PROSECUTING SHARIAH OFFENCES IN MALAYSIA: EVIDENTIARY ISSUES

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Abstract: The main issue is whether the basic principles of evidence as outlined in Islam and the existing Syariah Court Evidence (Federal Territories) Act 1997 are sufficient to be used in prosecuting Shariah offences in Malaysia. Admittedly Islam, as well as the SCEA 1997, do provide general guidelines on criminal prosecution. However, there are still provisions that need to be improved. The question also arises as to how far forensic evidence can be used in proving these offences. The role of experts will also be studied and also using technology as a part of evidences. This paper will focus on the question of evidential requirements in prosecuting Shariah offences in the Syariah court in Malaysia. Undoubtedly, in realizing this intention, it should not only be burdened on the shoulders of the prosecuting officers alone but the role to be played by lawyers, academics and judges will certainly have great impact in solving and improving these shortcomings.

Keywords: Shariah Offences, Evidentiary Issues, Islamic Criminal Law

INTRODUCTION
This paper will examine the problem of evidentiary issues Islamic criminal law, implemented in Malaysia legal system. In one hand, the evidences must implement using Malay law. In other hands, Islamic evidentiary issues on Islamic criminal law have to refer to Islamic legal system. Thus, this article will explore those contradiction issues, using comparative approach. Generally in every criminal prosecution, it will involves three major statutes ie. Syariah Criminal Offences Act, Syariah Criminal Procedure and Syariah

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Evidence. The Syariah Criminal Offences provides for the type of offences that can be prosecuted in the Syariah court. However, there are other Syariah statutes for instance, Islamic Family Law (FT) Act that also provide certain offences. For example section 123. It states: “Any man who, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both such fine and imprisonment.”

The best case to illustrate this section is Pendakwa Syarie Selangor lwn. Moktar bin Raden & 6 lagi. The accused, a Member of Parliament was charged and convicted under section 124 of the Selangor Family Law Enactment 2003. Thus, Syariah offences that can be prosecuted in the Syariah court in Malaysia (Federal Territories and the other 12 states) must first be enacted under the law passed by Parliament or State Assembly. There are certain acts which are not per se crime but have been categorised as Syariah offences because of the fatwa (legal edict) issued and gazetted. Smoking for an example. Thus, a Muslim who is smoking will not be charged for smoking but for disobeying the fatwa. Similarly, women in the state of Selangor are forbidden from entering beauty contests and participating in fashion shows because the clothes they wear are too revealing. Likewise, there are acts which are obviously crime under the Islamic law, but are not categorised under Syariah offences such as murder, robbery etc and there are also many criminal acts that been categorised as offences in both Islamic law and civil law and are enacted in both laws such as sodomy and defamation (qazf).

More interestingly, there is one act that could be considered as crime in both laws but yet to be enacted as crime. It is sorcery or black magic.

In Malaysia, there is no specific law that prohibit or criminalising the act of sorcery. However, for Muslims who practice it, he could be charged under section 10 of the Syariah Criminal Offences (Federal Territories) Act 1997 which provides:

“ Any person who worships nature or does any act which shows worship or reverence of any person, animal, place or thing in any manner contrary to Islamic Law shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.”

The state of Brunei quite recently has regulated the offence of sorcery. Section 208 of the Syariah Penal Code Order 2013 states:

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1 Section 124 to section 133 of IFLA 1984.
2 [2011] JH 32/1 69.
3 Warta Kerajaan Negeri Selangor, 1995.
4 It is a crime because the sorcerer maliciously intends to injure victims physically and would go to the extent of harming the victims’ minds. Sorcery (with Allah’s will) could also cause a breakdown of the affected family institutions. There are number of court cases in Malaysia that involved the practice of black magic either directly or indirectly.
“Any person who practices or advertises black magic is guilty of an offence and shall be liable on conviction to a fine not exceeding $20,000, imprisonment for a term not exceeding 5 years or both.” Interestingly this law also extended to those who seek help from a person who practices black magic for the fulfilment of any wish and he could be fined for the maximum of $8,000 or imprisonment for a term not exceeding 2 years or both.

CRIMINAL PROCEDURE

Before prosecution starts, it is vital for the Syarie Prosecutor to ascertain few things:
First, the charge is correctly framed,
Second, the presence of the accused,
Third, the proper court that is the court which has the jurisdiction and power, and
Fourth, the process of trial.

