THE LAW ON COMPETENCY, COMPELLABILITY AND CREDIBILITY OF WITNESSES: A COMPARATIVE STUDY OF EVIDENCE ACT 1950 AND ISLAMIC LAW

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ABSTRACT

Witnesses play an important role in the process of proof. In Malaysia, witnesses are subject to the Evidence Act 1950 which to a large extent is in *pari materia* to the Indian Evidence Act of 1872. This dissertation seeks to analyse three important issues: competency, compellability and credibility of witnesses. A comparative approach of Malaysian law and Islamic law is adopted. The dissertation is based on library research and concentrates on decided cases particularly Malaysian cases.

The study on Islamic law in regard to witnesses is concerned with the prescriptions of the Qur'ān and the Sunnah and their interpretations and explanations in the classical manuals of Islamic Law. All translations of the Holy Qur'ān are from 'Abdullah Yūsuf 'Alī's translation. As to Islamic procedural law, the study will focus on the Kelantan Evidence Enactment of The Syariah Court 1991 and the Syariah Court Evidence (Federal Territories) Act 1997.

Based on this research, it is crystal clear that Islamic law on witnesses is the best way to establish the competency of witnesses which may lead to the determination of their credibility and reliability of their evidence. Various aspects of problems as to the competency, compellability and credibility of witnesses are examined with a view to suitably injecting the Islamic concepts into the Evidence Act 1950.

مخلص البحث

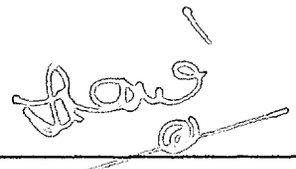
يلعب الشهود دوراً هاماً في عملية الإجراءات والبينات. فالشهود في ماليزيا مقيدون بقانون البينات الصادر عام ١٩٥٠م والذي يشبه إلى حد كبير قانون البينات في الهند الصادر عام ١٨٧٢ م. يهدف هذا البحث إلى تحليل ثلاث قضايا ذات أهمية ألا وهي: اهلية الشاهد، وإجباره على الشهادة، ومصداقيته. فالدراسة عبارة عن مقارنة للقانون الماليزي المتعلق بالشهادة والقانون الإسلامي في هذا الإطار. ولقد قامت الباحثة بدراسة كل المراجع المتوفرة قي الموضوع إلى أنها ركزت على الحالات المقررة وخاصة الحالات الماليزية منها.

فدراسة القانون الإسلامي بالنظر إلى ما يتعلق بالشهود يدفعنا إلى النظر في مقتضيات القرآن والسنة في الموضوع والتفاسير والتأويلات الموجودة في الكتاب القديمة للقانون الإسلامي. فكل التفاسير المعتمدة أخذت من تفسير معاني القرآن الكريم للعلامة عبد الله يوسف علي. وأما فيما يتعلق بالقانون الإجرائي، ركزت الدراسة على قانون البينات للمحكمة الشرعية بولاية كلا نتن لعام ١٩٩١م وقانون البينات للمحكمة الشرعية بالولاية الفيدرالية لعام ١٩٩٧م.

ومستندا بهذا البحث، يظهر أن الشريعة الإسلامية لاسيما في الشهادة هي أطيب الوسيلة في إثبات مصداقية الشهود حيث أنه يؤدي إلى تزكية مدى مصداقية وصلاحية شهادتهم. وجديرا بالذكر، أن البحث يحيط بعض المسائل والفروع المتعلقة بأهلية وإجبار ومصداقية الشهود. وكان الهدف العظيم منه إمكان تضمين وتضمير القواعد الإسلامية إلى قانون البينات ١٩٥٠م بماليزيا.

APPROVAL PAGE

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



Dr. Ismail bin Mohd @ Abu Hassan
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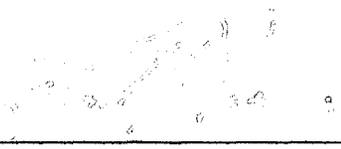
I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.



