

CHILDREN AND STANDARDS OF PROOF:  
A COMPARATIVE STUDY

AZMAN BIN DAWOOD  
121008

DEPARTMENT OF LAW  
INTERNATIONAL ISLAMIC UNIVERSITY  
12711/001  
121008



# BURDEN AND STANDARD OF PROOF:

## A COMPARATIVE STUDY

AZMAN BIN DAWOOD

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INTERNATIONAL ISLAMIC UNIVERSITY  
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## PREFACE

The phenomenal codification of the Islamic law of evidence already in force in some states promises the rightful resumption of Islamic law in Malaysia. The advent of codification of the Islamic law modelled on the Evidence Act 1950 which is extensively an incidence of the embodiment of Common law suggests interchangeability of principles between both Laws.

This dissertation purports to examine the concept of burden of proof at Civil and Islamic laws i.e. a particular aspect of two legal systems<sup>1</sup> or in Rheinsteins' classification, a micro-comparison<sup>2</sup>. It partakes on an analysis of variations between laws of two or more countries/legal systems<sup>3</sup>.

Meanwhile, the writer rejoices in Kamba's<sup>4</sup> hope:

*"Comparative law teaches one the value of modesty: it makes one aware of the fact that there is much to learn from the experience of other legal systems, and thus promote the cross-fertilization of ideas and experience."*

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<sup>1</sup> W.J.Kamba, Comparative Law: A Theoretical Framework, The International and Comparative Law Quarterly, July 1974: "the subject-matter of comparative law is two or more legal systems; or part, branches or aspects of two or more legal system..."

<sup>2</sup> Rheinsteins, Teaching Tools in Comparative Law (1952) 1 Am. J. Comparative Law.

<sup>3</sup> Gutteridge's definition of Descriptive Comparative Law in H.C. Gutteridge, An Introduction to the Comparative Method of Legal Study and Research, 2nd edition, pp. 2-3.

<sup>4</sup> W.J. Kamba, *supra*.

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### Introduction: Importance of Proof

Proof is of supreme importance to the administration of justice because as a tradition of the Prophet says,

*"If people's claim were accepted on their face value, some persons would claim other people's blood and properties..."<sup>6</sup>*

The necessity of proof is thus a restrainer to false, weak and unsubstantiated claim.

The importance of proof is also paramount in Civil law. Inter alia, we find in Sarkar on Evidence<sup>6</sup>:

*"...evidence is admitted to enable the court to come to a proper decision."*

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<sup>6</sup> Muslim, Sahih, V p.128; Muhammad bin Ismail, Al-Kahlani, Subuh Al Salam, Matba'ah Mustafa Al-Halabi Egypt (1960) Vol 4, p.132.

<sup>6</sup> Sarkar on Evidence, 12th Edition, at p.488.

Sir Rupert Cross<sup>7</sup> had this to say,

*"The evidence of a fact is that which tends to prove it - something which may satisfy an inquirer of the facts' existence. Courts of law usually have to find that certain facts exist before pronouncing on the rights, duties and liabilities of the parties..."*

Acknowledging that only substantiated claims are entertained, man might endeavour to furnish false proofs in order to succeed in their claims. In both legal systems, a heavy punishment awaits such transgressors:

In Surah An-Nur, 24:4,5 Allah s.w.t. warned:

*"And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors.*

*Unless they repent thereafter and mend (their*

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<sup>7</sup> Cross on Evidence, 6th edition, 1985 at p.1.



conduct); for God is Oft-Forgiving, Most Merciful."

A. Yusuf Ali<sup>8</sup> wrote,

*"The most serious notice is taken of people who put forward slanders or scandalous suggestions about women without adequate evidence. If anything is said against a woman's chastity, it should be supported by evidence twice as strong as would ordinarily be required for business transactions, or even in murder cases. That is, four witnesses would be required instead of two. Failing such preponderating evidence, the slanderer should himself be treated as a wicked transgressor and punished with eighty stripes. Not only would he be subjected to this disgraceful form of punishment, but he would be deprived of the citizen's right of giving evidence in all matters all his life, unless he repents and reforms, in which case he can be readmitted to be a competent witness.*

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<sup>8</sup> A. Yusuf Ali, The Holy Quran: Text, Translation and Commentary, 12th edition, 1989.

