulfakar, 2014). In addition, Hamid and Mainoonah (1993) stated that the term 'documentary evidence' refers to evidence brought to the knowledge of the court through examination.

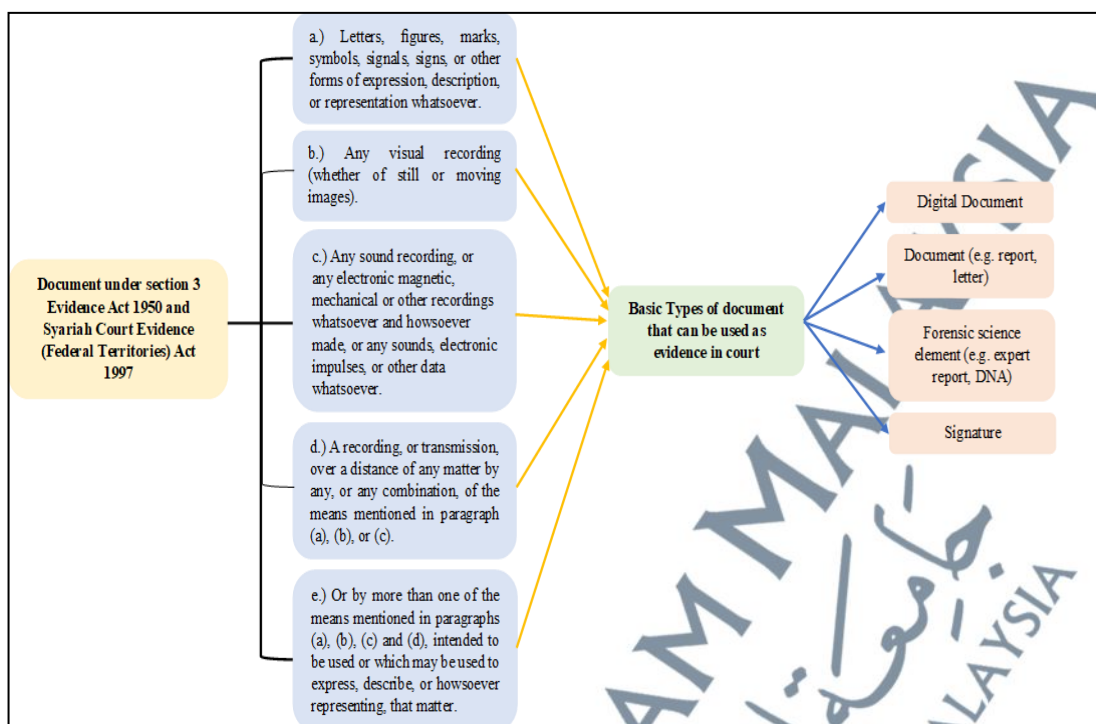
According to Sarkar and Awatshi (2001), documentary evidence addresses three main issues. First and foremost, there is an issue of proving the substance of the documents. Secondly, it needs to be clarified how the document authenticity will be

established. Finally, there is the question of how far and in what situations recorded evidence precludes oral evidence.

Buckland (1998) claimed that each technology has its own set of strengths and limits. Therefore, it should be comprehended that the functional character of a document may be inferred that it will be referred to as documents in both digital and paper systems.

In the civil court, digital evidence is computer-generated evidence under Section 3 of the Evidence Act 1950 [Act 56].

According to the case of *Chin Seow Noi v PP* [1994] 1 SLR 135, whereby Yong Pung How CJ said (page 156), “The use of the single word ‘includes’ in Section 3 is clearly intended to make the definition of ‘evidence’ an extensive one: Within the context of our Evidence Act, ‘evidence’ may thus be given not just the narrow statutory meaning explicitly spelt out in Section 3 itself, but also, where applicable, its ordinary, popular and natural meaning”. In other words, the scope of admissible evidence as provided for in the Malaysian Evidence Act 1950 [Act 56] is considerably broader. Reference to this regard can be made to the case of *Dilworth & Ors v Commissioner of Stamps* [1899] AC 99, [1895-99] All ER Rep Ext 1576; *Corporation of Portsmouth v Smith & Ors* (1883) 13 QBD 184; *Lee Yuan Kwang & Ors v PP* [1995] 2 SLR 349; and *Noliana Bte Sulaiman v PP* [2000] 4 MLJ 752.



