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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

DOCUMENTARY EVIDENCE;  
THE FUNCTION OF OFFICIAL DOCUMENTS IN  
ISLAMIC LAW OF EVIDENCE.  
(A COMPARATIVE STUDY WITH COMMON LAW)

By  
MOHAMMED BURHAN ARBOUNA

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“O you who believe if you deal with each other in transactions involving future obligation in a fixed period of time reduce them to writing...Disdain not to reduce to writing your contract for a future period, whether it be small or big; it is juster in the sight of Allah, more suitable as evidence and more convenient to prevent doubts...”

Al-Qur'an, al-Baqarah: 282.

“Go thou with this letter of mine and deliver it to them...The Queen said: You chiefs! Here is delivered to me a letter worthy of respect...” Al-Qur'an, al-Naml:28-30.

Dahhak Ibn Abu Sufyan is reported to have said: “The messenger of Allah wrote to me and ordered me to make over inheritance from Ashyam al-Dabbabi's blood money to his wife.”

Sunan Ibn Majah.

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## ABSTRACT

The number of judicial evidence is strikingly growing and expanding. However, today the majority of evidence adduced before any court of justice for evidential purposes is in the form of documentary evidence. Among other several documentary evidence is the evidence of official documents, which did not receive much attention by the modern Islamic writers. In this study concentration is centered on these documents and their role to preserve integrity of judicial system.

One endeavoured to establish strong connection between modern documentary practice and traditional juristic writings on documentary evidence; defined the methods and procedure by which these documents are incorporated by subsequent jurists as the mainstream of the law of evidence; and analysed the reasons for which some jurists are somewhat reluctant to admit official documents in evidence, especially in criminal cases. While admissibility of official documents at Common law today depends widely on statutory provisions, the modern Islamic legal observers maintain that admissibility of such documents in Islamic law is justified by the principle of *Istihsan*. It seems, however, that there is confusion of thought regarding this principle as a principal justification for the admissibility of documentary evidence. Hence, one argues that the justification of official documents as valid judicial evidence is contingent not only on the principle of *Istihsan*, but on ample authorities from the Qur'an, the Sunnah and practice of *Sahabah*.

In the conclusion, I tentatively suggest that there is no reasonable evidence to indicate that the legal jurists have never ignored documentary evidence at least in the area of official documents, because it has proved essential to the administration of justice.

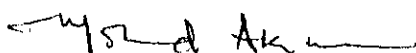
## ملخص البحث

كانت الشهادة في عصر ما قبل الكتابة تحتل مكان الصدارة بين طرق الإثبات ، إلا أنه بعد اكتشاف الكتابة والاكتشافات الحديثة في مجال الإثبات تغير الوضع، فأصبحت طرق الإثبات تتنوع وتترايد بشكل ملفت للنظر، وغدا التوثيق والإثبات بالكتابة رغم حداثة نشأتها في المرتبة الأولى بين أدلة الإثبات، والتي قد نالت اهتماما بالغا ودراسة وافية من الأنظمة الوضعية. ورغم ضرورة الكتابة ودورها في الإثبات لم تنل هذا الاهتمام، كما لم تنل دراسة كافية في الفقه الإسلامي الذي لم يهتم فقهاؤه إلا بالشهادة والإقرار واليمين، فلم يخصصوا الكتابة بدراسة أو حتى عنوان في مؤلف. ومن هنا رأى الباحث أن يركز البحث على الكتابة وبالأخص الأوراق الرسمية ودورها في الإثبات وحفظ الحقوق. وقد تبين الباحث وجود علاقة وطيدة بين الاهتمام بالكتابة كطريق الحكم والإثبات الملاحظ في القوانين الوضعية المعاصرة وبين الفقه الإسلامي التقليدي. ومن ناحية أخرى، فإن فقهاء الإسلام وإن لم يهتموا بالإثبات بالكتابة كما هو الحال في الفقه الغربي فإنهم لم ينكروها، بل كثيرا ما تعرض لها بعض الفقهاء كدليل شرعي اعترافا بحجيتها. وقد بين الباحث المواقف والطرق التي اتخذها الخلف في ترجمة أقوال الفقهاء القدامى فيما يتعلق بالإثبات بالكتابة لتناسب وضع البيئات الكتابية في العصر الحديث، ثم ناقش الأسباب التي دفعت بعض الفقهاء إلى إنكار الإثبات بالأوراق الرسمية غير الموثقة بالشهادة، وبخاصة في إثبات الجرائم. ومن هنا بين أن إنكار هؤلاء الفقهاء القضاء بالكتابة يرجع إلى الاحتياط وليس إنكارا في الحقيقة. وأكد الباحث أن الأصل في الإثبات بالأوراق الرسمية الكتاب والسنة والإجماع والاستحسان (مقاصد الشريعة) خلافا لأراء بعض المستشرقين وبعض كتاب المسلمين الذين يرون أن الكتابة استمدت شرعيتها كطريق الحكم من الاستحسان فقط وأن اعتماد شرعيتها على الكتاب والسنة ضئيل جدا.

