

Legal Analysis of Syariah Court Evidence Law on Digital Document as Evidence and Its Admissibility in Court Proceedings

Analisis Perundangan bagi Undang-Undang Keterangan Mahkamah Syariah terhadap Dokumen Digital sebagai Kaedah Pembuktian dan Kebolehterimaannya dalam Prosiding Mahkamah

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ABSTRACT

Presenting the digital document as evidence in court can prove and convict a case, as well as exonerate innocent people. Acceptance of digital documents as a method of proof has been practiced in the civil courts as early as the 1950s and is widely adopted until today. This is because, under civil laws, there is a specific provision in regards to the used of digital documents as evidence. However, this scenario is different with the Syariah courts as there is no specific provision according to Islamic law on the use of it. Not only that, but the Syariah law practitioners are also rarely exposed to cases related to the use of digital documents. Therefore, this study will

analyse the position of the digital document under Islamic law. This study also will explore the cases related to the use of digital documents in the Syariah court. This study uses qualitative methods by analyzing documents such as the provision from the Syariah court evidence (Federal Territories) Act 1997 [Act 561], journals, article papers, books and cases reported in legal journals. The results show the use of digital documents as evidence is allowed based on provisions from Islamic law and the need to use it in Syariah courts is very high in line with the rapid development of science and technology. The researchers have also put forward some challenges that will usually be encountered when handling this kind of evidence and suggestions to improve the use of digital documents in the Syariah courts.

Kata kunci:

Kebolehterimaan;
Dokumen Digital;
Keterangan; Undang-undang Islam;
Mahkamah Syariah

ABSTRACT

Penggunaan bukti dokumen digital di mahkamah berperanan untuk mensabitkan seseorang dengan sesuatu kes dan membebaskan orang yang tidak bersalah. Penerimaan dokumen digital sebagai salah satu kaedah pembuktian di mahkamah sivil bermula sejak tahun 1950-an lagi dan diguna pakai secara meluas sehingga ke hari ini. Hal ini demikian kerana, di bawah undang-undang sivil, terdapat peruntukan yang khusus bagi penggunaan dokumen digital sebagai bukti. Namun, senario ini cukup berbeza dengan mahkamah Syariah kerana, tidak ada peruntukan yang khas di bawah undang-undang Islam mengenai penggunaannya sebagai kaedah pembuktian. Bukan itu sahaja, pengamal undang-undang Syariah juga jarang didedahkan dengan kes-kes yang berkaitan dengan penggunaan dokumen digital. Oleh itu, kajian ini akan mengkaji apakah kedudukan dokumen digital di bawah undang-undang Islam. Kajian ini juga akan menganalisis kes-kes yang berkaitan dengan penggunaan dokumen digital di bawah bidang kuasa mahkamah Syariah. Kajian ini akan menggunakan kaedah kualitatif dengan menganalisis dokumen seperti peruntukan dari Akta Keterangan Mahkamah Syariah (Wilayah-Wilayah Persekutuan) 1997 [Akta 561], jurnal, artikel, buku dan kes-kes yang dilaporkan dalam jurnal undang-undang. Hasil kajian ini menunjukkan bahawa, penggunaan dokumen digital sebagai bukti adalah dibenarkan berdasarkan kepada peruntukan di bawah undang-undang Islam dan keperluan untuk menggunakannya di mahkamah Syariah adakah sangat tinggi seiring dengan perkembangan sains dan teknologi yang semakin meningkat. Penyelidik juga telah mengemukakan beberapa cabaran yang biasanya akan dihadapi oleh pengamal undang-undang Syariah ketika menggunakan jenis kaedah pembuktian ini dan beberapa cadangan penambahbaikan bagi meningkatkan penggunaan dokumen digital di bawah bidang kuasa mahkamah Syariah.

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INTRODUCTION

Information technology has contributed to the paradigm shift of the production, processing, exchange, and storing of data information by individuals and organizations (Wan Abdul Fattah *et al.*, 2021). Digital document is one of the new forms of information technology and it can be used as one of a method of proof in a court proceeding. This is because, in general, the use of digital documents in court can prove or convict a person in a case and also acquit an innocent person (Hazim *et al.*, 2020). Not only that, with significant changes in time and facilities, digital documents have begun to become the main reference material for each affair and have begun to gain a place to replace old-fashioned documents that rely solely on pens and papers only (Wan Abdul Fattah, 2016). Besides, Wan Abdul Fattah (2020) assumes that the community has also begun to accept digital documents in daily matters such as bill payments, money transfers, job applications and others because of faster and time-saving.

