

APPLICATION SHIFTING THE BURDEN OF PROOF IN SYARIAH CRIMINAL CASES UNDER THE SYARIAH COURT EVIDENCE ENACTMENT IN MALAYSIA*

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ABSTRACT

Burden of proof is one of the significant aspects in the Syariah Court Evidence Enactment. Inaccurate application of burden of proof and shifting the burden of proof could affect a just handling and outcome of a case. Brief analysis found that the inaccuracy issues seemed to be caused by misunderstandings and different interpretations among the Syariah law practitioners. Thus, the objective of this paper is to mainly identify the legal provisions relating to burden of proof and shifting the burden of proof in the Syariah Court Evidence Enactment. Besides, the paper also aims to analyse cases in the Syariah court that considered issues relating to the application of burden of proof and shifting the burden of proof in syariah criminal cases. The paper adopts the legal research methodology based on the doctrinal and qualitative approach. The data is gathered through library research and documentation, which are then analysed applying critical content analysis methods. The paper finds that there are misunderstandings and different interpretation among the

* This work is financially supported by Geran Galakan Penyelidik Muda (GGPM), National University of Malaysia (UKM), project code GGPM-2023-006.

Syariah law practitioners relating to the application of burden of proof and its shift in syariah criminal cases. The paper is essential in explaining the application of the legal provisions relating to burden of proof and its shift in the Syariah Court Evidence Enactment. The paper will also identify issues that relate to misunderstandings among the Syariah law practitioners and subsequently, suggest improvements that can be implemented to increase the understanding among the Syariah law practitioners.

Keywords: *Syariah Court Evidence Enactment, burden of proof, shifting the burden of proof, exception the burden of proof, syariah court*

INTRODUCTION

Burden of proof in Arabic language is termed as عبء الإثبات. Linguistically, the word عبء (*'ib'u*) means burden or weight of a matter, and الإثبات (*ithbat*) means to prove before a judge using rules as specified by Syariah of a right or a case that brings impact. Terminologically, the burden of proof is defined as the responsibility of one of the disputing parties to present arguments and evidence for their claim (Mustafa Zuhaili, 1982: 645). Determining the party who claims and party who is claimed against is important to identify who holds the responsibility to present evidence, as stated by Rasulullah SAW:

*“Evidence upon those who claim, oath upon those who deny”
(Sahih al-Bukhari, 4552).*

In general, the hadith explains about the duty or burden of the claimant to present evidence and thereafter, the burden shifts to the defendant. Ahmad Ibrahim Bek (2003:30) explained that the determining the party who bears the burden to prove is related to a fiqh maxim of “the original rule of a person is being free from any obligation”. Thus, anybody who claims or demands a right on another is obliged to present evidence.

Throughout the litigation proceedings in the court, it is important for a judge to determine upon whom the burden of proof should be placed. The burden of proof is an essential aspect that needs to be adhered to, and there are differences between the concepts of burden of proof in civil (*mal*) cases and criminal cases. Determining who bears the burden of proof accurately and providing evidence that achieves the required standard of proof will ensure justice in the adjudication of Syariah criminal cases. The parties carrying the burden of proof must present evidence to reach the prescribed standard of proof (Suhaizad et al., 2024: 12). Additionally, a judge needs to know the required standard of proof at both stages of a criminal trial, namely the prosecution

stage and the defense stage. Therefore, the conviction of an accused individual for an alleged offense depends on the burden of proof and the required standard of proof (Suhazid, Ahmad 'Azam & Muhamad Helmi, 2020: 395-413). The burden of proof in the law can be understood as a principle that requires a person to prove the existence or non-existence of a fact or to prove the entirety of a case (Ruzman, 2011: 223-248). Allocating the responsibility of the burden of proof to one of the two disputing parties will affect the trial procedure. This allocation provides guidance and direction to the judge in distinguishing the disputing parties and requires the party making the claim to present clear evidence (*bayyinah*) in support of their allegations (Md. Saleh, 2003: 235-262). Furthermore, the required standard of proof also varies depending on the party bearing the burden of proof, the type of burden of proof, and it can shift from one party to another. The application of the burden of proof is closely related to the aspect of evidence stated in the Syariah Court Evidence Enactment.

The lack of understanding regarding the application of the shifting of burden of proof can affect the principles of justice in Syariah criminal cases. Therefore, this writing analyses the issues that relate to the application of the shifting of burden of proof in Syariah criminal cases in Malaysia.

