

# **APPLICATION OF PRINCIPLES OF CHAIN OF EVIDENCE AND CHAIN OF CUSTODY DURING STORAGE AND FORENSIC EXAMINATION OF ELECTRONIC DOCUMENTARY EVIDENCE IN SHARIAH CRIMINAL CASES IN MALAYSIA**

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## **ABSTRACT**

Electronic documentary evidence is submitted to prove the facts of the case and to assist the court in making a good judgment. Nevertheless, the admissibility of such evidence in Shariah criminal cases depends on the competence of religious enforcement officers in preserving the integrity of electronic documents during the process of storage and forensic examination at the investigation stage. Religious enforcement officers must ensure that both the chain of custody and chain of evidence remain intact during the conduct of both processes, so that both amply support the admissibility of the document during the trial later. However, Shariah texts make no reference to the processes of storage and forensic examination of electronic documentary evidence in ascertaining proof and strength of *qarinah* evidence. In addition, legal provisions in the enactment do not appear to make any reference to these principles and processes. Such a scenario has caused some confusion regarding their acknowledgment in determining the admissibility of electronic documentary evidence in the Shariah court. This article uses a legal research framework developed qualitatively, with library research method used in data and information collection. These data and information are subsequently analysed using content analysis and critical analytical methods. The article aims to identify the principles of Islamic evidence and legal provisions under the Shariah Criminal Procedure

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Enactment and analyses existing problems relating to the process of storage and forensic examination of electronic documents. It suggests that a standard operating procedure on the processes of storage and forensic examination of electronic documentary evidence be developed in addressing issues relating to the integrity and admissibility of electronic documentary evidence in Shariah criminal trials.

**Keywords:** Storage, Forensic Examination, Electronic Documentary Evidence, Admissibility, Shariah Criminal Cases.

## **APLIKASI PRINSIP RANTAIAN KETERANGAN DAN RANTAIAN JAGAAN SEMASA PENYIMPANAN DAN PEMERIKSAAN FORENSIK KETERANGAN DOKUMEN ELEKTRONIK DALAM KES JENAYAH SYARIAH DI MALAYSIA**

### **ABSTRAK**

Keterangan dokumen elektronik dikemukakan untuk membuktikan fakta kes dan membantu mahkamah membuat penghakiman yang baik. Namun begitu, kebolehterimaan keterangan sedemikian dalam kes jenayah Syariah bergantung kepada kecekapan pegawai penguatkuasa agama dalam memelihara integriti dokumen elektronik semasa proses penyimpanan dan pemeriksaan forensik di peringkat siasatan. Pegawai penguatkuasa agama harus memastikan agar kedua-dua rantaian jagaan dan rantaian keterangan kekal kukuh semasa melaksanakan kedua-dua proses agar kedua-duanya menyokong secukupnya kebolehterimaan dokumen semasa perbicaraan nanti. Bagaimanapun, prinsip syariah tidak merujuk serta mengaitkan dengan jelas kepentingan proses penyimpanan dan pemeriksaan forensik dokumen elektronik dalam menentukan pembuktian dan kekuatan keterangan qarinah. Tambahan, peruntukan enakmen dilihat tidak membuat sebarang rujukan dan mengiktiraf kedua-dua prinsip dan proses. Senario sebegini telah menimbulkan kekeliruan berhubung pengiktirafan kedua-dua prinsip dan proses dalam menentukan kebolehterimaan sesuatu keterangan dokumen elektronik di mahkamah syariah. Penulisan ini mengguna pakai kerangka penulisan perundangan tulen secara kaedah kualitatif. Metodologi penulisan perpustakaan secara doktrinal digunakan sebagai kaedah pengumpulan data dan maklumat. Data dan maklumat tersebut kemudiannya dianalisis menggunakan kaedah analisis kandungan serta kaedah analitis kritis. Justeru makalah ini bermatlamat untuk mengenal pasti prinsip-prinsip keterangan Islam dan peruntukan undang-undang di bawah Enakmen

Tatacara Jenayah Syariah dan menganalisis masalah yang wujud berkaitan proses penyimpanan dan pemeriksaan forensik dokumen elektronik. Makalah ini mencadangkan agar satu prosedur operasi standard berkaitan proses penyimpanan dan pemeriksaan forensik keterangan dokumen elektronik dibangunkan untuk menangani isu berkaitan integriti dan kebolehterimaan keterangan dokumen elektronik dalam kes jenayah Syariah yang dibicarakan.

**Kata Kunci:** Penyimpanan, Pemeriksaan Forensik, Keterangan Dokumen Elektronik, Kebolehterimaan, Kes Jenayah Syariah.

## INTRODUCTION

The widespread use of electronic devices has benefited many.<sup>1</sup> In Shariah criminal cases, these devices are tendered as evidence in courts. The investigative process is particularly important in Shariah criminal cases to help the court gather relevant evidence and support the prosecution during the trial. For this purpose, religious enforcement officers will search and see the electronic documents from the place of crime or wherever the evidence is believed to be located. This process needs to comply with certain procedures so that the seized electronic documents can be admitted as evidence in court. At the same time, the process of storage and forensic examination of electronic documents also need attention, both of which are included in the process of investigating Shariah criminal cases. Therefore, it is very important for religious enforcement officers to ensure that the principles of chain of evidence and chain of custody are applied in these two processes.