EVIDENTIARY REQUIREMENTS

Allah almighty says:

يَاأَيُّهَا الَّذِينَ ءَامَنُوا كُونُوا قَوَّامِينَ لِلَِِّّ شُهَدَاءَ بِالْقِسْطِ وَلََ يَجْرِمَنَّكُمْ شَنَآنُ قَوْمٍ عَلَى أَلََّ تَعْدِلُوا اعْدِلُوا

"O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is Acquainted with what you do."  

Based on the Qur’anic verse, Islam emphasizes the concept of justice to the extent that it asks us to be fair even to those we detest.

The Prophet said:

لو يعطى الناس بدعواهم لادعى ناس دماء رجال واموالهم ولكن اليمين على المدعى عليه

“If given the opportunity for man to make allegations / claims (without evidence) they would surely sue / claim the life (blood) and the property of others, but oath is required from the accused.”

Thus,

البينة على المدعى واليمين على من انكر

“Evidence is imposed on the Claimants and Oath (is imposed) on the denier.”

Syariah Court Evidence (Federal Territories) Act 1997 (SCEA 1997)⁶

⁶ Al-Maidah (5):8. See also Surah Al-Nisa (4): 145.
There are a number of interesting sections in SCEA 1997:

**Section 2:**
“This Act shall apply to all judicial proceedings in or before any Syariah Court.”

**Section 3:**
“Hukum Syarak” means Hukum Syarak according to the Mazhab Shafie, or according to any one of the Mazhab Maliki, Hanafi or Hanbali;

**Section 130:**
1. Any provision or interpretation of the provision of this Act which is inconsistent with Hukum Syarak shall, to the extent of the inconsistency, be void.
2. In the event of a lacuna or where any matter is not expressly provided for in this Act, the Court shall apply Hukum Syarak.

### Requirement of Producing Evidence

Section 73 of SCE states:

1. Whoever desires any Court to give judgment as to any legal right or liability which is dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Also the same requirement can be found under Section 96 (c) and (d) of Syariah Criminal Procedure (Federal Territories) Act 1997 which clearly stated that the burden of proof (عبء الثبات) is on the prosecution or the complainant.  

It must be emphasized that the intention of the abovementioned sections is very much in conformity with the principle of Syariah that are stated in the Qur’an, Sunnah and Qawa’id Fiqhiyyah. For example:

a) **Surah al-Nisa, verse 15** (فاستشهدوا عليهن أربعة منكم)
b) **Surah al-Nur, verse 4** (ثم لم يأتيوا بأربعة شهداء)
c) **Hadith al-Rasul** (البينة على المدعي)
d) **Hadith al-Rasul** (البينة وإلَ حد في ظهرك)
e) **Qawaid al-Fiqhiyyah** (الأصل العدم/الأصل براءة الذمة)
f) **Qawaid al-Fiqhiyyah** (البينة لإثبات خلاف الظاهر واليمين لإبقاء الأصل)

Therefore, it is clear that the duty of the Prosecutor in a criminal proceeding or in criminal trial is to adduce evidence in order to prove the accused is guilty as charged.

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6 There are similar provisions in all Syariah Enactments in all states in Malaysia.
7 For detail discussion see Zulfakar, *Onus and Quantum of Proof in Islam: Past and Present*, [2012] 1 ShLR xxxi.
TYPES OF EVIDENCE

Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 defined the word ‘evidence’ to include:

a) bayyinah and syahadah;

b) ..... oral evidence;

c) ..... documentary evidence;

and the meaning of “bayyinah” is evidence which proves a right or interest and includes qarina;

In brief, the Syarie Prosecutor may submit the following type of evidence to the court:

**Iqrar (Confession of the accused).**

As agreed by the scholars, an admission or confession is a method that has never been disputed and it is the strongest method of proof which reaches the level of certainty (yaqin). This method is provided under sections 17 and 18 of SCEA 1997. Confession made in the Court expedites prosecution case.

The best example is as provided under section 152 (murder by black magic) of the Syariah Penal Code Order 2013 which states:

“Any person who commits qatl by black magic which in the ordinary cause of nature may cause death and it is proved by ikrar of the accused is guilty of committing the offence of qatlul-‘amd and shall be liable on conviction to death punishment as qisas.”

