



Document forensic, the fiqh and the Syariah Courts

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Abstract

Technological progress has made falsification of documents increasingly sophisticated and the need for forensic experts or Ra'yu al-Khabir indispensable in the Syariah Courts. This paper discusses the concept and methods of forensic document authentication by experts according to the Islamic law (fiqh). This study combined quantitative and qualitative approaches whereby 181 key informants comprising randomly sampled syariah and civil law experts and practitioners underwent in-depth interviews. Content analysis of the study revealed that respondent knowledge of document authentication methods according to the Islamic law was at the intermediate level with the mean = 3.59 and sd = 0.63 which was not enough to help the Syariah Courts cope with the rapid increase in the falsification rate of documents. This situation needs urgent redress and calls for the establishment of a comprehensive forensic model to provide adequate guidelines for judges and practitioners of the Syariah Courts.

Keywords: document authentication, fiqh authentication, expert opinion, forensic, syariah experts, syariah practitioners

Introduction

The word document according to *Kamus Dewan* (2005) refers to “*suatu yang bertulis atau bercetak yang digunakan sebagai rekod atau bukti*”. According to the classical jurists, a document etymologically means writing (*khat*), which is the recording of the verbal speech of a person using certain alphabets and comprehensible upon being read (Al-Qurrāfi, 2001; Ibn ‘Ābidīn, 1995; Ibn Qayyim, 2007; al-Dimyātī, 1993; al-Jurjānī, 2000)

With the advance of science and technology, the form of documents is developing. Documents are no longer limited to printed materials or something that is recorded solely. Voice recording and visual recording such as CCTV, photos, digital videos, floppy discs, compact disks and internet are also included in the definition of document (Al-Zanībāt, 2005). Therefore, document may be defined as: “*To clarify or to describe a certain thing through writing or sketches or records in a visual form either in a classical manner such as using papers, woods and the likes or in a modern way such as using floppy discs, compact discs, internet and the likes*”.

Lately, cases involving the falsification of documents are reported frequently along with the development of science and technology. Among the examples of documents falsification that have occurred especially in the Syariah Courts are the falsification of identification cards, marriage certificates, letter of approval to polygamous marriage, wills, birth certificates to ascertain the status of a child, pay slips in cases pertaining to maintenance, the alteration of the original meaning or the content of a document, the taking of false statements (Wan Abdul Fattah, 2011) and so forth. Under the law of evidence, expert opinions have been widely used nowadays either in civil or syariah cases.

Expert opinion has been adopted in the Islamic judiciary since the era of Khulafa’ ar-Rasyidin. This is proven based on a story where Saidina Ali had settled a case in which a woman had accused a young

man of raping her by spreading egg whites on her clothes and in between her thighs. Saidina Umar had asked the opinion of Saidina Ali to solve the case. With the expertise of Saidina Ali, he had proven that the white patches were actually egg whites and not semen as alleged by the woman. Imam Hanafi, Maliki, Syafie and Hanbali had unanimously agreed that it is compulsory for the judges to refer to expert opinion in complicated cases which may require an explanation by the experts to facilitate the judicial process (Syinyur & Abd Nasir Muhammad, 2006).

There are Quranic verses and *sunnah* pertaining to the legislation of expert opinions as a method of proof including in determining the authenticity of a document. Rasulullah saw recognized the validation of Zaid and Usmah's lineage by Madjaz al-Madlaji through *Qiyafah* by covering their heads and exposing their feet. This shows that He acknowledged expert opinion. The Islamic scholars had also stated that it is necessary for the judges to call the experts in a particular field to testify in courts in order to explain the matters in which the courts are having problem to handle especially those involving technical issues such as CCTV, DNA, SMS, MMS, video, DVD, finger print, pictures and so forth.

Expert evidence from the legal perspective and its practice in the civil courts has been discussed by Jal Zabdi (2008) in his book entitled "*Pengenalan Undang-Undang Keterangan Di Malaysia*". Jal Zabdi had written on expert evidence and its role according to the Evidence Act 1950 as practiced in the civil courts. He opines that expert evidence in relation to handwriting must be accepted with caution and it must be supported with other evidence. The article entitled "*Pengesahan Keaslian Dokumen Urusniaga Elektronik Menurut Fiqh dan Undang-Undang keterangan Islam Di Malaysia*" by Wan Abdul Fattah, Raja Raziff and Norma (2013) explained the importance of verifying the authenticity of electronic documents in transactions. The writers have explained a few forms of verification that have been usually used such as admission, testimony and oath but the form of verification that has been widely practiced is through expert opinion or through forensic experts.