PROVISION OF BURDEN OF PROOF IN SYARIAH COURT EVIDENCE ENACTMENT

The amendment of Syariah Court Evidence Enactment has gone through a unique and distinct phase. According to Ahmad Ibrahim, Syariah Court Evidence Enactment was formulated with reference to the Evidence Act 1950 (Act 56) and adjusted to comply with the Syariah law, known as the method of integrating English and Syariah law. Looking at the objective of amending Act 56, it aims to determine three main things. First, the determination of facts that can be presented before the court, second, the establishment of the types of evidence that can be presented to prove the existence of facts, and finally, to determine who and how the evidence is presented in the process of proof. The general principle of Act 56 also states that evidence can be admitted by the court if it is relevant to the issue being discussed. This means that relevance is a prerequisite for the admissibility of any evidence (Ramalingam, 2017:1-14).

The objectives and principle also serve as guidelines for the application of Syariah Court Evidence Enactment. In order to integrate both laws, namely Syariah law and the framework of Act 56, several methods or approaches have been implemented in the formulation process of Syariah Court Evidence Enactment. The first method is through the abrogation of any provisions that

conflict with the Syariah law. At the same time, examples and explanation in the Evidence Act that fall outside the jurisdiction of the Syariah Court are excluded from Syariah Court Evidence Enactment. The second method is by applying all provisions that do not contradict Syariah law and the jurisdiction of the Syariah court. This approach is known as *Ihtishab al-Asl*. The last method involves the utilization of various opinions from schools of thought and scholars, either through the *al-Talfiq* or *al-Takhayyur* approach (Ruzman, 2015:122-142). *Al-Talfiq* means incorporating the views of other schools of thought in a particular matter along with the views of the school of thought already practiced. On the other hand, *al-Takhayyur* involves choosing another school of thought in a specific matter (Ruzman, 2008: 345-366). This approach can be seen in the application of the principles of *al-Bayyinah* and *al-Shahadah* by accepting the views of Ibn Qayyim, who belongs to the Hanbali school of thought, in determining the broader meaning of *al-Bayyinah*.

The framework of Syariah Court Evidence Enactment in each state has noticeable similarities. The Syariah Court Evidence Act (Federal Territories) 1997 provides for a total of 132 sections. However, there are Syariah Court Evidence Enactment in several states that omit certain sections, such as the Syariah Court Evidence Enactment (Kelantan) 2002 and several other states, which provide for 131 sections. On the other hand, the Syariah Court Evidence Enactment (Terengganu) 2001 and the Syariah Court Evidence Enactment (Perlis) 2006 provide for a total of 130 sections. A significant difference can be observed in the Syariah Court Evidence Enactment (Kedah Darul Aman) 2014, which only provides for 100 sections. Meanwhile, the state of Perak has added several sections in the Syariah Court Evidence Enactment (Perak) 2004, making it a total of 135 sections. The provisions regarding the burden of proof stated in Syariah Court Evidence Enactment are in Part III under the title 'Production and Effect of Evidence.' In this part, there are four chapters containing 58 sections, starting from section 72 to section 129. Chapter 1 under the title 'Burden of Proof' consists of 11 sections, namely from section 72 to section 82, which specify matters related to the burden of proof.

TYPES OF BURDEN OF PROOF

There are two types of burden of proof provided for in Syariah Court Evidence Enactment, namely the legal burden of proof and the evidential burden. However, both types of burden of proof are not explicitly and clearly stated. Both types of burden of proof were explained by the trial judge in the case of *Normah binti Muda v Daud bin Awang Min [2012] 35 (1) JH 97*. The trial judge in this case stated that the concept of the legal burden of proof found in

section 73 of Syariah Court Evidence Enactment is equivalent to section 101 of the Evidence Act 1950. Meanwhile, the evidential burden of proof found in section 74 of the same enactment is copied from section 102 of the Evidence Act 1950.

