

EXAMINING THE APPLICATION OF STANDARD OF PROOF IN CRIMINAL CASES: A COMPARATIVE ANALYSIS OF ISLAMIC LAW AND COMMON LAW IN MALAYSIA

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ABSTRACT

In criminal litigation, evidence plays a very significant role in ensuring that justice is delivered. Nevertheless, justice cannot be achieved without the correct application of standard of proof. Failure to apply the correct standard of proof could result in miscarriage of justice. This paper examines the concept of standard of proof from the Islamic and common law perspectives. It also analyses the similarities and differences in the application of standard of proof under both legal systems. This study is a doctrinal research and utilises qualitative methods. The primary and secondary data are gathered using the documentation method obtained from library, legal statutes and reported cases. The gathered data are then further analysed using content analysis method. Findings of this study show that there are similarities and differences in the concept of standard of proof in criminal cases under both legal systems. In spite of the similarities, several applications under the common law should not be referred or utilised in litigating Syariah criminal cases. This paper suggests that the standard of proof under Islamic law is to be harmonised with the common law in the prosecution of criminal cases in the Syariah courts. The research conducted contributes towards the knowledge in distinguishing between the Islamic and common law principles particularly for countries that practise Islamic criminal law.

Introduction

There are basically five legal systems in today's world. First, the civil law system, applicable in the European continent and in its former colonies; second, the common law system which is applicable in the United Kingdom, United States and countries which were once colonies of Great Britain; third, the customary law system, applicable in some African, Chinese and Indian countries; fourth, the Islamic legal system, applicable in Muslim majority countries, especially in the Middle East; and fifth, the mixed or hybrid system, where both common law and Islamic law are applied, for example in Malaysia.

Both Islamic law and common law have different sources of references. Islamic law is based on divine source of law, the Quran and Sunnah. These sources are as termed as the revealed sources of Islamic Law. The Qur'an is the Word of God and the Sunnah is the tradition of the Prophet Muhammad (PBUH) (Khan, 2013). On the other hand, the source of common law is based on analogical reasoning. It is also based on the doctrine of judicial precedent and other legal sources such as statutes and decided cases. From another aspect, the history of Islamic Law begins with the law of God Almighty, delivered to the people by His Prophet and His Apostle. Meanwhile common law was developed through a series of historic events, ideologies, doctrines, institutions, and legal thoughts. This legal tradition was successfully brought by the British to various countries around the world that are different culturally, geographically and linguistically (Cruz, 2010).

In litigation cases, both systems agree that justice is achieved based on the evidence presented in judicial proceedings. This evidence must be presented through specific methods stipulated in the existing laws. Both Islamic law and common law have established rules of evidence that must be adhered to in proving cases before the court (Saifuddin et al., 2019). Among the methods for establishing criminal guilt are confession (*ikrar*) and testimony (*syahadah*) (Wan Ismail et al., 2018). Therefore, confession and testimony are important evidence in upholding justice in a trial. This is because the verdict of guilty or innocent depends on the evidence presented by both the prosecution and defence. Such evidence is essential in assisting the judge to seek the truth and deliver a fair and just sentence (Saifuddin et al., 2021).

In the process of proving a criminal case, the burden of proof and the standard of proof are significant elements that cannot be separated (Saifuddin, 2021). This is because in the adversarial system practised in this country, the use of the burden of proof and the standard of proof is an important aspect emphasized and mandated (Saifuddin et al., 2020). 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. The standard of proof is defined as a specific level and evaluation that must be proven by the prosecution and the accused to discharge the burden of proof. Thus, the standard of proof determines the accused's guilt or acquittal (Bahori et al., 2023).

Types of Standards of Proof According to Islamic Perspective

(i) *Yaqin*

Yaqin is the highest and strongest standard of proof in Islamic law. The term *yaqin* is translated as certainty, nevertheless, this is not to say that the standard of certainty under the common law is applicable to understand *yaqin*. Linguistically, *yaqin* refers to knowledge without any doubt (Al-Jurjani, 1985). According to Ibn Manzur (2000) in *Lisan al-'Arab*, *yaqin* is knowledge that eliminates doubt and represents the reality of a matter, and it is the opposite of doubt. *Yaqin* also means something that becomes certain through observation or evidence (Ibn Nujaim, 1902). Terminologically, Al-Jurjani explains that *Yaqin* is believing in something and being convinced that it cannot be otherwise and is in line with reality (Al-Jurjani, 1985). Abu Hilal al-Askari (1997) defines *yaqin* as a steady soul and at peace with what is known. *Yaqin* is also defined as a firm conviction without any doubt, based on definite evidence (Al-Burnu, 1989). Evidentiary, Subhi Mahsamani (1948) asserts that *yaqin* occurs through observation or testimony and argument (*dalil*). Proving a case up to the level of *yaqin* means that it has been successfully proven without any doubt (Mahmood Saedon, 1989). Therefore, convicting a case means evidence presented or provided reached the standard of certainty.

