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**THE ADMISSIBILITY OF DIGITAL DOCUMENT ACCORDING TO SYARIAH LAW:****A PRELIMINARY ANALYSIS**

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**ABSTRACT**

Major shifts in the science and technology landscape have made the collection and analysis of digital evidence an increasingly important tool in resolving crimes as well as preparing the case for the trial in the court. Digital documents are known as electronic documents and it can be used as a means of proof in court. Also, digital documents can be used as evidence in the category of documents based on the definition given in Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]. However, the digital document as a means of proof is still needed to be discussed in detail regarding its admissibility in the Syariah court. This is because there is no specific provision according to Syariah Court Evidence law on the use of it. This study, therefore, focuses on the concept of digital documents as evidence according to Syariah Law. This study aims to discuss from the Islamic legal perspective on digital documents as a means of proof from the holy Quran, hadith, legal maxims and acts. This study also will focus on the admissibility of the digital document as evidence in the Syariah court in Malaysia. The methodology of this study is a qualitative approach by using document analysis of article papers, journals, statutes and also related document references. The results show that the need to accept the admissibility of digital document as evidence very high, especially for use in the Syariah court. Studies show that the use of the digital document as evidence serves to support other evidence presented in court.

**Keywords:** *admissibility, digital document, electronic evidence, means of proof, Syariah Law*

## Introduction

Nowadays, there have been many arising cases of digital evidence arise when people start using technology to store information and data electronically, and later restore data for a specific purpose. This rapid growth of science and technology, combined with increasingly sophisticated and nuanced criminal behaviour has made *al-Qarinah* ever more important (Lukman *et al.*, 2020). Scientific evidence has been accepted in civil courts since the 1950s and it remains widely used to the present day (Zuha & Ramalingam, 2017). In Syariah law, the admissibility of a digital document as a means of proof is still under debate among scholars as to whether it is recognized as evidence in court. This is because, this kind of method is very difficult for some parties to accept the digital document as evidence (Wan Fattah *et al.*, 2019).

The challenge to use the digital document as evidence arise due to the issues of reliability, applicability and authenticity. Another question arises as whether the digital document is accepted or not in Islam and how it works. The admissibility of digital evidence as evidence in the court of law could be challenged by due to weight or reliability of the evidence produced during trial. The important component determines the admissibility of computer evidence through applicability and reliability (Augustine, 2010). Thus, this is important to highlight the importance of admissibility according to Syariah law.

Based on research conducted by Wan Abdul Fattah (2006), he explained the importance of using digital documents in the current situation as evidence because it can reinforce the other method of proof. He further compared the position of electronic and digital evidence materials as well as its practices in civil court in Malaysia. Digital document must also be approved and validated by the experts in advance before the trial of a case. Thus, specific legislation is needed to resolve any arising issues relating to technology in human life. However, when authenticity and admissibility have not been recognized in the digital document by the courts or lawyers, it cannot be accepted as evidence (Gita Radhakrishna, 2012).

The digital document is still relatively new in Syariah courts compared to other forms of proof. Its acceptance as a means of proof is still debated among scholars such as Hanafi, Maliki and part of Syafi and Hanbali. However, according to Ibnu Taimiyyah and Ibnu Qayyim (2001), anything that can explain and reveal the truth is called evidence. Thus, a digital document may be recognized as evidence. Next, this study will focus and explore the admissibility of the digital document as a means of proof in court.

## Literature Review

Based on the existing literatures, the researchers found that most of the findings acknowledged the digital document can be accepted in Islamic Syariah law. The use of electronic and digital devices has increased dramatically in line with the development in the era of globalization. The court has authorized the use of email, short message service (SMS), digital photographs, an automated teller machine (ATM), internet usage networks, digital video and related to this as acceptable evidence (Ismail, 2013).

Digital documents are classified as notes or documents that have been made, stored or extracted, copied or replicated or transmitted electronically through other electronic equipment and can be clearly understood and interpreted (Muhammad Fawwaz, 2008). Digital documents are also one of the relatively new methods of proofing compared to others, especially in the Syariah court (Wan Abdul Fattah, 2016).

