

## REQUIREMENT THAT NEEDED TO ADMIT THE DIGITAL DOCUMENT AS EVIDENCE IN SYARIAH COURT

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### ***ABSTRACT***

Under Islamic law, which is systematic and relevant at all times during advancement and technology, evidence in digital formats is permissible unless it is accurate and credible to implement justice and equality in court. However, the question of the acceptance of digital records as a source of evidence relates to authenticity and credibility as proof. The issue involving the acceptance of digital proof in a trial proceeding is not only that, but also its falsification. It is also necessary to have a specific practice in order to make sure that the digital document in the Syariah court is appropriate. The method of accepting digital documents in the Syariah Court is discussed in this article. Not only that, this article will describe the basic requirements for accepting a digital document at the Syariah Court and will define the procedure by knowing the requirement for accepting a digital document as evidence in Syariah Court. In order to support the research, this qualitative research followed the approach of literature review by gathering data from classical and contemporary legal books, which in data collection are primary, secondary data and scholarly views. The content analysis approach was used to evaluate all the data. In order to ensure the validity and consistency of the digital evidence submitted to the court, this paper aims to clarify the admissibility of digital evidence in Syariah Court, and then pursue the process by collecting preserved and properly circulated. It is because digital evidence is continually expanding, the need for certain procedures is important.

***Keywords:*** Digital Document, evidence, requirement, accepting, Syariah Court.

### **INTRODUCTION**

The admissibility of the digital document as documentary and primary evidence was acknowledged in Malaysian court proceedings. The use of digital documents addresses the

demands of the world in the era of globalization. However, the proposed approach is incapable of resolving issues with electronic evidence. If nothing changes in terms of improvement relating to problems with electronic evidence, especially those relating to operation and the economy, will not be resolved the problems properly (Rodrigue, Molina, 2017). According Volonino (2003), today, digital evidence is becoming more prevalent in today's information and communication systems, and it is primarily used by companies to store, retrieve, and distribute appropriate electronic documents for jurisprudence in audits, inquiries, and prosecutions. In placing more emphasis, Mohamed and Ramlee (2014) stated that any document may be used as a form of evidence in court as long as the quality is still accurate and permanent. Not only that, the use of a digital document as evidence in a Malaysian court was also allowed by the Syariah court, and it is commonly used in civil courts since the standard of proof for such evidence is less strict.

Fortunately, the question arises as to whether there is any procedure in the Syariah Court and what are the requirements are needed for the standard procedure on the admissibility of a digital document in Syariah court. This can be supported by Goodison et al., (2017), there must be a strategy or method that aids in improving the strength of the proof while using digital as evidence, such as using assessing software to increase the reliability and authenticity of electronic data as it plays a greater role in any case and to validate any cases as effective prosecution in court. This is because, according by Sa'di and Kamarudin (2020), electronic evidence presented, admitted, and used in court to decide whether a party is innocent or guilty must be authenticated in order to ensure that the theory of justice is preserved by protecting the innocent and punishing the guilty. On the other hand, we must verify and prepare a clear guidance for legal practitioners and Syariah judges, since the Syariah Court has not been introduced to the challenge of digital document forgery and authenticity, which can have an implicit effect on the decisions and judgments. As a result, this study aims to look for the requirement that needed to admit the digital document as evidence in Syariah court which may improve Syariah legal practitioners deal with this sort of evidence in a courtroom.

## LITERATURE REVIEW

There are some studies on this topic. However, there is no proper discussion of the requirement that needed to admit the digital document as evidence in Syariah court; instead, previous scholars only address the general understanding on the admissibility of the digital document as evidence in court. Basically, there is no perceptible difference between *kitābah*, *muharrar*, *asnād*, *hujaj*, *aurāq*, *sukk*, *hujah*, *mukhadar*, *sijjil* and *wathiqah* they all carry the document significance (Ismail & Ramlee, 2013).

Documentary evidence is just as significant as *al-Bayyinah* and that as part of the *fiqh jinayat* in attempt to prove the digital document as evidence, and it is essential for Muslims to justify justice in accordance with the holy Quran and Sunnah (Saharudini *et.al*, 2019). After all, the writers of these studies only mention the forms of proof and types of digital document as evidence (*al-kitabah*) that can be admitted in a Syariah court generally, rather than the requirement on the acceptance the digital documents as in a Syariah court.