Source: Wan Ismail et al., (2020)

Figure 2.1:Section 3 of the Evidence Act 1950 [Act 56] and the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]

Based on Figure 2.1, the definition of document in Section 3 includes digital documents as a type of document. Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] was based on this Act, which has been used in civil court for a long time. It could be more emphasised (Radhakrishna, 2012), that Section 3 defined a document as follows: any written words that are printed, lithographed, or photographed; a map, plan, graph, or drawing; a drawing, painting, image, or caricature; a photograph or a negative; an inscription on wood, metal, stone, or any other substance, material, or thing; photographic or other visual recording, particularly a recording of a photographic or other visual transmission over a distance; a thing that is captured, saved, analysed, accessed, or produced by a system.

According to Mohamed and Ramlee (2014), the term ‘digital system’ encompassed more than just electronic evidence, while the term ‘digital document’

focused on technical terms. This means that digital evidence is limited to evidence made with digital media; however, it includes mobile phones, digital audio and video, giving it a broader scope of digital evidence. Generally, digital documents are one of the most common types of actual evidence procedures used today, and they are produced electronically using a computer or machine (Ani Munirah, 2019).

The Malaysian Evidence Act 1950 [Act 56] was amended in 1993 to allow the admission of computer-generated evidence based on a joint court decision that digital documents were admissible as evidence under evidence law. The Malaysian legal framework for evidence was established by the Evidence Act 1950 [Act 56]. Furthermore, any section of the Evidence Act 1950 [Act 56], which refers to the admissibility of digital documents as evidence will apply (Radhakrishna, 2016). Therefore, Malaysian law of evidence is based on the Evidence Act 1950 [Act 56]. Furthermore, the admissibility of digital documents as evidence will be governed by any Act of the Evidence Act 1950 [Act 56]. Electronic records created from this device are admissible as evidence in Malaysian courts under Section 90A, Section 90B and Section 90C of the Evidence Act 1950 [Act 56].

Digital evidence is becoming more effective for prosecuting crimes in court due to significant advancements in the science and technology world. Digital documents that can be used in court as evidence are known as digital evidence. In Malaysian court proceedings, the digital document was found to be admissible as documentary and main evidence. In today's information and communication technology, digital evidence is becoming more common. Moreover, companies across the world are using it to save, retrieve and communicate relevant digital data for jurisprudence in investigations, lawsuits and prosecutions (Volonino, 2003).

This means that a computer or printed document recording can be used as documentary proof. Furthermore, Section 62 of the Evidence Act 1950 [Act 56] defined primary evidence as ‘self-produced papers for court inspection’ and Section 3 of the Evidence Act 1950 [Act 56] stated that ‘computer-generated records are primary evidence’. In civil court legislation, this Act clarifies the concept of digital documents in general.

Furthermore, in Malaysian civil courts, computer evidence is classified as one type of evidence and is referred to as digital evidence. Any display or print from a computer, regardless of whether it is admissible in court, is referred to as ‘computer evidence’. Digital documents are protected by Section 90A, Section 90B and Section 90C of the Evidence Act 1950 [Act 56].

An example is the case of *Navi & Map Sdn Bhd v Twincie Sdn Bhd & Ors* [2011] 7 CLJ 764. The plaintiff generated a certificate in accordance to the provisions in Section 90A for admission of the printout of Skype chat, which was duly signed by a digital evidence specialist from the Digital Forensic Department in Cyber Security as evidence. However, the plaintiff’s Skype chat evidence was ineffective in showing copyright infringement, for it was not a valid certificate under Section 90A (2). This was because it certified that the Digital Forensic Department in Cyber Security was not the officer responsible for the computer administration and analysis process. Unfortunately, parts of the Skype chat had vanished. As a result, the plaintiff’s claim against all defendants was rejected with charges by the court. It is because the party should fulfil the standards set forth in Section 90A of the Malaysian Evidence Act 1950 for digital evidence to be accepted (Mohamad Khairudid & Ahmad, 2019).

