

THE REALITY ON APPLICATION AND CHALLENGES OF CLOSED-CIRCUIT TELEVISION (CCTV) IMAGES AS EVIDENCE IN SHARIAH CRIMINAL CASES IN MALAYSIA

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Abstract

Purpose of the study: This study analyses the evidencing procedure via Closed-Circuit Television (CCTV) images in criminal cases of hudud, qisas, and takzir based on the Islamic Law of Evidence in Malaysia.

Methodology: The method used to analyze data is content analysis on primary and secondary data sources gained from various sources.

Main Findings: Closed-Circuit Television (CCTV) images are classified under the definition of an electronic document in Malaysia's Shariah law.

Applications of this study: This study proved the admission of video as evidence in cases including zina (adultery), qazaf (offense of making an accusation of zina) and other criminal offenses.

Novelty/Originality of this study: This study discovers how far Closed-Circuit Television (CCTV) images are being used as evidence and challenges faced in convicting charges in Shariah court using this evidence.

Keywords: *Fundamentals of Forensic Science, Fiqh Forensics, Shariah Criminal Cases, CCTV images, Electronic document, Electronic evidence.*

INTRODUCTION

Just like the admissibility of video assistant referee (VAR) that ends the long-story of injustice in the World Cup, Closed-Circuit Television (CCTV) images also play significant roles in giving justice to the world. Unlike in civil law, the debates on the admissibility of CCTV images as a mean of proof in Shariah law have not yet come to an end. As in Shariah criminal cases, it is very difficult for CCTV images to be accepted as one of the means of evidence by some parties. Due to the vulnerable feature of electronic evidence, their admissibility in courts is subjected to certain rules. There are not many kinds of research conducted on the evidencing procedure involving CCTV images from Islamic law of evidence perspective. Furthermore, the advancement in forensic technologies has drastically changed the perspective of both jurists and scholars towards CCTV images.

The constitutional of Malaysia provides a dual justice system of Civil and Shariah law that separates the administration and procedure of both legal systems including the evidencing procedure. As in Shariah Courts, the verification methods through CCTV images and electronic documents are still relatively new compared to other proofing methods. Some parties are still in doubt with this method, but it seems to fit with the opinions of prominent Muslim legal scholars of Ibn Taymiyyah and Ibn Qayyim that: "Anything that can explain and disclose the truth is considered as evidence" ([Ahmad Syukran, 2017](#), [Ibn Taimiyyah, 1995](#), [Ibn al-Qayyim, n. d.](#)). With that definition given, CCTV images are classified as electronic documents of documentary evidence that falls within the scope of admissible evidence. By focussing on Shariah criminal cases, this study explores the reality of CCTV application in Shariah courts and challenges faced by the court in dealing with electronic evidence-related cases.

LITERATURE REVIEW

CCTV Images as Electronic Documentary Evidence

Literature defined by an Islamic scholar agrees that CCTV image is a type of electronic documents that can be created, stored or extracted, copied, transmitted, received or communicated electronically through other electronic devices below. It can be clearly viewed and understood and derived from various different sources including VLSI chips, SDDs, hard disks, cell phones, digital cameras, computers, printers, photocopiers, support tapes, SDD cards, scanners, CDs, DVDs, VCDs, internet networks, software, and communication protocol. Based on the definition of electronic documents, it is clear that CCTV is included in the category of electronic documents. CCTV is a camera that captures video images and sends composite video signals to specific places. CCTVs are often used for surveillance purposes that are usually found in banks, airports, buildings and even now used in homes. The first CCTV was installed by German Company Siemens AG at Test

Stand VII in Peenemunde, Germany in 1942, used to observe the launch of the V-2 rocket. The main features of the CCTV operating system are cameras, digital video recorders (DVR) and monitor.

There is no specific classical reference that recognizes CCTV images as a mean of proof. However, the CCTV certification can be considered as a mean of verification.

