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Criminal Evidence System in Islamic Jurisprudence

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Abstract

This study deals with the criminal evidence system in Islamic jurisprudence. The importance of the study stems from its review of the Islamic precedence in deciding the rules of criminal evidence. Its importance also lies in the fact that it shows a set of methods of evidence that are dealt with by the positive law at a later time after they were decided by the noble Sharia. The objective of this study is to identify the criminal evidence system in Islamic jurisprudence and to show the methods of evidence approved by Islamic sharia in this context. In order to achieve the objectives of the study, the researcher adopts the descriptive analytical approach. The researcher reaches several results, the most important of which is that Islamic sharia has preceded in addressing the system of criminal evidence. The researcher also concludes that Islamic sharia approved a set of methods for criminal evidence, including what is agreed upon among jurists, and what was approved by some of them and disapproved by the others. The study ends with a set of recommendations, the most important of which is the necessity of implementing all methods that lead to the prevalence of the truth according to specific regulations so that there is no exaggeration in their estimation. The researcher also recommends the implementation of the methods of evidence approved by Islamic Sharia in all judicial facilities in Islamic countries so that they are interpreted in accordance with the rules and regulations of Islamic sharia.

Keywords: Criminal Jurisprudence, Islamic Sharia, System of Evidence.

Introduction

Criminal Evidence is an issue as old as humanity, and it is related to judicial efforts that seek to show the right to preserve the public interest. It is indisputable that this fact does not appear except by research, investigation and evidence. Criminal evidence is a backbone and a basic pillar for criminal judgments. Through those evidences which are presented as means of proof, the judgment is either conviction or innocence. There is no doubt that Islamic Sharia took the lead in approving the methods of criminal evidence, where the provisions of Sharia

organized a set of means by which crimes can be proven in the criminal field. Through this study, we review the system of criminal evidence in Islamic jurisprudence. The aim of the study is to identify the evidence system in force in Islam, in addition to highlighting the methods of criminal evidence in Islam. To achieve the objective of the study, the researcher adopts the descriptive analytical approach. The Islamic sharia stipulates that evidence has to be convincing to avoid the presumption of innocence, this evidence can be testimony and confession (Salama, 1982).

One of the important studies that deal with the subject of this research is Ben Said's study (2018), entitled: "The nature of evidence and its place in the Algerian civil law and judiciary." The study deals with the nature of evidence, the principles on which it is based, the legal nature of the rules of evidence and its place in the law, the role of the judge in evidence, and the place of evidence and its methods. The study uses the descriptive analytical approach. It concludes that evidence is of great importance. Its validity means that the objective of the judiciary, which is to fulfill justice and repay the injustices, is achieved.

Alrabe'e study (2016), entitled: "The position of Islamic Sharia on evidence in electronic writing", is one of the important studies in this context. The researcher demonstrates that Islamic Sharia is characterized by the fertility of principles and the flexibility of texts because the desired objective is to achieve stability through the administration of justice, as it allows us to resort to any sharia means or evidence. Contemporarily, it also can be used neuroscience and physiological tools to study the neural correlates of individuals' behavior (see Alsharif et al., 2021a; 2021b, 2021c; 2021d; 2021e; 2022; 2022).

The study shows that the principles of evidence in Islamic jurisprudence do not require a specific type of writing or a special writing material, because writing is permissible on any material that people are familiar with. Therefore, Islamic jurisprudence does not find anything wrong with relying on electronic writing to prove rights and obligations. The researcher concludes with a set of results and recommendations, the most important of which are: Islamic jurisprudence does not reject modernity in any field as long as it achieves objectives that do not contradict the origin or rules of sharia, because the desired objective of evidence is to maintain the stability of transactions and preserve rights. Regarding the scope of this current study, it deals with the system of criminal evidence in Islamic jurisprudence, where the researcher attempts to identify the system of criminal evidence in Islam, and then shows the methods of evidence in Islamic criminal jurisprudence, as follows:

The System of Evidence in Islamic Criminal Jurisprudence

Islamic sharia is based on justice, it established a system that consider evidence in criminal cases. This evidence has to be permitted and agreed upon in sharia law (Al-Laheidan, 1980). Regarding the determination of the criminal evidence system in Islam, Islamic jurists are divided into two groups, some of them are in favor of restricting the methods of evidence, and some of them are in favor of the freedom of evidence. This is what is explained in this part of the study as follows:

- **The Majority of Jurists are in Favor of the Restriction of the Methods of Evidence**

The majority of jurists are in favor of the restriction of the methods of evidence in the crimes, punishments and retribution in specific ways. This indicates that based on the opinion of the majority of scholars, the judge may not rule by methods of evidence other than those specified by the legislation in the cases presented to him, even if he is convinced of others.

This restriction of the methods of evidence limits the freedom of the judge and the freedom of the opponents as well (Halawa, 2003, p.13).

The evidence agreed upon by the majority of jurists and on which it is permissible to build penal provisions in the hudud (punishments) crimes and retribution is only represented in confession and testimony. This means that the evidence is not considered evidence according to the opinion of the majority in hudud crimes and retribution. This general rule has some exceptions, the majority of scholars believe in the possibility of considering some evidences in hudud crimes and retribution. This is what the Maliki school believes in: the permissibility of judgment with the evidence of pregnancy for a woman who has neither a master nor a husband, and she was not subjected to coercion, because pregnancy is considered an evidence of adultery. Abu Hanifa approves the permissibility of the judgment with the evidence of the refusal to take the oath in the crimes of retribution that occur in other than the soul, so that the offender is punished based on the evidence of the refusal to take the oath, because the refusal is an apparent evidence that indicates the honesty of the victim (Nasser, 2014, p. 185).

In summary, the majority of scholars specify the methods of evidence exclusively in hudud crimes and retribution, which are represented in confession and testimony. Evidence is not permissible except as an exception in some crimes that accept the evidence.

- **Some Jurists say that the Methods of Evidence Shall not be Specified**

This opinion is approved by Ibn Al-Qayyim and Ibn Taymiyyah "Hanbali", Ibn Farhun al-Yamari "Maliki" and Ibn Al-Ghiras "Hanafi". These jurists say that it is not permissible to restrict the evidence to specific methods that the judge and litigants are bound by. The people of this opinion call for freedom of evidence for the judge and litigants (Behance, 1962, p. 196). The judge, according to those who advocate this opinion, judges according to his belief and certainty in any evidence, and the litigants have the right to present any evidence that proves the validity of their claim. They stipulate that the evidence presented by the litigants shall not violate Islamic sharia and its purposes (Al-Awwa, 1986, p. 253).

Ibn Al-Qayyim says in his book *At-Turuq al-Hukmiyah* what proves his opinion that the evidence shall be left free: "If the signs of justice appear in a method, then it is from Allah's law and religion. The almighty Allah, who knows best and he is the most wise and the fairest to single out the paths of justice, does not put the signs of justice in a method and then negates what is clearer and stronger in evidence, so that he does not make it from it as an evidence when it exists. Rather, the almighty Allah make it clear, through the methods that he legislated, that his purpose is to establish justice among his servants, and for people to establish justice. Any method by which justice and equity are achieved is a method from the religion and does not contradict it" (Ibn Al-Qayyim, investigation by Al-Hamd, 2008, p. 262).

The conclusion of the people who advocate this opinion is that it is not possible to restrict the methods of evidence, as they are absolute without restriction except for adherence to the provisions of Sharia. Therefore, the door of evidence shall be open for the litigants and the judiciary at the same time. The researcher believes that the evidence shall be adaptef, while allowing room for evidence by emerging methods or any other method that the judiciary believes in to play a role in realizing the right.