Furthermore, according to Granja and Rafael (2017), the challenge of maintaining digital evidence that might be affected by various factors generated much discussion in the field of data management. This was supported by Suhaizad et al. (2019), who further argued that all facts and questions should be verified with thorough evidence and presented to a judge to seek justice in the legal process.

According to Michael Factor et al. (2009), the credibility of a digital document could be assessed when authentic information was obtained without misrepresentation, fraud, or damage. As a result, evidence has been provided to appropriately analyse the acceptability of digital documents, even rapidly changing technology. The author, Steven Goode (2009) mentioned that there should be a special requirement to accept it as evidence as it is very important in deciding cases involving digital documents as evidence. Generally, a judge can determine whether the evidence presented is authentic based on what is required for a claim in the trial court.

2.2.2 In Syariah Law

In most cases, there is no clear statement in the Qur'an or al-Hadith about the purpose of using digital documents as evidence. On the other hand, acceptance of digital documents refers to the widespread acceptance of evidence tools (Wan Abdul Fattah et al., 2018). When talking about *hukm*, or the perspective of Islamic law, there are many sources for reference, including the Quran, hadith and the maxims of law (Wan Abdul Fattah et al., 2020).

The importance of a document, referring to the basis of the rules for repayment of loan, shall be determined at the time the loan is traded. According to Surah Al-Baqarah, verse 282, Allah SWT says in the Quran:

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَى أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ﴾

Translation: "O you who have believed, when you contract (i.e. when you have or contract a debt) a debt one upon another for a stated term, then write it down".

(Al-Qur'an. Al-Baqarah 2:282)

Rasulullah SAW also said that:

عن عبد الله بن عمر -رضي الله عنهما- مرفوعاً: «ما حق امرئ مسلم له شيء يوصي فيه؛ بيت ليلتين إلا ووصيته مكتوبة عنده». زاد مسلم: قال ابن عمر: «ما مرت علي ليلة منذ سمعت رسول الله -صلى الله عليه وسلم- يقول ذلك، إلا وعندي وصيتي»

Translation: Abdullāh ibn 'Umar RA reported that the Messenger of Allah PBUH said: "It is not befitting for a Muslim who has anything concerning which a will should be made, to abide for two nights without having his will with him." Imām Muslim added that ibn 'Umar said: "Not one night passed by me since I heard the Messenger of Allah (may Allah's peace and blessings be upon him) mention this, except that I had a written will with me." (Hadith, Muslim: Book 11 #77)¹.

It showed that it was necessary to practise comprehending the significance of using a document in our daily lives. Islam has no restrictions on the kind of documents that can be used as evidence in transactions and to avoid fraud and disputes after they have been completed. The objective of the document is to prevent conflicts and fraud that can also be accomplished electronically, like through online financial transactions (Wan Abdul Fattah et al., 2018).

¹ Source from Muslim and Al-Nisaburiy Ibn al-Hujjaj al-Qushairiy (1997).

Furthermore, Al-Zanibat (2005) said in his book (*Al-Khibrah al-Fanniyyah fii Ithbat al-Tazwiir fii al-Mustanadat al-Khatiyyah Fannan wa Qanunan*), in this era, technologically, there is no more limited or printed documents or something that is recorded solely. Nowadays, the definition of a document includes voice recording and visual recording, such as CCTV, photos, digital videos, floppy discs, compact disks and the internet. This shows that the types of documents are expanding (Wan Abdul Fattah et al., 2015).

Digital evidence refers to evidence that is frequently manufactured by a computer or machine and generated electronically. Digital evidence is admitted in Malaysian courts (Ani Munirah, 2019). The provision of a research expert certificate to carry out the fact that it is in normal use and good working condition is ensured by Section 90A of the Malaysian Evidence Act 1950, which ensures the authenticity of digital evidence.