From the above-mentioned definitions, it can be said that the digital document has been accepted and classified as documentary evidence in the Syariah courts as it plays an important role in ensuring justice (Wan Fattah *et al.*, 2019). Generally, there have been no specific arguments on the use of methods of scientific proof such as digital documents. However, according to Wan Fattah *et al.* (2019), document verification is not empty diligence; rather, it is supported by the holy Quran, hadiths, and the practice of the companions' r.a.

According to Duryana Mohamed (2014), the digital document also can be defined as *al-kitabah*. In the meantime, the digital document may come under *al-qarinah* or circumstantial evidence (Ahmad Syukran, 2017). The application of forensic science also may come in the form *al-qarinah* which refers to circumstantial evidence (Ahmad Syukran *et al.*, 2019). This will also put together expert testimony (*al-ra'yu al-khabir*) to be present in the trial in support of this evidence (Zulfakar Ramlee & Wan Abdul Fattah, 2013).

The courts have also found that electronic and digital evidence can provide clear and detailed information, it is difficult to destroy but easy to be modified, copied and easy to handle. Legal issues raised which in court of law is when the validity and authenticity of the electronic evidence and digital evidence are often disputed (Ismail & Wan Fattah, 2013). Muslim jurists vary on the admissibility of the digital document in the court. The appearance of different types of documents gives rise to the differences of opinion among Muslim scholars on the validity of this evidence (Mahmud Saedon, 2003). This type of evidence is accepted by Muslim scholars and must be considered by the judge. However, the digital document must be original and validated proof (Ibnu Qayyim, 1977). This is because, the digital document also could be forged and it cannot be used as a form of evidence (Fathi Bahansi, 1962).

According to Ibnu Qayyim (n,d), anything that can explain and reveal the truth is considered as evidence. Therefore, these definitions carry a broad and comprehensive meaning, covers anything that explains it, describe or prove the position or circumstances of a right or interests that a judge may consider or the court in granting the right to the right or impose a fair and just punishment (Mahmud Saedon, 2003). The digital document can be defined as a compilation of coded document descriptors, which exist as magnetic impulses on a hard disk and which can be considered as legal evidence when viewed with the proper document creator software (Arthur Gingrande, 2010).

Although digital documents are widely used by members of the society, in general, the admissibility of digital documents in the Syariah court is still in dispute until today. Based on observations made by Wan Abdul Fattah (2016) in the case of Moriasi Bin Muhammad vs Ajmawati Binti Atan, he opined that Syariah Court is still less exposed to the concept and implementation of documentary material in the form of documents which is stronger and more consistent than testimony.

In another study conducted by Syazwan *et al.* (2019) related to the admissibility of scientific evidence through the forensic science method in the Syariah court, they found that forensics is categorized as evidence in Islamic Syariah law. They conclude scientific evidence should be acknowledged by the Syariah court as a means of proof in today's technological age since its role is recognized by Islam and it can assist the judge in upholding justice.

Digital forensics, as such a digital document, can be applied with references to the Syariah Courts Evidence (Federal Territories) Act 1997 [Act 561] (Khairudin and Che Yaacob, 2019). In another study by Lukman and Wan Abdul Fattah (2012), they found that proof of adultery cases by using *al-Qarinah*. They suggested several types of modern *al-Qarinah* such as fingerprints, deoxyribonucleic acid (DNA) tests, blood tests, voiceprints, image prints and face prints. Thus study shows that the method of proof using digital documents should be accepted in a Syariah court because it shows strong evidence to convict a case.

Hence, previous studies show the acceptance of digital documents as one of the methods for evidence in the Syariah court. Therefore, this article was created to study in more detail regarding to the acceptance of the digital document as a means of proof according to Islamic law is still need to be discussed in detail.

## Research Methodology

According to Ahmad Syukran *et al.* (2019), methodology plays an important role in achieving the objectives of a study. This study uses a qualitative methodology since this research is based in the fields of social sciences and law. The collected data is divided into two types: primary and secondary data. In this study, the primary data is gained from the provision of the holy Quran, the hadiths of the Prophet

(p.b.u.h.), Islamic legal maxims (*qawaid fiqhiyyah*), and the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]. These data sources were also used to find out directly about the status of digital documents as a method of proof. This is because the data collected from primary sources are clear, reliable sources, and their interpretation should not be swayed by one’s views. Journal articles, books, cases reported in law journals, and kitab *fiqh* are classified as secondary views. Then, the data obtained were analysed using document analysis methods and to come out what would be the position of digital documents as evidence in Islamic Syariah law.

