

CHAPTER 4

THE RULES OF ADMITTING DIGITAL DOCUMENT AS EVIDENCE IN SYARIAH COURT IN MALAYSIA WITH COMPARE THE CIVIL COURT PROCESS

4.1 Introduction

This chapter will answer the third research question. The researcher analyses Syariah law from the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] and Civil law from the Evidence Act 1950 [Act 56]. Then, the obtained data were analysed between the Malaysian Syariah and civil courts when dealing with this issue and comparisons were made from both laws. Thereafter, the next chapter will discuss the cases of accepting digital documents in the Malaysian courts.

The Malaysian constitution was established with a dual judicial system based on civil and Syariah laws, the administration and process of both legal systems separated as well as the method of proving. Digital documents are stored in digital format. As a result, the question of whether such digital evidence is legal under Malaysian law arises. In short, such evidence is permissible in civil courts, but its admissibility in Syariah courts is still debatable. In most cases, digital document introduced in court should be accompanied by textual descriptions or other supporting evidence, such as expert's testimony, to establish their authenticity. Rules should be determined for how and for how long digital data should be preserved, along with who may have access to it and the purposes and conditions for search and seizure as well as discovery and disclosure of such data (Radhakrishna, 2009). The strength or trustworthiness of the evidence could be used to challenge admissibility of the evidence. This is due to the fact that the

court has the option of disallowing all inadmissible evidence, allowing evidence to be readmitted after it has been denied or reversing its admissibility decision (Duryana, Zulfakar, 2014).

4.2 Malaysian Syariah Court

Islamic law emphasises justice and fairness in resolving disputes. To attain this goal, the legal community has devised a procedural law that will allow justice to be carried out successfully. Fairness should be applied regardless of future legal and technological developments, since Islamic law is comprehensive and valid at any time (Duryana & Zulfakar, 2014). The authority of the Syariah court has indeed been limited to family matters and moral offences committed by Muslims.

It is obvious from the previous provisions that digital evidence is permissible and recognised in Islam. Computer evidence, computer printouts and computer-generated documents, all of which are available in documentary formats, are examples of digital evidence. These documentary evidences are admissible according to majority of the Muslim jurists. Furthermore, only a few Quranic passages and hadiths strengthen the admissibility of digital documents.

When it comes to civil cases, digital evidence is admissible. Digital evidence is admissible in criminal trials, depending on reliability tests, but in *hudud* cases, punishment cannot be imposed unless it is backed up by other evidence, such as a confession or oral testimony (Abbasi et al., 2021).

Mohamed and Ramlee (2014) tended to concentrate on the principle that any document can be used as evidence in court if the quality stays unchanged and accurate. Furthermore, the Syariah court recognised the use of a digital document as evidence in a Malaysian court and it is frequently utilised in civil courts due to the lower standard of proof for such evidence.

Additionally, according to Mohamad and Ismail (2021), digital evidence was accepted in Malaysian Syariah courts to establish facts. The use of digital evidence in Syariah courts is not limited to civil cases, as is often recognised. However, Syariah court does not have jurisdiction over major criminal crimes like murder, theft, rape and many more. Legal matters on lineage determination and confirmation of a divorce decree are amongst the types of cases handled in the Syariah court that allow digital evidence to be considered. Briefly, it can be claimed that digital evidence to establish proof is not uncommon in the Islamic legal system. Table 4.1 shows the provisions related to the rules of admitting digital document as evidence in the Malaysian Syariah court.

Table 4.1. The Rules of Admitting Digital Document as Evidence in the Malaysian Syariah Court

No	Provision	Description
1	Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]	It explains the forms of documents as <i>al-bayyinah</i> and document description that can be accepted as evidence in court.
2	Section 33 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]	It explains the expert's testimony in convicting a document that requires a digital expert (<i>ra'yu al-khabir</i>) to verify trustworthiness of the document issued before being accepted as evidence.
3	Section 49 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]	It explains primary evidence.

