

**Anonymous Online Offenders – Presumption of Innocence or Presumption of Guilt? A  
Comparative Analysis between the Evidence Act 1950  
and the Islamic Criminal Law**

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**Abstract**

*Anonymity is perhaps the most valued feature of the Internet as its users are able to conceal their true identities or assume pseudonyms in the cyber world. Anonymity may be good for freedom of speech as any speakers could freely express their thoughts without the fear of being identified (though not impossible). Unfortunately, anonymity poses great challenges to law enforcement agencies as they would face difficulty in tracing cyber offenders. For that reason, the Malaysian Parliament has passed a new section 114A of the Evidence Act 1950 that has the effect of shifting the burden of proof on the alleged offenders to prove his innocence. This provision seems to be in contrast with the legal maxim of 'semper necessitas probandi incumbit ei qui agit' which means 'he who asserts must prove'. This same principle has also been adopted in Islamic criminal law as the Islamic legal maxim has explicitly stated that 'the onus of proof is upon the claimant, and the taking of an oath is upon him who denies'. As such, this paper attempts to scrutinise the approach that has been adopted by judges in interpreting and applying this new law. Further, a comparative analysis with Islamic criminal law will be made in order to ascertain whether such principle could be applied in certain cases since cyber criminals are hardly traceable or identifiable. The study is largely based on doctrinal research as it is primarily concerned with the review of relevant decided cases and statutory provisions as well as text books, journal articles and seminar papers. To sum up, it is submitted that the new law does not amount to an automatic presumption of guilt as the prosecutors are still required to prove the existence of relevant basic facts before the accused is mandated to prove his innocence.*

*Keywords: anonymity, cyber world, presumption of guilt, law of evidence, Islamic criminal law*

**Introduction**

The Internet has, since its first inception in the United States in 1969<sup>1</sup>, greatly affected almost all spheres of our lives. And in this Information Age, the future of the Internet looks much more ubiquitous as it appears to be seamlessly integrated into our daily activities. This is evidently

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<sup>1</sup> For brief historical background of the Internet, please refer to Ian J Lloyd, *Information Technology Law*, (5<sup>th</sup> Ed), Oxford University Press, 2008.

reflected in the emerging development of the Internet of Things (IoT)<sup>2</sup> as well as the steady surge of the Internet usage and penetration in all regions of the world.<sup>3</sup> As for Malaysia, the Malaysian Statistics Department (2016) has recently recorded that 71.1 percent out of the total population of 31.19 million in 2015 aged 15 years and above had used the Internet.<sup>4</sup> This has undoubtedly shown the widespread adoption and profuse acceptance of the Internet in the country.

Unfortunately, the Internet has also been misused and exploited by unscrupulous individuals to commit various kinds of cybercrimes such as online scams, computer fraud, hacking, publication of unlawful materials and many others. Such concern is not unfounded or baseless as CyberSecurity Malaysia (2016) has recorded an average of 10,000 cybercrime cases every year. This alarming scenario is further exacerbated by the fact that most of these incidents are committed by anonymous offenders. In response to this pressing concern, the legislature has in 2012 passed section 114A of the Evidence Act 1950 that was alleged to have arguably established the presumption of guilt (Peters, 2012). As such, it is appropriate to have a grasp on the subject of anonymity and its ramifications on existing statutory provisions governing cybercrime cases by analysing decided cases by local judges prior to and subsequent to the coming into force of section 114A of the Evidence Act 1950. In addition, a comparative analysis will be made with the position in the Islamic law in order to ascertain whether there exist any isolated situations that may invoke the presumption of guilt instead of presumption of innocence.

### **Anonymity and Legal Quandary**

Anonymity in simple terms refers to a person with no name or identity. It has been literally defined as the condition of being anonymous, whilst anonymous denotes a person unidentifiable by name or of unknown name (Oxford Dictionaries, 2016). Similar definition has been adopted by Kabay (1998) when it was asserted that anonymity can be defined simply as being without a name or with an unknown name. A detailed analysis conducted by Silva and Reed (2015) depicted an anonymous person as someone who is unnamed, unidentified, unknown, unspecified, undesignated, unseen or unacknowledged. Anonymity is also commonly associated with pseudonym although the latter is mostly referred to the use of false name. Nonetheless, for ease of understanding in this paper, anonymity covers both anonymous and pseudonymous offenders.