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DECLARATION

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

AKMAL HIDAYAH BT HALIM

Name: .....

Signature:..... Date: 28/10/99

Dedicated

To

My beloved Husband

And

My Family

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Praise be to Allah S.W.T. for giving me strength, patience and opportunity to work for my postgraduate degree at IIUM.

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My special thanks also goes to my wonderful husband Wan Kamaruddin, for his invaluable ideas, encouragements, helping hands and bearing with me patiently throughout my work. This humble work is dedicated to my family, especially my parents, Halim b. Jaafar and Akhirah bt. Abdullah, without whom and whose prayers would not have led me this far.

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INTRODUCTION

The central concern of this dissertation is to compare the laws regarding witnesses under the Evidence Act 1950 with the Islamic law of evidence by pointing out their similarities and differences. The primary reference for the Islamic law of evidence derives from the earliest works of Islamic law (those attributed to Mālik [d. 179/795], Abū Ḥanīfah [d. 150/767], al-Shāfi'ī [d. 204/820] and Ibn Ḥanbal [d. 241/855]) which was later developed by the mediaeval jurists namely Ibn Farḥun [the Mālikī, d. 799/1397], al-Marghīnānī [the Ḥanafī, d. 593/1197], Nawawī [the Shāfi'ī, d. 631/1233] and Ibn Qayyim [the Ḥanbalī, d.751/1350]. Other references may be alluded to on the basis of a comparative approach whenever deemed necessary.

The secondary references are the opinions of contemporary scholars such as al-Zuḥaylī, 'Abd al-Karīm Zaydān and Prof. Dr. Mahmud Saedon Awang Othman. The modern provisions of the Evidence Act 1950, Kelantan Evidence Enactment of the Syariah Court 1991 and Syariah Court Evidence (Federal Territories) Act 1997 are analyzed in order to see the realization of the classical precepts on the law.

This dissertation consists of four chapters. The competency of witnesses is discussed in the first chapter. The discussion is divided into two parts, the competency of witnesses under the Evidence Act 1950 and the competency of witnesses from the Islamic point of view. This chapter will discuss on the competency requirement under the Evidence Act 1950 and what is the Islamic perspective on this point.

Chapter two discusses the second limb of the topic, the compellability of witnesses. The general rule for this principle is laid down together with its exceptions. The provisions under the Act are analysed. The general rule as regard to the responsibility to give evidence under Islamic law is scrutinized. The extent of the responsibility under the *ḥudūd* and non-*ḥudūd* cases is differentiated here. The scope of compellability from the Islamic point of view will be examined.

The third chapter is on the credibility of the witness. This chapter is also divided into two parts i.e. Malaysian law and Islamic law. Under this heading, the procedure to question witnesses in court is discussed which consists of examination in chief, cross-examination and re-examination. This includes the issue of impeachment of witness' credibility. As to the Islamic point of view, the dissertation discusses on the examination of witnesses which is known as *tazkiyah al-shuhūd*. It is to be noted that the tripartite system has been included under the Kelantan Enactment and the Federal Territories Act 1997. Due to this, the practicality of the examination of witnesses (*tazkiyah al-shuhūd*) will be analysed .

At the end of every chapter, there will be a short analysis and comment of the on going discussion.

1. Witnesses under Evidence Act 1950

The law relating to witnesses assumes great importance in the administration of justice. By virtue of Section 118 of the Evidence Act 1950 (hereinafter referred to as 'the Act'), a person who is intellectually competent to testify is a competent witness. Section 118 shows that in determining the competency of witnesses, the concern in the

first place is with the ability to understand the questions put to them and ability to give rational answers to those questions. By virtue of Section 118, competence is entirely a matter of intellectual capacity to function as a witness. On the other hand, the witness may be an inveterate liar who fears neither God nor man or his testimony may be intrisincally biased. Do we stop only at examining the ability or do we need to go further ?