The admissibility of the document as evidence in court

The viewpoint of the admissibility can be divided into two respective opinions ([Fawwaz, 2008](#)):

The majority of Muslim scholars consisting of Hanafi, Maliki and some followers of Syafie and Hanbali rejected the acceptance of the document as a method of proof ([Ibn al-Qayyim, n.d.](#), [al-Zuhayli, 1982](#), [Zulfakar, 1997](#), [Ibn Farhun, 1986](#), [Ibn Qudamah, 1968](#)). The argument of the rejection of the jumhur against the document as a proof is that the documents are vulnerable to counterfeiting.

According to the Maliki sect and recent prominent scholars, documentary evidence is admissible as a mean of proof in Islam. This opinion is based on one of the verses in Qur'an where Allah (S.W.T) said;

O, you who believe! When you are conducting business with the receivables payable to a certain period of time then you shall write (the debt and the repayment period) (Al-Qur'an. Al-Baqarah: 2: 282)

In this verse, Allah s.w.t has ordered His believers to have a written document. Another statement regarding the importance of the written document is from The Messenger of Allah (p.b.u.h) when he ordered a document to be made when a debit transaction is done, he said:

It is the duty of a Muslim who has something which is to be given as a bequest not to have it for two nights without having his will written down regarding it. (Hadith. Sahih Muslim. 13:3987)

This hadith indicates that the Messenger of Allah (p.b.u.h) sent his people to testify. If the writing of the will is not important and not be beneficial, then surely the Messenger of Allah will not urge his people to do so. There are among the hadiths that the Messenger of Allah lowered the official stamp of the kingdom, as some governments would not treat any letter without any official stamp as in the hadith narrated by Anas bin Malik r.a.

In addition to that, the *qawa'id al-fiqhiyyah* (legal maxims) of '*al-kitab ka al-khitab*' implied that 'documents are equal to uttering' (in revealing the will and intention of the heart) ([Ibn al-Qayyim, n.d.](#), [al-Buhūti, n.d.](#), [Ibn 'Abidin, 1992](#)). All of these arguments actually indirectly recognize the CCTV image as a method of proof in Islamic law. Besides, there are two other main methods in convicting criminal cases known as *iqrār* and *shahādah*. *Iqrār* is a mean of confession or special recognition as one way of proving to condemn the rights or interests of others upon himself or to convict an offense or liability against himself as adultery ([Mahmud Saedon, 2003](#)). Section 17 (1) of the [Shariah Court Evidence \(Federal Territories\) Act 1997](#) clarifies that the *iqrār* is an admission made by a person, in writing or oral or by signature, stating that he has an obligation or liability against another person in respect of a right ([Malaysia, Shariah Court \(Criminal Jurisdiction\) Act 1965](#)). *Shahādah* is a notification of a right or interest to others by using the words '*asyhadu*' (I testify). Section 3 of the [Shariah Court Evidence \(Federal Territories\) Act 1997](#) interpreted *shahādah* as any evidence given in Court by using the expression '*asyhadu*' to prove a right or interest ([Shariah Court \(Federal Territories\) Evidence Act, 1997](#)). Although the testimony is a method of proof that the scholars have agreed upon, in criminal cases, there are a different number of witnesses that shall testify depending on the type of case.

The majority of Muslim scholars agree that the number of witnesses for adultery is four persons based on the Quranic verse which means:

And those who throw the accusation (adultery) to the women who are well-respected, then they do not bring four people, witnesses, then they will be whipped forty times, and do not accept their testimony forever; because they are the wicked ones (Al-Qur'an. Al-Baqarah. 2: 4).

For the hudud and qisas cases, as well as the crime of adultery and qazaf, the scholars concluded that the number of witnesses at least two men, as Allah s.w.t. said in the Quran which means:

And you shall have two male witnesses from among you (Al-Qur'an. Al-Baqarah. 2: 282).