4	Section 50 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]	It explains secondary evidence.
5	Section 51 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]	It explains proof of documents by the primary evidence.
6	Section 56 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]	It explains the circumstances on forms of documents that can be accepted as evidence in court.

The provisions of Syariah court relating to the admissibility of digital documents as evidence are listed in Table 4.1. Even though the Syariah laws of digital documentary description do not define or specify the admissibility of this evidence as they do in civil court, it is a type of description that is critical in the process of establishing cases of mal and Syariah violations. This is due to the fact that such digital documents help to reinforce facts and proofs (Wan Abdul Fattah et al., 2020).

Besides, the identified basis in admitting a digital document as evidence is found in the concepts of documentary evidence (*al-kitabah*). Examples of documentary evidences are photographs, tape recordings, films and printed emails, which are covered by various provisions, including Section 3, Section 45, Section 49, Section 50, Section 51 and Section 56 of the Syariah Court Evidence (Federal Territories) Act 1997 and other relevant sections of the Syariah Courts Evidence Enactments. Circumstantial proof (*al-qarinah*) is provided in Section 3 and Sections 5-16 of the Syariah Courts Evidence (Federal Territories) Act 1997 and other relevant sections of the Syariah Courts Evidence Enactments. The judge will rely on the evidence and weigh it to determine whether it is strong or weak. If the evidence is doubtful, a digital expert should be acquired. Furthermore, an expert's opinion evidence (*ra'yu al-khabir*) is provided in Section 33 of the Syariah Courts Evidence (Federal Territories) Act 1997

as well as other Syariah Court Evidence Enactments. The expert's opinion is based on a high level of specialised knowledge (Mohamad Khairudid & Ahmad, 2019).

In Syariah courts, these are the methods for accepting digital documents as evidence from an Islamic perspective. The development of Syariah court legal rules should be conducted in such a manner that it can serve as a guideline for Syariah legal practitioners when dealing with this form of evidence. It was observed that the defendant cheated and had sex with another man in the case of *Ahmad Faozi Bin Mansor vs Norhafizah Binti Ahmad*, file case no: (14002-058-0001-2004). In this instance, the plaintiff accused the defendant of deception by submitting a phone bill revealing that the defendant frequently communicated with other men. The husband's claim was approved by the Syariah court based on the proof of behaviour shown in the document descriptions, such as phone bills and SMS. This demonstrated that document descriptions, such as phone bills and SMS could be utilised in a Syariah court, as a digital form of evidence (Wan Abdul Fattah et al., 2021a). Therefore, clear guidelines should be analysed and produced for the legal practitioners and Syariah judges. This is because the Syariah court has not been exposed to the challenge of digital document fraud and authenticity, which can have an implicit effect on choices and judgements (Nurul Syazwani et al., 2021).

4.3 Malaysia Civil Court

The document can be used as evidence in a civil court on its own. Manual forms were not the only type of document available. According to Radhakrishna (2017), based on a common court judgment that digital documents are admissible as evidence under the evidence law, the Malaysian Evidence Act 1950 [Act 56] was revised in 1993 to allow the admitting of computer-generated evidence. Evidence law in Malaysia is established by the Evidence Act 1950 [Act 56]. Furthermore, the admissibility of digital documents as evidence would be governed by any provision of the Evidence Act 1950 [Act 56]. Table 4.2 shows the provisions related to the rules of admitting digital document as evidence in the Malaysian civil court.

Table 4.2. The Rules of Admitting Digital Document as Evidence in the Malaysian Civil Court

No	Provision	Description
1	Section 3 of the Evidence Act 1950 [Act 56]	It explains the forms of documents that can be accepted as evidence in court.
2	Section 90A of the Evidence Act 1950 [Act 56]	It explains the condition of the forms of documents that can be accepted as evidence in court.
3	Section 90B of the Evidence Act 1950 [Act 56]	It explains the purpose and manner of issuing a document to be used as evidence in court.
4	Section 90C of the Evidence Act 1950 [Act 56]	It clarifies that all documents submitted in court are in full force and nothing can refute them as evidence in court.
5	Section 45 of the Evidence Act 1950 [Act 56]	It explains the expert's testimony in convicting a document that requires an expert's opinion before being accepted as evidence.
6	Section 62 of the Evidence Act 1950 [Act 56]	It explains on primary evidence.
7	Section 63 of the Evidence Act 1950 [Act 56]	It explains on secondary evidence.