However, the definition of a digital document according to Islamic law still does not have a clear place in terms of its position as a method of proof in a court proceeding. On the other hand, the issue of the acceptance of digital documents in the Syariah courts also is still not fully discussed in detail, as legal practitioners are still less exposed to cases related to it. This study will therefore analyse the concept of a digital document as evidence under Islamic law by referring to the provisions of the Syariah Court of Evidence (Federal Territories) Act 1997 [Act 561] and how far the Syariah court in Malaysia admit the digital document.

LITERATURE REVIEW

There are a few studies regarding this topic. However, there is no specific study in regard to the concept of a digital document as a means of proof from Islamic law and its admissibility in a trial proceeding. Previously, the studies have been conducted by the other researchers only discuss the use of digital documents as evidence in terms of its definition in general, its functions, the classification of digital documents used as evidence, and several cases reported in the civil courts indirectly can be used as guidance in the Syariah courts.

According to Mohammad Ismail (2006), digital documents generally can be defined as any probative information stored, recorded, or channeled in electronic form and the material can be presented in court as evidence to support or refute the allegations. This is because, documents are no longer limited to printed material or something recorded only, even electronic documents such as closed-circuit television system (CCTV), photo recording, digital video, use of diskette, compact disc and internet are also included in the definition of documents (al-Zanibat, 2005). Not only that, the recording tape, for example, can be used as evidence in court if it has undergone the following procedure, which is a detailed examination that shows the tape is not changed from the original, the recording device used is still in good condition and it also can still be used properly (Augustine Paul, 2010).

Besides, Very Large Scale Integration (VLSI), Hard Disk, Software Design Description (SDD), Digital Cameras, Cell Phones, Scanners, SDD Cards, Support Bands, Photocopiers, Printers, Computers, Compact Disk (CD), Digital Video Disk (DVD), Internet Networks, Video Compact Disk (VCD), Software and Common Gateway Interface (CGI) is a source or example of electronic digital evidence stated by Mohammad Ismail (2006). From these studies, the authors only mention generally the definition and types of a digital document that can be used as evidence. However, the researcher did not find a specific discussion regarding its concept as evidence from Islamic law.

On the other hand, the researcher also refers to the experience in civil courts that use digital documents as evidence in order to be a reference in the Syariah courts on how civil courts deal with cases involving the use of digital documents. In the case of *PP v. Jawan Empaling & Anor [1996] 2 CLJ 328*, the court held that facsimile and microfilm were included in the category of documents as provided under the Evidence Act 1950 [Act 56], as the judge pointed out that a fax copy of the petition of appeal is acceptable as it does not specify that the original document must be sent. According to this judgment, the notice of appeal may also be filed/served via facsimile transmission. Indirectly, it is also included in section 3 of the Evidence of the Syariah Courts (Federal Territories) Act 1997 [Act 561] because section 3 of this provision takes the definition directly from the Evidence Act 1950 [Act 56].

In the case of *Munah bte Ali v. PP [1958] 1 LNS 40* also, the court has pointed that video recordings involving the process may be categorized as documents within the definition of section 3 of the Evidence Act 1950 [Act 56]. Thus, according to Mohammad Ismail (2006) & Wan Abdul Fattah (2016), in line with the development of science and technology, the term of the document also should be developed by including electronic and digital materials in the scope of its interpretation. These previous studies are only discussing in general the admissibility of digital evidence in civil court. The cases reported in civil courts indirectly serve as a guide for Syariah law practitioners to handle cases related to the digital document.

However, from the previous study, the discussion regarding the admissibility of a digital document in the Malaysian Syariah court is still less exposed in terms of its position under Islamic law and how far the Syariah court admits digital document as one of the methods of proof. Instead, the previous literature only focuses on the definitions, types, functions and cases reported in civil courts in general. Therefore, this paper aims to explore the position of the digital document in Islamic law, the admissibility of a digital document in the Syariah court and the challenges and suggestions to admit this kind of method in the Syariah court.

METHODOLOGY

This study uses a qualitative method by analyzing the documents. According to Glenn Bowen (2009), the analysis of documents is known as a systematic procedure for studying or evaluating both printed and electronic documents. Not only that, the main aim of document analysis is to systematically evaluate both public and private documents, primary or secondary documents (Walsh, 2014). In this paper, the collected data is divided into two types namely; primary and secondary data. For this paper, the primary data included the provision from the Syariah court evidence (Federal Territories) Act 1997 [Act 561] and reported cases. Basically, the primary data in this paper come from direct, authoritative sources and are not influenced by any individual opinions or opinions. Meanwhile, the secondary data are the discussions in article papers, books, journals and related documents references. The data collected was then analyzed using content analysis methods to understand and extract important and useful information from the text of the document (Leavy, 2017).