According to section 3 of the Syariah Court Evidence (Federal Territories) Act 1997, the word “document” means:

“any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of-

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<sup>1</sup> Md. Zahidul Islam et al., “Ensuring Safe Cyberspace for Children: An Analysis of the Legal Implications of Social Media Usage in Malaysia and Singapore,” *IIUM Law Journal* 28, no. SI (2020): 395, [https://doi.org/10.31436/iiumlj.v28i\(S1\).591](https://doi.org/10.31436/iiumlj.v28i(S1).591).

- (a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;
  - (b) any visual recording (whether of still or moving images);
  - (c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;
  - (d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or (c),
- or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter.”

Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 further provides that a “computer” means any device for recording, storing, processing, retrieving or producing any information or other matter, or for performing any one or more of those functions, by whatever name or description such device is called; and where two or more computers carry out any one or more of those functions in combination or in succession or otherwise howsoever conjointly, they shall be treated as a single computer. Note that this definition is word for word the same as the definition provided under the old section 3 of the Evidence Act 1950. The latter was replaced by a new definition in 2012:

“computer” means an electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic, storage and display functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with<sup>12</sup> q such device or group of such interconnected or related devices, but does not include an automated typewriter or typesetter, or a portable hand held calculator or other similar device which is non-programmable or which does not contain any data storage facility.”

The Shariah principles relating to the chain of custody and the chain of evidence in the storage and forensic examination of electronic

document evidence aim to secure public interest and make the judicial process easy.<sup>2</sup> This is because electronic document evidence needs to be assessed for its admissibility in Shariah cases so that the court can provide a fair order. This is the same as the importance of securing human welfare explained in the *Qur'an* :

“And do not cause corruption on the earth after its restoration.”<sup>3</sup>

Based on this verse of the *Qur'an*, it can be understood that human beings are forbidden to do damage, especially to religion, life, intellect, lineage and property.<sup>4</sup> Therefore, if the process of storage and examination of electronic document evidence is not clearly related to the principles of Shariah in the provisions of the law, this situation will cause confusion regarding the admissibility of such evidence. As a result, wrong judgments can be made by accepting evidence from an electronic document whose contents had been verified through inaccurate methods of proof.<sup>5</sup> Some parties may take advantage of the situation by submitting electronic documents that are not required or are modified for their own benefit. This will lead to injustice and harm, which are completely contrary to the *Maqasid Syariah*.

Section 90A(2) of the Evidence Act sets the requirements for admissibility and proof that a document was produced by a computer in the course of its ordinary use, by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used. In the Shariah court, the requirements for

<sup>2</sup> Ahmad Azam Mohd Shariff et al., “Prinsip Rangkaian Jagaan dan Rangkaian Keterangan: Keperluan kepada Pengiktirafan dan Pengaplikasian dalam Kes Syariah di Malaysia,” *Journal of Muwafaqat* 5, no. 1, (2022): 17-32, <https://doi.org/10.53840/muwafaqat.v5i1.106>.

<sup>3</sup> *Qur'an*, 7: 56.

<sup>4</sup> Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law* (Kuala Lumpur: Islamic Book Trust, 2010), 3.

<sup>5</sup> Maen Mohammad Ali S. Al-Qassaymeh, “The Evidential Weight of The Electronic Document under Jordanian Law: An Overall Comment,” *IIUM Law Journal* 19, no. 2 (2011): 290, <https://doi.org/10.31436/iiumlj.v19i2.11>.

admissibility and proof are provided in section 56 of the Syariah Court Evidence (Federal Territories) Act 1997:

- (1) Where the executant of a document denies the writing or the liability created therein, the writing and the execution of such document shall be proved at least by two witnesses to the document.
- (2) Where witnesses to the document cannot be found, the writing and the execution of the document shall be proved by two persons who can identify the writing and signature of the writer and executant of the document.
- (3) Where witnesses to the document or the persons referred to in subsection (2) can identify the writing and signature, the executant of the document shall be bound by any liability created therein.
- (4) Where witnesses to the document or the persons referred to in subsection (2) do not completely identify the writing and signature on the document, the writing and signature on the document shall be authenticated by at least two experts.
- (5) Where the writing and signature on the document has been authenticated by the experts, the executant of the document shall be bound by any liability created therein.
- (6) Where a document cannot be proved in any of the aforesaid manner, the person who denies the writing and execution of the document shall, on the request of the person who alleges that the aforesaid person is the executant of the document, take the oath, and if he refuses to do so, the person who alleges may take the oath and thereafter establish his claim.

