**PROOF IN THE SYARIAH COURTS IN MALAYA**

**By**

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A typical provision in the Administration of Muslim Law Enactment in the States of Malaya regarding evidence reads as follows:

“The Court shall observe all provisions of Muslim Law relating to the number, status or quality of witnesses or evidence required to prove any fact. Save as aforesaid, the Court shall have regard to the law of evidence for the time being in force in the State, and shall be guided by the principles thereof, but shall not be obliged to apply the same strictly.” (1)

As regards “status”, the Muslim Law requires, *inter alia,* that “witnesses must be free from bias and prejudice. Interested witnesses can always be challenged. A person cannot depose in favour of his ancestors or descendants, though he may legally do so against them. The deposition of an enemy is not admissible, i.e. of a person who hates the adversary to such a degree as to wish to see him fall into misery, to envy his prosperity and rejoice I his misfortune; but the favourable deposition of such an enemy is admissible.” (2)

Again, the provision of Muslim Law in respect of the “quality” of a witness, *inter alia*, is as follows: “No one can be accepted as a witness except a free, adult, sane Muslim of irreproachable and serious character, not liable to suspicion. It is necessary to constitute irreproachable character, that the witness should have abstained entirely from committing capital sins, and shall not be in the habit of committing sins of a less serious nature. By a man of serious character is meant one who models his conduct upon the respectable among his contemporaries and fellow countrymen. Certain actions are considered as incompatible with a serious character. Thus in the *Minhaj et Talibin* we read:

‘One should regard, for example, as wanting in seriousness, a person who eats in public places and walks there bareheaded; who embraces his wife in the presence of other persons, who is always telling funny stories; who habitually plays chess or sings or listens to singing, or who dances for an excessively long time. It is well, however, as far as these acts are concerned, to take into consideration the individual circumstances and places.’

By ‘liable to suspicion’ is meant a person who allows himself to be influenced by the idea of procuring some advantage or protecting some advantage or protecting himself against some damage.”(3)

As regards the “number of witnesses”, again I quote the same author: the testimony of a single individual is not enough to prove any fact, except the appearance of the new moon in the month of Ramadan. In order to prove the crime of *zina* (fornication) four male witnesses must be produces and two witnesses are required to prove the culprit’s confession, though in this latter case too, one jurist considers that four witnesses are necessary. Real property claims and contracts having consequences that are purely pecuniary, such as sale, cancellation by consent, transfer of debts due to a person and security, as well as the rights resulting from these contracts, such as the right of option or the term for payment, may be proved by the testimony of two male witnesses or of one male witness and two women…” (4)

The situation raises some problems. First, before a witness can give evidence in the Syariah Courts, if his “status” or “quality” is suspected or challenged, evidence will have to be adduced in order to enable the Court to decide whether he is a qualified person to be a witness. This means a waste of a lot of time. Secondly, the character of every witness is at stake. and if the provisions of Muslim Law of evidence regarding the “quality” of witnesses quoted above were to be applied strictly, the most of the “adult, sane Muslims” in this country today, would be condemned as persons “not” of “irreproachable and serious character”, and therefore not fit to be witnesses. Furthermore, even after a witness has successfully gone through the tests of “status” and “quality” his evidence is still not good enough to prove any fact except the appearance of the new moon in the month of Ramadan, which has no relevance in our Syariah Courts.

One wonders whether the strict tests of the “status” and “quality” of a witness and the necessary number of witnesses required to prove a fact under the Muslim Law should be followed in order to prove the offences under the Administration of Muslim Law Enactments in the States of Malaya. This is because most of the offences thereof are not strictly Muslim Law offences. For example, the offences under section 144 of the Administration of Muslim Law Enactment Kedah reads:

“Whoever shall in any shop or other public place purchase or sell or consume any intoxicating liquor shall be guilty of an offence punishable with a fine not exceeding twenty-five dollars, or, in the case of a second or subsequent offence, not exceeding fifty dollars.”

Note that under Muslim Law purchasing, selling or consuming any intoxicating liquor *per se* is an offence irrespective whether it is done in a public or private place. So the offences under section 144 (above) are not strictly Muslim Law offences. Besides there are offences which are created by the Enactments for the purpose of administration, which were unknown under the Muslim Law. They are, for example, unlawful solemnisation of marriage,(5) failure to report a conversion,(6) wilful neglect of statutory duty,(7) failure to report to a Registrar a divorce or revocation of divorce. (8) furthermore, even where a Muslim Law offence, e.g. fornication, is retained, the punishment for the offence is not. Under the Muslim Law the punishment for fornication is one hundred lashes(9). The punishment for fornication under the Enactments is either a fine or imprisonment.(10)

We have substituted Muslim Law offences, with their modern versions. We have added modern offences unknown under Muslim Law. We have substituted the punishments for the few Muslim Law offences which we have retained. The question is, why should the proof of such offences be required to comply with the Muslim Law of evidence? Yet even in this matter we only do so half-heartedly. For we do not follow the Muslim Law rule that parties to a suit cannot give evidence in favour of his own case, but instead can take oaths. Neither do we follow the elaborate rules of the Muslim Law of evidence regarding the burden of proof.

It is easy to understand why the Muslim Law requires four adult, male, sane Muslims of serious and irreproachable character to prove the offence of fornication as the punishment is very severe. But it is absurd to require the same strict proof for the same offence where the punishment has been very drastically reduced. Perhaps it is argued that the standard of proof must be the same for all criminal offences irrespective of the punishment. You must prove beyond reasonable doubt that *A* uses abusive words against *B* just as you must prove beyond reasonable doubt that *A* murdered *B.* That is true. But the situation is different here. The example given is where the same standard of proof is required to prove criminal offences punishable under the same legal system. The position here is where one has to prove according to the Muslim Law of evidence, offences created by statutues most of which were either unknown under the Muslim Law or have been tempered with, the punishments which are that of the Statute Law.

It is submitted that the provisions of the Administration of Muslim Law Enactments in the States of Malaya regarding evidence should be reviewed. The provision requiring the Court to “observe the provisions of Muslim Law relating to the number, stratus and quality of witnesses ore evidence required to prove any fact” should be repealed. Instead the Evidence Act, 1951, and the Common Law rules of evidence should be adopted, at least to be generally observed. However the requirements of the Muslim Law of Evidence relating to “status, number and quality of witnesses” could be retained in other matters besides the proving of offences in Court, *e.g.* in the solemnisation of marriage, revocation of divorce etc.

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[Note: This article only represents the author’s personal opinion and not the official opinion of the Legal Aid Bureau, or the Attorney General’s Chambers, Malaysia]

Endnotes:

1. Administration of Muslim Law Enactment 9 of 1962 (Kedah) sec, 50(1)
2. Dr. Ahmad Ibrahim; Islamic Law in Malaya: 369.
3. Dr. Ahmad Ibrahim: Islamic Law in Malaya: 370-371.
4. Dr. Ahmad Ibrahim: Islamic Law in Malaya: 368-369.
5. Kedah Enactment sec. 153
6. *Ibid*: sec. 155
7. *Ibid*: sec. 157
8. *Ibid*: sec. 154
9. Quran, An Nur: 2.
10. For example see Kedah Administration of Muslim Law Enactment: sec. 151

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