

THE APPLICATION OF FORENSIC SCIENCE ELEMENT IN DOCUMENTARY EVIDENCE: A REVIEW IN MALAYSIAN SYARIAH COURT

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ABSTRACT

Documentary evidence is one of the important methods of proof used in both Syariah courts and civil courts. Nowadays, with the rapid development in the field of science and technology has brought a major change in the forms of documents. This can be seen when the court begins to accept the application of the forensic science element in documentary evidence such as a medical report issued by a doctor, a chemical report issued by a department of chemistry, and others. This is because, in order to reinforce the other evidence presented, it is important to apply this kind of method of proof. However, there is no specific discussion regarding the documentary evidence featuring with forensic science element under the Malaysian Syariah court. Therefore, this paper aims to study the concept of forensic science elements in documentary evidence and then to identify its position under the Malaysian Syariah court. Finally, this paper will explore the reported cases involving documentary evidence featuring forensic science elements in the Malaysian Syariah court. The methodology of this study is a qualitative approach by using document analysis of the provision from the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561], article papers, journals, reported cases and related document references. At the end of the study, the researchers discovered several provisions from the Syariah Court Evidence Act 1997 [Act 561] concerning the acceptance of forensic science elements in documentary evidence, as well as several reported cases that use this type of means of proof.

Keywords: *Documentary evidence, Application, Forensic science element, Evidence, Malaysian Syariah court*

INTRODUCTION

Forensic science is one of the new branches of a scientific discipline that can be used as a means of proof in a court (Ahmad Syukran, 2017a). By the twenty-first century, the field of forensics had become very popular almost all over the world, and Malaysia as a rapidly developing country also is no exception. The field of forensics is similar to the field of pure science or applied science, which has existed for a long time but only recently has the focus shifted to the field of forensics. Not only that, the public's perception of forensics as a newly emerging field is incorrect, as this field has existed for centuries (Fauzan, 2018).

According to Saferstein (2015), forensic science have various kind of professions that utilize their skills and expertise to assist legal enforcement officials in handling their investigation. He also state several common professions that practicing forensic science element as such legal and jurisprudence, pathology, toxicology and, digital and multimedia. According to Saferstein (2015), forensic science has a range of careers that use their knowledge and experience to assist legal enforcement officials in handling their investigations. He also mentions several common professions that practice forensic science elements, such as legal and jurisprudence, pathology, toxicology, and digital and multimedia. This is due to the fact that forensic science plays an important role, particularly in a legal jurisdiction, as it can help the judges and legal practitioners (Ahmad Syukran, 2017b).

On the other hand, document also is one of popular of method of proof that use in a court proceeding. Not only that, the use of documents, either in traditional or electronic form, has been used as the main reference in every daily affair (Azhan Yahya *et al.*, 2017). This is because the document plays an important in convicting or deciding a case heard in court (Wan Abdul Fattah, 2020).

However, the question then arises whether or not this kind of documentary evidence featuring with forensic science element is permissible or not under Islamic law. Therefore, this paper will discuss the concept of forensic science element under Islamic law. Then, the researcher will discuss the position of forensic science in documentary evidence under the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]. Finally, the researchers will present the reported case involving the forensic science evidence in documentary evidence under the Malaysian Syariah Court.

METHODOLOGY

The methodology plays an important role in achieving the objectives of a study (Ahmad Syukran, 2017b). Therefore, this study uses a qualitative method since this research is based on the field of social science and law. The data collection is divided into two types which are; primary and secondary data. The primary data are usually collected from the source where the data originally originates from and are regarded as the best kind of data in research. In this study, the primary data is gained from the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]. On the other hand, secondary data is the data that has already been collected through primary sources and made readily available for researchers to use for their own research. For this study, the secondary data included books, articles papers, journals, reported cases and related document references. Then, the data obtained were analyzed using the document analysis method. Document analysis is a form of qualitative research in which