*The punishment of stripes is inflicted in any case for unsupported slander. But the deprivation of the civic right of giving evidence can be cancelled by the man's subsequent conduct, if he repents, shows that he is sorry for what he did, and that he would not in future support by his statement anything for which he has not the fullest evidence. Secular courts do not enforce these principles, as their standards are lower than those which good Muslims set for themselves, but good Muslims must understand and act on the underlying principles, which protect the honour of womanhood. Abu Hanifa considers that neither the stripes nor the incompetence of giving future evidence is cancelled by repentance, but only the spiritual stigma of being "wicked transgressors". This of course is the more serious punishment, though it cannot be enforced in the Courts."*

The Holy Prophet said,

*"Shall I tell you the most major of all majors is to associate false gods with Allah, to disobey the*

parents and false evidence (the Prophet s.a.w. repeated the last words thrice).<sup>9</sup>

In another hadith, the Prophet said,

*"You come to me for adjudication. Perhaps some of you are more eloquent in your argument than the others. If I should adjudicate in favour of a person against his brother depending on the former's statement while the latter in reality is in the right, then I would only be handing the former a piece of hell. Let him not take it."<sup>10</sup>*

Thus victory accomplished by an act of perjury in a trial tantamounts to one's endorsement to an allotment of sins and an allocation of an abode in Hell.

s.193 of the **Malaysian Penal Code** may well represent the position at Civil law. It states to the effect that whoever purposely adduces false evidence intending for use in any stage of a court proceeding shall be liable for imprisonment spanning seven years and

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<sup>9</sup> Article entitled Islamic Law of Evidence by Raja Bashir Ahmed Khan in Shariah and Legal Profession at p.340. Hadith reported by Bukhari, Muslim and Baihaqi.

<sup>10</sup> Mentioned by Bukhari, see Ayni, Umdat xiii p.257. See also Sahih Muslim translation by Abdul Hamid Siddiqi, Vol 3, Kitab Al-Aqdiyya, p.927.

also be liable to a fine. This provision is equivalent to a taazir punishment in Islam as may be prescribed by the State<sup>11</sup>.

Thus although the above general principle occasionally entails some danger for a claim though authentic, is of no consequence if the claimant is unable to prove it, it follows also that claims which can be substantiated are upheld even though they are based upon some secretly forged, but apparently sound, proof - for conceivably it is impossible to preclude a lie. Be that as it may, such judicial procedure conforms to the Prophetic teaching which states to the effect:

*"Verily, I adjudicate based on the visible evidence before me whilst Allah administers the invisible (evidence)."*<sup>12</sup>

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<sup>11</sup> Mahmud Saedon Awang Othman, Undang-undang Keterangan Islam, 1991, at p.85.

<sup>12</sup> Muslim, Sahih Juz V p.128.

## CHAPTER 2

### Insight into Burden of Proof

As claims need be substantiated it follows that a claimant is laden with a burden of proving his claim. This argument is consistent with the teaching of the Prophet which stipulates:

*"Evidence (Baivvinah) is on him who alleges; the oath on him who denies."*<sup>13</sup>

The above principle may be illustrated as follows:

*"A desires a court to give judgement that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime."*<sup>14</sup>

The illustration furnished above is explanatory to the maxim: Freedom from liability is a fundamental principle<sup>15</sup> which is clearly

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<sup>13</sup> Sunan Ibn Majah, 11th edition.

<sup>14</sup> s.101 Evidence Act 1950 illustration a); illustration to s.73 of the Draft of the Evidence Act of the Syariah Court (Federal Territory) 1989.

<sup>15</sup> The Mejlle, Article 8.

a derivative of the principle laid down by the Prophet quoted above.