Meanwhile, section 73 of the Syariah Court Evidence (Perak) Enactment 2004 provides:

“For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.”

Thus, section 90A of the Evidence Act 1950 and section 73 of the Syariah Court Evidence (Perak) Enactment 2004 set the

requirements for admissibility and proof of electronics documents by tendering in evidence a certificate as stipulated by section 90A(2) of the Evidence Act 1950 or section 73(2) of the Syariah Court Evidence (Perak) Enactment 2004, to prove that a document was produced by a computer in the course of its ordinary use. Section 56 of the Syariah Court Evidence (Federal Territories) Act 1997 (which has corresponding provisions in Syariah court evidence enactments of other states) does not require a certificate to be tendered as evidence to prove that a computer was in its ordinary use.

### **ELECTRONIC DOCUMENTS: PRINCIPLES OF PROBATIVE VALUE, CHAIN OF EVIDENCE AND CHAIN OF CUSTODY**

Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 mentions that *qarinah* means fact connected with the other fact in any of the ways referred to in the Act. On the other hand, electronic documents are defined as any type of output in digital form that has a relation with electronic devices.<sup>6</sup> The electronic document has been acceptable in some Shariah cases such as in *Moriazi bin Muhammad lwn Ajmawati binti Atan*.<sup>7</sup> The judge in the case agreed with the Plaintiff who had successfully submitted a valid *qarinah* accepted by the Selangor Shariah court, namely receipts and cheques as documents and money refunds. The money refund transaction presented by the Plaintiff in the form of a cheque was referred to as a digital document. Previously, in the case of *Azida Fazlina lwn Shamsudin Latif*,<sup>8</sup> in deciding whether divorce was properly pronounced, the court arrived at the conclusion that a message in an SMS sent by a husband to his wife stating that he divorced her is sufficient to conclude that a divorce had taken place. A similar stand can also be seen in the case of *Ahmad Faozi bin Mansor lwn Norhafizah Binti Ahmad*,<sup>9</sup> where the Shariah

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<sup>6</sup> Mursilalaili Mustapa Sa'di and Abdul Rani Kamaruddin, "The Authenticity of Electronic Document under Islamic Law and Malaysian Law of Evidence," *Prosiding Seminar Kebangsaan Penyelidikan Pengurusan Hal Ehwal Islam Malaysia*, 296.

<sup>7</sup> *Moriazi bin Muhammad lwn Ajmawati binti Atan*, *Jurnal Hukum* 20, no. 1 (2005): 105-121.

<sup>8</sup> Unreported case (10007.054.050.2003).

<sup>9</sup> Gombak Timur Syariah Court (14002-058-0001-2004).

court accepted the *nusyuz* claim filed by the husband by inter alia relying on phone bills and SMS texts.<sup>10</sup>

Section 48 of the Syariah Court Evidence (Federal Territories) Act 1997 clarifies that the evidence of document must be proved for its authenticity by tendering the primary document. However, if the primary document is disputed for its authenticity, it is sufficient if the maker of the document or an expert witness appears to prove the authenticity of evidence. According to Ibn Qayyim, the basis for the admissibility of documents as evidence is *qarinah*. If the document is strongly supported, then it should be admissible as evidence.<sup>11</sup>

According to Ibn Qayyim, the level of evidence of *qarinah* is the same as the level of other evidence of *bayyinah*.<sup>12</sup> *Qarinah* is a logical inferential evidence made based on the situation of a case. Based on this, it can be assumed that the evidence of electronic documents is also *qarinah*. The majority of ulama' from the four sects of Islam have accepted and considered *qarinah* as a proving evidence.<sup>13</sup> However, only a strong *qarinah* will be accepted as evidence. This is in line with the word of God in surah Yusuf:

“When he had provided them with their provision (to set on a return journey), someone put a drinking cup in the saddle-bag of his brother (Benjamin). Then (it so happened that) a crier called, ‘O (men of) the caravan carrying the corn, you are most surely thieves.’”<sup>14</sup>

<sup>10</sup> See also the cases of Ramlee bin Ismail v. Masuah binti Abd Rashid (2007), Zabariah binti Mat Piah v. Syed Abas Ibrahim (2008), Halijah binti Abdul Rahman v. Zambree bin Baharom (2008) and Mohd Nizam bin Abdul Malik v. Fauziah binti Mohd Isa (2006).

<sup>11</sup> Mohamad Azhan Yahya et al., “Pengemukaan Dokumen Elektronik sebagai Keterangan dalam Perbicaraan Mahkamah Syariah,” *JUUM* 27 (2020): 59, <https://doi.org/10.17576/juum-2020-27-06>.

<sup>12</sup> Ibnu Qayyim Al- Jauziyah, *Turuq al Hukmiyyah fi al Siyasa al Syar’iyyah* (Al-Muassasah al-Arabi, 1961).