FINDINGS AND DISCUSSION

Analysis of Syariah Court Evidence Law on Digital Document as Evidence

The digital document is one of the relatively new forms of methods of proof in the Syariah courts compared to other methods such as syahadah, ikrar and oath (Wan Abdul Fattah, 2016).

This is because there is no specific provision in regard to the use of digital documents as evidence according to Islamic law. However, the researchers refer to the opinion of Ibn Qayyim (n.d) and Ibn Taymiyyah (1995) that consider the digital document as evidence. This is because the opinion from these two scholars says that they accept anything that can explain and reveal the truth because it falls into the category of evidence. Therefore, it is shown that the digital document may be used as one method of proof, particularly in the Syariah court.

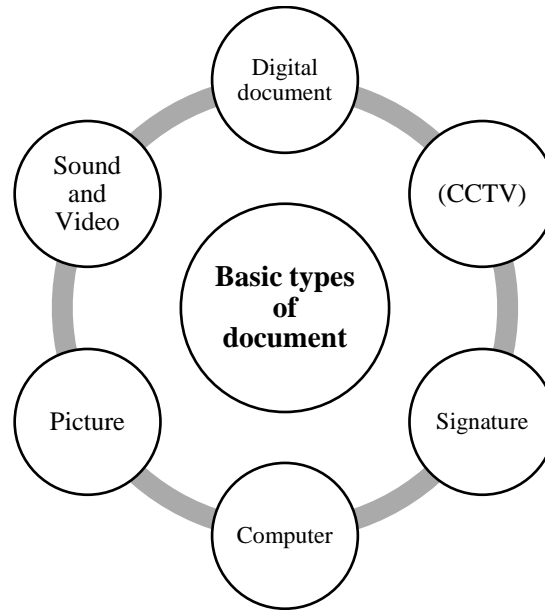
On the other hand, the researchers also will refer to Islamic Syariah law which is the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] to explore the position of the digital document under this enactment. The findings are summarized in Table 1 as below:

Table 1: Legal Analysis of Syariah Court Evidence Law on Digital Document as Evidence

The Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]		
No.	Section	Description
1.	Section 3	<p>This section explains the concept and definition of document.</p> <ul style="list-style-type: none"> • The researcher noted that, the digital document is included in this section.
2.	Section 49	From this section, the digital documents are included in the primary description category.
3.	Section 33	The cases involving the use of digital documents in the Syariah courts should be accompanied by expert opinion to maintain the credibility and validity of the evidence.

Based on table 1, section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] defined the document in detail and the researcher assumes that digital document is included in this section. This is because, under this provision, the document has a broader meaning and is not bound by handwriting alone (Wan Abdul Fattah, 2020). According to Sulaiman Marqus (1981), documents also should be seen in a broader scope of the functional aspects of the document and not just look at the form of documents and tools used. Figure 1 shows the classification of the document according to section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561].

Figure 1: Types of Document under Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]



Source: Adapted from Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]

The definition of document based on Section 3 is further strengthened by the provisions of section 49 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] which considers the computer as primary evidence that is a document issued by a computer included in this category (Wan Abdul Fattah, 2020). Section 49 indirectly indicates that the Syariah court accepts the method of proof in the form of a digital document.

According to Jasri Jamal (2011), the digital document also needs to be strengthened by expert opinion to test the credibility of document descriptions that have been released. This is because, according to section 33 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561], the digital document also should be supported by other evidence such as expert opinion to make sure the credibility of the evidence and also to verify the authenticity of the digital document from the expert.

As a conclusion, although there is no specific provision on the side of the Syariah principles related to acceptance of digital document in court, several provision under Islamic law which is the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] indirectly recognize the digital document as one of the methods of proof.

The Admissibility of Digital Documents as Evidence under Malaysian Syariah Court

From the above discussion, the researchers can say that the principles of Syariah recognize the digital document as a means of proof in the Syariah court by referring to provision provided from the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]. Not only that, according to Azhan Yahya *et al.*, (2017), the digital document also has been used for a long time in the judicial system in Malaysia. This is because, this kind of description helps to support the other facts presented in court (Wan Abdul Fattah *et al.*, 2020).