Rephrasing this maxim al-Sayuti proposed<sup>16</sup>:

*"The original presumption of something is that they do not exist."*

Attempting to clarify the basic principle of burden of proof enunciated by the Prophet the Mejjelle<sup>17</sup> further expounded:

*"Non-existence is a fundamental presumption attached to intervening attributes; and*

*It is a fundamental principle that a thing shall remain as it is originally."*

Observably, the requirement of evidence in support of an allegation is synonymous to an attempt to rebut a fundamental presumption.

The following practical scenario painted by Mahmassani may aid to instil the notion of burden of proof in Islamic law:

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<sup>16</sup> Jalaluddin Abdul Rahman al-Sayuti, Al-Ashbah wa al-Nazair, Matbaah Isa Al-Babi Al-Halarni, Mesir p.63.

<sup>17</sup> Article 9 and 5.

*"There are at least in every judicial dispute two litigant parties, the plaintiff and the defendant.*

*The first claims what is contrary to the apparent fact; the second holds to the apparent fact and denies the claim."<sup>18</sup>*

Thus, wherein a wife claims that her husband has divorced her to which such fact is denied by the corresponding husband, the onus of proof lies with the wife for originally or apparently an institution of marriage stands and continues to be so until proven to be dissolved by the alleged talaq.

A fresh approach to defining the concept of burden of proof has been injected by Prof. Dr. Mahmud Saedon Awang Othman<sup>19</sup>:

*"Burden of proof refers to the extent of evidence which is required to establish a particular wrong. In other words, burden of proof pertains to the sum of evidence which must be adduced in support of a particular case or the standard or degree of proof required to establish a particular case in Islam."*

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<sup>18</sup> Mahmassani, *supra*, pp. 169-170.

<sup>19</sup> Mahmud Saedon Awang Othman, Undang-Undang Keterangan Islam, 1990 p.16 (author's translation).

At Civil law the rule relating to burden of proof is claimed to be derived from the maxim of Roman law, "ei qui affirmat, non ei qui negat, incumbit probatio" and adopted partly because it is but just that he who invokes the aid of law should be the first to prove his case, and partly because in the nature of things a negative is more difficult to establish than an affirmative<sup>20</sup>.

It is respectfully submitted hereby however that the phrases "actori incumbit probatio" (burden of proof on plaintiff) and "omnia praesumuntur pro negante" (presumption is to be made in favour of the defendant) constitute evidence of the inroads and embodiment of the Prophetic provision in Common law though clothed in another phraseology.

At English law<sup>21</sup>, (as at the end of 19th century) a laudable attempt was made to expound the concept of burden of proof. It was proposed that the phrase "burden of proof" is used in more than one sense:

The "first sense" refers to the peculiar duty of a party who has the risk of any given proposition on which parties are at issue - who will lose the case if he does not make this proposition up, when

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<sup>20</sup> Ratanlal & Dhirajal, The Law of Evidence, 12th edition, p. 201.

<sup>21</sup> J.B. Thayer, Preliminary Treatise on Evidence at the Common Law, p. 355.



all has been said and done.

Simply put it means that the party who has the burden of establishing a case<sup>22</sup>.

The meaning of burden of proof in the first sense nearly corresponds to the legal burden or burden of proof in the strict sense<sup>23</sup>. Phipson defined it as "the burden of proof as a matter of law and pleading; the burden of establishing a case whether preponderance of evidence or beyond reasonable doubt<sup>24</sup>." In DPP v Morgan<sup>25</sup> it is termed the "probative burden". Cross (supra) defined it as the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved or disproved either by a preponderance of the evidence or beyond reasonable doubt as the case may be. This definition is based on r.1.04 of the American uniform rule.

The "second sense" of the phrase "burden of proof" is "the duty of going forward in argument or in producing evidence, whether at the beginning of a case, or at any later moment throughout the

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<sup>22</sup> Ratnial & Dhirajlal, The Law of Evidence, 12th edition, 1953 p. 199.