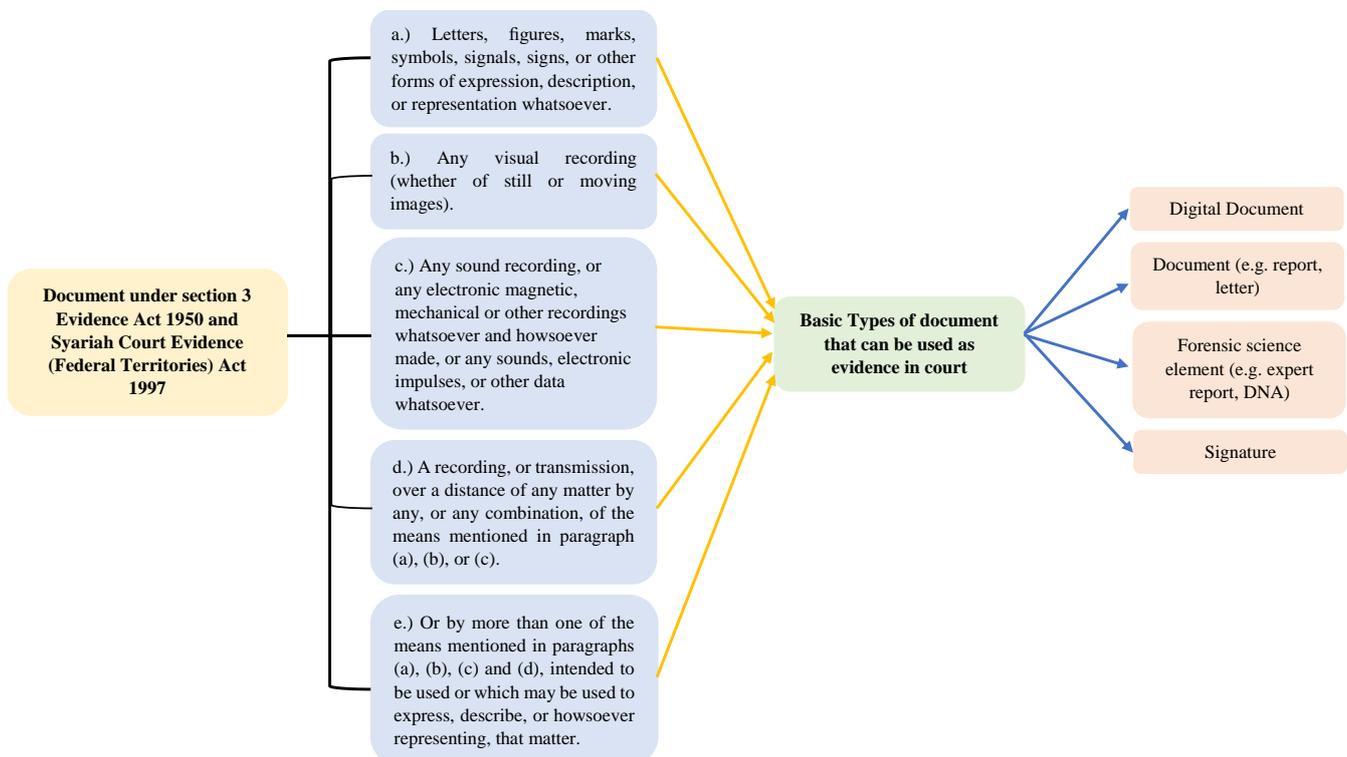
## Findings and Discussion

### *The Concept of Digital Document as Evidence*

There is no specific elaboration of the terms digital document according to Syariah principles as it is regarded as a new method of proof in the court of law. In Malaysia, the Evidence Act 1950 [Act 56] is the main legislation governing the evidence of the form is to be proved and tendered to the court, its relevancy as well as its effects.

‘Document’ under the Evidence Act 1950 [Act 56] means: any matter expressed, described or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, soundtrack or other devices whatsoever. Question arises as whether digital documents can be classified as a document under section 3 of the Evidence Act 1950 [Act56]?

Based on figure 1, it can be says that Section 3 also refers to digital documents as a form of document based on its definition of a document. The concept of the document as evidence in Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] was taken from this act, which has long been practised in the civil court.