In a trial, the standard of *yaqin* referred to is *'ilm al-yaqin*, which is the certainty obtained from the evidence presented by the disputing parties. The evidence presented reaches the standard of *yaqin* when it contains no doubt that could demote it. Certainty also occurs when one is charged with an accusation; whereby he is not to be considered guilty until proven otherwise. This is because initially, the accused is presumed innocent, and this presumption is a form of certainty. The certainty will be dispelled if strong evidence is presented by the accusing party. In other words, the accusing party must present evidence that can reach a convincing degree to dispel the original certainty, which is that the accused party is not guilty. This aligns with the principle, "*the responsibility, when established with certainty, is not lifted except with certainty*" (Al-Hariri, 1998). This standard of proof is applied in cases of hudud and qisas where the punishments and forms of retaliation or damages are fixed in the sources of the law.

(ii) *Zan al-Ghalib*

The second standard of proof in Islamic is *zan al-ghalib*. For the purpose of translation, *zan al-ghalib* can be translated as preponderance of probability. *Zan al-ghalib* is a combination of two words, '*zan*' and '*al-ghalib*'. Linguistically, *zan* is a sign that, when strong, leads to certainty, and when weak, leads to a level that does not go lower than suspicion (*wahm*) (Al-Gharib, 1978). According to Ibn Faris (1991), *zan* has two different meanings: certainty and doubt. This is because, the Arabic society uses the word '*zan*' for both of these situations. On the other hand, '*ghalib*' has several meanings, including strong, dominant, abundant, and thick (Ibn Manzur, 1983).

Terminologically, according to Al-Kalwadani (2000), *zan al-ghalib* is strengthening of one of two possibilities. It is also defined as an addition to the two possibilities that do not reach a definite or certain degree (Ibn Amir Al-Haj, 1983). Additionally, *zan al-ghalib* is understood as one of the states of presumption that can help to reach the truth even though it cannot provide full certainty (Mahmood Saedon, 1990). Based on the given definitions, *zan al-ghalib* is closely related to *zan*. However, the jurists have distinguished *zan al-ghalib* from *zan*. *Zan al-ghalib* is a standard that approaches certainty and conviction, while *zan* approaches doubt or uncertainty. This is as explained by al-Shatibi (1997), that the level of presumption in matters of negation and affirmation varies based on the strength and weakness that can lead to either certainty or doubt.

Ibn 'Abidin (1996) explains that if one of two matters is strong and surpasses the other but the heart does not take it into consideration because it cannot disregard other matters, it is *zan*. However, if the heart remains with one of those matters and can abandon the other, then it is *zan al-ghalib*. Therefore, a strong *zan* leads to certainty, while a weak *zan* leads to doubt. Al-Raysuni has established a percentage range to determine *zan* and *zan al-ghalib* starting from 51% to 99% (Al-Raysuni, 1997). The percentages proposed through this viewpoint help distinguish between the standards of proof. The Quran states:

Translation: O you who have believed, avoid much (negative) assumption. Indeed, some assumption is sin.

(Surah Al-Hujurat, 49: 12)

From the above-mentioned verse, it is evident that not all *zan* or presumptions are false and unacceptable as evidence functions to ascertain the truth. According to Al-Qurtubi (n. d.) in his commentary (*tafsir*), the verse indicates that the *zan* or presumption which is not acceptable in Islam is the one that is not strengthened by any evidence or clear signs. If the assumption corresponds to the truth, then it reaches the degree of *zan al-ghalib*.

The acceptance of *zan al-ghalib* as one of the standards of proof is explained by Al-Ghazali (1970) where he wrote that there is a consensus among the companions regarding the use of *zan al-ghalib*. Meanwhile, Muhammad Mustafa Zuhaili (1982) explains that Islam permits the use of *zan al-ghalib* in legal matters as evidence. The standard of *zan al-ghalib* can be achieved through the testimony of two male witnesses, confession, oaths (Wan Ismail, W. A. F., et al., 2021), and evidence based on circumstances or circumstantial evidence. *Zan al-ghalib* can be placed in the realm of certainty when it becomes difficult to attain absolute certainty, as *zan al-ghalib* is near certainty (Ibn Farhun, 1986). The position is agreed by al-Razi (1997) through the fiqh principle of *zan al-ghalib* that placed it in the realm of certainty (*yaqin*). Furthermore, al-Razi (2000) stated that the punishment in religion based on *zan al-ghalib* is permissible

based on consensus. Thus, it is agreed that presumption alone cannot be the sole basis for establishing a legal ruling; but if presumption is supported by stronger presumption of truth and conviction, it can be accepted.