Social scientists have argued that anonymous persons tend to act differently when they cannot be identified (Burkell, 2006). On this note, Froomkin (1999) submitted that anonymity has both valuable and harmful consequences, and different persons weigh these outcomes differently.

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<sup>2</sup> For overview on Internet of Things (IoT), see Internet Society, 'The Internet of Things: An Overview' <http://www.internetsociety.org/sites/default/files/ISOC-IoT-Overview-20151221-en.pdf> (accessed 14 February 2017).

<sup>3</sup> For latest statistics on Internet usage, see Internet World Stats, 'Internet Users in the World by Regions – June 2016' <http://www.internetworldstats.com/stats.htm> (accessed 14 February 2017).

<sup>4</sup> See Department of Statistics Malaysia 'ICT Use and Access by Individuals and Households Survey Report' [http://www.dosm.gov.my/v1/index.php?r=column/cthemByCat&cat=395&bul\\_id=Q3l3WXJfBg1PNjRwcHZQTVISR1UrQT09&menu\\_id=amVoWU54UTI0a21NWmdhMjFMMWcyZz09](http://www.dosm.gov.my/v1/index.php?r=column/cthemByCat&cat=395&bul_id=Q3l3WXJfBg1PNjRwcHZQTVISR1UrQT09&menu_id=amVoWU54UTI0a21NWmdhMjFMMWcyZz09) (accessed 14 February 2017).

Zimmerman (2012) contended that anonymity empowers a sense of self-government and a greater range of self-expression in the cyber space. And with the availability of vast arrays of Internet based communications such as blogs, online forums, social networking sites like Facebook and Twitter etc., Wu (2005) argued that these online publications, in particular blogs, have rejuvenated the exercise of the fundamental right to freedom of speech and expression in Malaysia. Consequently, public debate and discussion on matters of public interest are easily accessible via these platforms.

Nevertheless, these new media have also been resorted to disseminate and publish illicit content such as defamatory statements, seditious remarks, hate speech, indecent and obscene materials and many other harmful contents. In response to this, Dato' Seri Utama Dr Rais Yatim, former Minister in the Prime Minister's Department, has in July 2001 announced that the government would not be hesitant to take stern actions against dangerous websites, particularly those that threatened the security of the country (Azmi, 2004). Legal actions against such offenders are theoretically possible as there are a number of specific statutes, especially the Computer Crimes Act 1997 (the CCA) and the Communications and Multimedia Act 1998 (the CMA), that have been specifically formulated to regulate and tackle cybercrimes and related offences on the Internet. Apart from that, the provisions of existing laws such as the Penal Code, the Defamation Act 1957 and the Sedition Act 1948 may also be extended and applied to the cyber world. But the applications of these laws against cyber criminals are not straightforward or smooth sailing as enforcement agencies and prosecutors are faced with a difficult task, though not technically impossible, in proving the true identities of anonymous offenders and holding them guilty in courts.

The struggle in attributing and holding such criminals guilty for cybercrimes may be best illustrated with the case of *Pendakwa Raya v Muslim bin Ahmad*<sup>5</sup>. The respondent (accused) was charged for improper use of network facilities or network services under section 233(1)(a) of the CMA for allegedly posting three offensive comments ("*damn your sultan*", "*your sultan kantoi*" and "*what's the kantoi with your sultan*") on the Perak State Government's official portal on 7 and 8 February 2009. He denied the charges and claimed to have been at work when the offensive comments were posted. Despite the fact that the comments were traced to originate from the respondent's Internet protocol (IP) address, the learned Sessions Court judge had acquitted and discharged the respondent on the ground that the appellant had failed to prove the case beyond reasonable doubt since there was a slight possibility that someone else could have used the same IP address. However, the earlier decision by the court of first instance was reversed on appeal by the High Court as Amelia Tee Hong Geok Abdullah J ruled that the trial judge had erred in her findings as she did not consider the failure of the respondent to state his whereabouts during the commission of the alleged offence was merely a bare denial and thus did not raise any reasonable suspicion in the prosecution's case.