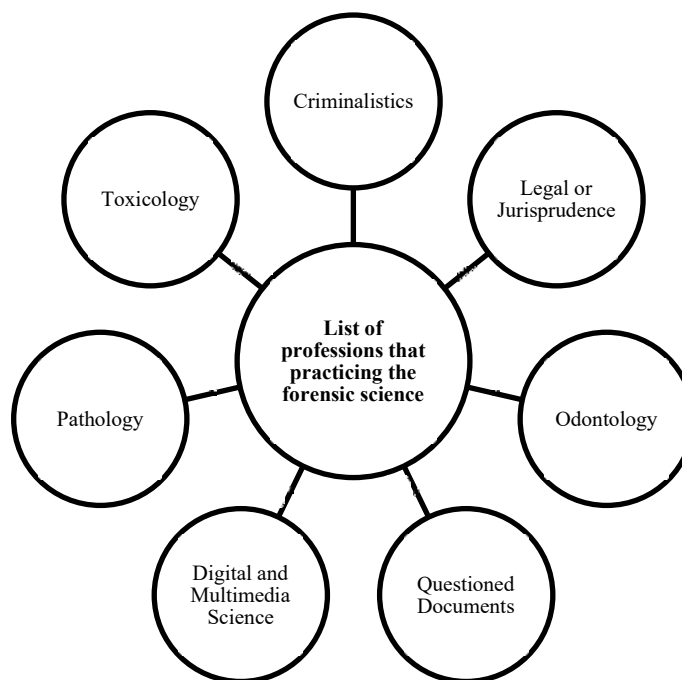
documents are interpreted by the researcher to give overall meaning around an assessment topic (Bowen, 2009).

THE CONCEPT OF FORENSIC SCIENCE ELEMENT IN ISLAM

Forensic science is one of the legal applications of scientific methods (Hazim *et al.*, 2019). The term forensic is derived from the Latin word *forensis*, which means "forum" and was originally used to regulate the mechanism of debate in a trial (Ahmad Syukran, 2017a). Metwally (2019) defines forensic science as "the application of scientific or technical practices to the identification, collection, evaluation, and interpretation of evidence for civil and criminal law or administrative issues".

On the other hand, according to Saferstein (2015), there are several professions that practicing forensic science as shown in figure 1:

Figure 1: List of professions that practicing the forensic science

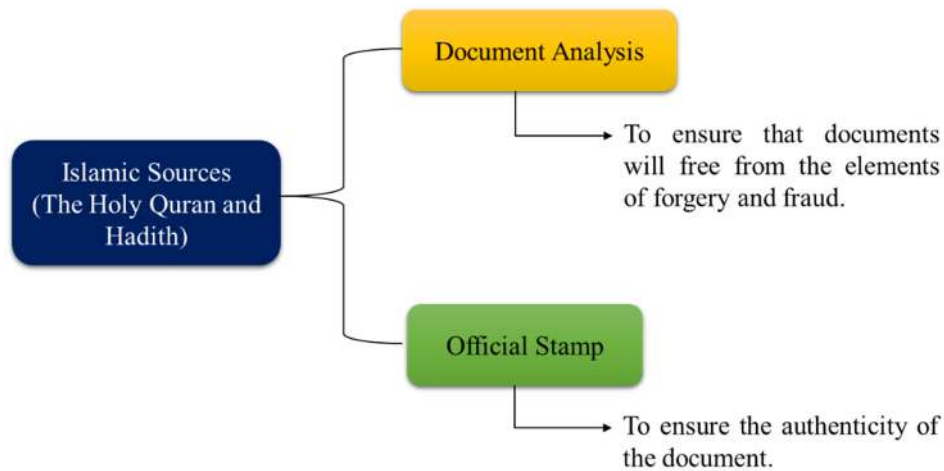


Source: Extracted and modified from Saferstein (2015)

There are a number of governmental and non-governmental organizations in Malaysia that carry out forensic science applications, such as the Forensic Department in governmental and non-governmental hospitals, the Malaysian Communications and Multimedia Commission, the Centre of Analysis for Forensics Science of Kimia Malaysia, the Royal Malaysian Police Forensics Unit, and CyberSecurity Malaysia (Hazim *et al.*, 2019).