<sup>23</sup> Cross, op cit, at p. 106.

<sup>24</sup> Ibid.

<sup>25</sup> (1967) AC 182; (1975) 2 All E.R. 347.

trial or discussion."<sup>26</sup>

J.D.Heydon<sup>27</sup> described the task of producing evidence fit to be considered by a jury as "evidential burden", the "burden of adducing evidence" or the "duty of passing judge".

The Privy Council decision of Jayasena v R.<sup>28</sup> may serve as an exponent of the above senses of the term burden of proof. Lord Devlin proposed:

*"An evidential burden is only the burden of adducing evidence, example, raising a doubt where there is no duty to prove, whereas legal burden is the burden of proving a case, of convincing the court to believe in the existence or non-existence of a fact."*

Although Thayer's senses of the term burden of proof seemed missing from classical Islamic juridical discussion, the writer hereby endeavours to manifest that Thayer's notion had merely remained latent in the authoritative nusus of Islamic law:

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<sup>26</sup> J.B. Thayer, *supra* at p. 355.

<sup>27</sup> J.D. Heydon, Evidence Cases & Materials, 2nd edition, 1984 p. 113.

<sup>28</sup> [1970] A.C. 618 (P.C.).

( In the light of Thayer's first sense of the term "burden of proof" it is submitted hereby that the description is apt respecting inter alia the following authorities:

- (a) *"And those who launch a charge against chaste women and produce not four witnesses to support their allegation, flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors."*<sup>29</sup>

Thus it is evident in the above ayat that a charge of zina<sup>30</sup> must be supported and proved by the prosecuting party's evidence consisting of four witnesses (shahadah). Such burden of proof constitutes a legal burden. The requirement of the legal burden is further amplified in Surah An-Nur:13 when Allah says to the effect:

- (b) *"why did they not bring four witnesses to prove it."*

Hence if any persons took it seriously, it was their duty to search for and produce the evidence, in the absence of which they themselves became guilty of slander<sup>31</sup>.

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<sup>29</sup> A. Yusuf Ali translation of the Holy Quran, 1989, Surah An-Nur, 24:4, p. 897.

<sup>30</sup> *ibid* at p. 896: Zina includes sexual intercourse between a man and a woman not married to each other. It applies both to adultery (which implies that one or both of the parties concerned) and to fornication, which in its strict signification, implies that both are unmarried.

<sup>31</sup> *ibid* at p. 899.

(c) *"Anas bin Malik said, "The first case of lian that occurred in Islam was when Hilal bin Umayyah accused his wife in the presence of the Prophet s.a.w. of having committed adultery with Sharik bin Sahma. The Prophet said, "Produce evidence [baiyyinah] or you must receive punishment on your back." He said, "O Prophet! When one of us sees a man having intercourse with his wife, should he go and seek evidence?" But the Prophet s.a.w. merely said, "You must produce evidence or receive punishment on your back." Hilal then said, "On Him who sent you with the truth, I am speaking truly. May Allah send down something that will free my back from punishment."<sup>32</sup>*

The hadith above clearly states Hilal who launched a charge of zina against his wife must produce baiyyinah to support his allegation. What is meant by baiyyinah here is shahadah<sup>33</sup>.

This is indicated by the Quranic verses on lian, which were revealed on that occasion:

*"And those who launch a charge against their*

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<sup>32</sup> Izuddin Baliq, *Menjaah al-Sahih*, Dar al-Fatah, Beirut, Vol 1 (1398 H, 1978 M) p. 586.

<sup>33</sup> Mahmud Saedon Awang Othman, *IU Law Journal*, Vol 2 No 1, 1992, p. 20.