<sup>13</sup> Mohd Munzil Muhamad et al., “Qarinah: Admissibility of Circumstantial Evidence in Hudud and Qisas Cases,” *Mediterranean Journal of Social Sciences* 6, no. 2 (2015): 142, <https://doi.org/10.5901/mjss.2015.v6n2p141>.

<sup>14</sup> Qur’ān, 12: 70.



This verse shows the existence of *qarinah* that the cup was in their sacks causing them to be sure of the theft even though the act of stealing was not seen. This verse also clarifies that the element of *qarinah* has the potential to be designed and fabricated and therefore only a very strong *qarinah* can be accepted. Therefore, the judgement of the judge must be legally bound by the available evidence.<sup>15</sup> To ensure that the *qarinah* is acceptable, the process of storage and examination of electronic document evidence must fulfill the principles of chain of evidence and chain of custody.<sup>16</sup>

The chain of custody begins when the public prosecutor initiates action against the accused. Every stage of the movement of evidence along with the date and time need to be recorded carefully and accurately to be accepted as strong evidence.<sup>17</sup> The chain of custody cannot be severed until the case is completed. If this chain of custody is severed, the court reserves the right to reject the evidence presented.

In addition to the validity and relevance of taking into account the acceptance of *qarinah* evidence, it is a priority to ensure that the content of evidence is not damaged or altered. This can be done by proving that it is properly handled, in order to ensure the existence of a chain of evidence.<sup>18</sup> This is in line with the principle of trust to take care of a case's stuff well as in Surah Al Nisaa verse 58 which means:<sup>19</sup>

“Surely Allah commands you to make over trusts to their owners and that when you judge between people you judge with justice;

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<sup>15</sup> Shaukat Hayat, “The Decision by A Judge on the basis of his Personal Knowledge,” *IJUM Law Journal* 19, no. 2 (2011): 268, <https://doi.org/10.31436/ijumlj.v19i2.10>.

<sup>16</sup> Ahmad Azam Mohd Shariff et al., “Prinsip Rantaian Jagaan dan Rantaian Keterangan: Keperluan kepada Pengiktirafan dan Pengaplikasian dalam Kes Syariah di Malaysia,” *Journal of Muwafaqat* 5, no. 1, (2022): 17-32, <https://doi.org/10.53840/muwafaqat.v5i1.106>.

<sup>17</sup> Muhamad et al., “Qarinah,” 142.

<sup>18</sup> Mursilalaili Mustapa Sa'di, Abdul Rani Kamaruddin, and Zulfakar Ramlee, “Reception of Electronic Evidence from Islamic Perspective,” *Australian Journal of Basic and Applied Sciences* 9, no. 26 (2015): 30.

<sup>19</sup> Qur'ān, 4: 58.

surely Allah admonishes you with what is excellent; surely Allah is Seeing, Hearing.”

A situation involving a Shariah criminal case can be seen through electronic video recordings that record the criminal incidents. To come to a conclusion on proof, the court will also pay attention to circumstantial evidence surrounding the video recording. Therefore, the video recording becomes evidence that needs to be handled properly according to set procedures so that the chain of custody is not severed. To ensure that the electronic document is admissible, it must be proven that a document was produced by a computer in the course of its ordinary use. On the other hand, the integrity of the electronic document should be maintained. Therefore, the process of storage and examination of electronic document evidence must fulfill the principles of chain of evidence and chain of custody.<sup>20</sup>

At the same time, while tendering the evidence, the prosecution has to ensure that the chain of evidence is strong, and the credibility and integrity of the data are not affected.<sup>21</sup> In proving the existence of a chain of evidence, public prosecutors need to ensure that evidence taken at the incident is collected and sealed. It also needs to be proved that the evidence was brought to the investigative office and stored neatly in the case storage area. Then, if the evidence is sent to any laboratory for testing, it must be proven that the evidence has been stored back in the original container and sealed by the laboratory member.<sup>22</sup> This is a procedure to ensure that a piece of evidence “*remains intact*” throughout the case.<sup>23</sup>

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<sup>20</sup> Mohamad Azhan Yahya and Ahmad Azam Mohd Shariff, “Memperkasakan Prinsip Syariah dalam Pengumpulan Keterangan Digital dalam Kes Jenayah Syariah.” Presented in 6<sup>th</sup> Muzakarah Fiqh & International Conference 2022 (6<sup>th</sup> MIFC 2022), 13<sup>th</sup> 7 14<sup>th</sup> December 2022, 27-33.

<sup>21</sup> Muhamad et al., “Qarinah,” 147.

<sup>22</sup> Mohamad Azhan Yahya, Hammad Mohamad Dahalan, and Suhaizad Saifuddin, “Analisis Proses Pengumpulan Keterangan Dokumen Elektronik dalam Kes Jenayah Syariah,” *ISLĀMIYYĀT* 43, Isu Khas (2021): 18.

<sup>23</sup> Muhamad et al., “Qarinah,” 147.