For this section, the researcher found several cases related to the used of digital documents in the Malaysian Syariah court. In this paper, the researcher will discuss three cases related to the

use of digital documents as a method of proof in the Syariah court. Table 2 shows the name of the case, the type of case claim and the type of digital document used as evidence in the Syariah court.

Table 2: The Case Study on the Use of Digital Document in the Malaysian Syariah Court

No.	Name of the case	Type of case claim	Type of digital document used as evidence
1.	<i>Mohd Nizam bin Abdul Malik v. Fauziah binti Mohd Isa (14004-058-0030-2006)</i>	Nusyuz demands	Picture
2.	<i>Halijah binti Abdul Rahman v. Zambree bin Baharom (05001-054-055-2008)</i>	Demand for divorce confirmation	Short message service (SMS)
3.	Siti Adira Suhaimi dan Adenan Abu	Marriage confirmation application	Original picture of the wedding

Case Study 1: Mohd Nizam bin Abdul Malik v. Fauziah binti Mohd Isa (14004-058-0030-2006)

In this case, the plaintiff lodged a police report because his wife had left the house without his permission. The plaintiff, in this case, filed a police report because his wife had left the house without his permission. The plaintiff stated that the defendant had changed her attitude by liking to go out at night without his permission. In the case of nusyuz claims, most of the claims made are based on photo-shaped evidence by attaching a picture showing the behaviour of *nusyuz's* wife with another man who is not her muhrim. The plaintiff has attached a photo of the defendant hugging another man to this nusyuz claim. The researcher found that the Syariah court accepts the case of *nusyuz's* claim if there is evidence that shows the *nusyuz's* behaviour occurred, and the method of proof presented is a picture, which is considered as a digital form of evidence and it is admissible in the Syariah court.

Case Study 2: Halijah binti Abdul Rahman v. Zambree bin Baharom (05001-054-0055-2008)

In the case of *Halijah binti Abdul Rahman v. Zambree bin Baharom (05001-054-0055-2008)*, the defendant has sent a short message service (SMS) on January 12, 2008 for divorce by using a mobile phone. However, on 13 March 2008, the woman violated the *taklik*. After hearing evidence from both parties, the Port Dickson district Syariah subordinate court convicted both parties of divorce. In this case, it is possible to conclude that SMS is used as proof of divorce even if the husband does not intend for divorce. Based on the court decision, the researcher believes that the SMS also is one of the digital document categories that can be accepted as a method of proof to further strengthen the case's conviction in the Syariah court in particular.

Case Study 3: The Marriage Application Case of Siti Adira Suhaimi and Adenan Abu

In the case of a marriage confirmation application by Siti Adira Suhaimi and Adenan Abu, they were ordered to provide proof of their marriage in Songkla, Thailand, in December 2015. Having lodged an application for confirmation of polygamous marriage abroad on 8 January 2015 according to sections 12 and 23 of the Law on Islamic Family Law (Federal Territories)

1984, they are required to submit proof of marriage, which is the original photo marriage, in order to approve the application made by the applicant. From this case, the researcher assumes that the wedding photos of Siti Adira Suhaimi and her partner in Thailand are used as clear evidence and certified by the court to approve and confirm their application for confirmation of marriage. The researcher also found that this original image is one type of method included in the digital document category.

From the above case studies, the researcher found that the Syariah courts accept the use of digital documents as evidence in courts such as SMS, pictures, CCTV and others. This is because these description works to reaffirm other evidence filed in court. However, the researcher also thinks that the evidence in the form of digital documents should also be supported by other evidence such as evidence from experts to confirm the authenticity of the digital document if its authenticity is in doubt. For example, in the case of Ajmawati's divorce claim in *Ajmawati Atan v. Moriazi Mohamad [2005] 1 CLJ (SYA) 54*, the understanding of the admissibility of the digital description was unclear, which resulted in the case being ordered to be heard again with the submission of the supporting witnesses. Thus, the evidence is accepted or rejected by the court after being strengthened by expert opinion (Mohamad Aniq *et al.*, 2021).

The Challenges and Suggestion when Admitting the Digital Document as Evidences in the Malaysian Syariah Court

The use of digital documents in the Syariah courts is a form of proof that plays an important role in the process of proving a mal case and a Syariah crime even though there are no clear details regarding its definition and acceptability in terms of Syariah principles (Azhan *et al.*, 2017). From the previous discussion, the admissibility of the digital document as evidence is recognized as a description of *qarinah*. This is because, these description helps to strengthen the facts, convinces the court to accept the facts and to make a decision (Wan Abdul Fattah *et al.*, 2020).