In presenting evidence before the court, the above principle is also applicable, wherein the standard of *zan al-ghalib* takes the place of certainty when the presented evidence fails to reach the level of certainty. For example, if a ship sinks in the middle of the ocean, then all the passengers can be presumed to have perished based on *zan al-ghalib* (Mahsamani, 1946). Therefore, in many cases such as *takzir* (discretionary punishment) and family matters, a claim can be proven and accepted if the presented evidence reaches the degree of *zan al-ghalib*.

(iii) *Zan*

Under *zan al-ghalib* there is a lower standard of proof called ‘*zan*’ and translated as presumption. According to al-Jurjani (2000), *zan* is understood as believing in something based on a strong opinion or view, yet still considering and not disregarding other views. In technical terms, *zan* means presumption or being in an uncertain state but leaning towards the truth. This standard is not sufficient to establish proof beyond a state of certainty (Mahsamani, 1946). Therefore, *zan* can be defined as a presumption that is closer to the truth but does not reach the level of certainty and *zan al-ghalib*. Allah SWT says in the Quran:

Translation: Indeed, assumption avails not against the truth at all.

(Surah Yunus, 10:36)

Based on the mentioned verse, generally, *zan* cannot ascertain the truth of something. The jurists refer to the type of presumption mentioned in this degree as mere conjecture (*mujarrad zan*). The standard of *mujarrad zan* is distinct from *zan al-ghalib*, as it leads to doubt, and legal rulings are not to be based on this type of standard. Whereas *zan al-Ghalib* leans towards certainty, and thus, Islamic legal rulings can be built upon it (Al-Hamwi, 1998). In a hadith narrated by Abu Hurairah, Prophet Muhammad (PBUH) said:

Translation: Avoid conjecture, for conjecture is the most dishonest form of talk.

(Sahih al-Bukhari, 1997, 4:7, Hadith 5143)

Based on this hadith, the jurists interpret the kind of presumption referred to in the hadith as mere conjecture unsupported by any indications or signs (al-Qarinah) leading to the truth (Al-Bahuti, 1997).

In proving a case before the court, presumption (*zan*) does not have any effect on the burden of proof because the jurists have established the standard of proof required, either reaching the standard of certainty (*yaqin*) or preponderance of probability (*zan al-ghalib*), to establish a claim. This is in line with one of the conditions for proving a case in Islam is that the presented evidence must reach the standard of proof, either certainty (*yaqin*) or preponderance of probability (*zan al-ghalib*) (Mustafa Zuhaili, 1982).

(iv) *Syak*

The next standard of proof is *syak* and can be translated as doubt. Linguistically, *syak* carries several meanings, including not being sure, ambiguity, and uncertainty (Al-Fayumi, 1998). Ibn Faris (1991) defines *syak* as the occurrence of doubt between two matters and the inability to lean towards either of them with certainty. Technically, there are several definitions. Al-Jurjani (1985) explains that *syak* is a matter that has equal weight or remains suspended between two matters, and the heart does not incline towards either of them. It is also a state of doubt between two disputing parties, where neither side achieves victory. *Syak* is also a presumption or a state between certainty and uncertainty, with neither surpassing the other. It is a state where doubt and conviction are equally balanced, and it cannot determine which one is stronger between the two.

Doubt (*syak*) is not sufficient to remove certainty (*yaqin*) (Mahsamani, 1946). When something is established with certainty and conviction, and doubt arises afterward, the state of certainty should be maintained. This principle is explained through several hadiths of Prophet Muhammad (PBUH) that mentioned the position of doubt, including a hadith narrated from Sa'id al-Khudri:

Translation: When any one of you has doubt (hesitation) in his prayer and does not know how many rak'ahs he has prayed whether three or four, he should cast aside his doubt and base his prayer on what he is sure of.

(Sahih Muslim, 1955, 5:51, Hadith 571)

Nevertheless, in proving a charge against an accused before the court, certainty that an accused is innocent can be eliminated by doubt that reaches the level of *syak* (doubt) based on the fiqh principle 'doubt is an explanation for the accused' (Al-Sarkhasi, 1989). This is because, the original state of the accused being innocent is the convincing presumption unless proven otherwise by the prosecuting party. If the accused then manages to fend off, the original state, which is the presumption of innocence, remains.