وفي خاتمة البحث أكد الباحث أنه لا يوجد دليل علمي مقنع يدل على أن فقهاء الإسلام ألفوا اعتبار الأوراق كطريق الحكم لضرورتها وأثرها في إثبات الحق وحفظه. ودلل على هذا بقبول الفقهاء المتأخرين، وبخاصة فقهاء المذهب المالكي، الإثبات بالأوراق الرسمية إذا حلت من التزوير.

## APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standard of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Law.



---

Prof. Dr. Mohamad Akram Shair bin Hj. Mohamed Shair

Supervisor

Date: 26/9/98

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standard of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Law.



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Dr. Ismail Mohd. @Abu Hassan

Examiner

Date: 26/9/98

This thesis was submitted to the Kulliyah of Laws and is accepted as partial fulfilment of the requirements for the degree of Master of Comparative Law.



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Tan Sri Prof. Harun Hashim

Acting Dean, Kulliyah of Laws

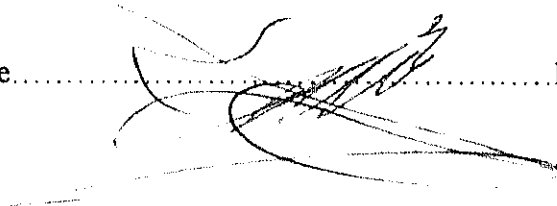
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**Tan Sri Prof. Dato' Harun Mahmud Hashim**  
Acting Dean  
Kulliyah Of Laws  
International Islamic University Malaysia

## DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name: Mohammed Burhan Arbouna

Signature..........Date.....26/9/98.....

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This thesis is dedicated to my parents, my wife, Surayyah,  
and children 'Abdullah and Leena.

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## INTRODUCTION

“... And when ye judge between people that ye judge with justice...” al-Quran: 4:57. “We sent down to thee the book in truth that thou mightest judge between people by that which Allah has shown thee, so be not advocate for those who betray their trust.” al-Quran: 4:105. The Prophet (P.B.U.H.) said; “the burden of proof is upon the plaintiff.”

The above quotations indicate that the main object and function of judiciary in any given society is to adjudicate cases, settle disputes, and administer justice in order to ascertain the truth. To achieve this end, the trial judge is, therefore, duty-bound to thoroughly elucidate the reality of the case in hand until a decision therein attains reasonable degree of certainty. This objective and function, however, cannot be attained unless the judicial entities follow certain scientific and systematic evidential mediums that are in accordance with limitations and profound evidential rules shaped by legal scholars. Since it is only by means of proof that the judge can attain a degree of certainty, it therefore follows that, evidence and litigation form essential part of the administration of justice.

Today, the states have endorsed, based on *Siyasah al-Shar'iyah* or public policy, classes of written proof, which has become part of the law of evidence with which the courts should comply. As a result, the majority of proof adduced before any court of justice for evidential purposes are in the form of *al-Kitabah* or written documents. The practical convenience and the greatest probative value of the written documents perhaps occasioned this rapid turnover. Thus, if a documentary record can be traced to the issue, there is no good reason to object to the utility of such a record.

Accordingly, use of documentary evidence, at least on ground of public interest, also forms part of judicial administration. This, therefore, shows that law of evidence, especially documentary evidence is of vital importance, which modern authors and Islamic institutions should warrant attention.

Nevertheless, after more than a century of scholarly attention by both the Western and Muslim jurists to Islamic Law, its law of procedure and evidence and, most importantly, the law relating to documentary evidence, remain hitherto one of the most nagging and difficult area for those interested in Islamic law of evidence. This perhaps is remarkably attributed to the fact that the majority, if not all, of modern scholars, (both Muslims and non-Muslims), interested in Islamic law have concentrated their attention vastly on matters of substantive law, particularly those relating to personal status--that is, the law of marriage, divorce, inheritance, etc, which has been treated exclusively. This being so, the Islamic adjective law--the law of procedure and evidence, and particularly documentary evidence, does not receive the same level of attention, despite the vital importance of these latter subjects in protecting the rights of the members of the society. Besides, it is by means of the law of evidence and procedure the substantive law of any law, including that of Islam is applied in practice. Not only the adjective law on procedure bears importance to be inquired into but also every connected person knows well that the judicial process in the adjudication of cases under Islamic law entails all kinds of possible technicality, which might hinder an efficient administration of justice. Yet, the law of evidence in general and documentary evidence in particular remain thus far over-simplified.