Methods of Criminal Evidence in Islam

Islamic law is guided by the sharia that is associated with the teaching of the Quran and the Sunnah (Alotaibi, 2021). Islamic Sharia has approved a set of methods or means to

prove crimes, including what those that gain consensus among Islamic jurists, and others that are specific to some of them without the other. In this part of the study, the researcher reviews these methods as follows:

- **Testimony**

Islam considers testimony as one of the most important methods of evidence because it is easy to access and report and anyone can do it. Testimony focuses on saying what the person sees, hears, or perceives with one of the senses and presents it before the judiciary. Islam is concerned with testimony and has organized its rules and enacted its provisions. The judge in Islamic jurisprudence has a discretionary authority to accept or reject the testimony (Al-Wargami, 1993, p. 582). The jurists differ in defining it according to their differences in the rulings related to it from their perspectives. The Hanafi school defines it as: "a statement of truth to establish the right through uttering the testimony in the Judicial Council," Ibn Arafa, from the maliki school, defines it as: "An utterance that the ruler shall listen to and judge according to it" (Al-Zuhaili, 1982, p. 104).

The Shafi'i school defines it as: "the truthful information by people about others and starts with (I testify)." It is also defined by the Shafi'is as: "telling about something with a special wording" (Baraka, 2010, p. 35). The Hanbalis defines it as: "Informing what the person knows with a special wording" (Qasimi, 2020, p. 878).

In this context, the researcher prefers the definition of the Shafi'i school, which is: "informing a ruler truthfully about of othes to judge according to it, with the wording (I testify)". The jurists of Sharia have agreed on the legitimacy of evidence by testimony, they infer this from the quran, the Sunnah, consensus and reason. As from the quran, the almighty Allah says: "bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses" (Surah Al-Baqarah, vers No. 282), and "Conceal not evidence; for whoever conceals it,- His heart is tainted with sin. And Allah Knoweth all that ye do." (Al-Baqarah, vers No. 283).

As for the evidence for the legitimacy of testimony from the Sunnah, it is reported in more than one place, one of them is: Muslim, Abu Dawood, Al-Nasa'i and Al-Tirmidhi narrated that Abbas said: "A man came from Hadramaut and a man from Kinda to the Messenger of Allah, peace be upon him. So the Hadhrami said: O Messenger of Allah, this man has overpowered me over a land that belonged to my father. The one from kinda said: It is my land in my hands that I cultivate and he has no right to it. The Messenger of Allah, may Allah's prayers and peace be upon him, said to the Hadhrami: Do you have evidence? He said: No. The messenger said: you have the right to hear his oath. He said: the man is corrupted and does not shy away from anything. He said: You do not have that. So he went to swear, the messenger, peace and blessings be upon him, said when they came back: if he swore on this money to take it unjustly, he would meet Allah while Allah would not want to meet him" (Sahih Muslim, No. 139).

As for the consensus, the nation has unanimously agreed from the era of the prophethood to this day on the legitimacy of testimony as a means of judicial evidence. It has become from indisputably established facts of the religion, those who deny it are disbelievers because they deny texts of the Quran and Sunnah (Al-Wargami, 1993, p. 590)

As for the mind, testimony has become a necessity for the establishment of social life, the relationships in which it arise, the accompanying concerns, and the transactions and facts that may be lost because of which rights may be lost. Therefore, the testimony is a necessity to preserve those rights (Qasmi, 2020, p. 380).

Regarding the conditions that shall be met for the validity of testimony in Islam, they are represented in: Islam, reason, freedom and maturity, vigilance, sight according to the Hanafi school, utterance according to the majority jurists, justice according to the majority jurists, and his testimony is not contested according to the majority jurists (Al-Zuhaili, 1982, p. 132).

In sum, Islam acknowledges the evidence with through testimony of witnesses and is a forerunner in defining its rules and provisions.