The difficulty encountered by the prosecution in proving the commission of cyber offences by those who hide behind the cloak of anonymity can also be seen in the subsequent case of *PP v.*

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<sup>5</sup>*Pendakwa Raya v Muslim bin Ahmad* [2013] 1 AMR 436

*Rutinin Suhaimin*.<sup>6</sup> The case involved an appeal by the prosecution against the discharge and acquittal of the respondent (accused) at the end of the prosecution's case. The respondent was charged under section 233 of the CMA for posting an offensive remark ("*Sultan Perak sudah gilaaaa*") on the online visitor book of the homepage of the HRH Sultan of Perak. The court of the first instance decided that there was no *prima facie* case against the respondent as the appellant (prosecutor) failed to prove the offensive remark was posted by the respondent and that the Internet could have been accessed by anyone from the disputed computer. On appeal, the acquittal was quashed and the respondent was ordered to enter his defence. It was decided by Ravinthran Paramaguru JC that the trial judge had failed to consider the strength of circumstantial evidence by forensic expert indicating that the disputed Internet account belonged to the respondent and that there was no evidence that any other person used the computer at the time of the offence. Thus, the appeal was allowed and the respondent was required to enter his defence.

The accused was then tried before another Sessions Court judge and he was later convicted for the offence and was sentenced to a fine of RM 15,000 in default eight months' imprisonment. Dissatisfied with the decision, the accused (now the appellant) then lodged this appeal in *Rutinin Suhaimin v PP*<sup>7</sup> in the High Court of Kota Kinabalu, Sabah. On appeal, the appellant insisted that he did not make the offensive remark though it originated from his Internet account as his computer and the Internet account were accessible by other persons continuously from 8 am to past 7 pm. It was observed by Richard Malanjum CJ (Sabah & Sarawak) that the trial judge had erroneously held the defence was a mere denial as she failed to consider the appellant's defence on the whole. Further, she appeared to have shifted the onus of proof on the appellant to prove his innocence and this approach was totally unacceptable as there was no such presumption under section 233 of the CMA. Apart from that, there was not an iota of evidence adduced by the prosecution that it was the appellant who actually made and initiated the transmission of the offensive remark. As a result, the appeal was allowed and the earlier conviction and sentence were set aside as the appellant was found to have successfully raised a reasonable doubt in his defence.

The two cases above clearly demonstrate an uphill predicament faced by prosecutors in proving their cases beyond reasonable doubt against anonymous cyber criminals as only one reported case was ruled in favour of the prosecution. The anonymity issue has then prompted the Parliament to pass section 114A of the Evidence Act 1950 that has the effect of shifting the burden of proof on the accused to prove his innocence. Nevertheless, the application of the new amendment has raised a baffling issue of whether it would have the effect of incorporating the presumption of guilt on the accused (Peters, 2012). If the answer to the question is in the affirmative, then it would possibly be in contravention with the established maxim of '*semper necessitas probandi incumbit ei qui agit*', which means 'he who asserts must prove', and the general presumption of innocent until proven guilty.

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<sup>6</sup> *PP v. Rutinin Suhaimin* [2013] 2 CLJ 427

<sup>7</sup> *Rutinin Suhaimin v. PP* [2015] 3 CLJ 838

## **Presumption of Innocence**

The presumption of innocence is a crucial right conferred on any accused person in criminal trials as he is legally presumed innocent until proven guilty in a court of competent jurisdiction. It is one of the two presumptions that may apply without proof of basic facts<sup>8</sup>. Since any person is presumed innocent by the law, the general burden of proof<sup>9</sup> in criminal proceedings lies on the prosecution to prove the facts which constitute an offence by such a person (accused) beyond a reasonable doubt.<sup>10</sup> At the same time, there is no similar burden placed on the accused to prove his innocence. The accused's only obligation is to weaken the effect of the prosecution's evidence by casting a reasonable doubt in the prosecution's case.

Nonetheless, the prosecution may rely on any available statutory presumptions, either presumption of fact or presumption of law, in order to prove one or more prerequisites of the charge against the accused<sup>11</sup>. Once the presumption has been successfully invoked by the prosecution, then the burden of proof will shift to the accused to rebut such presumption<sup>12</sup>. The implication of presumption has been highlighted by Thomson CJ in *Ng Kim Huat v PP* that "...while a statutory presumption, when it arises, may operate in place of evidence and so reverse the onus of proof of any point, the bare potential existence of such a presumption cannot of itself dispense with proof of any fact the existence of which is a condition precedent of the presumption arising". Since statutory presumptions, in particular the disputed presumption of fact in section 114A of the Evidence Act 1950, appear to be in conflict with the presumption of innocence, it is pertinent to examine whether such presumption has really established the notion of presumption of guilt.