The legal burden of proof refers to a responsibility or task placed on a party to prove the existence of a fact. This burden of proof can be understood as the burden to establish a case, where the burden does not shift or transfer to another party. In such circumstances, the law itself determines whether the fact in question has been proven or disproven. In the case of Syariah criminal offenses, this type of burden remains with the prosecution from the initial stage of the prosecution until its conclusion. At this stage, the prosecution must present evidence to prove the facts in question by proving each element of the offense. During the defense stage, the prosecution must counter the evidence presented by the accused to maintain the level of proof achieved during the prosecution stage. Therefore, this burden is closely related to the degree of proof in a case. On the other hand, in civil cases, the burden lies with the Plaintiff or Applicant until the trial is concluded. This category of burden is also known as the “burden of persuasion,” which is the responsibility of a party to convince the court of the existence of a disputed fact (Zulfakar, 2015: 122-142).

The evidential burden of proof, on the other hand, refers to the responsibility placed on the other party to provide evidence that can raise doubts or bring up issues against the prosecution in Syariah criminal cases (Suhaizad, Ahmad ‘Azam & Muhamad Helmi, 2020: 395-413). It is also the duty of the Defendant or Respondent to refute and raise doubts about any disputed facts. Therefore, this task constitutes the burden of proof by presenting evidence to support an asserted fact. This burden of proof differs from the legal burden of proof, where the burden of proof of evidence is not fixed and can shift from one party to another. For example, the evidence presented by the prosecution can shift to the accused after the prosecution has completed presenting evidence. The burden of proof of evidence provided in section 74 of Syariah Court Evidence Enactment is copied from section 102 of the Evidence Act (Adibah, Azizah, Azhan, Suhaizad & Mohd Kamel, 2023: 1-30.).

SHIFTING THE BURDEN OF PROOF

Another issue closely related to the burden of proof is the shifting of the burden of proof. It involves the transfer of the responsibility to present evidence from one party to another. The shifting of the burden of proof in the Syariah

Court Evidence Enactment is important in order to place the responsibility of proving a fact on the correct party and to determine which party needs to bear the burden of proof to establish a fact. Besides that, the shifting of the burden of proof affects the degree of proof and the responsibility of both parties in proving their respective cases (Ruzman, 2011: 223-248).

The shift of the burden of proof ensures the protection of the accused's rights by allowing the accused to prove a certain fact, thereby ensuring a fairer and more equitable administration of criminal justice. The shift of the burden of proof is also in line with the Hadith of Rasulullah SAW which states that the evidence must be provided by the party who accuses and the oath by the accused.

The burden of proof can shift in legal and evidential contexts (SC Sarkar, 2016: 251). The legal burden of proof shifts when the accused raises a defense under general exceptions, like the defence of alibi or other exceptions as provided in the Syariah criminal offenses legislations. In civil (*mal*) disputes, such as Child Maintenance Arrears claims, the defendant must show evidence of payments made. This shift also happens when the accused in Syariah criminal cases is ordered to enter defence. Here, the evidential burden of proof shifts.

The general principle in the Syariah Court Evidence Enactment establishes that the legal burden of proof rests on the party making the claim. However, in certain exceptional circumstances, there are exceptions where this general principle does not apply, rather the burden of proof shifts to the accused party (Jal Zabdi, 2003: 187). These exceptions are not clearly stated or provided for in the Syariah Court Evidence enactment and reference has to be made to the Evidence Act instead.

The shifting of the evidential burden for the accused party is aimed at raising doubt about the proven facts of the issue. However, according to the Evidence Act, an exception to shifting the evidential burden of proof happens when the accused is required to prove another asserted fact that is not included in the proven facts of the issue. In these circumstance, the accused party does not bear burden as heavy as the party making the claim, but they are still responsible for proving the asserted facts. These exceptions are applicable to sections 75, 77, 78, 79, and 80 of the Syariah Court Evidence Enactment. The shifting of the burden of proof caused by exceptions to the general principle of the legal burden of proof occurs due to one of the following reasons:

1. Alibi

In cases of Syariah crimes, if the accused party claims that at the time of occurrence, he was in a different location, he must prove this fact. The exception to the general principle of the legal burden of proof through an alibi is provided under section 75 of the Syariah Court Evidence Enactment. In such a situation, the accused party will bear the burden of the legal burden of proof by presenting evidence to support the asserted fact. Regarding the use of alibi as a defence, section 197 of Syariah Criminal Procedure Act 1997 ('Act 560') explains that details regarding the alibi must be disclosed to the prosecution at least 10 days before the trial.