Based on the findings of this study, it can be concluded that the use of forensic science elements in documentary evidence is permissible in Islam. This is because the researchers have referred to several provisions from the Holy Quran and Hadiths in regards to the acceptance of the application of forensic science elements in documentary evidence. Figure 2 shows, the acceptance of forensic science elements from the Holy Quran and Hadith.

Figure 2: The Acceptance of Forensic Science Element from the Holy Quran and Hadith



Source: Extracted and modified from the Holy Quran and Hadith

Figure 2 shows, it is important to make sure the authenticity of the document by using the document analysis to ensure its originality. This is because, one of the challenges in admitting the document as a means of proof is its falsification (Wan Abdul Fattah, 2020). According to Ahmad Ibrahim (1928), there are numerous cases of document falsification, such as fake signatures and content modification. Therefore, the document analysis is one of form of documentary evidence featuring with forensic science element have been seen as one of the solution to ensure the authenticity of the document and free from the element of forgery.

On the other hand, the use of an official stamp in the delivery of a letter is very important in order to confirm the authenticity of the letter (Ibn Hajar, 1996). This is because according to al-Mawardi (1972), some of the governments will not receive any letters without an official stamp as stated by Anas bin Malik:

Anas bin Malik has said: *"When the Prophet SAW wanted to send a letter to the Roman government, they said that they would definitely not read the letter unless there was an official stamp, so Rasulullah SAW took a silver stamp engraved with the words of Muhammad Rasulullah and stamped on the letter to be sent to the Roman government."*

(Narrated by al-Bukhari. Hadith no. 7162)

Therefore, it shows that the official stamp also is one of the forensic science elements in documentary evidence in order to ensure the authenticity of the document. From the above discussions, it has shown that there is evidence from the Islamic sources including the Holy Quran and Hadith that show, forensic science is permissible in Islam. This is because it is important to include the forensic science element in the documentary evidence as it will help the court to make an appropriate decision.

THE POSITION OF FORENSIC SCIENCE ELEMENT IN DOCUMENTARY EVIDENCE UNDER SYARIAH COURT EVIDENCE LAW

There is a various kind of documentary evidence featuring with forensic science element. Chemical, medical and Deoxyribonucleic acid (DNA) test reports are examples of this kind of mean of proof and categorized as documentary evidence featuring with forensic science element and can be used as evidence in a court proceeding. This is based on section 49 of the Syariah court Evidence (Federal Territories) Act 1997 [Act 561], the primary evidence in such cases is defined as the document itself produced for the inspection of the court.

“Section 49. Primary evidence”.

Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1- *Where a document is executed in several parts, each part is primary evidence of the document.*

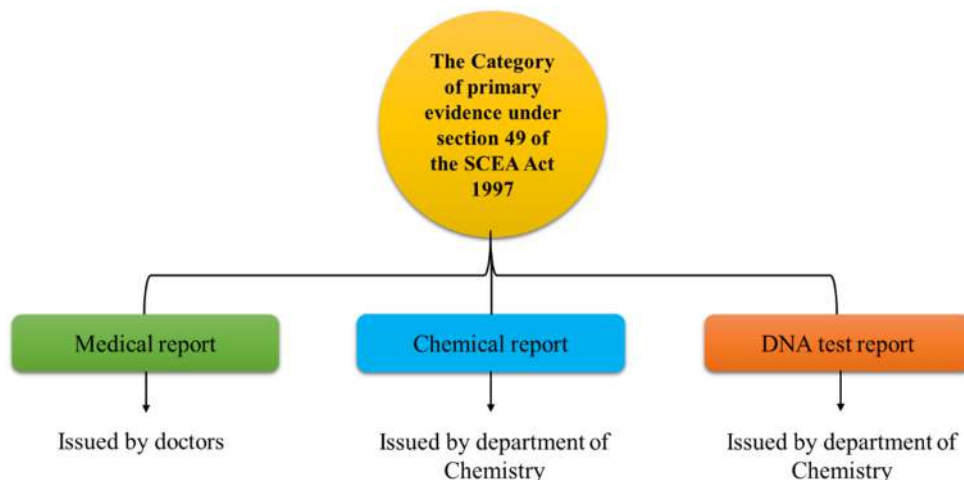
Where a document is executed in counterparts, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2- *Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the contents of the original.*