In the article entitle, "Document forensic, the fiqh and the Syariah Courts" by Wan Ismail *et.al*, (2015), the authors study expert opinions or forensic experts are often referred to in civil courts to assist judges in making fair decisions, including assessing record authenticity. This is because expert testimony is much more persuasive than other forms of proof. It is more reasonable because testimony of expert opinion is more compatible with scientific arguments validated by latest technology, and it is also scientifically acceptable despite the passage of time. This can be emphasized by Kallil and Yaacob (2019), order to ensure justice in the

provision of judgement, digital forensics is combined with Islamic law of evidence. As a result, the standard requirement for the admissibility of digital evidence by digital forensic experts. However, the paper only discusses on the specific issue regarding the rate of document falsification that rapidly increasing in terms of the necessary for having expert opinion without discuss overall on the requirement that need to admit digital evidence in Syariah court.

A forgery document is one of the challenges in admitting the digital document as evidence. As a result, the court is considering appoint an expert to investigate the validity of digital evidence, and legal practitioners must act by identifying approaches used by forensic experts for verifying digital evidence during the authentication process, as it is important to establish a framework as a standard of legal forensic for legal proceedings in Syariah Court (Ismail & Asutay, 2017). This can be supported by Wan Ismail *et.al*, (2015), the majority of document falsification and document authentication crimes is prosecuted in civil courts. Aside from that, such an offence is therefore subject to civil judicial system. These are the reasons why a comprehensive guideline of the procedures for proving the falsification of a document in Syariah Courts is not valid. Most of cases, if the original digital document has been destroyed, the court will consider identical duplicates, so the parties must verify the validity and authenticity of the copy (Pantelis & Michael, 2019). Hence, this point only discussed the conditions that must be met in order for the digital document to be considered proof, but not specifically in the fully requirement on the acceptance of digital document in Syariah Court.

In the book entitled “The Authentication of Electronic” by Allison (2016), states that the basic techniques of digital evidence are collect, preserve, analyse and present to the court. Therefore, the author, on the other hand, only discussed the basic procedure in general, but holding out the requirement on the phase of procedure to admit digital document as evidence.

As the result of the following studies, a little research has been carried on the requirement that needed to accept the digital evidence in court. However, existing studies only addresses the concept of a digital document in general, as well as the need and conditions for its admissibility in court without specifically discuss on the requirement to admit the digital document in each step as evidence in court. As a summary, the aim of this article is to investigate the requirement that needed to admit the digital document as evidence in Syariah court in Malaysia.

## **RESEARCH METHODOLOGY**

A research methodology is essential in achieving a research aim and objectives. Since this research is focused on social sciences and law, it will take a qualitative approach. The data generated was further categorized into two types: primary and secondary sources. Besides, primary data in this study have used from the holy Quran, a hadith of the prophet Muhammad, an Islamic legal maxim (qawaid fiqhiyyah), administrative rules, and regulations on the Syariah Court Evidence (Federal Territories) Act 1997. In the sense that it was collected with the aim of solving a specific research issue, primary data is often accurate, credible, and informative. In addition, academic views, such as books, journal articles, reports, internet publications, and government records, were included in secondary data. The data was then analysed using document analysis techniques in order to fulfil the study results aims and outcomes.

## DISCUSSION AND FINDINGS

### Concept of the Digital Document in Islamic Law

The value of a document regarding the basis of the rule for the repayment of a loan should be fixed at the time the loan is transacted, according to Surah Al-Baqarah, verse 282. In the Holy Quran, Allah SWT says:

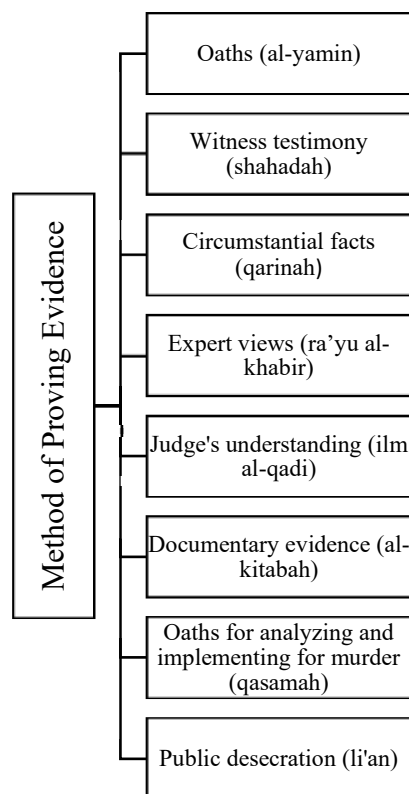
يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ

“O you who have believed, when you contract a debt for a specified term, write it down.”