So goes to a practitioner of black magic (Sahir) who pleads guilty before a judge in court because he had inflicted injury on the victim by using magic spells.\(^8\) Similarly, if the wife (the accused) pleads guilty before a judge in court that she used black magic on her husband for certain reason.

However, a confession made outside of the Court must fulfill a number of conditions. Among others are; the confession must be made in the presence of two male witnesses, who are ‘aqil, baligh and ‘adil\(^9\). Thus, if a wife had confessed in front of two witnesses that she had used black magic on her husband in order to gain something, then this confession could be used as evidence against her.

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\(^8\) The charge will depend on the wording of the offence.

\(^9\) See s.17(2)(a)(b) and Pegawai Pendakwa MUIS lwn. Haji Adib
If one of the conditions mentioned are not met, such as the two witnesses are not just (adil), then the statement made by the wife can only be regarded as circumstantial evidence (qarinah).10

In hudud cases especially adultery, there is view from the Hanafi’s jurists that such iqrar should be repeated four times while the prevailing view of Shafie’s school is that one single confession is suffice for conviction. In Malaysia, since the offence of adultery only be punished with ta’zir punishment, a single confession is already sufficient.11

**Shahadah (Testimony).**

It is also unanimously agreed by the scholars that *al-shahadah* is a very strong method that reaches certainty (yaqin). This method is provided under Section 3 and Sections 83 to 86 of SCE 1997. However, this method is strenuous as the witnesses must fulfill all six conditions which are Muslim, sane, puberty, just, have a good memory and are not prejudiced. Notably, fulfilling the conditions of ‘adalah’ ie. to be a person of integrity is difficult but not impossible. Section 83(1) states:

‘A Muslim is deemed to be ’adil if he carries out his religious obligations, performs the prescribed religious duties, abstains from committing capital sins and is not perpetually committing minor sins.’

Apart from fulfilling the conditions of witnesses in giving testimony, there is a condition on the number of witnesses (Nisab al-Shahadah / adad al-shuhud) required if the parties involved intend to present their witnesses in court. The minimum number of witnesses in proving criminal cases is two male. This requirement is stated under section 86(5) of the SCE 1997 that provides:

“Except as otherwise provided in this section, evidence shall be given by two male witnesses or one male with two female witnesses.”12

Provisions under section 86 give rise to many issues including:

**First:** Is sorcery a crime of hudud or ta’zir offence? This involves the standard of proof, either at prima facie stage or at the judgment stage. If classified under hudud offences which are punishable by hudud punishment, then the required standard is certainty

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10 See section 17(3) of SCEA 1997.
11 See the case of Muhammad Ibrahim Iwn PS Pulau Pinang [1999] JH 10/2 185.
12 Section 86(5) SCEA 1997.
13 See Zulfakar, *Pembuktian Dalam Kes Jenayah Syariah Malaysia: Isu dan Penyelesaian*, KANUN [2015] 122.
(Yaqin) and this standard usually requires the testimony of two witnesses who meet six conditions mentioned above.

Second: If it is taʿzir. What is the required minimum number of witnesses? Does section 86 (5) which allows the testimony of a man and two female witnesses apply?

Third: Section 3 of SCEA 1997 states that a witness who would like to give "Shahadah" must mention the word "asyhadu". How it is done practically? What are the consequences of not using this pronouncement?

Fourth: Are the witness subjected to Tazkiyyah al-Shuhud? Tazkiyyah al-Shuhud is usually required, especially in cases involving hudud.

**Bayyinah (Evidence).**

This is the oral evidence by unqualified witnesses who cannot give testimony due to non-compliance of the requirements for a witness as provided in section 83 (1). In other words these witnesses do not give testimony but only bayyinah. They consist of non-Muslims or a fasiq or a child or an adult of poor memory or a just person who has an interest in that case.  

The word "bayyinah" as pointed out by Imam Ibn Hajar al-Asqalani, as:

كل ما يكشف حق فهو البينة

"anything that discloses the truth is evidence."

Therefore items like tools for casting spells, charms, baby dolls etc. are material evidence which is included in the term bayyinah. In some instances, the existence of these things may also be accepted as circumstantial evidence (qarinah).