Strong *Qarinah* (*qarinah al zahirah* / *qarinah al-qāṭi'ah*) in the Shariah criminal case requires evidence to support and is considered relevant as proof of an accusation. In evidence of electronic documents obtained to convict Shariah criminal offenders, it needs to be ensured that every detail is scrutinised and recorded accurately, and the electronic document submitted 'remains intact' at all times. If the evidence has been verified through the processes mentioned above, then it is clear that the evidence is strong under the principle of Shariah proof.<sup>24</sup> Thus, the evidence in question is indeed relevant and acceptable based on the principle of *qarinah al-zahirah* as agreed by scholars such as Ibn Qayyim,<sup>25</sup> Abdul Karim Zaidan<sup>26</sup> and Mahmud Saedon,<sup>27</sup> and its strength and reliability cannot be questioned.<sup>28</sup>

In other words, the court can only make a decision if either party succeeds in proving its facts and evidence to a reasonable possibility.<sup>29</sup> When a *qarinah* has gone through all the scrutiny based on the above principles and the court is satisfied with the result, it can be accepted as evidence in a trial, and be the basis for a judgment in a Shariah criminal case.

<sup>24</sup> Assistant Religious Enforcement, Johor Islamic Religious Department, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, May 2, 2018; Assistant Investigation Unit Officer, Head Operations Unit and Head of Investigation Unit, Enforcement Division, Malacca Islamic Religious Department, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, March 1, 2018.

<sup>25</sup> Ibn al-Qayyim, *al Turuq al-Hukmiyyah fi al-Siyasah al-Syariyyah*, (Qaherah: Matbaah al Sunnah al-Muhammadiyah, 1953), 3-24.

<sup>26</sup> Abdul Karim Zaidan, *al Qadha fi al Syariah al Islamiyyah*, (Baghdah: Matbaah al Ani, 1984)

<sup>27</sup> Mahmud Saedon, *An Introduction to Islamic Law of Evidence*, (Shah Alam: Hizbi, 1996).

<sup>28</sup> Muhamad et al., "Qarinah," 142.

<sup>29</sup> Mazupi Abdul Rahman and Ahmad 'Azam Mohd Shariff, "The Scope and Application of Similar Fact Evidence under the Evidence Act 1950: Introduction and its Overview from the Perspective of Islamic Law of Evidence," *JUUM* 7 (2003): 83-84, <https://ejournal.ukm.my/juum/issue/view/590>.

## **PROCESS OF STORAGE AND FORENSIC EXAMINATION OF ELECTRONIC DOCUMENT EVIDENCE IN SHARIAH CRIMINAL CASES**

Electronic documents seized will be taken to a designated case storage area. The process needs to be handled carefully so that the electronic document evidence is not contaminated in its integrity and the chain of evidence is not severed.<sup>30</sup> In order to prevent these, handling procedures on seized items need to be followed. Instruction 20 under the Standing Instruction of the Director of the State Islamic Religious Department 2007 provides for the process of handling objects (including evidence of electronic documents) seized as follows:<sup>31</sup>

- (1) Register the seized items and affix the label, item number, date, time, address of the incident and case file number;
- (2) Ensure that the items seized are the same as those in the list or confiscation form;
- (3) Remove perishable items one by one by taking pictures separately;
- (4) Make a note when the picture is taken;
- (5) Receiver's declaration and submission of confiscated items for each transaction must be recorded and signed.

To identify its application in the investigation stage of Shariah criminal cases, the authors have conducted interviews with religious

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<sup>30</sup> Judge of the Syariah High Court of Shah Alam, Selangor, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, March 27, 2018; Judge of the Syariah Subordinate Court of Rembau, Negeri Sembilan, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, March 2, 2018.

<sup>31</sup> Instruction 20 Standing Instruction of the Director of the State Islamic Religious Department 2007.

enforcement officers in Negeri Sembilan, Perak, Selangor, Malacca and Johor.<sup>32</sup> The findings of the interviews are detailed as follows:

At the initial stage, the electronic document evidence seized and confiscation forms should be collected and submitted to the investigating officer.<sup>33</sup> Before signing the acceptance form, the investigating officer has to check and examine all the items seized based on the list or confiscation form.<sup>34</sup> Thereafter, the investigating officer must ensure that the electronic document evidence seized is in its original condition as it was received based on the physical information as well as photographs recorded in the confiscation form.<sup>35</sup> Next, the investigating officer will give the item number on every electronic document evidence seized and note the date of submission on its label.<sup>36</sup> During the submission of electronic document evidence seized, the officer that seized the item and the investigating officer must record a declaration that the electronic document evidence seized has

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<sup>32</sup> Assistant Officer of Islamic Affairs, Investigation Unit, Enforcement Division, Negeri Sembilan Islamic Religious Affairs Department, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, February 28, 2018; Chief Religious Enforcement Officer, Syariah Law Enforcement Division Office, Perak, "Islamic Religious Criminal Cases," interview by Mohamad Azhan Yahya, March 7, 2018; Investigating Officer, Selangor Islamic Religious Department, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, January 29, 2018; Assistant Religious Enforcement, Johor Islamic Religious Department, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, May 2, 2018; Assistant Investigation Unit Officer, Head Operations Unit and Head of Investigation Unit, Enforcement Division, Malacca Islamic Religious Department, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, March 1, 2018.