However, the use of digital documents as a means of proof is also not to be missed from the elements of document forgery and fraud (Wan Abdul Fattah, 2020). In this section, the researcher will present some of the challenges that will be encountered when handling the case involving the use of digital documents, as well as some suggestions for improvement to strengthen the use of the digital document as evidence in the Syariah court.

The Challenges when Admitting the Digital Document as Evidences in Syariah Court

In general, the jurisdiction of Syariah courts is very limited compared to civil courts because there is no specific act providing for the digital document in Syariah courts instead the civil court has specific acts related to digital documents such as the Digital Signature Act 1997 and Electronic Commerce Act 2006 (Wan Abdul Fattah, 2020). However, the digital document is accepted as a method of proof in Syariah courts based on sections 3 and 49 of the Syariah court evidence (Federal Territories) Act 1997 [Act 561].

The challenge of accepting digital documents as a means of proof is the admissibility of evidence without witnesses and experts, as well as the clarity of the evidence. This is because it is intended to convict a case, especially in criminal cases such as *khalwat* cases where further evidence is needed to reinforce the evidence that will be submitted to the Syariah court (Wan Abdul Fattah *et al.*, 2018).

According to Duryana and Zulfaqar Ramlee (2014), the issue relating to admit the document to either conventional means or digital means is a forgery. This is because, in the advancement of science and technology, the originality or fake of a photograph and the result of recording sound or image can be made by other persons. This is due to irresponsible attitudes or individuals who are low in moral and religious values (Mubarak, 2005; Mohamad Aniq *et al.*, 2021).

The Suggestions for Strengthen the Use of the Digital Document as Evidence in The Syariah Court

From the discussion above, this is the possible reality or will happen when admitting the digital document as evidence specifically to be applied in the Syariah court. Therefore, in this section, the researcher would like to put forward some suggestions and improvements to strengthen digital documents as one form of proof in the Syariah courts.

Generally, in the Syariah court, there is no specific provision regarding the use of the digital document as evidence. However, according to sections 3 and 49 of the Syariah court evidence (Federal Territories) Act 1997 [Act 561], this kind of method is generally included in this clause. Therefore, the scholars and the legal experts in the field of evidence as well as researchers must discuss to form a definition of digital documents according to Islamic law and its admissibility as evidence in the Syariah court that must be clarified and refined. This aims to further detail the concept of the digital document from the perception of Islamic law and its implementation procedure in court.

Among the challenges that will be faced while using digital documents is document forgery. In the Syariah court, there is no specific provision for an offense related to document forgery instead it is confined to the offense of contempt of court (Wan Abdul Fattah, 2020). This situation makes the cases related to document forgery will be difficult to handle by Syariah law practitioners. The Syariah Law practitioners also should refer cases to document forgery and cases related to the use of the digital document as evidence in civil court and how the civil court handles these cases. By referring to civil court also, the Syariah law practitioners should know how it can be applied in the Syariah court to combat cases related to document forgery and the use of the digital document as evidence.

The acceptance of digital documents as evidence has already begun to be accepted in the Syariah court as in the cases that have been discussed before. Although there is a challenge to handle cases related to digital documents, the writer believes that digital documents play a significant role in strengthening the conviction in court, especially in this age of developing technology. It is hoped that the stated suggestion may help to further strengthen the digital document as one of the forms of evidence in the court.

CONCLUSION

In conclusion, the description of digital document form can be used as one of the new forms of evidence specifically to be applied in the Syariah courts. This is because, from the findings of the research conducted, the researcher found that there are several provisions regarding the use of digital documents as evidence such as section 3, section 49 and section 33 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]. These provisions indirectly recognize digital documents as evidence. The researcher also found several cases regarding the admissibility of digital documents in the Syariah court such as the case of *Mohd Nizam bin*

Abdul Malik v. Fauziah binti Mohd Isa (14004-058-0030-2006), *Halijah binti Abdul Rahman v. Zambree bin Baharom (05001-054-055-2008)* and the marriage application case of Siti Adira Suhaimi and Adenan Abu. This also indirectly shows that Syariah courts are starting to accept digital documents as one method of proof. The researcher also put forward some challenges that Syariah law practitioners will face when handling cases related to the used of digital documents. At the end of the study, the researcher also stated some suggestions for improvement regarding the acceptance of digital documents in the Syariah court.

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