(v) *Wahm*

The lowest standard of proof in Islam is *wahm*, translated as erroneous presumption. Linguistically, *wahm* means the passing of thoughts through the heart (Ibn Manzur, 1983). From a technical standpoint, *wahm* refers to a weak possibility or a weak likelihood (Al-Zarkasyi, 2000). It is also defined as a vague presumption or possibility that leans more towards being incorrect and is not supported by any evidence of wrongdoing (Al-Burnu, 1989). According to Mahmood Saedon (1990), possibilities can be divided into two types. The first type is mere possibility, where the possibility is unsupported by any evidence or proof. This falls under the category of *wahm* and is not accepted. The second type is a possibility that is supported by evidence and proof and, is accepted as valid evidence. Sometimes, this possibility is given preference over other evidence and proof. A possibility supported by evidence can elevate the degree from *wahm*. This standard also represents a presumption or uncertain state that leans more towards being incorrect and does not have any legal consequences. In other words, *wahm* means a mistaken presumption and is the lowest standard of proof, compared to *syak* (doubt), *zan* (presumption), *zan al-ghalib* (preponderance of probability), or *yaqin* (certainty). In the context of legal evidence, the degree of *wahm* is not accepted at all and can be considered a claim or denial without any supporting evidence. According to explanations, percentage of standard of proof in Islam can be conclude as below:

Standard of Proof	Certainty	Uncertainty
<i>Yaqin</i>	100 %	0%
<i>Zan al-Ghalib</i>	90-99%	1-10 %
<i>Zan</i>	51-89%	11-49%
<i>Syak</i>	50 %	50%
<i>Wahm</i>	0-49%	51-100%

Table 1. Percentage Standard of Proof in Islam

Standards of Proof in Criminal Cases According to Common Law in Malaysia

The application of standards of proof in criminal cases in Malaysia has undergone development and changes over a long period of time. Several standards of proof are practised in criminal litigation in the civil courts of Malaysia, based on the common law system of foreign countries, especially England.

Under the common law, standard of proof means the degree of proof required in proving the facts in issue by adducing relevant evidence which is admissible and has a great weightage (Peter, 2013). Before going further discussing the standards of proof, it is important to understand the difference and to differentiate the terms 'standard of proof' and 'burden of proof'. In the case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* (2015) 5 MLJ 1, the Federal Court acknowledged the difference between standard of proof and burden of proof. The court observed:

(5) Briefly the former relates to the burden or obligation of proving a fact on the party who exerts the existence of any fact in issue and wishes the court to believe in its existence: ss 102–103 of the Evidence Act 1950 ('the Act'). The burden of proof of a party never shifts.

(6) The latter refers to 'the degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen'.

It is understood from the court's observation that the term '*standard of proof*' refers to evaluation of the degree of that piece of evidence presented by the parties in proving their claims before the court. On the other hand, the court in *International Times & Ors v. Leong Ho Yuen* (1980) 1 LNS 31 discussed the difference of senses between the expressions of 'burden of proof' and 'onus of proof'. The court observed that the former relates to responsibility of establishing a case which rests on the party seeking to prove their case. This is as enshrined in section 101 of the Evidence Act. On the other hand, the sense 'onus of proof' refers to responsibility of adducing evidence for the purpose of discharging the burden of proof.

(i) Beyond Reasonable Doubt

Black's Law Dictionary (2004) defines reasonable doubt as the doubt that prevents a person from being sure that the accused is guilty or the belief that there is a real possibility that the accused is not guilty. In a criminal trial, the accused must present evidence that raises reasonable doubt against the evidence presented by the prosecution. If the accused successfully raises reasonable doubt, they have the right to be acquitted. In the case of *Mat v PP* (1963) MLJ 263, the Court of Appeal provided guidance for the magistrates' courts to follow. If the magistrates' court is satisfied without any reasonable doubt about the accused's guilt, the charge should be proven. However, if the magistrate accepts the explanation from the accused, then the accused should be acquitted. In situations where the magistrate does not find the explanation from the accused raising any reasonable doubt about the accused's guilt, the accused should be convicted. But if the explanation from the accused raises a reasonable doubt in the magistrate's mind, the magistrate should acquit the accused. In the case of *Naggapan v PP* (1988) 2 MLJ 53, the Federal Court decided that an accused person only needs to raise a reasonable doubt in the prosecution's case, i.e., by attacking the elements of the crime to achieve acquittal. This principle was further upheld and explained by the Federal Court in the case of *Mohamed Radhi bin Yaacob v PP* (1991) 3 MLJ 169, stating that the accused must raise a reasonable doubt in the prosecution's case to enable the accused to be acquitted.