Table 4.2 indicates the provision related to the admissibility of digital document as evidence in the civil court. Generally, digital documents have been introduced and used in the civil court previously since they are significant in proving a criminal case.

As previously stated, computer evidence, computer output and computer printout are accepted and used in Malaysian courts to determine the admissibility of digital evidence. This position is supported by several sections of the Evidence Act 1950, including Section 3, Section 62, Section 63, Section 65, Section 90A, Section 90B, Section 90C and Section 45 of the Evidence Act 1950 [Act 56].

There are two different legal concerns to consider with digital document in Malaysia. Firstly, whether these electronic gadgets are covered by Section 3 of the Evidence Act 1950 [Act 56], which defines a computer. Secondly, if a certificate is required when the creator of the document is not summoned to testify in court (Mursilalaili Mustapa et.al, 2015).

Sections 45 of the Evidence Act 1950 [Act 56] provided that an expert's opinion on the quality of electronic evidence is legally relevant. Digital evidence, as defined by Section 62 and Section 63 of the Evidence Act 1950 [Act 56], is a documented evidence that should be accompanied by primary evidence, unless an exception applies under Section 65 of the Evidence Act 1950 [Act 56] that stated secondary evidence might be used if the person presenting it establishes a legal basis for why primary evidence is unavailable after a thorough search (Mursilalaili Mustapa et al., 2015).

As acknowledged, Section 90A is the main section and it has seven subsections that defined the admissibility and proof rules for computer-generated documents. Furthermore, a document generated by a computer is admissible under Section 90A of

the Evidence Act 1950 [Act 56] subject to its relevancy, best evidence rule and authentication if it is verified by the person-in-charge or controlling the computer in its regular use and that the device is in good working condition. Computer-generated documents are considered primary evidence under Section 90A and also an exception to the hearsay rule. Section 90B deals with the legal significance of evidence, whereas Section 90C states that the provisions of Section 90A and Section 90B shall take precedence over any other statutes provisions (Radhakrishna, 2009). The most common question about machine performance, according to the case in *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134, was whether the plaintiff or defendant fulfilled the requirements of Section 90A (2) of the Evidence Act 1950 [Act 56]. This phase required the individual-in-charge of the computer operation to create a certificate. If the person in question is present at the case hearing, the certificate is unnecessary (Duryana & Zulfakar, 2014).

According to Mohd Akram and Zulfakar (2011; p 124), it was determined that Section 90A, Section 90B and Section 90C are exceptions to the hearsay rule, claiming that any information contained in a computer-generated document is admissible as evidence, regardless of whether the person issuing the document or statement is the maker of the document or statement. As defined in Section 62 of the Evidence Act 1950 [Act 56], a document presented for the consideration of court is primary evidence. A computer-generated document is considered primary evidence. Therefore, even if it is hard to tell the difference between an original and a duplicate document, computer-generated evidence is frequently accepted in court as the main evidence.

Consequently, there should be an acquired control for accepting them as evidence because it is so important in deciding a case involving digital documents as evidence.

Generally, judges can determine if the evidence submitted is genuine based on the proof required for a claim in the trial court. Since civil court has more detailed provisions that have been used in issuing digital evidence in court, the Syariah court can make these provisions as reference in dealing with digital evidence in court.

4.4 The Comparison of the Rules between the Civil and Syariah Court through the Digital Document as Evidence

The principles of proof in Islamic jurisprudence are well-structured and broad in scope, which are applicable to new problems that will arise in the future. There is no denying that Islamic law lacks specific rules regarding digital evidence. Establishing the relevance and credibility of digital evidence in courts is tough. Specific security measures need be implemented to prevent it from being destroyed or manipulated to retain the authenticity of the digital evidence (Duryana & Zulfakar, 2014). In most cases, digital evidence that was introduced in court should be accompanied by textual descriptions or other supporting evidence, such as an expert's testimony, to validate their authenticity (Wan Abdul Fattah et al., 2019).