<sup>33</sup> Instruction 20 (a) Standing Instruction of the Director of the State Islamic Religious Department 2007; Mohd Radzi bin Sulaiman, Assistant Religious Enforcement, Johor, interview.

<sup>34</sup> Instruction 20 (b) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>35</sup> Instruction 20 (c) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>36</sup> Instruction 20 (d) Standing Instruction of the Director of the State Islamic Religious Department 2007.

been submitted and received and each signed it.<sup>37</sup> It aims to ensure that the chain of custody and the chain of evidence are connected.<sup>38</sup>

Then, the electronic document evidence must be registered in the registration record book. Every electronic document description shall bear the record of the item number, date, time, address of the incident and case file number.<sup>39</sup> At the same time, labelling is made on the description of the electronic document and it is noted on the label and affixed.<sup>40</sup> Religious enforcement officers must ensure that the electronic document evidence received is the same as that listed on the confiscation form.<sup>41</sup> If the seized item consists of various components, each component should be recorded in the registration according to its unit.<sup>42</sup> However, the instructions to register each unit according to its components are not detailed out in the legal provisions and the Instructions. Additionally, the aspect of photography that supports its admissibility in court is also not specified.

Pursuant to the above process, during the submission for storage, the religious enforcement officer involved shall make a declaration of submission and acceptance and sign it.<sup>43</sup> It aims to ensure that the chain of custody and the chain of evidence are not severed.<sup>44</sup>

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<sup>37</sup> Instruction 20 (1) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>38</sup> Judge of the Syariah High Court of Shah Alam, interview; Judge of the Syariah Subordinate Court of Rembau, interview.

<sup>39</sup> Instruction 20 (e) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>40</sup> Instruction 20 (e) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>41</sup> Instruction 20 (e) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>42</sup> Assistant Officer of Islamic Affairs, Negeri Sembilan, interview.

<sup>43</sup> Instruction 20 (1) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>44</sup> Judge of the Syariah High Court of Shah Alam, interview; Judge of the Syariah Subordinate Court of Rembau, interview.

Electronic document evidence is then placed in the evidence room and supervised by an authorised officer.<sup>45</sup> Supervision is necessary to keep it safe and to ensure that the chain of custody and chain of evidence is not severed. For this purpose, the electronic document evidence should always be handled in good condition since it is placed in the evidence room until the end of the trial, by following a certain procedure.<sup>46</sup> This procedure entails that the electronic document evidence shall be properly maintained in a certain place,<sup>47</sup> the evidence room shall always be locked to ensure that the item cases are in a safe condition,<sup>48</sup> the evidence room lock type cannot be duplicated,<sup>49</sup> and the keys are only given to the officer authorised to look after the evidence room.<sup>50</sup> Nevertheless, instructions relating to the supervision of the evidence room are made in general only and details of their application are not clarified.

Electronic document evidence must be ensured to be registered in the record book<sup>51</sup> and enclosed in an envelope and sealed if necessary<sup>52</sup> to ensure that its integrity is not contaminated.<sup>53</sup> Only the chief religious enforcement officer or an authorised religious enforcement officer can take out electronic document evidence from

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<sup>45</sup> Principal Assistant Director, Legal, Trial and Appeal Division, Syariah Prosecution Department, Negeri Sembilan, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, February 26, 2018.

<sup>46</sup> Assistant Religious Enforcement, Johor, interview; Assistant Islamic Affairs Officer, Negeri Sembilan, interview.

<sup>47</sup> Directive 8 (c) and (d) of the State Chief Syarie Prosecutor.

<sup>48</sup> Instruction 21 (c) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>49</sup> Instruction 21 (d) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>50</sup> Instruction 21 (d) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>51</sup> Instruction 21 (a) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>52</sup> Instruction 21 (b) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>53</sup> Principal Assistant Director, Negeri Sembilan, interview; Assistant Investigation Unit Officer, Malacca, interview.

the evidence room.<sup>54</sup> To keep items seized in a safe condition, they are only allowed to be taken out to court or other places for the purpose of investigation.<sup>55</sup> The authorised officer has to guard the evidence room and record any outgoing or incoming electronic document evidence in the record book.<sup>56</sup> Any error in this will jeopardise the admissibility of such evidence.