Explanation 3- *A document produced by a computer is primary evidence.*

Forensic science is basically defined as the document itself that is produced for the court's inspection. Figure 3 shows, the categorization of primary evidence under this clause.

Figure 3: The Category of Primary Evidence according to the Section 49 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]



Source: Extracted and modified from the Section 49 of the Syariah Court Evidence (Federal Territories) Act 1997

Figure 3 shows, several examples of the primary document under this clause. One type of documentary evidence that includes forensic science is a medical report. In general, the purpose of a medical report is to provide written information on the health and condition of patients who have received treatment at the hospital, and it can only be given by the medical officer of the clinical department where the patients are receiving treatment. As a result, the medical report must be submitted to the court, as well as a specialist in the relevant field as such doctors. Besides, according to Section 33 of the same provision, the doctors must appear in court to testify.

“Section 33. Opinion of experts”.

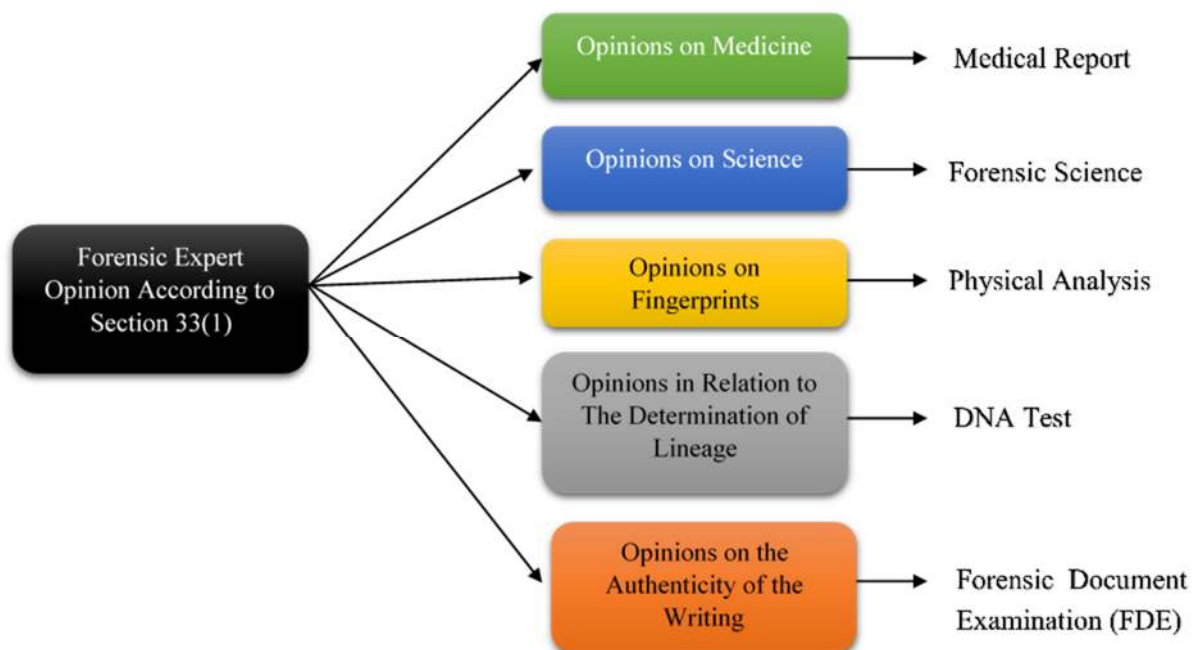
(1) When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions or relating to determination of nasab, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions or relating to determination of nasab, are qarinah.