Despite the fact that the Syariah principles of digital documentary description do not define the meaning or admissibility of this proof, it is a type of description that is crucial in the process of proving cases of mal and Syariah crimes. This is because digital records like these contribute in the reinforcement of facts and proofs (Wan Ismail et al., 2020).

According to Islamic scholars, Islamic Law of Evidence refers to the intent of explaining a certain fact, which must be revealed before the judge. Based on verses from the Al Quran, Islamic scholars have developed a method of providing evidence. Vows, oaths (*al-yamin*), and witness testimony (*shahadah*) are among the forms of evidence that can be allowed in Syariah courts, circumstantial facts (*qarinah*), expert views (*ra'yu al-khabir*), judge's understanding (*ilm al-qadi*), documentary evidence (*al-kitabah*), oaths for analyzing and implementing for murder (*qasamah*) and public desecration (*li'an*) (Wan Ismail & Asutay, 2017). Table 1 shows the method of proving evidence in Islamic perspectives:

Figure 1: Method of Proving Evidence



This can be supported by Kallil and Che Yaacob (2019), mentioned that the admissibility of documentary evidence (*al-kitabah*), circumstantial evidence (*al-qarinah*), and expert opinion evidence under the Syariah Court Evidence Act or Enactments is based on the general criteria given under the admissibility of documentary evidence (*al-kitabah*), circumstantial evidence (*al-qarinah*), and expert opinion evidence (*al-rakyu al-khabir*). In contrast, Section 90A of the Malaysian Evidence Act ensures the authentication of digital evidence by the provision of an expert certificate researchers to conduct to the fact that it is in regular use and in good working order.

According to Wan Ismail *et al.*, (2020), an overview of this digital document in Malaysia that is normally submitted in Mal cases to support a divorce case, a marriage declaration, and nafkah cases in Syariah court. These types of electronic and digital evidence are also used in the investigation of Syariah crimes, such as accusations of illegal intercourse and khalwat.

Thus, through Islamic view the acceptance of digital documents relates to a wide acceptance of proofing methods in general. Even though, the issue that related to digital document in Syariah court limited to certain cases, the review from a digital document to assist the legal practitioners explain the facts and evidence of the related cases.

### **The Practise of Acceptance of Digital Documents in the Syariah Court**

In most cases, the purpose of the use of a digital document as a form of evidence is not clear state in the Holy Quran or al-Hadith. The acceptance of digital documents, on the other hand, refers to a wide range acceptance of the means of evidence (Wan Ismail *et al.*, 2018). There are many sources to be referred to when it comes to *hukm*, or Islamic legal viewpoint, such as the Quran, hadiths, and legal maxims (Wan Ismail *et al.*, 2020).

Basically, Islamic law had considered the digital document as *al-kitabah*, circumstantial evidence (*al-qarinah*), and expert opinion evidence in general (*al-rakyu al-khabir*) as mentioned before. According Wahbah al-Zuhaili (2004), defines *al-qarinah* as "anything that has a meaning, which is derived from terms, situations, actions, or omissions that appear under section 3, 5-16 of the Syariah Court Evidences (Federal Territories) Act 1997 [Act 561] and other sections of Syariah Courts Evidence Enactments. Not only that, but digital evidence may also transmit data to a disc or hard disc to clarify a particular problem. The judges would then explain the evidence, determining whether it can be accepted or not, before appointing a digital expert to investigate the digital document's validity as evidence (Wan Ismail *et al.*, 2015).

According to Ahmad Syukran (2017), states that digital evidence is one part of the documentary evidence and also one type of the primary evidence. In the meantime, from the Islamic point of view, digital evidence is a part of the admissibility of *al-qarinah* that may be a method of proof in legal cases because it is circumstantially valid as relevant facts. Besides that, the meaning of document can be found on the Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] as:

*any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of-*

- (a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;*
- (b) any visual recording (whether of still or moving images);*

(c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;  
(d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or (c),  
or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing.

According Mohamad Khairudin *et al.* (2019) also added that digital document as the original instruments for collecting or sending information, however it should have been questioned before being handed over to the court because it may be transformed as forged documents. It necessity to fulfil the requirement of the digital document as evidence in order to prevent suspicion and later doubt.