## **Section 114a of the Evidence Act 1950 – Presumption Of Guilt?**

Section 114A was inserted as a new amendment to the Evidence Act 1950 vide the Evidence (Amendment) (No 2) Act 2012. The amendment was tabled on 18 April 2012 and was passed without substantial debate on 9 May 2012. It has now come into force starting from 31 July 2012. Entitled as 'Presumption of Fact in Publication', the new statutory provision is similar to other presumptions that require the establishment of certain basic facts before such presumptions may be invoked by the court. Nonetheless, the passing of the amendment has led to a heated debate

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<sup>8</sup> Another presumption that may apply without proof of basic facts is the presumption of sanity.

<sup>9</sup> The expression 'burden of proof' refers to the obligation of a party to adduce sufficient evidence to enable judgment to be given in his favour.

<sup>10</sup> A reasonable doubt has been given a judicial interpretation by Sharma J in *PP v Saimin* [1971] 2 MLJ 16 as "...the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If, after you have fully investigated the evidence and compared it in all its parts, you say to yourself, I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there. It must be a doubt so solemn and substantial as to produce in the minds of the trier of fact some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence".

<sup>11</sup> Halsbury's Laws of Malaysia – Evidence – Proving particular facts [500.021]

<sup>12</sup> Mohamad Azmi SCJ in *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169 at 171.

among certain groups in the society. The Centre for Independent Journalism (2012) has strongly objected to the new amendment on the perception that the presumption could lead to arbitrary arrest and prosecution of innocent persons. Ultimately, it was argued to be contrary to the basic principles of a fair legal system which presume a person is innocent until proven guilty by the prosecution. It was further alleged that section 114A will have a serious chilling effect on free speech on the basis that the public may simply resort to self-censorship to avoid any unwarranted consequences.

On the contrary, the proponent of this new amendment asserted that the enforcement agencies are still required to conduct comprehensive investigation to trace and identify the real suspects before making charges (The Sun Daily, 2012). This is in parallel with the explanation by the Minister in the Prime Minister's Department, Dato' Seri Mohamed Nazri Aziz, during the Parliamentary debate which expressly stipulated that the prosecution must prove the existence of certain specific facts before the rebuttable presumption of fact under section 114A may be invoked (*Hansard*, 18 April 2012).

Subsection (1) of section 114A states that:

A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or republish the publication is presumed to have published or republished the contents of the publication unless the contrary is proved.

Plain reading of the provision appears to presume any person as the publisher if his name, photograph or pseudonym is portrayed as the owner, host, administrator, editor or sub-editor of such online content. In relation to this, Peters (2012) argued that subsection (1) of section 114A may implicate online intermediaries or any other persons who administer, operate or provide online forums or discussion groups. It was further argued that they may possibly be held accountable for the content even if they have no knowledge about it once it is proved that they facilitate the publication of any disputed content. Apart from that, Radhakrishna (2013) alleged that the presumption may affect victims of hacking and identity theft and they would have to bear the evidential burden of proving their innocence.

Section 114A (1) has been applied in the case of *YB Dato' Hj Husam Hj Musa v Mohd Faisal Rohban Ahmad* (2015). The appellant (plaintiff) sued the respondent (defendant) for publishing articles defamatory of him on a blog '*ruangbicarafaisal.blogspot.com*'. The trial judge found the articles were defamatory of the appellant, but still ruled in favour of the respondent on the ground that the appellant had failed to establish the respondent as the writer or owner of the blog in question without considering the coming into force of section 114A of the Evidence Act 1950. On appeal, it was ruled that the trial judge had failed to contemplate the application of the new amendment in the electronic environment as it will assist the appellant to force the respondent to exonerate himself from liability. Since the appellant had successfully linked the respondent to the defamatory posts via the latter's photographs and his letter to other bloggers, the first presumption under section 114A was accordingly invoked. Consequently, the appeal was allowed as the

respondent had failed to rebut the presumption of fact and his defence of mere denial was not accepted by the court.