As a general rule, under Malaysian Law, witnesses are both competent and compellable. However, there are exceptions to this general rule. A witness may be competent to give evidence but may not be compelled to do so particularly where he is entitled to claim privilege. There are five types of privilege. These are privilege as to Judges, Session Court Judges and Magistrates, privilege as to communication during marriage, privilege as to affairs of state, privilege as to professional communications and privilege against self incrimination.

Another aspect that is important is the issue of a witness's credibility. Witnesses who constantly lie may not be credible. Such witnesses are among those whose credibility may be impeached under the Evidence Act. Once a witness's credibility is impeached, the whole of his evidence must be ignored by the court. On the other hand, not all witnesses who tell lies are unreliable. There may be situations where the court sieves the evidence given by such witnesses and accepts the truthful parts.[1]

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[1] Rafiah Salim, *Evidence in Malaysia and Singapore – cases, materials and commentary*, Butterworths, Singapore, 1994, p. 401.

The procedure for questioning witnesses is important in determining their credibility. Section 138 (1) of the Act provides for the order in which questions are to be put to the witness, namely, he is first to be examined-in-chief, that is the examination of a witness by the party who calls him. Then, if the adverse party so desires, the examination of a witness shall be made by this party which is known as cross-examination. Where a witness has been cross-examined, and is then examined by the party who called him, such examination shall be called his re-examination.[2] This three level system of questioning is often referred as the tripartite system.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination in chief. As to the re-examination, it shall be directed to the explanation of matters referred to in cross-examination and if a new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine on that matter. The court may in all cases permit a witness to be recalled either for further examination-in-chief of for further cross-examination. If it does so, the parties have the right of further cross-examination and re-examination respectively.[3]

[2] See Section 137 of Evidence Act 1950.
[3] Ibid., Section 138 (2), (3), (4).

2. Witnesses in Islam

In Islam, the laws are very stringent in accepting the testimonies of witnesses. The reasons for this are the forgetfulness of witnesses, their suppression of evidence or willful distortion of facts resulting from partiality, incitement or bribery.

Thus, Islamic law of evidence has laid down detailed conditions that are to be fulfilled by a person before his testimony can be accepted as evidence. One of the most important conditions for witnessses is the condition of trustworthiness (*'adl*). The testimony of a person who is notorious for lying or for bad character is unacceptable and due to this, the law makes it a requirement to investigate the uprightness of witnesses which is also known as examination of witnesses (*tazkiyah al-shuhūd*).

The term for evidence is *bayyinah*. The most important type of evidence is witness or *shahādah*, so that the term *bayyinah* is sometimes used as a synonym for witnesses.[4] It may be seen that a large part of Islamic Evidence is in the form of testimony or *shahādah* given by the witnesses and what is disputed can be resolved by their testimonies.

Al-Zuhaylī observed that the jurists are of different opinions with regard to the issue whether *shahādah* means evidence (*bayyinah*) or that *shahādah* is only a type of evidence and there are other types of evidence (*bayyinah*). They can be divided into three groups. The first group which consists of the majority of the early jurists is of the opinion that *bayyinah* is said to be *shahādah*, for it is through *bayyinah* and the

[4] Schacht, J., *An introduction to Islamic law*, Oxford, 1964, p. 192-193.

presence of witnesses that right and truth become evidence. This is the view of the Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī. Secondly, the name *bayyinah* is given to whatever clarifies, explains or shows the existence of a right. Al-Qur'ān uses the term *bayyinah* to mean not only *shahādah* but argument, proof and clear evidence that is used to establish the right. This view, which is in line with the literal meaning of *bayyinah*, is held by Ibn Qayyim, Imām Mālik, Abū Ḥanīfah, Ibn Farḥūn, al-Ṭarabulsī and Imām Aḥmad ibn Ḥanbal. Finally, *bayyinah* is taken to include both the evidence of witnesses and the special knowledge of the *qāḍī*, for the right and truth can be established by either of these methods. This is the view of Ibn Ḥazm.[5]