**Qarinah.**

It may be referred to as circumstantial evidence. It is indirect or inferential evidence. The classical term is presumptive proof. Under Malaysian context simply means relevant fact to the fact in issue which may include conduct, motive, opportunity, opinions

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14 See sections 119-128 SCE 1997.
15 See sections 83 (2)(3) (4) (5)(6)(7), 84, 85(3)(4) SCEA 1997.
etc. Qarinah is most suitable method that could be applied at the present day because of its wide scope and easiness to obtain particularly when direct evidence i.e. confession (iqrar) and oral testimony (shahadah) are difficult to be obtained\textsuperscript{16}.

If the victim complaints or makes allegation that he had been enchanted by someone then qarinah of horrific nightmares, creepy sounds, filthy smells are relevant and admissible if the effects of these disturbances can be proven physically, for example the victim suffers from depression, emotional distress, loss of weight and other symptoms that have been agreed by medical expert. Thus, the combination of opinions from two experts, first from the medical doctor and second from Muslim practitioner who is knowledgeable in this special area, could be used as an indicator that the victim is suffering from an evil spirits or sorcery.

It will be a strong qarinah, if the victim is suffering pains that medical doctors fail to diagnose. Instead, when victims undergo 'Islamic medicine' treatments (illaj bil qur’an), the victim shows signs of recovery\textsuperscript{17}.

Motive such as revenge, envy, jealousy are examples of qarinah that could be used in supporting in most of the criminal prosecutions. Nonetheless, the prosecution must incorporate these elements of motive with other qarinah as discussed above since, motive cannot stand alone.

Quite interesting when section 23 of the Syariah Criminal Offences Act 1997 provides:

(2) Any woman who performs sexual intercourse with a man who is not her lawful husband shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

\textsuperscript{16} Zulfakar Ramlee, ‘Al-Qarinah: Pemakaiannya Dalam Litigasi Mal dan Jenayah, Undang-Undang Islam: Jenayah, Keterangan dan Prosedur, Dewan Bahasa Dan Pustaka, vol. 13, 2007, pp.187-211.

\textsuperscript{17} See sections 5-16, 17(3), 20-42 SCE.
(3) **The fact that a woman is pregnant out of wedlock** as a result of sexual intercourse performed with her consent shall be prima facie evidence of the commission of an offence under subsection (2) by that woman.

(3) For the purpose of subsection (3), any woman who gives birth to a fully developed child within a period of six qamariah months from the date of her marriage shall be deemed to have been pregnant out of wedlock.

Thus, the above provision allows the use of pregnancy by unmarried girl as strong qarinah in proving zina (adultery). In fact, Caliph Umar is the one who clearly announce that pregnancy (*al-hubla*) could be used in proving zina offence that liable for hudud punishment.\(^\text{18}\)

**Kitabah** (Documents).

It is interesting that the SCEA 1997 defines document according to contemporarily and broadly meaning. In short, documents include writings; words that are printed, lithographed or photographed; maps, plans, graphs or sketches; inscriptions on wood, metal, stone, or any other substance, material or other article; drawings, images, pictures or caricatures; photographs or negatives; tape recordings of telephone communication, including a recording of such communication transmitted from a distance; recorded matters, stored, processed, retrieved or reproduced by a computer\(^\text{19}\).

The question that always asked is whether document can be used in proving hudud offences?\(^\text{20}\)

In brief, Imam Malik and Imam al-Bukhari agreed that official document can be admissible in murder and hudud cases.\(^\text{21}\) Reference also made to *al-qasamah*, in which the Prophet instructed his companions to write a letter to the Jews of Khaibar in claiming

\(^\text{18}\) See Ibnu Qudamah, *al-Mugni*; Ibnu Taimiyyah, *Majmu* al-*Fatawa*; Ibnu Qayyum, *al-Turuq* and Ibnu Farhun, *Tabsirat al-Hukkam*.

\(^\text{19}\) See section 3 and examples.

\(^\text{20}\) Untuk bacaan lanjut, Wan Abdul Fattah Bin Wan Ismail dan Zulfakar Ramlee, Keterangan Melalui Kitabah: Satu Tinjauan Menurut Fiqh Dan Undang-Undang Semasa Di Malaysia, JUU, 2013, ms.