Subsection 1 of section 114A has again been referred to in *Ahmad Abd Jalil lwn PP* (2015). The appellant (accused) was convicted for posting offensive comments in Facebook using a pseudonym account of Zul Yahya. The appellant then appealed against his conviction on a number of grounds including that the disputed computer from which the offensive remarks were published on the pseudonym Facebook account of Zul Yahya, though was under his control, could have been accessed by anyone in his office and thus the presumption of publication invoked by the prosecution under section 114A should have failed. Nevertheless, the appeal was dismissed as the High Court found that based on relevant circumstantial evidence and forensic experts presented by the prosecution, the appellant had failed to rebut the presumption on a balance of probabilities.

Based on the aforesaid judgments, it is apparent that the court would only permit the application of presumption of publication by the prosecutor (in criminal cases) or plaintiff (in civil suits) after the existence of relevant facts has been clearly established. Only then, the burden will be shifted to the offender to prove his innocence on a balance of probabilities.

With regard to subsection (2) of section 114A which reads:

A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.

A scrutiny of subsection (2) demonstrates that a registered subscriber may be regarded as publisher of any content if such content is proved to originate from his registered account. This could affect owners or operators of public places that offer free Wi-Fi services to their customers such as restaurants, cafes and many others. Further, Peters (2012) claimed that registered subscribers with unsecured Wi-Fi services could face problems if their Wi-Fi accounts are used by piggy-back riders to publish illegal content on the Internet.

The presumption of publication in subsection (2) has been discussed in *Tong Seak Kan & Anor v Loke Ah Kin & Anor* (2014). In this case, the plaintiffs sued the first defendant for online defamation and as a result of a judgment in default, damages for the sum of RM 600,000 were awarded to the plaintiffs. The first defendant then applied to set aside the judgment by claiming *inter alia* that he was neither the owner nor the publisher of the two blogs allegedly containing defamatory statements of the plaintiffs. The court found that confirmation by Google Inc. and two local network service providers offered conclusive evidence that the first defendant was the registered subscriber of the two blogs in question. By virtue of section 114A (2) of the Evidence Act 1950, the first defendant as the registered subscriber was presumed to be the publisher of the defamatory publication and consequently, was statutorily required to rebut the presumption by proof to the contrary on the balance of probability. Since the first defendant merely denied ownership of the two blogs without producing any evidence to rebut the presumption of publication

under subsection (2) of section 114A, his application to set aside the earlier judgment in default was dismissed by the court.

In the subsequent case of *Dato' Abdul Manaf Abdul Hamid v. Muhammad Sanusi Md Nor and Zulkifli Yahya* (2014), the application of section 114A (2) of the Evidence Act 1950 has again been invoked. The plaintiff sued the defendants for defamatory statements published in a Facebook account bearing the first defendant's name and defamatory articles in a blog *KedahLa.blogspot.com* that were allegedly written by the two defendants. Nonetheless, the civil suit failed as the court observed that the plaintiff did not take any measures to identify the true owner of the disputed Facebook account as well as the actual authors or administrators of the defamatory entries in the blog. As such, it was decided that plaintiff could not rely on the presumption of publication in section 114A (2) as he failed to prove the defendants as the registered subscribers of the social network services.

Apart from the two presumptions in subsections (1) and (2), a further presumption of publication is stipulated in subsection (3) that states:

Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the contents of the publication unless the contrary is proved.

The potential implication of subsection (3) has been argued by Dazuki (2016) to render parents or guardians accountable for illicit content posted on the Internet by their children for the mere fact that the IP address is traced back to their computers. On the same note, it was further submitted that employers might get into trouble for illegal content posted by their employees using the office's Internet and computers. The basis of the argument can be evidently illustrated by the above-mentioned case of *Ahmad Abd Jalil lwn PP* (2015) whereby the offensive comment was traced to have originated from one of the computers and the Internet facility in the appellant's office. Nonetheless, instead of prosecuting the employer, the prosecution had based on technical experts and forensic evidence successfully identified and then brought criminal action only against the appellant. Finally, the court ruled that it was the computer under the appellant's custody which was used to access the pseudonym Facebook account that posted the offensive remark. Thus, the presumption of publication under subsection (3) of has been successfully invoked by the prosecution against the appellant.