Under Islamic law, the testimony given by a witness in any hearing can be divided into two parts. Firstly, testimony in the form of *bayyinah* and secondly, testimony in the form of *shahādah*. Section 3 (1) of the Kelantan Evidence Enactment of the Syariah Court 1991 defines *bayyinah* as evidence which proves a right or interest including *qarinah* or circumstantial evidence. *Shahādah* is defined as evidence with the quality of truth given in a court using the expression '*ashhadu*' in order to establish a right or interest of a person against another and if it is so established it binds the judge. This is also provided by Section 3 (1) of the Syariah Court Evidence (Federal Territories) Act 1997. Article 1684 of the Mejelle states that *shahādah* is to give information by the word *shahādat* where the parties are face to face in the presence of the judge.

[5] Muḥammad Muṣṭafá al-Zuhaylī, *Wasā'il al-Ithbāt*, Maktabah Dār al-Bayān, Damsyek, 1987, pp. 25-26.

Analysis of the law shows that failure to meet all conditions for witnesses does not immediately impede the person's eligibility. Such evidence may still be admitted as *bayyinah* by the judge.

In Islam, the Muslims are collectively responsible for the administration of justice particularly in relation to giving evidence. The Muslims should not hesitate to bear the responsibility in order to establish justice. The best witness is the one who gives *shahādah* without being asked for it or without it being preceded by a charge. The Prophet S.A.W. was reported to have said the following:

> "Have I not told you about the best witness? It is he who gives his testimony before being asked for it".[6]

The Muslims are encouraged to adduce evidence willingly, to prohibit the withholding of evidence and to be just and trustworthy. Islam views the giving of evidence as the discharge of a trust on behalf of Allah and to be a witness in accordance with His Supreme Will. All parties to the dispute are charged with the obligation of upholding justice absolutely. Success in a trial means success in upholding justice and rendering it to the rightful person. It is not considered a success if it merely displaces justices from the person entitled to it.[7]

It is hoped that this dissertation can provide an opportunity to know about the growth of evidence and procedure in Malaysia as well as under Islamic law principles so that a clearer understanding on the Islamic law of evidence is achieved in order to justify its incorporation into the Evidence Act 1950.

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[6] Muslim, *al-Ṣaḥīḥ*, Vol. 6, p. 17.

[7] Mahmud Saedon A. Othman, *An introduction to Islamic law of evidence*, Hizbi, Shah Alam, 1996, p. 1-4 passim.

CHAPTER

ONE

CHAPTER 1
COMPETENCY OF WITNESSES

1.1 Competency under Evidence Act 1950

Competence imports a qualification to do an act. In the law of evidence, competency means that there is no legal reason why the person concerned should not give testimony in court.[8] It means capacity to give evidence. A witness is competent if he may lawfully give testimonial evidence. Sections 118,119,120,133 and 133A of the Evidence Act 1950 deal with competency of witnesses. This chapter seeks to analyse the following issues:

(i) Who may testify

(ii) Dumb witnesses

(iii) Evidence of children

(iv) Parties to civil suits, wives and husbands as witnesses

(v) Evidence of an accomplice

1.1.1 Who may testify

Section 118 of the Act sets out the principles regarding the competency of witnesses as follows:

> All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

[8] Hamid Ibrahim & Maimoonah Hamid, *Law of evidence*, Central Book Corporation Sdn. Bhd., Kuala Lumpur, 1993, p. 459.

Under this section all persons are competent to be witnesses, provided they satisfy the test of being able to understand the questions which are being put to them and they are in a position to give rational answers to those questions. Those who will not be competent are such persons whom the court considers incapable of understanding the questions and giving rational answers by reasons of tender years, extreme old age, disease, whether of body or of mind, or any other cause of the same kind. Under this section, even a lunatic or a mentally disordered person is competent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

In *Kee Lik Tian v PP*,[9] the appellant had been convicted of the offence of raping a 12 ½ year old girl. The learned President of the Sessions Court found the girl to be mentally retarded or otherwise having a very low IQ but he held that she was a reliable and credible witness. Applications were made during the trial for the girl to be sent to a psychiatrist and also to have her cross-examined on her report but these were refused. The appellant appealed. It was held that in the circumstances of this case, the learned President should have determined the competency of the witness to testify and he should have done this with the aid of expert medical opinion.