The strength of *iqrār* and *shahādah* cannot be denied in the further proof as confirmed in the Qur'anic verses and al-Hadith, and the scholars also agree on this matter. However, a common issue arises especially with regard to the testimony; are the witnesses present today in criminal cases especially in the case of adultery had fulfilled the requirements of *syara'*? With many obstacles that occur today, it is almost impossible for witnesses to meet the requirements set by the *syara'*. If there are no serious actions taken, then this matter will lead to another problem which is the failure to enforce the [Act 1965, Shariah Court \(Criminal Jurisdiction\) Act](#) that was fought by many parties a few times before.

Compared to witnesses, the evidence through the document (CCTV image) is seen as very consistent and lasting under a restricted and well-protected protocol that was set up by law enforcement authorities. The protocol has the capability to ensure the safety and confidentiality of evidence including CCTV; for the long term starting from the investigation period

until the day of trial. So, the evidence is safe from any fabrication or alteration, and damages or the potential to be lost as it was handled by authorized and well-trained personnel.

METHODOLOGY

For sampling purposes, all data will be collected from primary sources which are al-Qur'an and Hadith, and also secondary sources such as journals or reference books and case studies. Al-Qur'an and Hadith are categorized as primary data sources as both are authoritative and direct sources, while journals, reference books, and cases are clustered into secondary sources because all those are renewable or subjected to change when there is new discovery found.

In this qualitative study, the content analysis method is used for data analysis and interpretation. This type of data analysis is selected based on its systematic and objective of data analysis to describe certain phenomena from verbal, visual or written of collected information. Content analysis method concerned with meanings, intentions, consequences, and context to gain an in-depth understanding of the particular issue.

DISCUSSION / ANALYSIS

The Admissibility of Electronic Documentation Regarding Cases

Up to this moment, the Shariah Court has only limited its jurisdiction over family cases and moral crimes involving Muslims. The question is; if given a wider jurisdiction, is the Shariah Court ready to handle cases that use electronic evidence such as CCTV images? In Malaysia, it is undeniable that most of the law practitioners from the Civil Court had numbers of experienced dealing with various types of evidence, including electronic documents compared to those at Shariah Courts. This situation does not mean that law practitioners in the Shariah Court had rejected the evidence by electronic evidence, because of a lack of exposure to cases that has electronic documents as evidence to be testified in court.

In Shariah Courts, there is no special Act provides for electronic documents. In contrast to the Civil Courts, there are specific acts relating to electronic documents such as the [Digital Signature Act 1997](#) and the [Electronic Commerce Act 2006](#). Although the Shariah Court does not provide the purpose of electronic documents, Section 3 of the [Shariah Court Evidence \(Federal Territories\) Act 1997](#) stated that, 'any letter, sign, number, symbol, or signal specified, described, or howsoever described, including anything contained in a disc, tape, film, soundtrack or any other device' is classified as document. Additionally, section 49 of the [Shariah Court Evidence \(Federal Territories\) Act 1997](#) explicitly considers the computer as primary evidence. Section 49 of the [Shariah Court Evidence \(Federal Territories\) Act 1997](#) states that 'A document issued by a computer is primary evidence' ([Mutawalli, n. d.](#)).

These two sections actually proved that the Shariah Court accepts CCTV images as a method of proofing without limiting certain cases. The concept of the document as evidence in Section 3 of the [Shariah Court Evidence \(Federal Territories\) Act 1997](#) was actually taken from the same section of the Evidence Act 1950 which has long been practiced in the Civil Courts ([Evidence Act, 1950](#)). Parallel with the development of science and technology as well as the development of the globalization era the term should be developed by including electronic and digital material in the scope of its interpretation.