2. General Exception

Section 77 provides for the responsibility of the accused in Syariah criminal cases to prove that his case falls within the general exceptions mentioned in the Syariah Criminal Offences Enactment. For example, in the Syariah Criminal Offences Act (Federal Territories) 1997 (Act 559), the relevant exceptions are found in sections 48 to 53 of that act. On the other hand, the Syariah Criminal Offences Enactment (Negeri Sembilan) 1992 provides a more general exceptions, found in sections 4 to 22. Based on these general exceptions, an individual accused of committing an offense under the Syariah Criminal Offences Enactment bears the burden of the legal burden of proof. It becomes the responsibility of the accused to prove that his case falls within one of the exceptions stated in the substantive Syariah criminal law.

3. Knowledge of Specific Facts

The exception to the general principle also applies to Section 78 of Syariah Court Evidence Enactment, which pertains to the burden of proving facts known specifically. If a particular fact is known specifically by the accused or any party, it becomes the duty of the accused to prove it. This provision means that if a certain fact is easier to prove by a party who has knowledge of that fact, then that party bears the burden of proof. This is because it is difficult for the prosecuting party to prove a negative. Citing the case of *Abdul Rahman bin Salleh & another v Pendakwa Syarie Jabatan Hal Ehwal Agama Terengganu [1995] X (I) JH 12*, it quotes a judgment from the Court of Appeal (at the time) which explains:

Section 106 of the Evidence Act 1950 provides that when a fact is known specifically by a person, the burden of proving that fact rests upon that person. In this case, the burden of proving that Friday prayers can be held in the particular surau falls upon the individuals who are accused.

The above judgment explains the responsibility of the accused party to prove the claim that constitutes a fact known specifically to them. Therefore, the burden of legal proof lies with the accused party to prove the asserted facts based on Section 106 of Act 560 and Section 78 of Syariah Court Evidence Enactment.

In the case of *Rokiah Mudzi v Mohd Yunus Keling [2018] 3 LNS 1*, the Plaintiff made a fasakh claim against the Defendant. Among the grounds presented by the Plaintiff was that the Defendant has negligently or failed to provide for her maintenance for a period of three months. The trial judge referred to section 78 Syariah Court Evidence Enactment and observed:

Therefore, specifically regarding the matter of whether maintenance was provided to the Plaintiff by the Defendant, the burden of proof lies with the Defendant, as he is making a claim contrary to the original or apparent state of affairs, namely that the maintenance was not given initially. The Plaintiff falls within the definition of mudda'a alaih (the party claiming), while the Defendant is mudda'I (the party being claimed against). Therefore, based on the presented reference, the Defendant in this case bears the burden of proof to demonstrate that maintenance was provided to his wife.

In this case, the evidence by the Defendant was easier to be presented compared to if the evidence has to be presented by the Plaintiff. Therefore, the Defendant has to present the evidence to prove his case.

4. Presumption

The exception to the general principle of the legal burden of proof law also applies to presumptions. When a presumption is made, the general principle that the party asserting a fact must prove its existence does not apply. When the existence of a fact is allowed to be presumed, the burden of proof on the party asserting that fact is removed. Therefore, if a presumption is used, it is considered something that assists the party bearing the burden of proof in relieving their burden (Jal Zabdi, 2003: 189). In Syariah Court Evidence

Enactment, there are two types of presumptions: presumption of facts and presumption of law. Presumption of fact can be understood as when one original fact is proven, a presumption can be made regarding the existence of another fact. On the other hand, presumption of law refers to presumptions made based on the law. Therefore, if a Syariah judge uses a presumption to prove a case, the burden of proof under the law shifts from the party making the claim, and the party being accused must rebut that presumption. However, the party making the claim still needs to prove the factual issue being asserted.

Presumption of fact in Syariah Court Evidence Enactment can be observed in section 4(1). The section states:

(1) Whenever it is provided by this Enactment that the Court may presume the existence of a fact, it may either regard the fact as proved unless and until it is disproved, or may call for proof of it.

Based on the provisions above, presumption of fact is one of the facts that does not need to be proven. This means that the party denying it bears the burden of proof. There is a provision related to presumption of fact that needs to be read together with section 4(1), namely section 82 of Syariah Court Evidence Enactment. This provision concerns the court's presumption regarding the existence of certain facts based on the ordinary course of events and other circumstances.

On the other hand, legal presumptions are provided through several provisions. Section 4(2) states:

(2) Whenever it is provided by this Enactment that the Court shall presume the existence of a fact, it shall regard the fact as proved unless and until it is disproved.