Therefore, it can be noted that in determining the competency of witnesses, the concern in the first place is with the ability to understand the questions put to them and to give rational answers to those questions. By virtue of Section 118, it is pertinent to submit that competency is entirely a matter of intellectual capacity to function as a

[9] [1984] 1 *MLJ 306.*

witness. Competency is not tested on the basis of age of a person but only on the basis of capacity to understand.

1.1.2 Dumb Witnesses

A witness who is unable to speak may give evidence in any other manner in which he can make it intelligible, as, for example, by writing or by signs; but the writing or the signs must be made in open court. Evidence so given shall be deemed to be oral evidence.[10]

In *Chai Kor v PP*,[11] one of the witnesses against the appellant at the trial was a deaf-mute whose evidence could not be properly understood and to whom proper questions could not be put at all. Even the court interpreter had difficulty in communicating with the witness. It was held that the circumstances concerning the evidence of the deaf mute in this case demanded that the judge should warn the jury in the strongest terms to consider whether they should or should not accept his evidence. This was a case where the judge would be justified in directing the jury that they could not safely accept his evidence, or further that the evidence should be excluded from their consideration altogether. Wylie CJ (Borneo) stated that:

> " Here is a witness whose evidence could not be properly understood and to whom proper questions could not be put at all. Therefore, it is a case where the jury might well have been directed that this evidence was to be excluded from their consideration altogether. From the record, it is difficult to see, when those features arose how the court could continue to take the view that this witness was a competent witness within the meaning of section 118 of the Evidence Ordinance..."

[10] Section 119 of Evidence Act 1950.
[11] [1965] 2 MLJ 208.

It is submitted that the above decision is correct despite the fact that Section 119 of the Act states that a witness who is "unable to speak may give his evidence in any other manner in which he can make it intelligible".

1.1.3 Evidence of Children

Since competency is tested on the basis of capacity to understand, no precise age limit can be given as persons of the same age differ in mental growth and their ability to understand questions and give rational answers. Therefore, the testimony of children may be admissible if they appear to possess sufficient understanding.

Evidence of a child of tender years is governed by Section 133A of the Act which provides:

> Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section:
>
> Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

By virtue of this section, such evidence may be received, though not given upon oath, if the court is of the opinion that:

(i) the child does not understand the nature of an oath

(ii) he possesses sufficient intelligence to justify the reception of the evidence; and

(iii) understands the duty of speaking the truth.

Section 133A, however, contains a special proviso to the effect that where such unsworn testimony of the child is given on behalf of the prosecution, the accused "shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof" which implicates the accused. Therefore, a conviction cannot stand on the uncorroborated evidence of an unsworn child witness. A mere warning by the court of the danger of convicting the accused in view of the uncorroborated evidence of such a witness is not adequate as the requirement of corroboration is mandatory. On the other hand, if the child witness gives evidence on oath, section 133A does not apply.

However, judging from case-law, despite the mandatory requirement for corroboration under the proviso of section 133A, the general practice is that the courts adopt "the rule of prudence" as explained by Azmi LP in *Loo Chuan Huat v PP*:[12]

> "...the jury must be warned that it is unsafe to act on the evidence of a child unless it is corroborated in material particulars implicating the accused...[P]rudence requires that it should be corroborated. Hence it is called a rule of prudence which merely means that the evidence is not to be given weight unless it is corroborated in material particulars..."

The learned Lord President further explained that the rule of prudence is based on the experience that sometimes a child finds it difficult to distinguish between reality and fantasy.

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[12] [1971] 2 MLJ 167.