If the seized item requires an analysis report from the Department of Chemistry, it is sent to the Department of Chemistry for analysis.<sup>57</sup> During the submission of the seized items for examination, the Investigating Officer shall ensure that every seized item submitted to the Department of Chemistry is sealed by the Department.<sup>58</sup> When the results of the examination have been completed, the investigating officer should obtain the official results of the items analysed.<sup>59</sup> The official report of the analysis should be ensured to have been signed by the relevant officer as confirmation of the examination.<sup>60</sup> Then, the results of the analysis report will be included in the investigation paper.<sup>61</sup> It is also to be noted that every submission and acceptance of

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<sup>54</sup> Instruction 22 (a) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>55</sup> Instruction 22 (b) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>56</sup> Instruction 22 (c) Standing Instruction of the Director of the State Islamic Religious Department 2007; Syariah Officer LS 41, Prosecution Division, Penang Islamic Religious Department, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, March 23, 2018.

<sup>57</sup> Instruction 20 (i) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>58</sup> Instruction 20 (k) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>59</sup> Instruction 20 (j) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>60</sup> Instruction 12 (j) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>61</sup> Instruction 12 (m) Standing Instruction of the Director of the State Islamic Religious Department 2007.



a seized document must be certified and signed by the officer receiving it.<sup>62</sup>

Based on the interviews with the religious enforcement officers, Syarie prosecutors, and Syarie lawyers regarding the application of electronic document evidence examination in Shariah criminal cases, forensic analysis is also conducted on the electronic document evidence.<sup>63</sup> The application of the chemical examination process is provided in the Syariah Criminal Procedure Enactment and the Standing Instructions of the Director of the State Islamic Religious Department 2007.<sup>64</sup> Cyber Security Malaysia, the Malaysian Communications & Multimedia Commission and the Police Forensic Department are agencies that assist in the conduct of forensic analysis, and in the checking and verification of the validity and originality of the content of electronic document evidence.<sup>65</sup>

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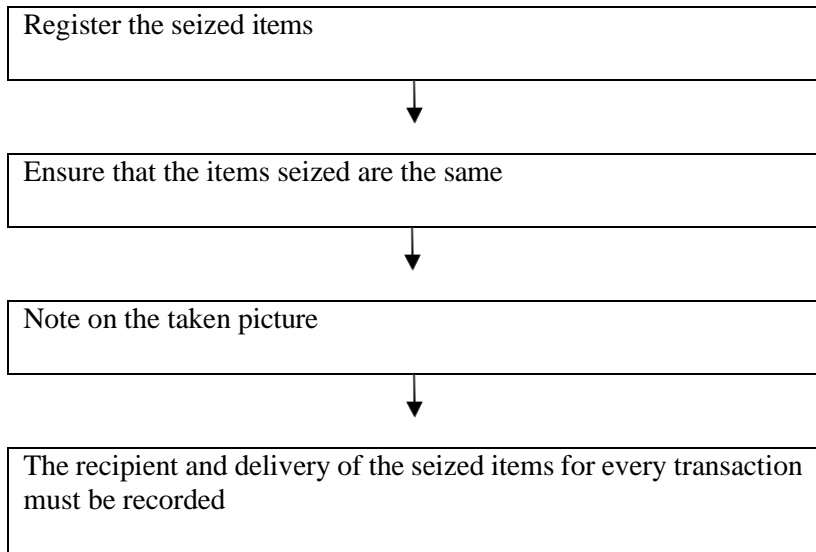
<sup>62</sup> Instruction 12 (m) Standing Instruction of the Director of the State Islamic Religious Department 2007.

<sup>63</sup> Assistant Officer of Islamic Affairs, Negeri Sembilan, interview; Chief Religious Enforcement Officer, Perak, interview; Investigating Officer, Selangor, interview; Assistant Religious Enforcement, Johor, interview; Assistant Investigation Unit Officer, Malacca, interview; Syarie Lawyer Perak and Penang, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, 9 July 2018; Malacca State Syarie Lawyer, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, May 1, 2018 Malacca State Syarie Prosecutor, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, March 1, 2018.

<sup>64</sup> Malacca State Syarie Prosecutor, interview.

<sup>65</sup> Chief Religious Enforcement Officer, Perak, interview.

**Diagram 1: Process of handling electronic documents evidence**



## DISCUSSION AND ANALYSIS

Based on the Standing Instructions and interviews with religious enforcement officers related to the application of seizing procedures on electronic document evidence, the authors found that the process of storing evidence of electronic documents under the Standing Instruction of the Director of the State Islamic Religious Department 2007 is not related clearly to the Islamic principles on the aspect of chain of custody and chain of evidence.<sup>66</sup> An interview with assistant religious enforcement officers in Johor finds that there are different understandings regarding the process of storing electronic document evidence, leading to confusion regarding its application, especially

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<sup>66</sup> Standing Instruction of the Director of the State Islamic Religious Department 2007; Assistant Officer of Islamic Affairs, Negeri Sembilan, interview; Chief Religious Enforcement Officer, Perak, interview; Investigating Officer, Selangor, interview. Assistant Religious Enforcement, Johor, interview; Assistant Investigation Unit Officer, Malacca, interview.