- **Writing**

The jurists differed regarding the consideration of writing as a means of evidence in general. The discussion has raged among the scholars of the same school of thought. The Hanafis, the Shafi'is, the Hanbalis, and the Malikis have different opinions regarding the acceptance of the writing as an evidence. The summary of the discussion is that the majority of jurists do not accept writing as a means of evidence. The researcher points out here that they excluded some cases and permitted evidence in writing. Their evidence in the prohibition is the similarity of the handwritings and their confusion and difficulty in distinguishing them. They also said that writing may be for fun and entertainment. Therefore, it is not suitable as evidence for the lack of intention when it is written. They infer the prohibition from the proof that evidence is restricted to confession, oath and refusal, and writing is not one of them (Al-Abdalawi, 1986, p. 221).

While the Malikis, Ahmad in a narrative, and some of the predecessors and contemporary ones approve writing as a means of evidence, their evidence is the Almighty's saying: "O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him." (Surah Al-Baqarah, vers No. 282).

They infer the permissibility of evidence by writing from the deeds of the Prophet, may Allah bless him and grant him peace, when he approved writing down the rulings, texts and messages. They also say that writing is like speech and calligraphy is like verbal expression in expressing the will and manifesting the intention (Al-Zuhaili, 1982, p. 358). The researcher advocates the opinion of the legality of writing as it is one of the evidences because the text and the action of the Prophet, peace and blessings be upon him, are proven and it is in agreement with reason and logic. There have been many forms of writing that can serve as evidence in sharia. Some jurists call "argument" and others call it "record" or "document" (Baraka, 2010, p. 40).

- **Confession**

There is no doubt that confession is the best evidence, as the proof by other means and methods may be lacking, and it may be impossible to prove anything by one of them. Therefore, confession is one of the most important methods of evidence approved by the noble Sharia.

Confession is defined as: "a declaration of a right you owe to others" (Baraka, 2010, p. 77). This means that confession is a statement that includes everything that is told, whether it is true or false. The word "right" here means any established right, i.e. on the confessor for others, i.e. This may be the right of the almighty Allah, and it may be the right of a human being.

The legitimacy of confession as one of the means of evidence in Islamic jurisprudence is cited in the Quran, the Sunnah of His Messenger, consensus and reason. As for the evidence from

the Quran, the almighty Allah says: "and made them testify concerning themselves, (saying): "Am I not your Lord (who cherishes and sustains you)?"- They said: "Yea! We do testify!" (Surah Al-A'raf, vers No. 172), and "O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves." (Surah An-Nisa, verse No. 135).

As for the evidence for the legitimacy of confession from the Sunnah, it is proven in the hadith of Abu Hurayrah, in which he narrates about the Messenger of Allah, may Allah's prayers and peace be upon him, that he said: "Go to this woman, O Anis, and if she confesses, stone her" (Sahih Al-Bukhari. Hadith No. 2278). As for the evidence of the legitimacy of confession from the consensus the nation has unanimously agreed on the validity of confession from the era of the Prophet, may Allah's prayers and peace be upon him, till this day.

As for the evidence of the validity of the confession to be one of the rational means of evidence is that evidence may not be possible in other methods such as testimony and writing, and there would be no way to prove except by confession. It is also not logical for a person to testify against himself, so confession is the strongest argument and evidence (Qasimi, 2020, p. 373). The validity of the confession requires a set of conditions agreed upon by the jurists, namely reason, puberty, not charged with accusation, choice and will (Al-Zuhaili, 1982, p. 252). From the previous discussion, it is concluded that confession is legal and is considered as a means of evidence.

- **Experience**

Criminal experience is among the most important investigation procedures in criminal jurisprudence, it is also a means of evidence. Experience is defined as the technical advice that the judge uses to form his belief in matters whose assessment requires special tools that the judge does not personally possess (Schnior, 2005, p. 16). The legitimacy of experience in Islamic sharia has been proven by the texts of the Quran and Sunnah, the actions of the Companions, and by reason. As for the quran, the Almighty Allah say: "So ask the people of the message if you do not know." (Surah Alnahel, verse No. 43), and "none can inform you like [one] Acquainted [with all matters]." Surah Fatir, verse No. 14).