Broadly speaking, the over-simplified approach to Islamic law of evidence in general including documentary evidence in particular in recent studies obscures the vital role of documentary evidence, particularly evidence of official documents. It also cannot explain why deliberation on documentary evidence gradually disappears in the writings of the modern scholars despite the reform introduced into the law of documentary evidence, not through modern legislative activity, but by distinguished Muslim legal observers, notably Ibn al-Mansif (d.620 A.H.= 1223/4 A.D.) in his *Tambih al-Hukkam ala ma'khidh al-Ahkam* (Alerting the judges of the sources of rulings). Also, Al-Mawardi (d. 450 A.H. = 1058 A.D.) in his *Adab al-Qadi* (Conduct of the judge), and Ibn Qayyim (d. 751 A.H. = 1350 A.D.) in his *al-Turuq al-Hukmiyyah* (Methods of judgment).

Regrettably, the consequences of the superficial approach to documentary evidence observed in the modern writings is so grave that few students, and even academicians, who engage themselves in Islamic law of evidence have good understanding of the rules of documentary evidence, particularly those relating to official documents, (focus of inquiry).<sup>1</sup> Undoubtedly, official documents have vital

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<sup>1</sup> The phrase "official document" is used in this study to mean "public document" as preferred by Wigmore. Thus throughout his discussion on public documents, Wigmore uses terms, such as "official records", "official statements", and "official documents". See his work *Evidence in trials at Common law*, (Boston & Toronto: Little, Brown and Company, 1978). See for example paragraphs 1218-1219a, 1634-1637,1682. In *R. V. Halpin* [1975] 1 Q.B. 907 the word 'official' was also used to mean 'public' documents. However, Lord Blackburn prefers the word 'public' and defended using it in *Sturla v. Freccia* [1880] 5 App. Case. 623 saying that, "public" does not mean that such documents are open to the whole world, but the word must be construed in a specific context. The modern Muslim states' Evidence Acts used both terms. For the validity of both terms (public or official) we used both terms in this study.

role that cannot be overruled in the law of evidence. Its utility and importance also cannot be taken for granted. The practical significance of, and the legal growth and change introduced by, this mode of proof in Islamic law of evidence is remarkably obvious that the legal jurists never underestimated the fundamental need for such documentary evidence. Nevertheless, the subject too does not receive much attention from modern authors and there have been insufficient studies on this important branch of our law of evidence. However, only few works escape this generalization, namely, *al-Qadi wa al-Bayyinah* (The judge and the Evidence) authored by Abdul Haseeb Abdul Salam, and *Turuq al-Ithbat al-Shar'iyyah* (Legal methods of proof), authored by the eminent modern legal jurist, Ahmad Ibrahim Baik. Also *Wasail al-Ithbat fi al-Fiqhi al-Islami* (Methods of proof in Islamic legal thought), authored by Muhammad Ibn Ma'ajuuz. Haplessly, these books are authored in Arabic language, which make it very difficult for English speaking students to have access to. There is also superficial treatment of the subject in a number of modern Arabic books such as *'Ilm al-Qada': adillat al-Ithbat* (The science of judiciary: means of proof) authored by Ahmad al-Husary, *al-Qada' fi al-Islam* (The judiciary in Islam) authored by Abdul Salam Madkur and many others. However, all these modern works deal with the probative value of official documents in a more brevity manner, and precisely in the language of *fatwa*, not in a manner of academic discussion. This, it is believed, does not cater the needs of those interested in the study of documentary evidence in Islam. Western works on documentary evidence in Islam, generally, are more concerned with the historical facet of the subject than its legal aspect. Although the

history of legal institutions is valuable as it enables us to improve existing legal thoughts in order to administer justice equitably.

Thus, one hopes that this study, (Documentary evidence: The function of official documents in Islamic Law of evidence), may further add to that earlier research flavour of congruity and comprehensiveness. In addition, this study is aimed at helping us to get closer to the understanding of the fundamental principles and rules with regard to the law of documentary evidence and rules of the admissibility of official documents, which are scattered in traditional treatises of Islamic legal thought. The chief purpose of this study, however, is to examine the role of official documents as it is worked out by distinguished legal jurists with a comparative study with some existing legal systems. However, this study is by no means aimed at a comprehensive comparative study, but is intended to suggest further lines of research. It is also aimed at exposing the English speaking students, Muslims and non-Muslims, to the principles and richness of the law relating to written documents. Unlike available literature on the subject, the writer attempts a more detailed analysis of the law respecting the subject from the viewpoint of the four Sunnite *fiqh* schools and the modern current views. The writer also strives to outline the development that occurs concerning admissibility of documentary evidence in general and official documents in particular. In many cases, a section is concluded with the writer's own views.