Section 33 of the Syariah Courts Evidence (Federal Territories) Act 1997 [Act 561] and other Syariah Court Evidence Enactments imposed this provision on the acceptance of digital document as evidence in court (Wan Ismail *et al.*, 2018). The opinion of experts was reported as follows in Section 33 of the Syariah Courts Evidence (Federal Territories) Act 1997 [Act 561]:

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.*

According Wan Ismail (2015) also stated that Islamic scholars have also argued that it is important for judges to allow experts in a specific field to give statements in order to clarify problems that the courts are having difficulty dealing with, especially those involving technical problems.

Thus, the general principle of accepting the digital document as evidence based on the concept of *al-kitabah*, circumstantial proof (*al-qarinah*), and expert opinion evidence (*al-rakyyu al-khabir*). These are the method of acknowledging digital documents as evidence from an Islamic perspective have been practised in Syariah courts. Apart from that, the authenticity of the digital evidence should be verified before being submitted to the court by following the requirement needed. The enhancement of the legal rules of Syariah court must be provided in way to serve as a guide for Syariah legal practitioners when dealing with this form of method of evidence.

### **Requirement on Accepting the Digital Document as Evidence in Syariah Court**

The use of electronic materials has led to a significant increase in the amount of digital evidence used as evidence. As a result, any lawyer should investigate for sources of electronic data to see how the data is produced, processed, distributed, destroyed, or deleted (Volonino, 2003). According to Rodrigue and Molina (2017), the originality of the digital document as evidence depends on the process of getting the proof and requirement to follow digital forensics protocol

to assist the prosecutor in court. In fact, digital evidence procedures require collection, preservation, analysis, and presentation.

It can be more emphasis by Mohamad Khairudin *et al.* (2019), in order to fulfil the requirement, the court had to appoint a digital expert whose job it was to restore or retrieve data that had been accidentally or deliberately removed. The court must also ensure that the authenticity and reliability of the documents submitted are high. A standard method must be followed during the verification process, but it does not clarify or propose methods that must be followed during the verification process in Syariah courts in a simple and comprehensive manner (Wan Ismail & Asutay, 2017).

Instead, they would analyse and present the evidence to the court as computer-based material in order to maintain the validity of the digital evidence using advanced methods for gathering, reviewing, analysing, and presenting the evidence to the court as computer-based material. The four stages of electronic forensics that a court of law may provide are identification, preservation, analysis, and presentation of digital evidence (Granja, 2017).

First and foremost, the researcher had discussed on identification, preservation, and collection. Identification, preservation, and collection are the first steps in the requirement for accepting a digital document, as outlined in Sections 42 to 53 of the Criminal Procedure of the Syariah Court (Federal Territories) Act 1997 [Act 561]. Section 42 describes the summons to produce a text. According to Mohamad Khairudin *et al.*, (2019), a summons is a written notice given by a civil court requiring one to appear before the court in a specific manner if any court, Religious Enforcement Officer, or police officer conducting an investigation requires the processing of any property or document. As a consequence, the regulatory authorities will assist in the review of the required documents.

Section 55 mention on the requirement that are related to Section 54 for data collection as follows:

1. *When the information referred to in section 54 relates to the commission of a non-seizable offense, the officer to whom it was given shall refer the informant to a Judge of a Syariah Subordinate Court.*
2. *No Religious Enforcement Officer shall, in a case involving a non-seizable offense, exercise any of the special powers in relation to investigations given by this Chapter without the order of the Chief Syariah Prosecutor.*
3. *Any Religious Enforcement Officer receiving such an order may exercise the powers in respect of the investigation given under this Chapter except the power to arrest without warrant.*

The process will collect data by preserving and collecting the information. Then, after conducting a digital evaluation of the text, identify the individual involved using the information gathered under section 63. Furthermore, once the document is decided, the data obtained under section 63 for search by religious law enforcement authorities is used to identify those who are involved.

Section 73 of the Syariah Court Evidence (Perak) Enactment 2004 provides more information on digital evidence:

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.*

The significance of accepting the digital document as evidence must be valid and accessible before the digital evidence presented to the court.

Then, step on processing, reviewing, and analysing. Processing, analysis, and evaluation by providing evidence in court with the validity of the evidence. Furthermore, it is requiring in having digital experts that has a lawful certificate in digital forensics must providing appropriate digital evidence and ensuring the digital evidence as the key of the authenticity of digital evidence. (Allison, 2016). According to Mohamad Khairudin *et al.* (2019), the requirements of expert are defined from the physical device and apply forensic analysis software to generate the evidence as a result of this process. Thus, the court will analyze all of the provisions before deciding whether digital evidence is relevant to the case or invalid in a specific case.