According to Black's Law Dictionary (2004), beyond reasonable doubt is the standard used by a jury to determine whether a defendant in a criminal case is guilty. This standard of proof is derived from the ruling in the case of *Woolmington v Director of Public Prosecutions* (1935) AC 462. A few years later, Denny J in the case of *Miller vs Minister of Pensions* (1947) 2 All ER 372 explained that this standard of proof does not require certainty but rather a high probability. Subsequent trial judges further clarified that the standard of proof beyond reasonable doubt should not be equated with a standard that surpasses shadow of doubt. The law would fail to protect society if there was a possibility of subverting justice. If the evidence presented by someone is very strong, leaving only a very slim chance (remote possibility) in their favor, the case is said to have been proven beyond reasonable doubt. In criminal trials in Malaysia, the evidence presented by the prosecution must surpass the standard of beyond reasonable doubt at the end of the trial. The Federal Court, in the case of *Mohamed Radhi bin Yaacob v PP* (1991) 3 MLJ 169, explained that the fundamental principle in criminal trials in Malaysia is that the burden of proof lies with the prosecution to prove the case beyond reasonable doubt.

Apart from beyond reasonable doubt, there is another similar standard of proof known as the 'irresistible conclusion'. An irresistible conclusion is a standard of proof similar to beyond reasonable doubt and beyond the shadow of a doubt. In the case of *Magindran a/l Mohan v. Public Prosecutor* (2010) 6 MLJ 619, the court expressed that the guilt of the appellant is beyond reasonable doubt, and the court concurred with the trial judge in not imposing a higher standard of proof higher than beyond reasonable doubt. In the case of *Dato Mokhtar Hashim & Anor v PP* (1983) 2 MLJ 232, an irresistible conclusion means that when the prosecution establishes a case, there is no other evidence indicating that the offense was committed by someone other than the accused.

The court in a few cases categorised that the use of irresistible conclusion test is where the evidence against the accused is of circumstantial. In the case of *Karam Singh v PP* (1967) 2 MLJ 25, the court observed that when the prosecution relies on circumstantial evidence, such evidence must be inconsistent with another hypothesis than that of the guilt of the accused. The same principle was established in the case of *Chan Chwen Kong v Public Prosecutor* (1962) 1 MLJ 307. In the case of *Jayaraman & Ors V. Public Prosecutor* (1982) 1 LNS 126, the court determined that the irresistible conclusion test only appears to impose a higher burden of proof on the prosecution compared to cases where direct evidence is relied upon. In essence, applying the one and only irresistible conclusion test is another way of stating that the prosecution must prove the guilt of the accused beyond a reasonable doubt. Thus, if there are no other relevant facts besides the evidence against the accused, this will be considered a *prima facie* case against the accused, as embedded in the Criminal Procedure Code (CPC), and the standard of beyond reasonable doubt is basically met. Based on the court observations, beyond reasonable doubt is applicable when direct evidence is presented, whereas the irresistible conclusion is used when circumstantial evidence is presented.

(ii) *Prima facie*

In a criminal trial, the prosecutor has to prove *prima facie* case at the end of the prosecution's case in order for the court to call the accused to enter defence. There have been some interpretations that have been changing alongside with the development of the CPC. The phrase "*prima facie*" is a combination of two Latin words, namely '*primus*' meaning first, and '*facies*' meaning view (Oxford Latin Dictionary, 1968). Referring to the Oxford English Dictionary (2010), *prima facie* is defined as '*at first sight*' or '*as it appears initially, without investigation*' or '*arising from the first impression or based on the first assumption.*' Black's Law Dictionary (2004) provides a clearer meaning, where *prima facie* is sufficient to prove a fact or raise an inference unless proven otherwise or rebutted. Meanwhile, The Osborn's Concise Law (2013) gives the definition of *prima facie* as a case where there is some evidence to support the allegations and charges made, sufficient unless it is refuted.

Initially, a *prima facie* case applied only minimal or sufficient standard of proof to establish the presumption of the accused' guilt (McKillop, 1967). If the other party can demonstrate that there is no case to answer, then the case must be dismissed. Gordon-Smith Ag JA, in the judgment of the case *PP v Chin Yoke* (1940) MLJ 47, quoted the definition of *prima facie* by referring to Mozley and Whiteley's Law Dictionary. He quoted that *prima facie* means that the party involved in the trial is said to have a *prima facie* case when the supporting evidence is strong enough for the opposing party to be called upon to answer it. Based on the case of *Haw Tua Tau v Pendakwa Raya* (1981) 2 MLJ 49, the Privy Council clarified the *prima facie* test for the prosecution's case closure. If the court finds that the prosecution has proven a *prima facie* case at the close of the prosecution's case, this means that the facts are not inherently incredible, and there is some evidence supporting each essential element of the alleged offense (minimal evaluation). Therefore, in this case, the court determined that it only needs to undertake a minimal evaluation of the evidence presented at the close of the prosecution's case by the prosecution.