# CHAPTER ONE:

## PRELIMINARIES

### 1.1. Necessity of evidence

The supreme importance and necessity of evidence in the administration of justice, is undisputed in Islamic law. The Qur'an has pronounced a principle respecting the necessity of proof in procedural matters in the following verses:

1. "O ye who believe, if a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwittingly."<sup>2</sup>
2. "We sent down to thee the book in truth that thou mightest judge between people by that which Allah has shown thee, so be not advocate for those who betray their trust."<sup>3</sup>

As far as is known, ascertainment of the truth or facts in a legal case is attained only by proof, which Allah (S.W.T.) shows to those involved in the administration of justice.

3. "O David! We did indeed make thee a vicegerent on earth so judge thou between men in truth."<sup>4</sup>

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<sup>2</sup> Al-Qur'an; Surat al-Hujrat: 49.

<sup>3</sup> Ibid, Surat al-Nisa: 105.

<sup>4</sup> Ibid, Surat Sa'd: 26

Here again, the foremost people for this vicegerency are those entrusted with the administration of justice and since this trusteeship cannot be implemented accordingly without proof, it is obvious that methods of proof are vitally important in the administration of justice. The Prophet emphasised the necessity and importance of proof in a number of *Ahadith*. An intriguing example is the Prophet's saying; "If people's claims were taken at their face value, some people would claim other people's lives and properties..."<sup>5</sup> Hence, the necessity of proof is apparent. It is sufficient to mention that evidence is the medium upon which the judiciary of any society is duty-bound to use to discharge its duties, for the realisation of justice in resolving legal deadlock amicably and protecting the rights of the individuals. Thus, the judge cannot ascertain the reality, truth, or falsehood of cases and claims brought before him without evidence adduced by the parties to litigation. Thus evidence, as picturesquely dramatised by one scholar, "is to legal practice what logic is all to reasoning. ... It is by this that the judge separates the wheat from the chaff among the mass of facts that are brought before him; decides upon their just and mutual bearing; learns to draw correct inferences from circumstances and to weigh the value of direct testimony. It is by this guide that he is able to...rest his judgment on a basis of probabilities at least comparatively satisfactory to his own mind."<sup>6</sup>

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<sup>5</sup> Imam Muslim, *Sahih*, ([trans. ` Abdul Hamid Siddiqi] SH. Muhammad Ashraf printing press, Lahore, Pakistan, reprinted 1981), vol. 3, p. 927.

<sup>6</sup> Norton, *Evidence*, p. 1, as quoted by Mohd. Akram Shair bin Hj. Shair Muhamed, *Circumstantial Evidence at Common Law, the Evidence Act and under Shariah Law. A comparative appraisal*, (Ph.D. thesis submitted to the Kulliyah of Laws, International Islamic University, Malaysia, April, 1994), p. 7.

In brief, the importance of evidence is evidenced in part by the fact **that** it is by means of evidence that persons protect or **establish** their rights. **On** the other hand, evidence is a means upon which the judge depends to seek the truth and **dispense** justice. It is not, therefore, an exaggeration to say that *without Bayyinah* or evidence, no **judicial** system would exist, and consequently no fair judgement can take place.

## 1.2. THE CONCEPT OF *AL-BAYYINAH* AND EVIDENCE

### 1.2.1. The meaning of *al-Bayyinah* under Islamic Law

*Al-Bayyinah*, which corresponds to what in Common Law<sup>7</sup> is called evidence, literally means, “proof” or “argument that, by inference with intellect or action or sense, manifests, clarifies, or shows the existence or non-existence of something.”<sup>8</sup>

*Al-Bayyimah* or evidence in a general sense has been defined as any material that may be legally admitted in order to prove or disprove some fact in dispute between adversaries.<sup>9</sup> In Bentham’s language it connotes “any matter of fact, the effect, tendency or design, of which when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact.”<sup>10</sup> However, legal jurists of

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<sup>7</sup> Common Law throughout this work means that law which evolved from England. It includes Malaysian Law by virtue of being largely founded on English Law principles and developed by judges and legislators trained under English Common Law. Hence, deliberation on English Common law is applicable on Malaysian Law. However, where distinction between the two systems is intended the words “English or Malaysian” will be used.