As for the Sunnah, Jaber, may Allah be pleased with him, said: "We set out on a journey. One of our people was hurt by a stone, that injured his head. The then had a sexual dream. He asked his fellow travelers: Do you find a concession for me to perform tayammum? They said: We do not find any concession for you while you can use water. He took a bath and died. When we came to the Prophet (peace be upon him), the incident was reported to him. He said: They killed him, may Allah kill them! Could they not ask when they did not know ?..." (Mustadrak al-Hakim. No. 5855/1). As for the evidence for the legitimacy of experience as one of the means of evidence from the actions of the Companions, Alaa bin Abdul Rahman about Abu Majda who said: I cut off the ear of a boy or part of my ear was cut off. So Abu Bakr came to us as a pilgrim, and we gathered to him, and he sent us to Omar Ibn Al-Khattab, and Omar said: This deserves retribution. Call Hojama to take the retribution." (Ibn al-Qayyim al-Jawziyyah, 1991, p. 70).

As for the evidence for the validity of experience from the mind is that the judge faces technical issues that he does not have the ability to consider because he is not an expert in them, and he cannot establish an accurate opinion without the assistance of an expert and specialist (Al-Omar, 2020, p. 40). From the aforementioned discussion, it becomes clear that resorting to people of expertise, knowledge and competence is necessary in order to achieve

justice in society, and that it is inevitable for the judge to refer to the experts to help him deliver the right to its people.

- **Presumption**

Islamic Sharia recognizes presumption as one of the means of evidence. The jurists approve and rely on this method to reveal the truth and act accordingly (Qasimi, 2020, p. 415).

Presumption is the clues or conditions that prove a hidden matter. The proof of the legitimacy of presumption as a means of evidence is what the almighty Allah say: "they brought his shirt stained with false blood." (Surah Yusuf, 18), and: "a witness from her family testified. "If his shirt is torn from the front, then she has told the truth, and he is of the liars." (Yusuf, 26). Another example of presumption that is valid to be an evidence is that a woman is pregnant and does not have a husband, so this is an evidence that she committed adultery. So, the abovementioned discussion proves that the Islamic Sharia uses presumption and employs it as one of the methods of evidence.

- **The Knowledge of the Judge**

The noble Sharia identifies the methods of evidence by which the right holder reaches his right, and clarifies what is suitable to be a means of evidence and what is not. The Islamic jurists differ in defining these means, each according to his approach in interpreting the texts and applying reason. Among the means in which the jurists differ is the judge's judgment based on his personal knowledge. The researcher points out here that the Islamic jurists agreed that the judge has the right to judge according to his knowledge in matters of Al-Jarh wa At-Ta'deel (Criticism), and in the actions that occur before him in the ruling council. They also agreed that the judge judges according to his knowledge in the right of the almighty Allah. For example, the judge hears an irrevocable divorce from the husband, and they differ in other than that. Imam Malik and Imam Shafi'i said, and it is a well-known opinion of Imam Ahmed and is the opinion of the later Hanafis, that it is not permissible at all for the judge to judge according to his knowledge (Ibn Rushd, 2014, p. 470), and their evidence for that is the what the almighty Allah said: "those who accuse chaste women and then do not produce four witnesses - lash them with eighty lashes." (An-Nur, 4), and: "when they do not produce the witnesses, then it is they, in the sight of Allah, who are the liars." (An-Nur, 13).

Their evidence from the sunnah is what Umm Salamah (May Allah be pleased with her) reported: the messenger of Allah (peace be upon him) said, "Verily, I am only a human and the claimants bring to me (their disputes); perhaps some of them are more eloquent than others. I judge according to what I hear from them). So, he whom I, by my judgment, (give the undue share) out of the right of a Muslim, I in fact give him a portion of (Hell) Fire". (Sahih Muslim, 245).