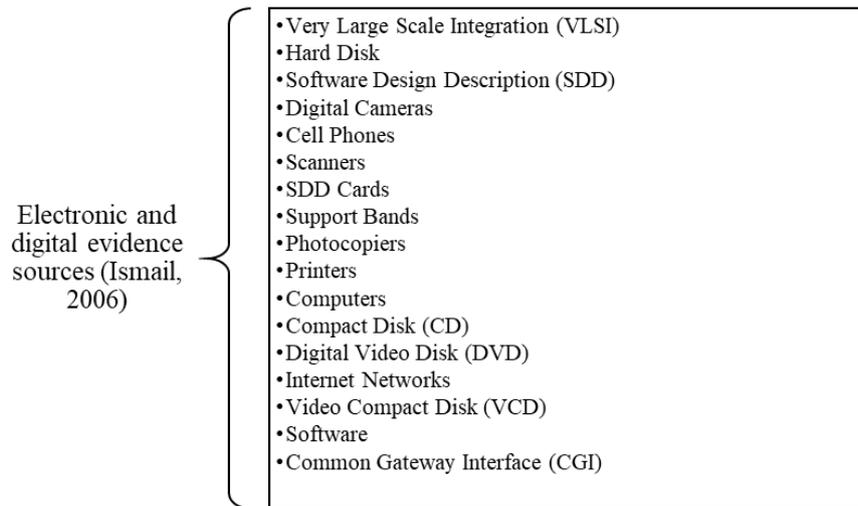


**Figure 1:** The Concept of Document as evidence

Documents can be classified as explaining or describing something by using writing or sketches or outwardly shaped copies either classically such as using paper, wood or modern such as the use of diskettes, compact discs, internet and the like (Wan Abdul Fattah, 2020).

From the definition from Wan Abdul Fattah (2020) indicates that the document is not limited to the use of certain equipment only, but it is important that the document is readable and physical in nature, whether it can be understood by reading it directly or by using special equipment. For example, sound recordings, cassettes, compact discs, CDs and others can be included or categorized as document category since its content can be understood even with the use of certain equipment to read it (al-Humaidhi, 1989).

According to Ismail (2006), the digital document can be defined as a form of probative information stored, recorded or channelled in electronic form and the material can be presented in court as evidence supporting or denying the allegations. Figure 2 shows the sources of electronic and digital evidence according to Mohamad Ismail (2006).



**Figure 2:** Classification of Digital Documents

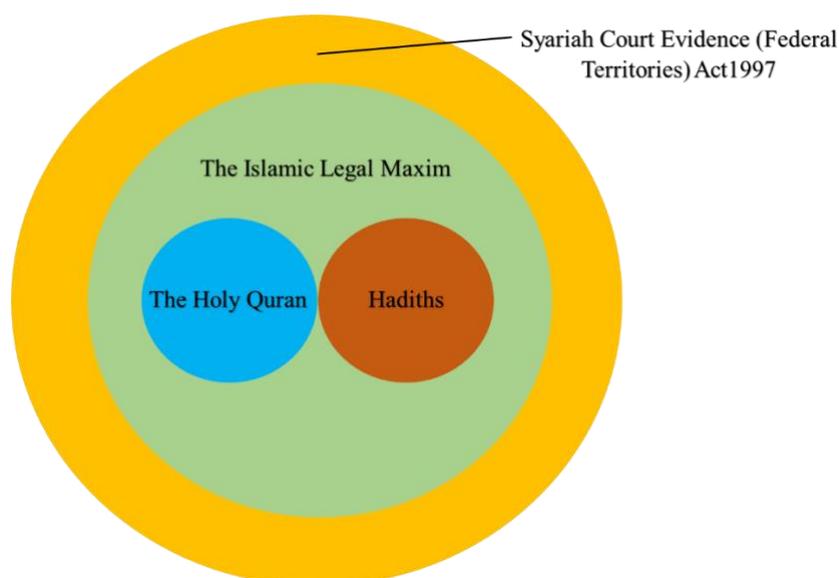
Islam is an appropriate religion to be practised at any age. Thus, new *hukm* can be introduced according to today’s existing problem which is suitable as long as that the new *hukm* adheres by the principles of Syariah law and does not breach Islamic law. Therefore, this above-mentioned description has been submitted to reinforce other evidence filed in court. This kind of method also needs to be strengthened by expert testimony to test the credibility of document descriptions that have been released (Jasri Jamal, 2011).