<sup>8</sup> Lane, Edward William, *An Arabic-English Lexicon*, (Islamic texts society trust, Cambridge, England, 1984) vol. 1, p. 23.

<sup>9</sup> See, 'Abdul Haseeb Abdul Salam Yusif, *al-Qadi wa al-Bayyinah*, (Maktabat al-Mu'allah, Kuwait, 1987), pp. 17-19; Ahmad Ibrahim Baik, *Turuq al-Ithbat al-Shar'iyah ma'a bayan ikhtilaf al-madhahib al-fiqhiyyah*, (ed., Wasil 'Ala' al-Din Ahmad Ibrahim), Matba'at al-Qahira, Cairo, 1985), pp. 26-27. (Hereafter refers to as *Turuq al-Ithbat*).

<sup>10</sup> Bentham, *Works* (ed. Bowring) vol. 6, p.208, as quoted by Montrose, J. L., “Basic concepts of the Law of Evidence” 70 [1954] L. Q. R. pp.527, 529.

both Islamic Law and Common Law dispute the strict legal connotation of *al-Bayyinah* or evidence.

From Islamic point of view, two main views are held concerning the exact legal meaning of *al-Bayyinah*. The first view is that *al-Bayyinah* is a term that connotes anything that clarifies and explains the existence of a right or manifests the truth. (*Ismun li kulli ma yubayyinu al-haqq wa yuzhiruhu*).<sup>11</sup> This view is espoused by a number of distinguished legal scholars, including Ibn Qayyim<sup>12</sup>, Ibn Taimiyyah<sup>13</sup>, both Hanbali legal scholars, Ibn Farhun<sup>14</sup>, a Maliki, and Ibn Hazm al-Zahiri.<sup>15</sup>

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<sup>11</sup> Ibn Qayyim al-Jawziyyah, Muhammad Ibn Abi Bakar, *al-Turuq al-Hukmiyyah fi al-Siyasat al-Shar'iyah* (ed. Muhammad al-Fiqqi) Matba'at al-Sunnah al-Muhamadiyyah Cairo, 1953), p.12. (hereafter referred to as *al-Turuq al-Hukmiyyah*).

<sup>12</sup> Ibid. pp. 12-16. *I'tam al-Muwaqq'in 'an rabbil 'alamin*, (ed. Muhammad Abdul Salam Ibrahim) Dar al-Kutub al-'Ilmiyyah, Bairut, 1991), vol.1, p.71-73. (hereafter refers to as *I'tam al-Muwaqqi'in*).

<sup>13</sup> See, Muhammad Ibn 'Abdul Rahman Ibn Qasim and son, (comp.) *Majmu'u Fatawa Sheikh al-Islam Ibn Taimiyyah*, 1<sup>st</sup> ed. 1398 A.H.), vol. 20, pp. 388-390; vol. 34, pp. 81, 238; vol. 35, pp. 392-395, where Ibn Taimiyyah maintains that 'judicial evidence' includes besides the oral testimony of witnesses, circumstances, surroundings, customary practice and others. With regard to customary practice as evidence he asserts that if the couple dispute the duty of maintenance the case should be settled according to custom. That is, if the practice of the place is that a husband usually maintains a wife her claim of otherwise would not be entertained. In the like manner, when both the wife and husband claim ownership of goods in the house and no evidence available, the rule of customary practice will be applied. That is what by custom is usually brought to the house by women or used by them is hers and vice versa. Therefore, Ibn Taimiyyah gives the term *bayyinah* a broader meaning.

<sup>14</sup> See his work, *Tabsirat al-Hukkam fi Usul al-aqdiyah wa manahij al-Ahkaam*, (Matba'at al-Kulliyat al-Azhariyyah, Cairo, 1986), p. 2-40.

<sup>15</sup> See, his book, *al-Muhallah bil a'athaar*, (ed. Abdul Gaffar Sulaiman al-Bandari), Dar al-Kutub al-'Ilmiyyah, Bairut, 1988), vol. 8, pp. 523-526. Ibn Hazm maintains that *bayyinah* should be broadly construed to include not only the oral testimony of witnesses but any method that will bring the truth into light such as the special knowledge of the *qadi*. The *qadi* may give judgement upon his cognisance of a fact. Yet, according to him, special knowledge of the *qadi* is the strongest and the utmost form of *al-Bayyinah*. It is unjust for the *qadi* to have knowledge of a fact in issue and let the perpetrator to go unadjudged or knows of a sin being practised without having it corrected, on the ground that he is waiting for witness to give evidence to that effect. By this, Ibn Hazm's most assertion is that justice may be established through whatever information.