Their rational evidence from the intellect is that the judge's judgment according to his knowledge places him in accusation and raises suspicion against him, and there is a room for bad judgment and an opportunity for revenge against enemies. So, it is not permissible for the judge to judge according to his knowledge. This is the implementation of the theory of "blocking the means," which requires the prohibition of permissible means if they lead to a prohibited outcome. In this case, the prohibition is represented in injustice and unfairness in the judgement (Abu al-Basal, 1997, p. 61).

While the Shafi'is, according to their well-known opinion, Ahmad in one of his reports, Ibn Hazm and the As-sahibaim from the Hanafi school advocate the judge's permissibility to

judge according to his personal knowledge (Al-Sarakhsi, 1989, p. 105). Their evidence for that is the what the almighty Allah said: "O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves." (Surah An-Nisa, verse No. 135). Their evidence from the sunnah is what A'isha reported: "Hind, the daughter of 'Utba, wife of Abu Sufyan, came to Allah's Messenger (may peace be upon him) and said: Abu Sufyan is a miserly person. He does not give adequate maintenance for me and my children, but (I am constrained) to take from his wealth (some part of it) without his knowledge. Is there any sin for me? Thereupon Allah's Messenger (may peace be upon him) said: Take from his property what is customary which may suffice you and your children." (Sahih Muslim, 248).

In fact, the researcher prefers the first opinion, which says that it is not permissible for the judge to make a judgement according to his knowledge, because our time is not like theirs, and our morals are not like theirs, and intentions have changed and suspicions have increased, and blocking the means is a priority in this time. So, prevention is more probable, Allah knows best.

- **Oath**

Oath is one of the means of evidence that judges rely on in Islamic sharia to settle disputes between individuals. It is considered a subjective means linked to the conscience of individuals, and it is resorted to when other evidences are insufficient, it enhances peace in the souls of the litigants (Al-Zarqa, 1959, p. 156). Oath is defined as testifying the almighty Allah for speaking the truth with a sense of the majesty of the one by whom the person swear, and with the fear of his punishment (Bahnasy, 1962, p. 200).

The proof for the legitimacy of oath as a means of evidence from the Quran, is what the almighty Allah said: "by the sky and the night comer." (At-Tariq, 1), and: "Say: Yes! By my Lord! It is the very truth." (Yunus, 53). The nation has unanimously agreed on the legitimacy of oath as an evidence. Oath acquires this value from the greatness and sanctity of Allah, by whome the person swears. Oath is divided into two types: a decisive oath, which is directed by the opponent to his other opponent when he is unable to provide an evidence, and the complementary oath, which is directed by the judge to one of the two opponents, to complement the presented evidence (Zaidan, 2002, p. 186). As for the oath by which the case is abated or confirmed, the jurists have unanimously agreed that it is an oath (swear) by Allah, and its formula is close to all jurists (Al-Zuhaili, 1982, p. 169).

Discussion and Conclusion

The study has concluded that Islamic sharia approve a set of methods of evidence represented in testimony, writing, oath, confession, presumption, experience and knowledge of the judge. In addition, the Islamic Sharia has preceded the contemporary man-made systems in the criminal evidence system. The study also concludes that sharia jurists differ in the method of evidence, some of them restrict the means of evidence and this is the opinion of the majority of jurists, and some of them do not restrict the methods of evidence and say they are not limited, this is the opinion of some ancient and contemporary jurists.

The study has also concluded that Islamic sharia approve a set of methods or means to prove crimes, some of which have the consensus of Islamic jurists, and some of them are specific to some of them without the others. At the conclusion of the study, the researcher recommends:

1. Implementing all methods that lead to the empowerment of the right, in accordance with specific provisions without overestimating them.

2. Implementing the methods of evidence approved by Islamic sharia in all judicial facilities in Islamic countries so that they are interpreted in accordance with sharia rules and provisions.
3. Holding special courses for all workers in the fields of judiciary and prosecution, and providing them with sufficient guidance about the methods of evidence approved by Sharia.

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