With regard to the presumption in subsection (3) of section 114A, there are a few key words that need to be clearly explained. Firstly, the word 'computer', which has been given the same interpretation in both section 3 of the Evidence Act 1950 and section 2 of the Computer Crimes Act 1997, reads:

An electronic, magnetic, optical, electrochemical, or other data processing device, or a group such interconnected or related devices, performing logical, arithmetic, storage and display functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or



related devices, but does not include an automated typewriter or typesetter, or a portable hand held calculator or other similar device which is non-programmable or which does not contain any data storage facility.

It is apparent that the word 'computer' has been statutorily defined in a comprehensive and all-embracing manner so as to include any electronic devices that are capable of performing the four required functions namely logical, arithmetic, storage and display. This would undoubtedly cover smartphones as well since they are able to perform the four stated functions and are currently being widely used to access the Internet and other web-based communication platforms such as Facebook, Twitter, Instagram and many others.

Another important key word is the phrase 'custody or control' which does not synonymously amount to ownership. This can be best illustrated in the case of *Ahmad Abd Jalil lwn PP* (2015) as the disputed computer belonged to the appellant's employer but was put under his control or custody. As a result, the subsection (3) has been successfully invoked against him as it was evidently proved that the offensive comment originated from the computer that was under his control and thus, he was presumed to have published the content since he was unable to prove to the contrary.

Apart from the position under the Evidence Act 1950, it is also pertinent to consider and compare the position of presumption of innocence versus presumption of guilt under the Islamic legal principles.

### **Presumption f Innocence Under The Islamic Criminal Law**

The basic and essential principle in Islamic judicial system is the onus of proof lies on no other than the claimant / prosecutor. This is agreed upon by the Muslim jurists unequivocally. This principle is based on the Quranic verse where Allah said, "Say, ... Bring forth your proofs, if you are truthful."(an-Naml :64)

This verse insists on producing proof if someone claims certain facts that he believes them to be true. It is an inherent theme in the Holy Quran that someone will not be responsible for the sin of others. It is explicitly stipulated in the Holy Quran that "And no bearer of burdens will bear the burden of another" (al-Isra' :15). This verse indirectly denotes that the presumption of guilt is not applicable to anyone unless for what is proven and admitted against him.

Besides the Prophet also indicated the same principle as was reported by Ibnu 'Abbas (radhiyAllahu 'anhu) said that the Messenger of Allah (SallaAllahu 'alayhi wasalalm) said: ".....were people to be given according to their claims, some would claim the wealth and blood of others. But

the burden of proof is upon the claimant and the taking of an oath is upon the one who denies (the allegation)".<sup>13</sup>

This hadith needs no further explanation as the Prophet clearly educated us that the burden of proof is upon the claimant. There is also consensus in Islamic legal maxim stating that "a person is originally free from any liability". This maxim impliedly shows the responsibility of the claimant to bring the evidence to implicate others as everybody is free from any implication at the first place unless proven otherwise by any evidence.

For the sake of this article, the very issue to be addressed is whether Islam allows the onus of proof to be shifted to the accused / defendant as per the position in section 114A of the Evidence Act 1950. The Islamic law jurists differ in ascertaining this issue. There are two opinions regarding this matter. The first group was of the opinion that the burden of proof cannot be shifted to the accused / defendant. This is the opinion of Hanafite, Ibadite and some hadith scholars like Imam al-Bukhari. Their argument was generally based on the hadith previously mentioned where the Prophet said, "But the burden of proof is upon the claimant and the taking of an oath is upon the one who denies (the allegation)". This hadith showed on the distribution of burden of proof and *yamin* and this distribution cannot be tolerated. This hadith showed that the proof must be brought up by the claimant only and no indication that it can be shared by the accused / defendant. Their argument also comes from the hadith where the Prophet requested the proof from a group of people who accused a Jewish involving a murder case. They admitted that they do not have any proof and the Prophet did not shift the onus of proof to the accused.<sup>14</sup> This is another clear indication on how the onus of proof stayed on the claimant.