among the officers themselves.<sup>67</sup> This is because Islamic law has emphasized on the principles of relevancy, probative value, corroborative value, chain of custody and chain of evidence in determining the admissibility of electronic documentary evidence.<sup>68</sup> However, the existing provisions that involve electronic documentary evidence do not associate all the principles harmoniously. This is proved by the non-existence of a provision that explains about admissibility of electronic documentary evidence. The views of shariah judges can be different from those practicing shariah law regarding the admissibility of such evidence. This is because the interpretation of law provisions is made personally by the practitioners, and is not conclusively borne out by any other law provision. This situation certainly does not help these officers in performing their duties properly.<sup>69</sup> Findings of the interviews conducted with the assistant religious enforcement officers in Negeri Sembilan, Perak, Selangor, Johor and Malacca indicate that this situation has seriously affected the entire process of gathering electronic document evidence in Shariah criminal cases.<sup>70</sup>

Therefore, aspects related to statement of transactions in electronic document evidence (transactions of audio and video in recording devices belonging to religious enforcement

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<sup>67</sup> Assistant Religious Enforcement, Johor Islamic Religious Department, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, May 2, 2018.

<sup>68</sup> Mohamad Azhan Yahya, Hammad Mohamad Dahalan, and Suhaizad Saifuddin, "Analisis Proses Pengumpulan Keterangan Dokumen Elektronik dalam Kes Jenayah Syariah," 20.

<sup>69</sup> Assistant Officer of Islamic Affairs, Investigation Unit, Enforcement Division, Negeri Sembilan Islamic Religious Affairs Department, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, February 28, 2018; Chief Religious Enforcement Officer, Syariah Law Enforcement Division Office, Perak, "Islamic Religious Criminal Cases," interview by Mohamad Azhan Yahya, March 7, 2018; Investigating Officer, Selangor Islamic Religious Department, "Gathering Electronic Document Evidence in Syariah Criminal Cases," interview by Mohamad Azhan Yahya, January 29, 2018.

<sup>70</sup> Assistant Officer of Islamic Affairs, Negeri Sembilan, interview; Chief Religious Enforcement Officer, Perak, interview; Investigating Officer, Selangor, interview. Assistant Religious Enforcement, Johor, interview; Assistant Investigation Unit Officer, Malacca, interview.

divisions/departments) and related notes, photography, filing, diary of religious enforcement officers etc., and transactions and exchanges of religious enforcement officers who are in charge of securing the evidence room need to be detailed out and refined. Aspects of maintenance operations and transactions involving storage areas and electronic devices (belonging to the department/division of religious enforcement) also need to be detailed out and streamlined. Rectifying all these aspects is necessary to ensure that the electronic document evidence is well maintained and not contaminated, and can secure the chain of evidence and chain of custody of the case.

At the same time, it is very important that the application of electronic document evidence examination process fulfill the Shariah principles related to relevancy, probative value, corroborative value, chain of custody and chain of evidence, in order to support the admissibility of electronic document evidence. For this purpose, the authors argue that transactions involving electronic document evidence during the examination should be given attention to, starting from the process of gathering electronic document evidence from the disputing parties, submitting it for examination by forensic agencies and tendering it in court. Specific guidelines on the process of examining electronic document evidence that support the chain of evidence and the chain of custody must be provided. Therefore, it is the view of the authors that appropriate guidelines related to the examination of electronic document evidence are established, so that execution of the collection process in Shariah criminal cases is made clear, consistent and based on Shariah principles, so that such evidence ultimately can be utilised as a basis for judgment.

## CONCLUSION

The Shariah courts must be prepared to take on the responsibility of handling cases involving electronic document evidence more dynamically in the future. The article suggests that standard operating procedures relating to the storage and examination of electronic document evidence at the investigation stage of Shariah criminal cases be established. Such procedure should be based on the Shariah principles relating to the chain of evidence, that support the admissibility of electronic document evidence. The article also suggests that the forms on the movement of case items (electronic document evidence) in the process of their storage and examination be provided. These forms are required to ensure that the process of storage and examination of electronic documents comply with Shariah principles related to the chain of custody and chain of evidence, supporting the admissibility of electronic document evidence during the trial.

To strengthen the suggestion above, a new section on how to evaluate the chain of custody and chain of evidence should be introduced. The new section can be cited as section 56A of the Syariah Court Evidence Enactment:

“Section 56A. How to decide on the admissibility value of chain of custody and chain of evidence for electronic document evidence.”

The new section will provide the court with clear guidelines in examining the chain of custody and the chain of evidence, in evaluating the admissibility of electronic document evidence. It is hoped that the suggestions made in this article will help strengthen the process of storage and examination of electronic document evidence in Shariah criminal cases. It is also hoped that they will assist the prosecution in submitting electronic documents as the main evidence in a more neat and efficient manner.

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