The courts have referred to the test of minimal evaluation explained in the *Haw Tua Tau* case until the Federal Court in 1994 adopted the use of the maximum evaluation of evidence in the case of *Khoo Hi Chiang v PP* (1994) 1 MLJ 265. In that case, the Federal Court decided the court's duty at the close of the prosecution's case is not to undertake a minimum evaluation of the evidence but a maximum evaluation of the evidence to determine whether the prosecution has proven the charges against the accused beyond reasonable doubt.

Based on the above case, the court decided that a maximum evaluation of the evidence is required to determine whether the prosecution has proven the charges against the accused beyond any reasonable doubt. This decision was later acknowledged by the Federal Court in the case of *Arulpragasam Sandaraju v PP* (1997) 1 MLJ 1. After this case was decided, amendments were made to subsection 173(f) and section 180 of CPC by reintroducing the *prima facie* test. However, these amendments were seen as less effective in resolving the issue due to the lack of specific definition regarding the *prima facie* test. In an appeal case of *Looi Kow Chai & others v PP* (2003) 2 AMR (MR), the court observed that there is only one task for a judge presiding alone under section 180 of Act 593 (as amended in 1999) at the close of the

prosecution's case. The judge must evaluate the prosecution's evidence using a maximum evaluation and ask if he were to decide to call the accused to enter his defence, and the accused chooses to remain silent, is he prepared to convict the accused based on the entirety of the evidence contained in the prosecution's case? If the answer is negative, then no *prima facie* case has been established, and the accused is entitled to be acquitted.

A similar test was also explained by Augustine Paul J in the case of *PP v Dato Seri Anwar Ibrahim* (1999) 2 MLJ 1 and in an opinion of the Federal Court in the case of *Balachandran v PP* (2005) 2 MLJ 301. In the latter case, the Federal Court explained that by using the test, the question to ask at the close of the prosecution's case; is the evidence sufficient to establish a *prima facie* case against the accused if the accused chooses to remain silent? If the answer is affirmative, then *prima facie* has been established at that point. The Court further added that a maximum evaluation of the credibility of the witnesses must be made at the close of the prosecution's case before the court decides whether a *prima facie* case has been established to allow the accused to be called upon to present his defence.

After Balachandran's case, in 2007, subsection 173(h) of Act 593 was amended to include subsection 173(h)(iii) alongside subsection 180(4). Both subsections provide that a *prima facie* case occurs when the prosecution has proven strong evidence supporting each element of the offense, which if unchallenged or unexplained, would still justify a conviction. Therefore, these provisions explain that even if the accused chooses to remain silent, the accused can still be convicted of the offense, and the prosecution is considered to have presented evidence beyond reasonable doubt. Zaki Azmi CJ (as he then was) provided an explanation regarding the amendment of these provisions in the case of *PP v Hanif Basre Abdul Rahman* (2008) 3 MLJ 161.

(iii) Balance of Probability

The standard of proof is called the balance of probability. The balance of probability means that judgment will lean towards the party who successfully presents stronger evidence compared to the other party. This implies that even though the standard of proof presented may be low, it is sufficient that this standard is higher than the standard of proof presented by the other party (Mc Alhone & Stockdale, 1996). This standard of proof also needs to be made with due consideration and rational circumstances (Peter Murphy, 1980). It can also be understood as evidence that reaches a level of reasonable possibility, and this standard is higher than the evidence presented by the opposing party, as determined by a reasonable and fair person (Mustafa, 1988). This standard of proof is used in deciding civil cases, as explained in the case of *Miller v Minister of Pension* (1947) 2 All ER 372, in which the honourable Lord Denning observed that it must lead to a reasonable degree of probability but not as high as the standard of proof required in criminal cases. If the evidence presented and the tribunal opine, that it is more likely than not, the burden has then been discharged. However, if the probabilities are evenly balanced, then it is otherwise.

In Malaysian courts, the standard of balance of probability is referred to and followed in civil cases and civil claims, as explained in the case of *Noel Kenneth Davidson v Firm Corp. Sdn. Bhd* (1994) 2 MLJ 40. However, this standard of proof is also applicable in certain circumstances for criminal cases, such as cases involving presumptions, circumstantial evidence, and civil cases with criminal elements. Justice Mohamed Azmi explained in the judgment of the case *Mohd Radhi bin Yaacob v PP* (1991) 3 MLJ 171 that to rebut a statutory presumption, as the accused in this case was charged with a drug trafficking offense, the balance of probabilities standard is required. This standard of proof is not as high as the standard of beyond reasonable doubt that the prosecution needs to prove.