The above provision relates to rebuttable presumption of law. When the court is directed to make a presumption as stated in the provision, the court must make that presumption. However, this presumption can only be made after the underlying facts have been proven as explained by the court in the case of *Muhammed Hassan v Pendakwa Raya [1998] 2 MLJ 273*. If such a presumption is made, the burden is on the accused to prove otherwise. If the accused fails to rebut the presumption that has been made, the presumption remains and the accused can be convicted of the offense. Legal presumptions are provided for through sections 78 and 79 Syariah Court Evidence Enactment. Section 78 provides for the burden of proof regarding the presumption of life. When the issue of whether a person is alive or deceased is raised and it is proven that the person has been alive for a period of thirty years, the burden of proof to prove that the person is deceased lies on the party asserting it. On the other

hand, section 79 pertains to the presumption of death. The party asserting that a person is still alive after a prescribed period must prove their claim.

CASE ANALYSIS

The research has conducted an analysis and found the following findings:

1. Unclear understanding relating to Legal Burden of Proof and Evidential Burden of Proof

The confusion and misunderstanding relating to both types of burden of proof can be observed from the case of *Pendakwa Syarie Negeri Sembilan v Mohd. Nor bin Wahab* [Criminal Case No.: 05002-138-0001-2016]. The trial judge in his judgment stated:

In this case before the court, it is the responsibility of the prosecution to prove its case against the accused, as required by section 74 Syariah Court Evidence Enactment of Negeri Sembilan 2003

Based on the above case, the author finds that the trial judge erred in stating the responsibility of the prosecution to bear the legal burden of proof under section 73 of the Negeri Sembilan Syariah Court Evidence Enactment 2003. A similar mistake can be observed in the case of *Pendakwa Syarie Selangor v Sukree bin Masuyu* [2008] 3 ShLR 172. The accused made a false confession to the charge of “khalwat” under section 62(2) of the Selangor Syariah Criminal Offence Enactment 1995. According to the judgment, the trial judge, among other things, explained:

According to the court’s opinion, the prosecution has successfully proven the aforementioned facts and has successfully proven the accused’s involvement in “khalwat,” where the burden of proof for such an accusation lies with the prosecution in accordance with the principles of fiqh, which means proof on the claimant and oath on the one who denies. The prosecution has also fulfilled the requirements stipulated in sections 3, 48, 49, 50, 73, 74, 75, 76, and 77 of the Selangor Syariah Courts Evidence Enactment 1996.

Based on this case, the trial judge made an error in explaining the prosecution’s responsibility to bear the legal burden of proof under Section 73 of the Syariah Court Evidence Enactment (State of Selangor) 2003. This finding aligns with the findings presented by Ahmad ‘Azam (2011) regarding

the confusion of Syariah prosecutors in explaining these types of burden of proof.

2. Confusion regarding the shifting of burden of proof

Confusion and misunderstandings regarding the shifting of the burden of proof can be identified through decided cases. In the case of *Wan Azrul Abdullah v Ketua Pendakwa Syarie Pulau Pinang [2014] 1 ShLR 13*, the appellant represented by a lawyer had filed an appeal petition, among other things, stating:

The Learned High Court Judge erred in law by placing the burden of proof on the accused for the authenticity of the documents referred to as ID-1 and ID-2, namely the marriage certificate and the marriage confirmation by the Malaysian Consulate in Thailand. Under the Islamic law of evidence, Al-Mudda'ii bears the burden to prove the case. When the accused submits these documents in court as bayyinah, and if the prosecution denies them, then the prosecution becomes Al-Mudda'ii and is required to prove the flaw in those documents.

Based on that case, the appellant argued that the burden of proof for the verification of a marriage certificate rests with the prosecution. However, the Court of Appeal ruled that the burden of proof is on the accused based on sections 75 and 77 of the Syariah Court Evidence Enactment (State of Selangor) 2003. This is because when the appellant claims that the court should believe that they were married, the burden of proving that claim lies with the appellant. The court further explained in its subsequent judgment:

In the acceptance of documents as evidence, if there is a dispute over the contents and its authenticity, that matter must be proven by its maker or the authority to prove it.