Based on cases discussed in the Civil Court below, the document can stand strong as evidence on its own. Documents are not just limited to manual forms, even CCTVs are also categorized as documents in the group for the electronic document. In view of the experience of the Civil Court in Malaysia, it had been dealing with various types of electronic documents. The cases are as follow:

1. The honorable judge in the case of [Munah bte Ali v. Public Prosecutor \(1958\)](#) has decided that video recording involving the process may be categorized as a document in accordance with the definition of Section 3 of the [Evidence Act 1950](#).
2. The case of [Public Prosecutor v. Empaling \(1996\)](#) and [Public Prosecutor v. Datuk Haji Sahar Arpan](#), the court is of the opinion that fax and microfilm copies are included under the definition of documents as provided under Section 3 of the [Shariah Court Evidence \(Federal Territories\) Act 1997](#) and [Evidence Act 1950](#).
3. Where in the case of [Mohd Ali Jaafar v. Public Prosecutor \(1998\)](#), the court has convicted allegations of corruption against the accused via tape recordings. The Malaysian Anti-Corruption Commission (MACC) uses the recording tape of the accused as evidence of the conviction. After the investigation of the legitimacy of the tape, the Court received a tape recorder as evidence to convict the allegations of corruption against the accused as the tape was also considered a document ([Yusoff, 2008](#)).
4. In the case of [Ahmad Najib bin Aris v. Public Prosecutor \(2009\)](#), although no certificates are attached, chemical expert reports and CCTV recordings are adopted as documents issued by the computer.
5. In the trial of Gnanasegaran and Hanafi's which was held in the Supreme Court, there are two types of documents presented as evidence during the trial. Chemical reports were produced by computer as a written document (as written in Section 90A (1) of [Evidence Act 1950](#)) have been adopted on the basis of thorough question regarding the use of CCTV and this has been complied with by Section 90A (3) of [Evidence Act 1950](#). However, CCTV footage has been

rejected in the case of Gnanasegaran and Hanafi since there are no certificates that attached or oral evidence is presented in the case.

Shariah Court also accepts digital materials as evidence in the trial and those cases are as follow:

1. The application for marriage confirmation of Siti Adira Suhaimi and Adenan Abu;
2. The case of fasakh between Zabariah bint Mat Piah v. Syed Abas bin Syed Ibrahim;
3. The case of nusyuz between Mohd. Nizam bin Abdul Malik v. Fauziah binti Mohd. Isa, Ahmad Faozi bin Mansor v. Norhafizah binti Ahmad and Ramlee bin Ismail v. Masuah binti Abd Rashid;
4. The divorce case between Moriazi bin Muhammad v. Ajmawati binti Atan.

Usually, digital items presented in court need to be attached with written descriptions or supported with other information such as evidence from experts to verify the authenticity of such digital documents. For example, because of having a problem in understanding the acceptability of digital evidence in court, this situation resulted in the case (d) being ordered to be heard again by submitting witnesses supporting the claim. Selangor Shariah High Court Judge then initially approved the plaintiff's application because the plaintiff succeeded in submitting a court-approved *qarinah* (circumstantial evidence) in a receipt/cheque as a document and a refund. However, on 4 April 2005, the defendant appealed. The Judges of Appeal Court at that time received the appeal and requested the judge to be repealed by the witnesses. The grounds of judgment are that the plaintiffs should submit witnesses to confirm his statement. This statement is based on section 94-99, the Shariah Court Evidence Enactment, in which the prosecution should present a witness in their prosecution. The judge who handles this case does not refer to al-Kindi and Hadrami's case before deciding his judgment.

This paper opined that the judgment made by the Chief Judge of the Selangor Shariah Court is more in line with the requirements of the Quran which outlines general documents. The author's justification is as follows:

1. The Judge of Appeal does not refer to Section 49 of the [Shariah Court Evidence Act \(Federal Territories\) 1997](#) on primary evidence: 'Primary evidence means the document itself produced for the inspection of the Court: Explanation 3-A document produced by a computer is primary evidence.' In this provision, it is clear that electronic documents are sufficient to be a proof of evidence without the need for witness testimony as requested by the appellate judges.
2. In this case, appeal judges may also be less exposed to the execution of electronic documents. This is because every process of storage, production, and delivery of money is either online or by check as in this case, all of its data is stored in the system or named as an electronic document. Even evidence with electronic documents is stronger and more consistent than testimony, as it does not change with time change even though its owner has long passed away. Compared to the testimonies likely to change with changing times such as forgotten or possibly the witness died.