Furthermore, fraud cases, which are classified as civil fraud also apply the standard of balance of probabilities (Ismail et al., 2022). This observed in the case of *Ang Hiok Seng v Yim Yut Kiu* (1997) 1 AMR 917. The Federal Court in this case classified fraud into two types, namely civil fraud and criminal fraud. The judge explained that for criminal fraud offenses, it must be proven beyond reasonable doubt, while civil fraud only needs to be proven on the balance of probabilities. The same principle was observed in the cases of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* (2015) MLJU 0292 and *Letchumanan Chettiar Alagappan v Secure Plantation Sdn Bhd* (2017) 4 MLJ 697.

Comparative Analysis of the Standard of Proof in Criminal Cases Between Islamic Law and Common Law

This paper finds that there are similarities and differences in the application of the standard of proof between Islamic law and the common law. Islam establishes five standards of proof, ranging from the highest level of *yaqin* to the lowest, *wahm*, with *zan al-ghalib*, *zan*, and *syak* in between. Each of these levels of proof has its own value and predetermined criteria. Fundamentally, the standard of proof in Islamic law differs from the standard of proof in the common law. This is because, the standard of proof in criminal cases under the common law depends on specific characteristics and the judge's satisfaction in determining certain standards. These differences can be observed in the two diagrams below:

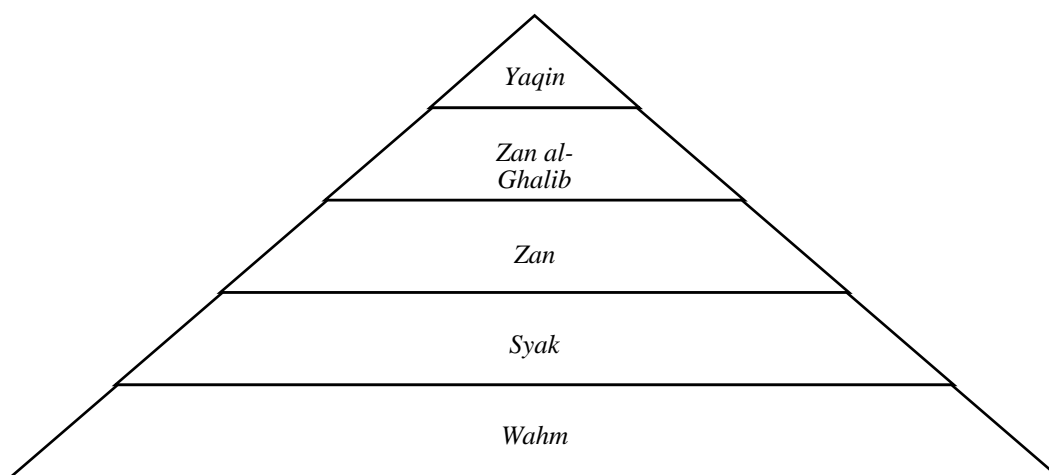


Diagram 1. Standards of proof according to Islamic law

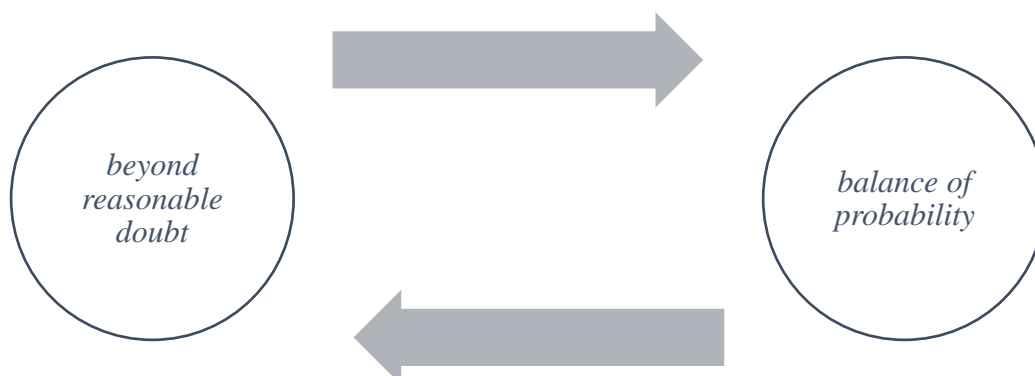


Diagram 2. Standards of proof in criminal cases according to Common law

The above diagrams show the differences in the classification of standards of proof based on Islamic law and common law. The standard of proof in Islamic law is based on levels of certainty or conviction. Each level has its own criteria regarding the certainty or uncertainty of the evidence presented. In contrast, under common law, each standard of proof tends to rely on specific definitions and characteristics. The interpretation of each standard of proof also varies according to the evolution of time and usage in a particular country.