*spouses and have no evidence [shuhada'] other than their own, [accept] their solitary evidence [shahadah] if they bear witness four times by Allah that they are solemnly telling the truth.*

*And the fifth [oath should be] that they solemnly invoke the curse of Allah on themselves if they tell a lie.*

*But it will avert the punishment from the wife if she bears witness four times by Allah that [her husband] is telling a lie.*

*And the fifth (oath) should be that she solemnly invokes the wrath of Allah on herself if [her accuser] is telling the truth.*

*If it were not for Allah's grace and mercy on you and that Allah is Oft-Returning, Full of Wisdom, [you would be ruined indeed].<sup>34</sup>*

Again hereto, the requirement of the adduction of shahadah in a lian i.e. charge against a spouse of committing zina constitutes

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<sup>34</sup> Surah Annur:6-9.

a legal burden of proof.

Respecting the second sense i.e. evidential burden, the writer advances the following authorities in support of such connotation:

In Surah Yusuf, 12:17,18 Allah enlightened us:

*"They said: "O our father! We went racing with one another, and left Joseph with our things and the wolf devoured him...but thou wilt never believe us even though we tell the truth.*

*They stained his shirt with false blood. He said: "Nay, but your minds have made up a tale (that may pass) with you. (For me) patience is most fitting: against that which ye assert, it is God (alone) whose help can be sought."*

The above ayat describes the incident where Yusuf a.s. was alleged to have been devoured by wolf. The claim was supported by a specimen consisting of Yusuf's blood-stained shirt<sup>35</sup>. The adduction of such material evidence sought to discharge Yusuf's

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<sup>35</sup> If the brethren could produce (Yusuf's garment) blood stained before their father, they thought he would be convinced that Joseph had been killed by a wild beast: A.Yusuf Ali, supra at p. 554.

kins' legal burden. Yusuf's father refuted the claim and supported his opposition with inter alia the evidence (qarinah) that:

- (a) the wolf had devoured Yusuf leaving however his shirt intact;
- (b) the blood stain on the shirt was fabricated and constituted non-human blood (blood of a goat which the brethren had killed expressly for this purpose<sup>36</sup>).

Thus in this incident, a denial to an allegation (otherwise judgement not in favour of the claimant) was supported by evidential burden. This shows that burden of proof in Islamic Law ceteri paribus, comprises of two senses i.e. legal burden and evidential burden<sup>37</sup>.

Again in the same Surah ayat 25-28 Allah s.w.t. narrated another incident involving Yusuf a.s.:<sup>38</sup>

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<sup>36</sup> Ibid, p. 554.

<sup>37</sup> See Abdul Rahman Mustafa, Prinsip-Prinsip Undang-Undang Keterangan Islam: Satu Pendekatan Perbandingan, 1st edition, 1988 at p. 110: Prinsip memberi keterangan ini adalah sama dengan Islam kerana pembuktian di dalam Islam tidak semestinya pihak yang mendakwa sahaja menanggung beban memberi keterangan tetapi pihak kena dakwa juga dikenakan memberi keterangan sekiranya ia menafikan keterangan yang telah diberikan oleh pihak pendakwa, oleh itu beban memberi keterangan juga adalah berpindah kepada pihak kena dakwa dan ini adalah berbeza dengan pembuktian dari segi undang-undang kerana Islam juga telah menegaskan bahawa:

*Baiyinah itu bagi orang yang mendakwa dan sumpah atas orang yang engkar.*

<sup>38</sup> See p. 559, A. Yusuf Ali.

*"So they both raced each other to the door, and as she tore his shirt from the back: They both found her lord near the door. She said: "What is the (fitting) punishment for one who formed an evil design against thy wife, but prison or a grievous chastisement?"*

*He said: "It was she that sought to seduce me - from my (true) self." And one of her household saw (this) and bore witness, ( thus): "If it be that his shirt is rent from the front, then is her tale true, and he is a liar!"*

*"But if it be that his shirt is torn from the back, then she is the liar, and he is telling the truth!"*

*So when he saw his shirt - that it was torn at the back, (her husband) said: "Behold! It is a snare of you women! Truly, mighty is your snare!"*

A. Yusuf Ali on the commentary of the above verses wrote<sup>39</sup>:

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<sup>39</sup> *ibid*, p. 559.