Based on the above case, the appellant and the appellant's Syariah lawyer misunderstood that the burden of legal proof can shift to the accused based on sections 75 and 77 of the Evidence Enactment (State of Penang) 2004. This finding also aligns with the issue raised by Ahmad 'Azam (2011) in his writing, which found that there are practitioners of Syariah law who do not grasp the concept of the shifting burden of proof.

3. Difficulties in Differentiating Use of Section for *Mal* and Syariah Criminal Cases

There are several practitioners of Syariah law who are unsure about the application of Section 78 of the Syariah Court Evidence Enactment (State of Selangor) concerning whether it can be applied to Syariah criminal cases or not. This is because the provision is unclear and difficult to understand. Similar confusion also exists regarding the understanding of the use of sections 79 and 80 of the same enactment, which are only applicable to *Mal* cases (Suhaizad, Ahmad 'Azam & Muhamad Helmi, 2020: 395-413). This finding coincides with the issue raised by Zulfakar Ramlee (2015:122-142.) in his writing regarding the confusion in the application of provisions for *mal* and criminal matters.

4. Confusion Regarding the Use of General Exception Provisions

There are practitioners of Syariah law who are uncertain about the application of this provision, as they believe that it might also be applicable to *mal* cases. Moreover, confusion can also be seen from the uncertain response regarding whether this provision comes into play through the initial denial of the accused or through their defense (Suhaizad, Ahmad 'Azam & Muhamad Helmi, 2020: 395-413).

Similar confusion is found in decided cases as well. In the case of *Pendakwa Syarie Kelantan v Mat Rahim Saman & another [1995] X (I) JH 110*, both accused faced charges under sections 9(1) and (2) of the Syariah Criminal Offences Enactment (Kelantan) for the offense of *khalwat*. Both accused raised a defense that they were legally married at the time of arrest. They presented their marriage documents from Thailand in court. The prosecution argued that both accused should prove the authenticity of the documents since they had specific knowledge of them. This argument was based on section 77 of the Syariah Court Evidence Enactment (Kelantan) 1991 concerning the general exception, and section 106 of Act 56 concerning facts known specifically. The Syariah judge rejected this argument and acquitted both accused due to the prosecution's failure to prove the authenticity of the marriage documents, which were alleged to possibly contain forgery or fraud. Based on this case, the trial judge believed that the burden of proof for cases falling under the general exception lies with the accused, and this burden shifts to the prosecution if the issue of forgery is raised.

Confusion regarding the application of Section 77 of the Syariah Court Evidence Enactment (State of Selangor) can also be found in the case of *Pendakwa Syarie Wilayah Persekutuan v Zulkifli Othman [Syariah Criminal Case No: 14100-143-0017-2017]*. The accused was charged with committing the offense of khalwat under Section 27 of the Syariah Criminal Offences Act (Federal Territories) 1997. In this case, the accused pleaded not guilty and requested a trial. In delivering the judgment for the prosecution stage of the case, the trial judge summarized that the prosecution had successfully presented evidence as provided under sections 73, 74, 75, 76, and 77 of the Syariah Court Evidence Enactment. However, it was noted that the use of Section 77 of the Enactment was inappropriate as it is not applicable to the prosecution stage and is only relevant during the defense stage. Furthermore, in this case, no defense was raised during the defense stage. Similar judgments can be observed in the cases of *Pendakwa Syarie Selangor v Sukree bin Masuyu [2008] 3 ShLR 172* and *Pendakwa Syarie Selangor v Abdul Kahar bin Ahmad [2009] 29(1) JH 100*. Both cases also involved the accused pleading guilty, yet the trial judges discussed the use of Section 77 of the Syariah Court Evidence Enactment.

5. Confusion Regarding Use of Presumption Provisions

Some Syariah law practitioners who do not have a clear understanding of the application of presumptions related to the burden of proof. This group is confused about the use of sections 79 and 80 of the Syariah Court Evidence Enactment (State of Selangor), which pertain to legal presumptions, as well as section 82 of the same Enactment concerning factual presumptions. Furthermore, these practitioners do not comprehend the concept of applying the exception to the general principle of the burden of proof for both types of presumptions (Suhaizad, Ahmad ‘Azam & Muhamad Helmi, 2020: 395-413).