The standard beyond the shadow of doubt according to its application in the common law shares similarity with the standard of *yaqin* in Islamic law. Both standards of proof establish that there must not be any doubt or uncertainty in the presented evidence. Therefore, these standards represent the highest and strongest level but are very difficult to achieve. In Islam, the standard of *yaqin* is required only for proving hudud and qisas cases. However, if there is any doubt, the punishment will be reduced to *takzir* punishment. In contrast to the usage of beyond the shadow of doubt, the judge must acquit the accused if this standard of proof is not met.

Meanwhile, the standards of *prima facie* and beyond reasonable doubt in common law have some similarities in terms of the strength of evidence with the standard of *zan al-ghalib* in Islamic law. The two standards under the common law share similarities with *zan al-ghalib* as both contain a high standard close to certainty. However, there are identified differences between the standards. The common law's standards of *prima facie* and beyond reasonable doubt do not specify a particular indication regarding reasonable doubt compared to the standard of *zan al-ghalib* in the adjudication of Syariah criminal cases. In Islamic law, when the evidence presented achieves 50 percent certainty and 50 percent uncertainty as raised by the accused, the standard is no longer *zan al-ghalib* and it falls to *syak*. This is according to the principle of fiqh that stipulates an accused must raise doubts that achieves standard of *syak* as '*doubt serves as an explanation for the accused*' (Al-Sarkhasi, 1989). Based on these findings, there exists a difference between both standards. In common law, the standard of beyond reasonable doubt is achieved when the accused fails to raise any reasonable doubt, while the standard of *zan al-ghalib* is achieved at the end of the case, when no doubt reaching the standard of *syak* is raised by the accused.

Meanwhile, the meaning of *zan* from the perspective of terminology and definition presented by scholars of *usul* (Islamic jurisprudence) shares similarities with the standard of balance of probabilities in common law. This similarity occurs when the court observes that the evidence presented by one of the disputing parties leaning towards certainty. This observation could lead to the success of that party in a trial. Nevertheless, it must be understood that the standard of *zan* alone cannot be relied upon in proving matters according to Islam. This is because the jurists have stipulated that the evidence presented must be based on strong knowledge (*'ilm*) or a strong presumption (*zan al-ghalib*) (Zuhaili, 1982). Therefore, the standard of *zan* is not applicable to decide civil or criminal cases in Islam. Islamic law establishes a standard of proof that reaches *zan al-ghalib*, whether for civil or criminal cases, while common law differentiates between civil and criminal cases and sets a lower standard of proof for certain circumstances in criminal cases, such as when using presumptions and exceptions to the general principle of burden of proof.

For the standard of reasonable doubt that the accused must raise during the defence stage under common law, it cannot be equated with the concept of standard of *syak* under Islamic law. This is because, conceptually *syak* in Islam has a clear indication in the form of percentage where certainty and uncertainty are equally balanced at 50%. Whereas the standard of reasonable doubt does not have any specific indication as it relies on the satisfaction or dissatisfaction or observation of a judge.

Based on the findings presented, this writing finds that there are similarities between Islamic law and Common law in establishing a high standard for convicting an accused in criminal cases. However, these similarities do not mean that the standard of proof in criminal cases as applicable in the civil courts is entirely suitable for application in the Syariah court. This is because, there are differences in meanings and applications between the two. Additionally, the use of evidentiary laws to raise the standard of proof in both systems also differs. For example, the standard of proof established under Islamic law requires evidence that necessitates high knowledge or certainty. This standard can only be achieved through recognized methods of evidence under Islamic law, such as the requirement of taking oaths in cases involving property in civil and criminal matters, which is not accepted in the civil courts. These differences need to be understood so that the application of Islamic law remains a priority in filling the gaps in Syariah law in this country.

Conclusion

The paper concludes that there are similarities and differences in the application of standard of proof between Islamic law and the Common law. These similarities and differences need to be understood by legal practitioners, especially those in the field of Syariah law, so that the appropriate standard of proof can be applied in Syariah criminal cases. It cannot be denied that reference to common law practices is allowed as long as it does not contradict Islamic law. However, reference to Syariah law should always be prioritized, as provided under section 230 of the Syariah Criminal Procedure (Federal Territories) Act 1997. This section clearly stipulates that Syariah law must be referred to when there is a gap in the law. Thus, the paper concludes that the existing similarities between both legal systems do not imply that the standard of proof applicable in the civil courts is entirely suitable for use in the Syariah Court. This is

because, there are several differences between the two legal systems that limit the application of the standard of proof used in the civil court to be fully implemented in the Syariah court.

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