In Syariah court, a description of this digital document usually submitted in mal cases intended to support a divorce case, a marriage declaration and cases related to nafkah. These electronic and digital evidence also are used in prosecution of Syariah crime cases, for instance, in the accusation of illegal intercourse and khalwat.

Although the details of the Syariah principles relating to such digital documents are not clear, they should be considered an important form of evidence because the description from a digital document can help the court to understand the facts and the evidence.

***The Islamic Legal Perspective on Digital Documents as a Means of Proof***

Generally, the source of the use of the digital document as a means of proof cannot be found clearly in the Holy Quran or al-Hadith. However, the acceptance of digital documents refers to a general acceptance of the means of proof (Wan Fattah *et al.*, 2018). On the aspect of *hukm* or the Islamic legal perspective, there are several sources to be referred such as Quran, hadiths and legal maxims (*qawaid fiqhiyyah*). Figure 3 shows the main sources of Islamic legal perspective on the acceptance of digital documents as a means of proof.



**Figure 3:** The Main Sources of Islamic Legal Perspective on Digital Documents

Basically, based on these several sources of reference, we can infer that digital documents can be used as a means of proof in Islamic law. The importance of recording or documenting transactions to avoid any kind of problems as mentioned in surah al-Baqarah verse 282:

*“Believers! Whenever you contract a debt from one another for a known term, commit it to write.” (Al-Qur’an. Al-Baqarah 2:282)*

Based on the above surah, Allah Almighty stresses making a documented text which is possible to be used as an evidence during the court proceeding. The principles laid down by Islam is relevant all time. From the hadith of the Prophet SAW, 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)*

It is clear from this hadith that the Messenger of Allah (may peace be upon him) advised us to write a will. This is because, if such writing were unimportant and lacking in benefits, the prophet would not have his ummah do it. The legal maxims (*qawaid fiqhiyyah*) say that “*al-kitabah kalkhitab*” which means *kitabah* is equal to document. This method indirectly means that each text or document is as acceptable as a conversation.

According to section 3, 5-16 of the Syariah Courts Evidence (Federal Territories) Act 1997 [Act 561] and other sections of Syariah Courts Evidence Enactments, the judge will examine the evidence and test whether the evidence is strong or weak. If there is any doubt, the evidence should be authenticated by the opinion of the expert in digital forensics. Allah SWT asks to seek experts in any case if the people are unable to answer any problems as mentioned in surah An-Nahl verse 43:

*“And We sent not before you except men to whom We revealed [Our message]. So ask the people of the message if you do not know.” (Al-Qur’an. Yusuf 16:43)*

Thus, the Court will therefore seek the opinion of those who are experts in the chosen field, as provided in Section 33 of the Syariah Courts Evidence (Federal Territories) Act 1997 [Act 561] and other Syariah Court Evidence Enactments. The expert opinion is based on a high standard of professional expertise (Wan Abdul Fattah, 2018).

Muslim jurists also agreed that such a digital document can be used to prove matters related to all civil cases, such as property and not matters involving hudud and qisas (Arbouna, 1999). The issue of admissibility is not disputed, but there are disputes over the proof of authenticity of documents produced

either by conventional means or by electronic means (Al-Zuhaili, 1994). These arguments indirectly show that digital documents are a method of proof in Islamic Syariah law, because such documents can assist the court to consider the facts and evidence.

### *The Admissibility of the Digital Document as Evidence in Syariah Court*

In general, the proof is an essential element of a trial proceeding and needs to be presented systematically in court (Suhaizad *et al.*, 2019). To seek justice in a trial, all facts and issues raised must be supported by systematic evidence and presented to the court. Islam sets out the methods of proof, which must be followed by parties involved. It is unfortunate that the legal practitioners in the Syariah courts are rarely exposed to cases that involve digital documents (Wan Fattah *et al.*, 2018). Within the Syariah legal framework in Malaysia, knowledge relating to forensic science is considered foreign when applied in the Syariah court (Ahmad Syukran, 2017). Exceptions to using this means of proof will complicate the process of proving a case.