According to Mohamad Khairudid and Ahmad (2019), the Syariah Court Evidence provision of legislation contained a combination of digital forensic technology with Islamic Evidence Law. The relevant provisions of the Syariah Evidence Act or Enactments as well as sections of the Syariah Courts Civil or Criminal

Procedures deal with documentary evidence, circumstantial evidence and expert's opinion evidence. The need of provision for the enforcement officer to access computerised data, as provided in the Malaysian Criminal Procedure Code, and the exclusive part on admissibility of digital evidence has not been altered except for the Syariah Court Evidence (Perak) Enactment No. 8 of 2004. As a result, the amendment is necessary.

Nonetheless, the decisions of Malaysian civil courts in matters involving digital evidence can be used as reference by Syariah courts when dealing with digital evidence situations. The party should meet the standards as set forth in Section 90A of the Malaysian Evidence Act in order for the digital evidence to be accepted (Mohamad Khairudid & Ahmad, 2019).

The current Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] and other Syariah Court Evidence Enactments governing digital evidence are based on the general requirements for admissibility of documentary evidence (*al-kitabah*), circumstantial evidence (*al-qarinah*) and expert's opinion evidence (*ra'yu al-khabir*). In contrast, Section 90A of the Malaysian Evidence Act 1950 [Act 56] regulated the authentication of digital evidence by the provision of an expert certificate, attesting to the fact that it is in common use and good functioning order (Mohamad Khairudid & Ahmad, 2019). The judgements of Malaysian civil courts in situations involving digital evidence can also be used as a reference by Syariah courts when dealing with digital evidence cases. The defendant should follow these laws as set forth in Section 90A of the Malaysian Evidence Act 1950 [Act 56] for the digital evidence to be accepted.

According to Syariah law studies, the Syariah courts recognised the use of digital documents as a method of proof. Numerous cases cited on the use of digital documents

as evidence suggested that Syariah practitioners are beginning to use digital documents in court. The usage of digital documents as evidence supported other evidence offered in court. As a result, a digital document as evidence is admissible in Syariah court once it has been enhanced by an expert (*ra'yu al-khabir*) to ensure its reliability (Wan Abdul Fattah et al., 2021b).

As acknowledged, digital documents are available in digital format. As a result, the question of whether such digital evidence is legal under the Malaysian law arises. Briefly, such evidence is legal in the civil courts; however, its admissibility in Syariah courts is still debatable. In Malaysia, it is indisputable that most civil court lawyers are more proficient in dealing with various forms of evidence, including digital document, than those practicing in the Syariah courts (Nurul Syazwani et al., 2021). Moreover, the admissibility of digital evidence in court encountered various obstacles and challenges. Traditional principles of the evidence admissibility are challenged by digital evidence. According to Mohan (1992), when determining the weight to be given to a statement admissible as evidence, all the circumstances in which a reasonable inference can be drawn as to the statement's accuracy or otherwise should be considered. These include whether or not the statements are made concurrently with the occurrence or existence of the facts stated, and whether or not the maker of the statement had a compelling interest.

However, the general rules in accepting digital document as evidence in the Syariah court will potentially benefit legal Syariah measurement standard accurate results. This is by using an implementation method that requires the provision from the Evidence Act 1950 [Act 56] for achieving an effective digital document as evidence in court.

4.5 Conclusion

In conclusion, this chapter briefly discussed how the Malaysian Syariah and civil courts deal with the issues of digital document as evidence by analysing cases from both courts. The researcher analysed several cases involving digital documents under the Syariah and civil courts to obtain a general conclusion on how both courts deal with this issue. Furthermore, the researcher made a comparison between the Malaysian Syariah and civil courts on how both courts dealt with the issue of digital document as evidence at the end of this section. Therefore, the researcher will focus on cases related to this issue in the next chapter.