Additionally, in the case of *Pendakwa Syarie Negeri Sembilan v Mohd Amin Mohd Zin & another Syariah Criminal Case No: 05500-114-1052-2009 & 05500-114-1051-2009*, the trial judge made an error by referring to section 82 of the Syariah Court Evidence Enactment concerning factual presumptions. In reality, factual presumptions were not applicable and did not need to be discussed in that case. The trial judge appears to have misunderstood the use of section 82 of the Enactment, which deals with factual presumptions, as distinct from the burden of proving a fact as stipulated under section 75 of the same Enactment.

6. Confusion Regarding Application of Provisions Relating Burden of Proving Fact Specifically Known

The difficulty in understanding the existing provisions is further supported by the case of *Ketua Pendakwa Syarie Selangor v Ahmad Munawar Zakaria*, [Syariah Criminal Case No: 10400-1140-0003-2019]. The accused was charged with the offense of preparing to commit premarital sexual intercourse under section 26 of the Syariah Criminal Offences Enactment (State of Selangor) 1995. The trial judge explained:

When the syariah prosecutor alleges that the accused has committed an offense, then the syariah prosecutor must prove his allegation as provided in sections 73, 74, and 78 of the Syariah Court Evidence Enactment (State of Selangor) 2003.

Based on the above case, the use of section 78 of the Syariah Court Evidence Enactment to explain the prosecution's responsibility to prove a certain fact is not accurate. This is because section 78 is related to the exception to the general principle of the burden of legal proof. Therefore, this provision is applicable to the accused during defense stage, not during the prosecution stage.

The findings from the cases above are further supported by the case of *Pendakwa Syarie Negeri Sembilan v Rahim bin Ramli* [Syariah Criminal Case No: 10400-1140-0003-2019]. The accused was charged with the offense of gambling under section 79A of the Syariah Criminal Offences Enactment (State of Negeri Sembilan) 1992. During the defense stage, the accused claimed that he was forcibly brought into the gambling premises by the Islamic Religious Enforcement officers. The trial judge concluded that the accused had failed to prove this issue based on section 75 of the Syariah Court Evidence Enactment (State of Negeri Sembilan) 2003. In this case, the accused had to prove the fact of coercion, which was known specifically to him under section 78 of the Enactment. This responsibility aligns with the purpose of section 78 of the Enactment, which was established due to the difficulty in the claiming party proving a negative. Therefore, the prosecution's responsibility to prove that the accused was not coerced is more burdensome than the accused's responsibility to prove that he was coerced. Hence, the burden of proving this fact lies with the accused during his defence.

7. Regarding Use of Oath for Syariah Criminal Cases

There are Syariah law practitioners who are mistaken about the use of oaths in Syariah criminal cases (Suhaizad, Ahmad 'Azam & Muhamad Helmi, 2022).

This confusion can also be seen in the appellate case of *Ketua Pendakwa Syarie Kedah v Rodziah Ismail & 2 others* [Criminal Appeal Case No: 02000-102-0001-2007]. Respondent 1, who was the accused, was charged with violating a fatwa under section 166A of the Islamic Religious Administration Enactment (Kedah) 1962 and section 23 of the Syariah Criminal Offences Enactment 1988 for providing witchcraft services. The trial judge determined the existence of a prima facie case and ordered all three respondents to take the Syariah oath. After the respondents took the Syariah oath, the trial judge recorded an acquittal. This action was based on the procedure provided under subsection 98(f) of the Syariah Criminal Procedure Enactment (Kedah) 1988, which allows the accused to take an oath. The appellant, who was the prosecution, subsequently appealed to the Syariah High Court, which rejected the appellant's appeal. The appellant then filed an appeal to the Syariah Court of Appeal in the State of Kedah.

Through the judgment, the Syariah Court of Appeal agreed with the non-application of the Syariah oath in Syariah criminal cases. This was because the method of legal interpretation used to interpret subsection 98(f) of the Syariah Criminal Procedure Enactment (Kedah) 1988 was incorrect. The Court of Appeal also concurred with the appellant's argument that the offenses charged against all respondents were takzir offenses involving the rights of Allah. Therefore, these matters did not require the Syariah oath to shift the burden of proof. However, despite this, the Court of Appeal made a contrary decision, upholding the previous court's decision and acquitting the respondents.