Common problems in dealing with digital evidence in both courts, the Shariah Court and the Civil Courts are; when they faced with the consequence of the rejection of evidence and this problem is because the presence of evidence without witnesses and experts opinion made the evidence less clear and finally lead to failure in convicting a case. Moreover, in convicting someone accused of a criminal case, it requires other evidence to reinforce the evidence lodged in the Shariah Court, for example in khalwat cases ([Zulfakar, 1997](#)).

Challenges of CCTV Images Acceptance as Legislative Method in Shariah Criminal Cases

There are challenges that arise in receiving electronic documents as evidence, among which is the authenticity of the recordings made by CCTV. Electronic evidence is often exposed to corruption and aggression as happened in the case of Alliance and Leicester Building v Ghahremani. In this case, the Court has decided to waive the evidence as there is doubt about the validity of the document.

Although there have been cases of document forgery that forced the court to reject it as evidence, this does not necessarily mean that all electronic evidence is rejected by judges in the trial. The Islamic law itself has outlined some guidelines to prove the legitimacy of a document before it can be accepted as evidence. The main point in this guideline is to use expert services, especially in this study, in the field of digital forensics. Besides, a study conducted by ([Ahmad Syukran, Aminuddin & Abdul Rahim, 2015](#)) found that there is an obvious association between forensic science elements and Islamic law. There are Qur'anic and al-Sunnah references regarding the opinion of the experts as a means of proofing especially in the verification of documents. For example, both words *ahl al-Zikr* and *Khabir* stated in Qur'an refer to expert opinion, as Allah SWT which means:

So ask those who are religious if you do not know (Al-Qur'an. Al-Nahl. 16:43).

The above statement indicates that; if the document has been recognized by experts and the specialist has complied with requirements set by the law, that document may be admissible as evidence; in this case the CCTV images. Furthermore, confirmation of information through expert opinion has been accepted since the time of the Prophet Muhammad (p.b.u.h) when he recognized Mujazziz al-Mudliji's statement confirming family ties between Usamah and Zaid r.a.

Section 33 (1-3) of the [Shariah Court Evidence \(Federal Territories\) Act 1997](#) clearly states that:

1. When the Court has to make an opinion on a matter concerning the laws of a foreign country or of science or the arts, or of the identity or purgative of handwriting or fingerprints or in relation to the determination of nasab, the opinion on the matter of the person having the skills specialized in the laws of foreign countries, science or the arts, or in matters of identity or purity of handwriting or fingerprints or relating to the determination of nasab, is qarinah.
2. Such persons are called experts.
3. Two or more specialists shall be summoned to give evidence if possible but if there are no two experts, the expert's evidence is sufficient. If two experts give different opinions, then the third expert shall be summoned to give evidence.

In Malaysia, there are indeed digital forensic scientists who are specialized in processing digital images for law enforcement purposes and internationally accredited. These experts can verify the originality of images captured by CCTV and finalized the result before it can be used as evidence in court.

CONCLUSION

CCTV images can actually be used as evidence as it is classified as the electronic description under the concept of *kitabah* or documentary or *wathaiq* and document are one of accepted evidence in court, either in the Shariah Court or in the Civil Court. Every recording that has been made will first go through strict screening by experts who meet the criteria as outlined by the Islamic law. To further strengthen the implementation of electronic evidence in the Shariah Court, Section 90A as contained in the [Evidence Act 1950](#) must be added to the [Shariah Court Evidence \(Federal Territories\) Act 1997](#). This is because Section 90A has outlined a fairly clear provision of electronic documents for Shariah law practitioners at the same time. There are law practitioners and court judges who are still quite fuzzy about the implementation of electronic documents as one of the proven methods so they should be given greater exposure to electronic documents by establishing sections specifically related to forensic electronics. Further research should be carried out to come out with a clearer guideline in dealing with electronic evidence.

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