Although the Syariah principles of digital documentary description provide no clear details on the definition and the admissibility of this evidence, it is a form of description that plays an important role in the process of proving cases of mal and Syariah crimes. This is because such digital documents help to reinforce facts and evidence. The evidence from the digital document supports other existing facts and evidence, so it will help to convince the Syariah court, in particular to accept facts and evidence, and it assists the court in making its decision.

Section 3 of the Syariah Courts (Federal Territories) Evidence Act 1997 [Act 561] has shown that digital documents can be classified as documents. Generally, document descriptions are anything presented in court which is a document to be evidence of a claim or indictment or defense. Document descriptions in digital are forms of the document which use the medium of electronic devices and it also acts as evidence to be presented in court.

Based on the findings of this study, the principles of Syariah recognize the digital document as a means of proof in the Syariah court. This is because this kind of method of proof helps to support the other facts presented in court. In the case of *Azida Fazlina vs Shamsudin Latif*. The court upheld and convicted the divorced spouse through a short message system (SMS) when the husband sends an SMS text for a divorce. It indicates that digital information such as SMS is accepted by the Syariah court to assist the confirmation of pronoun cation of divorce between the husband and wife

In the case of *Ahmad Faozi Bin Mansor vs Norhafizah Binti Ahmad*, the defendant had cheated and had sex with another man. In this case, the plaintiff claims the defendant because of cheat by attaching a telephone bill indicating that the defendant always contacts with other men. The Syariah court accepted nusyuz's claim submitted by the husband based on the evidence of behavior presented in document descriptions such as phone bills and SMS. This shows that document descriptions such as phone bills and SMS are acceptable as a digital form of evidence and are used in the Syariah court.

According to section 33 Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] and section 45 Evidence Act 1950 [Act 56], the digital evidence should also be supported by other evidence such as expert opinion. It is because it is meant to verify the authenticity of the digital document from the expert. Figure 4 show the category of expert opinion under the provision Evidence Act 1950 [Act 56] and Syariah Court Evidence (Federal Territories) Act 1997 [Act 561].

Provision	Evidence Act 1950	Syariah Court Evidence (Federal Territories) Act 1997
Section	Section 45 Opinions of experts	Section 33 Opinions of experts
Form of Acceptance	Relevant facts	<i>Qarinah</i>
Category of Expert Opinion	Foreign law Science or art Identity Genuineness of handwriting Finger impressions -	Foreign law Science or art Identity Genuineness of handwriting Finger impressions Relating to determination of nasab

**Figure 4:** Categories of expert opinion according to Evidence Act 1950 [Act 56] and Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]

In the case of Ajmawati's divorce claim in *Ajmawati binti Atan vs Moriazi bin Mohamad*, the understanding of the admissibility of the digital description was unclear, which resulted in the case being ordered to be heard again with the submission of the supporting witnesses. The evidence is also admissible in court after it is enforced with expert testimony to test the credibility of the documents that have been issued (Azhan Yahya *et al.*, 2017).

Studies show that the Syariah Court recognizes the used of digital document as a method of proof by referring to Syariah Islamic law. From the findings, the several cases listed regarding to the used of digital document as evidence indirectly recognizes this kind of method of proof is start to be accepted in the trial. However, the discussion on standard operating procedure (SOP) is needs to discuss in detail on how to implement this kind of method in a trial.

## Conclusion

The use of a digital document as evidence is permitted in Islamic Syariah law. The concept of using a digital document as evidence is intended to support or refute the claim. Section 3 and section 49 of the Syariah Court Evidence (Federal Territories) Act 1997 [ACT 561] provide that electronic documents are accepted as evidence. Although there is no clear position on the acceptability of digital documents as evidence in the Syariah courts, many studies have considered the use of digital documents as evidence in Syariah courts. The results show that there is a very high need to accept digital documents as evidence, especially in the Syariah courts. As such, developments in science and technology have led to the need to make use of it. Studies show that the use of the digital document as evidence serves to reinforce the other evidence presented in court. Accordingly, the evidence provided by this digital document is admissible in the Syariah court after it has been strengthened by the expert in digital forensics (*Al-Ra'yu al-Khabir*) to test the credibility of the document issued. However, the discussion on the use of the digital document as evidence needs to be further extended in the context of the implementation of the standard operating procedure (SOP) in the Syariah Court.

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