The second opinion took a different approach as it was agreed that the burden of proof can be shifted to the accused / defendant. This is the opinion of the majority of scholars including Shafiite, Maliki, Hanbalite and Shiite. Their argument is also based on hadith of "But the burden of proof is upon the claimant and the taking of an oath is upon the one who denies (the allegation)". According to them, the request for the accused / defendant to perform *yamin* is an indirect indication that the burden of proof can be transferred. They considered that *yamin* asked by the Prophet as a shift of burden. Besides it is a consensus among the scholars that *yamin* can be shifted between the claimant and the accused so as the burden in verifying the truth. However this opinion restricted such a shift to very limited situations, namely:

- i. In the case of *yamin al-mardudah* where the accused refused to perform *yamin* then right/burden to perform it returned to the claimant and he can gain his right through it.
- ii. In the case where the claimant bring only one witness, then he himself performed the *yamin*, then the burden of proof can be shifted to the accused/defendant.
- iii. The claimant brings the evidence then the burden can be shifted to the accused/defendant.

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<sup>13</sup> Narrated by Imam al-Bayhaqi and he opined that the hadith is *hasan*.

<sup>14</sup> Narrated by al-Bukhari, Muslim, Abu Daud, al-Tirmizi, an-Nasaie, Ibnu Majah, al-Shafie and Malik.

- iv. Lastly if the accused / defendant denies the claim which was forwarded by the claimant, then the denial must come with the evidence.

All the above mentioned situations were enlisted by Dr. Muhammad Al-Zuhayli in his *book wasail al-ithbat fi al-Shariah al-Islamiah* in concluding the second opinion. However, according to the concluding situations as abovementioned, it is submitted that only the fourth situation appears to be relevant and ought to be examined side by side with section 114A of the Evidence Act 1950. The fourth situation has directly put the onus of proof on the accused / defendant to prove otherwise. This seems to be in parallel with what has been stipulated in section 114A that has the effect of establishing the presumption of publication on certain categories of people unless proven otherwise.

## Conclusion

To sum up, section 114A of the Evidence Act 1950 has introduced a new presumption of publication that empowers the prosecution or plaintiff in civil proceedings to rely on it in order to prove and attribute the identity of anonymous offender in the cyber world. Regardless of the coming into force of the new provision, it is pertinent to highlight that any person who wishes to rely on such a presumption must first establish the existence of certain basic facts before the presumption can be invoked. This general principle has been asserted by Abu Bakar Katar JC in the case of *Dato' Abdul Manaf Abdul Hamid* (2014) that only if the plaintiff has successfully proved that the social website was registered under the defendant's name, then the presumption of publication in section 114A of the Evidence Act 1950 may be prayed. On the contrary, the plaintiffs in the earlier case of *Tong Seak Kan* (2014) has established the true identity of the first defendant through a John Doe action against Google Inc. in the US and then obtained confirmation from two local network service providers. Consequently, Abdul Rahman Sebli J allowed the plaintiffs to rely on the presumption of publication and the burden was then shifted to the first defendant to prove his innocence. As such, these two cases have clearly indicated that the presumption of publication in section 114A is not automatic and its application will be determined by the court after considering the facts and circumstances of each case.

Apart from its application, it must be borne in mind that the presumption is rebuttable i.e. the person against whom the presumption is applied to may adduce evidence to rebut it on the balance of probabilities. Mere denials by the defendant as have been shown in *Tong Seak Kan* (2014) and *YB Dato' Hj Husam Hj Musa* (2015) are not acceptable to rebut the statutory presumption on a balance of probability.

Finally, it is submitted that comprehensive analysis of the provision of section 114A of the Evidence Act 1950 and its application by judges in the aforesaid reported cases may be a good basis to concur with Peters (2015) that the new amendment is not oppressive as it sounds. Though some critics are worried and concerned about its implication on freedom of speech and expression, it must always be remembered that the cyberspace does not guarantee absolute freedom as what is illegal offline will also be illegal online. For that reason, Internet users in Malaysia must always

be wary of various laws that have been enacted to govern publication of illegal content and they are no longer could hide their identities behind the cloak of anonymity.

As to the position under Islamic legal principles, there are some jurists who have argued that in isolated cases, the accused / defendant might be requested to prove his innocence even though the general rule is that the onus is on the claimant or prosecution to prove the guilt of any accused / defendant.

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