The confusion pertains to the provisions of section 72 of the Syariah Court Evidence Enactment (State of Selangor) and section 87(4) of the same Enactment. There is no provision regarding the requirement to present evidence for Syariah criminal cases after section 72 of the Enactment. Meanwhile, subsection 87(4) of the Enactment, which relates to the accused's responsibility to present evidence, falls under the chapter on witnesses. This provision can cause misunderstandings because the accused is not included in the definition of "witness" in the Syariah Court. The ambiguity of these provisions has led to confusion concerning the use of the Syariah oath in Syariah criminal cases.

8. Inaccurate Reasonings for Cases with Guilty Plea

The analysis of several cases has indeed identified judgments that incorrectly discuss the application of the burden of proof in cases of guilty pleas. This issue can be seen in the case of *Pendakwa Syarie Selangor v Abdul Kahar bin Ahmad* [2009] 29(1) JH 100, in which the accused pleaded guilty to

all charges. In the judgment, the trial judge discussed how the prosecution had successfully fulfilled the requirements of the burden of proof stipulated in sections 73, 74, 75, 76, and 77 of the Syariah Court Evidence Enactment (State of Selangor) 2003. These provisions relate to the burden of legal proof, evidence, alibi, and the general exception. Similar use of these provisions was found in other cases as well. For instance, cases such as *Pendakwa Syarie Negeri Sembilan v Hammirul Hamlen* [Criminal Case No: 05001-114-0022-2015], *Pendakwa Syarie Wilayah Persekutuan v Abdul Samathu Alil Rahman* [Criminal Case No: 14300-138-0023-2010], and *Pendakwa Syarie Selangor v Sukree bin Masuyu* [2008] 3 ShLR 172. The inaccurate use of these sections in cases involving guilty pleas clearly demonstrates a lack of understanding and clarity regarding the proper application of the legal provisions. Based on the text of these judgments, the analysis suggests that the trial judges have engaged in copy-and-paste behavior, inserting certain phrases from previous judgments without fully comprehending the true intent of each provision.

CONCLUSION

The provisions regarding the burden of proof and the shifting of the burden of proof stated in the Syariah Court Evidence Enactment are in line with the general principles of Islamic law. They accurately determine who must bear the burden of proof, and achieving the required degree of proof ensures justice in the judgment of Syariah criminal cases. Islamic legal principles stipulate that the claimant is the first to bear the burden of proof. The accused is also given the opportunity to present a defense through the shifting of the burden of proof. These rules directly reflect justice in trial proceedings. Without these rules and methods, trial proceedings would become disorganized and could lead to injustice.

This article concludes that there are diverse understandings, interpretations and applications among Syariah law practitioners related to the application of the burden of proof and shifting the burden of proof under the Syariah Court Evidence Enactment in Malaysia. These issues need to be resolved so that the application of the burden of proof and the shifting burden of proof can be adjusted. One of the factors in the occurrence of these issues is related to the evidence law provisions regarding the burden of proof stated in the Syariah Court Evidence Enactments are vague and lack clarity. Therefore, the existing provisions of the Syariah Court Evidence Enactment need to be detailed and updated to create a more organized and comprehensible legal framework. Additionally, the understanding of Syariah law practitioners regarding the application of the burden of proof needs continuous enhancement to ensure its

proper application in case litigation, aligning with the genuine requirements of the law.

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Application Shifting the Burden of Proof in Syariah Criminal Cases Under
the Syariah Court Evidence Enactment in Malaysia

*Pendakwa Syarie Negeri Sembilan v Mohd Amin Mohd Zin & anor, Syariah
Criminal Case No: 05500-114-1052-2009 & 05500-114-1051-2009*

*Pendakwa Syarie Negeri Sembilan v Mohd. Nor bin Wahab [Criminal Case
No: 05002-138-0001-2016].*

*Pendakwa Syarie Negeri Sembilan v Rahim bin Ramli [Criminal Case No:
10400-1140-0003-2019*

Pendakwa Syarie Selangor v Abdul Kahar bin Ahmad [2009] 29(1) JH 100

Pendakwa Syarie Selangor v Sukree bin Masuyu [2008] 3 ShLR 172

*Pendakwa Syarie Wilayah Persekutuan v Abdul Samathu Alil Rahman
[Criminal Case No: 14300-138-0023-2010]*

*Pendakwa Syarie Wilayah Persekutuan v Zulkifli Othman [Syariah Criminal
Case No:14100-143-0017-2017].*

*Wan Azrul Abdullah v Ketua Pendakwa Syarie Pulau Pinang [2014] 1 ShLR
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