(2) Such persons are called experts.

(3) Two or more experts shall be called to give evidence where possible but if two experts are not available, the evidence of one expert is sufficient. If two experts give different opinions a third expert shall be called to give evidence.

On the other hand, the figure 4 shows, the category of forensic expert opinion as stated under this clause.

Figure 4: Forensic expert opinion according to the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]



Source: Extracted and modified from the Section 33 of the Syariah Court Evidence (Federal Territories) Act 1997

On the other hand, evidence from a chemical report requires the original document to be presented in court. This is because, according to Section 47(1)(d) of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561], forensic experts must provide evidence orally and directly before a judge.

“Section 47. Oral evidence must be direct”.

(1) Oral evidence shall in all cases whatever be direct, that is to say:

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Therefore, it can be said that, the Syariah court recognized this kind of method of proof based on the provisions from the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] as mentioned above. This is because, the researchers think that, it is important to apply the scientific evidence as such forensic science element in documentary evidence in order to help a court decide a case properly. Although Syariah courts are still less exposed to the type of scientific evidence, the researcher thinks that the advancement of science and technology causes Syariah law practitioners and also need to use new evidence like this to help them dealing a case in court.

THE REPORTED CASE INVOLVING FORENSIC SCIENCE ELEMENT IN DOCUMENTARY EVIDENCE UNDER THE MALAYSIAN SYARIAH COURT

In general, the majority of Malaysian Syariah practitioners are not fully prepared to admit the forensic science element in a court proceeding (Syazwan *et al.*, 2019). This is because, most of them are rarely exposed to the case related to it (Wan Abdul Fattah *et al.*, 2020). However, from the findings of this study, the researchers found that, there are some of Syariah's judges have decided the case by accepting scientific evidence as such forensic science as a method of proof.

The researcher will discuss the case *Pendakwa Syarie Sabah v. Rosli bin Abdul Japar* as one of the earlier cases related to the use of forensic science elements in documentary evidence in Syariah courts in this paper. In this case, the accused Rosli bin Abdul Japar was summoned to testify on charges of having illicit relations with Cik Murni binti Muhammad until she gave birth to an illegitimate child named Hasmawi bin Abdullah.

The Sabah State Syarie Prosecutor submitted expert testimony and scientific evidence featuring with forensic science elements through DNA reports that demonstrated its effectiveness. In this case, the Syariah court accepted the two methods of proof that had been submitted by the Sabah State Syariah Prosecutor because this evidence was very clear. Therefore, the court has sentenced the accused of being found guilty of having illicit intercourse

to the point of giving birth to a child out of wedlock. The court sentenced the accused to a fine of RM3,000.00 and if he failed to pay the fine, he was jailed for 6 months.

From this case, it indirectly shows that Syariah courts are beginning to recognize scientific evidence as a form of proof. However, there aren't many cases recorded involving the use of this kind of means of proof since Syariah practitioners are rarely exposed to it. The researchers think that the use of forensic science elements in documentary evidence under the Malaysian Syariah court should be given exposure to Syariah law practitioners in terms of standard operating procedure (SOP) and its implementation.

CONCLUSION

In a conclusion, generally, Islam allows the use of forensic science elements based on the provisions from the Holy Quran and hadith. This is because from these two kinds of sources allocated that, it is needs to apply forensic science as such document analysis and official stamps in order to make sure the authenticity of the document. On the other hand, according to Section 49 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561], this clause also categorized the medical and chemical report as examples of documentary evidence featuring with forensic science element. Not only that, this kind of evidence also should be supported by the expert as provided in section 33 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]. Finally, the researchers also found the reported case involving the application of forensic science element in documentary element in documentary evidence as such in the case *Pendakwa Syarie Sabah v. Rosli bin Abdul Japar*. It is hoped that this paper will be a reference point regarding to the concept of documentary evidence featuring with forensic science element under the Malaysian Syariah court.

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