\(^\text{21}\) Shahih al-Bukhari, bab ‘al-khatm’; Ibnu al-Manasif, *Tanbih al-Hukkam*.
qisas for the killing of Abdullah bin Sahl. Imam al-Mawardi al-Shafie also agreed on the use of official document involving the offences like qisas and qazaf. What more, if such offences like qazaf is punishable only with ta’zir punishment. The acceptance of this evidence, however, depends on whether it is of primary or secondary, and subject to authenticity.

*Ray al-Khabir* (Opinions of Experts).

This is provided under sections 33 of SCEA 1997.

(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 specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions or relating to determination of nasab, are qarinah.

(2) Such persons are called experts.

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

It is highly interesting that the Syariah Court has begun to accept experts’ opinion since 1990 in determining the truth of the allegations of a husband who claimed that he was bewitched. In the appeal case of *Mustafa bin Batcha v a. Habeeba*, the Syariah Appeal Court acknowledged that black magic although prohibited in Islamic, is still practiced by the Malay community. In this case, the husband alleged that when he pronounced the divorce to his wife, he claimed that he was under the influence of black magic. The Court of Appeal held that this fact (the man being under the influence of black magic) must be proven and an expert (shaman) should be called to determine its truth. However, there are several issues that need to be solved, among others;

Firstly; Who are the experts in this particular area?

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22 Shahih al-Bukhari dalam Kitab al-Ahkam, Bab Kitab al-Hakim ila Umalihi, hadis no. 7192.
23 Section 41 of the Syariah Criminal Offences (FT) Act 1997.
24 See JH 7 (1990) 255
Secondly; Who will determine that a person is an expert in this area?
Thirdly; How to determine? Is it by qualification or by experience?

**Forensic evidence.**

This is the most contemporary method to prove and it is easy to be acquired. In addition, its accuracy is reliable. It is a method that was introduced by Prophet Muhammad SAW and was practiced by the Companions.25 As to whether DNA test could be accepted by the Syariah Court in Malaysia? Reference should be made to the SCEA 1997. This Act has adopted the concept of *al-bayyinah* which provides very wide meaning and scope. Since *al-bayyinah* has been defined as "evidence to prove the right or interest, including qarinah, DNA test results can be presented in the Syariah Court as evidence to prove the prosecution's case.

The DNA test can also be tendered in the Syariah Court as matter falls under expert's opinion. Section 33 of the Syariah Court Evidence (Federal Territory) Act 1997 provides:

(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 specially 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.

This section clearly provides a vast platform for parties to present experts' opinion based on the results of scientific experiments including DNA testing.26 For example, the analysis of chemicals would solve the issue of authenticity of a written document. Further

25 See writer's working paper entitled “PEMBUKTIAN SAINTIFIK; KETERANGAN DNA, MIKROFILEM DAN AUDIOVISUAL:ANTARA KERELEVANANNYA DAN KEBOLEHTERIMAANNYA” which was presented in Persidangan Pegawai Syariah Kali Ke-5 at Hotel Grand Bluewave, Shah Alam on 9th Sept. 2003.
26 See the case of *Pendakwa Syarie Negeri Sabah Iwn Rosli bin Abdul Japar* [2007] JH 23/2 237.
analysis from geneticists is able to solve succession issue or matters on the status of illegitimate child\textsuperscript{27}.

Evidence based on the analysis of physicians about injuries or murder would solve criminal cases and claims for compensation for injuries suffered. The results of forensic tests can also be used in proving a criminal offence, including sorcery crimes done on a victim and at the same time it can also be used to rebut the allegation or deny his involvement in the said crimes.

\textbf{Conclusion}

Prosecution without evidence is nothing then mere allegation. The law must also protect the accused from unfounded allegation. Admittedly, the basic principles of evidence that have been outlined in Islam are already embodied in the SCEA 1997. The broad application of the term 'bayyinah' which covers the latest forensic evidence would solve many complex and sophisticated cases. However, special provisions need to be amended particularly on expert issues. The most important aspect is on the application of correct standard of proof. It is hoped that the role of lawyers, academics and judges themselves can help in improving the provisions of the statutes.

\textsuperscript{27} Zulfakar Ramlee, \textit{Keterangan DNA dalam Sistem Perundangan Islam}, Jurnal ILIM, Bil.1, 2008, 111.
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