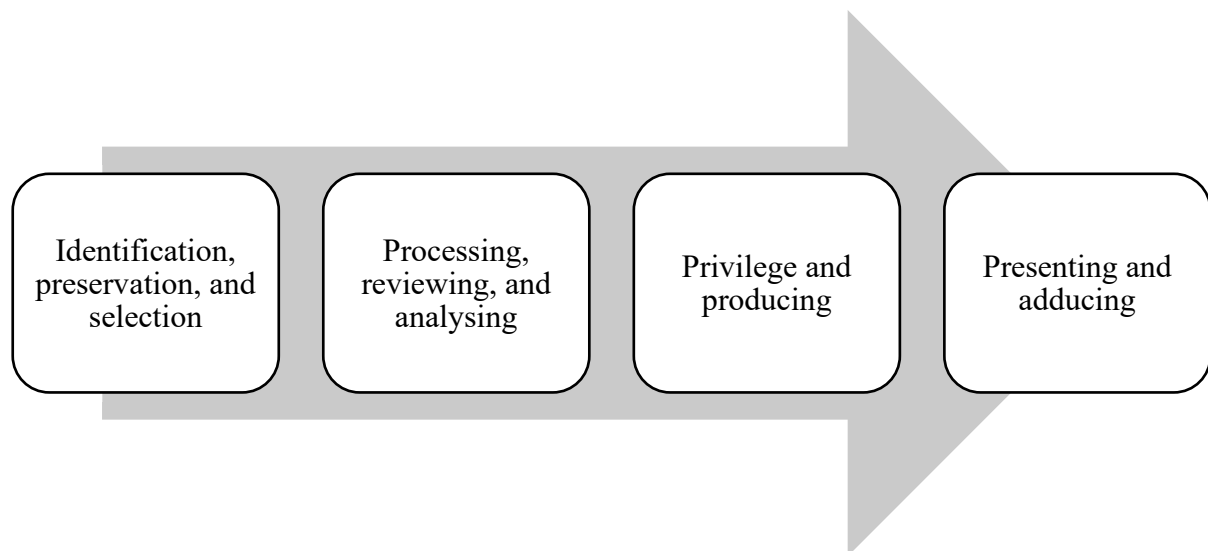
Next, privilege and producing discussed on the important for lawyers to collaborate with forensic experts in general practise of law and the existence of forged documents. It also can be supported by Wan Ismail *et al.*, (2015), the judges will require the assistance of forensic experts before presenting in court in cases involving matters beyond their skills and experience, such as the authentication of signatures, digital videos, or other forms of records. The experts will check the digital evidence and submit it to the court after the digital discovery process is completed (Mohamad Khairudin *et al.*, 2019).

Finally, point of presenting and adducing. During the presentation, the proof will be shown electronically in the courtroom and will be accessible and online. The judges will determine whether or not the proof is admissible after the submission (Allison, 2016). Courts will verify about the reliability of the digital evidence presented by digital investigators to requiring them to be truthful and forthright during presenting in court.



Figure 2 shows the step on the requirement that needed to admit the digital document as evidence:

Figure 2: Step on the Requirement That Needed to Admit the Digital Document as Evidence



As a result, the acceptance of digital documents as evidence is necessary for their submission in court to be valid. From the above discussion, the researcher has indirectly discussed the general requirement in the acceptance of the digital document as a method of evidence in a court case.

## CONCLUSION

As a consequence of the previous argument, an important concern in digital evidence is the validity and credibility of the document to submit in court by justifying its applicability as evidence. Due to significant advances in the science and technology landscape, Syariah practitioners should have a standard method to fulfil the requirement in acceptance the digital document as evidence in court. Besides, the admissibility of digital evidence in Islam was recognised as *al-qarinah* (documentary evidence) and supported by expert opinion as been mentioned before. In addition, the provision that related to this issue, defined the process for accepting a digital document as proof and ensuring the validity and accuracy of the document. The general method and requirement in accepting the digital document as evidence in the Syariah court will end up benefiting legal Syariah measurement standard accurate result by using an implementation method requiring of the provision for achieve an effective digital document as evidence in court.

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Wan Ismail W. A. F., Baharuddin

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