Furthermore, according to Ahmad Syukran (2017), digital evidence is part of the admissibility of *al-qarinah* in Islamic law and it can be used as a tool of proof in legal cases, as it is valid according to the circumstances and relevant facts. Wahbah al-Zuhaili (2004) defined *al-qarinah* as “anything that has meaning, whether it comes from a term, situation, deed, or omission”. In Syariah principles, the explanation of a document is *al-qarinah* that can be reinforced with evidence from experts tasked to test the credibility of the document’s evidence and in turn, help the court consider the facts and evidence (Mohamad Azhan et al., 2017).

Digital document is also known as a powerful *al-qarinah*. *Al-qarinah* is represented in circumstances that end up in a level of confidence according to terminology perspectives. Since technology is changing rapidly, nowadays, most of the evidence is proven by *al-qarinah*, such as DNA evidence, fingerprints, blood tests,

CCTVs and many others, rather than proven by *syahadah* (pledge of oath) (Lukman et al., 2020). The significance and acceptability of *al-qarinah* as evidence and proof in Syariah civil and criminal matters are distinctly defended by the principle of Syariah proof.

Wan Abdul Fattah, (2011) also added the necessity of having a structure or procedure related to digital documents as evidence with certain criteria. This is a method of verifying the authenticity of digital evidence by experts, who confirmed that digital documents could be accepted in court. For example, the court will generally accept identical duplicates for cases that appropriately prove the original document is lost; therefore, the parties need to confirm the authenticity and accuracy of the copy (Mountrakiks & Ionnou, 2019). Furthermore, *Al-Kitabah kalkhitab* (الكتاب كالخطاب) is a jurisprudence method that declares, “Documents are the same as words (in describing the will and intention in the heart)”. Similarly, an Arabic proverb stated that “writing is the incorrect of two human tongues”. As a result, it appeared that the document could be used to make a proof argument. In Islamic jurisprudence, all of these arguments are aimed at indirectly accepting digital documents as a method of proof (Wan Abdul Fattah, 2016).

Islamic jurists are more concerned about the issue of whether the digital document can be falsified. Al-Zuhaili said in his book (*Al-Wasail Al-Ithbat*), the issue of admissibility had no argument, the argument was about proving the authenticity of the document issued either by conventional means or electronically (Duryana & Zulfakar, 2014).

Briefly, digital document is evidence that is admissible to the Syariah court. It is because the authentication can be proven by an expert's opinion and it is one of the *al-qarinah* that is powerful during trials. Additionally, digital document is also known as الكتاب كالخطاب, which carries the meaning of 'the letter is considered as an oral expression', as included in *Qawaid Fiqhiyyah* (Wan Abdul Fattah et al., 2018). Therefore, it can be related to digital documents, which is one of the documents that represent an oral expression.

As a result, the general principle of recognising digital documents as evidence based on *al-kitabah*, proof according to circumstances (*al-qarinah*), and evidence of expert opinion had been established (*ra'yu al-khabir*). In Syariah courts, this is a method of accepting digital documents as evidence from an Islamic perspective. In addition, the admissibility of a digital document as evidence needs to be verified before it is given to the court, as required.

Improvements to the legal norms of Syariah courts should be conducted in a way that can serve as a guide for Syariah law practitioners when dealing with this type of evidence. Briefly, the method demonstrated that before, it was used to verify the validity of digital documents, which were categorised as *al-qarinah* and *al-kitabah*, with expert opinion added to strengthen the digital document. As long as the validity of the digital document can be proven, Islam accepts it as evidence. However, defining the jurisdiction of the court to prosecute and charge the case requires classifying the digital document from an Islamic perspective for the court to use it as evidence in deciding the admissibility of digital or digital evidence in this new era.

2.3 Conclusion

In summary, this chapter focused on the concept of digital document from two perspectives, the Syariah and civil laws. Furthermore, the researcher explained how far digital documents are admissible in Malaysia under the Syariah and civil laws. The researcher expanded on the concept of accepting digital document in Syariah and civil cases that typically occurred in a court procedure, as explained at the end of this chapter. Therefore, the next chapter explains the existing law on the use of digital document.