Anwarullah (2004) in his book "Principles of Evidence In Islam" has also stated that expert evidence is a method of proof that has been adopted by the courts including in cases involving documents authentication. Anwarullah in his writing has also included the Islamic jurists' opinions pertaining to the strength of expert opinions in evidence and cases that can be proven through the same. Wan Abdul Fattah (2011) in his research "*Kekuatan Keterangan Dokumen Dalam Kes-Kes Muamalat Menurut Fiqh Dan Undang-Undang Keterangan Di Malaysia*" has also stated that expert evidence is a strong evidence in proving the validity of a document.

Based on the above discussion, most scholars have only explained the concept of expert evidence theoretically and the procedures of documents authentication which are being practiced in the civil courts. Apart from that, the scholars have described the forms of documents authentication such as in relation to signatures, handwritings and so on which have been conducted by the experts at the request of the parties with the permission by the courts. However, none of the writers and the researchers have emphasized on the respondents' knowledge on the methods of documents authentication by the experts and the respondents' knowledge on the methods of documents authentication by the experts according to the Islamic law.

Expert opinions in documents authentication

In civil courts, expert opinions or forensic experts are frequently referred to in order to assist the judges in making fair judgment including in determining the authenticity of documents. This is because expert evidence is far more convincing in comparison to other methods of proof. It is more convincing because the evidence of forensic experts is more consistent with the scientific arguments supported with the use of the latest technology and it is still logically acceptable regardless of a long time period.

The appointment of experts or forensics at the request of the judges is for the purpose of having their opinions on certain issues disputed by the parties. The judges will request for the assistance by the forensic experts in cases concerning the matters beyond their capabilities and expertise such as the verification of signatures, digital videos or other types of documents. With the assistance by the experts, it

will facilitate the courts to analyse and come to an accurate and fair decision (Syinyur & Abd Nasir Muhammad, 2006). As stated by Anwarullah, expert evidence is a testimony given in relation to scientific, technical or professional matters by certain individuals with qualifications by virtue of special training, expertise or knowledge in a particular subject. A witness is considered as an expert with the knowledge, expertise, experience, training or education that relates to the facts who may testify in courts by giving their opinions or otherwise. Expert evidence is one of the types of evidence that is accepted under the Islamic law either in criminal or civil cases. According to *Majallah Al-Ahkam Al-Adliyyah*, the opinions of an individual with an expertise may be accepted as a valid evidence (Anwarullah, 2004).

According to *Kamus Dewan* (2005), expert is defined as, “*ahli yang mahir, pandai sekali dalam sesuatu ilmu juga orang yang dirujuk atau dirunding untuk melaksanakan atau menyelesaikan sesuatu*”. Meanwhile, forensic is defined as “*bukan pengetahuan perubatan yang diperlukan dalam pengadilan misalnya untuk menentukan punca sesuatu kematian*”. Therefore, a forensic expert can be defined as an individual with a skill and has an expertise in forensics who can be referred to or discussed with in order to settle or to assist in a court proceeding. In Malaysia, the Chemistry Department of Malaysia under the Ministry of Science, Technology and Innovation (MOSTI) has divided the forensics services to five sections. They are narcotics, serology/DNA, criminalistic, toxicology and inspection of disputed documents such as inspection of handwriting, signature, printing process and also the analysis of papers and ink.

In Islam, expert opinion is only acceptable when it fulfills the conditions. Pursuant to the Islamic law, an expert is required to be a Muslim, sane and has reached puberty. Hanafi, Maliki, Syafie and Hanbali unanimously agreed that the opinions from children or a mentally ill person are invalid. Apart from that, an expert must be an upright person. Nevertheless, according to the opinion of Maliki school, it is allowed to accept the opinions of the experts who are sinful (*fasiq*) in an emergency because their opinions are to be taken solely as an information instead of as a testimony. The Islamic scholars have also agreed that an expert must truly have competence in his field. Besides that, there are also some scholars who have added other conditions such as being able to speak, to listen, to see, trustworthy and the number of experts must be more than one (al-Zuhailiy, 1994; Syinyur & Abd al-Nasir Muhammad, 2006).

Section 33 of Syariah Court Evidence (Federal Territories) Act 1997 provides that the court may call expert witness 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*. The Lord President in the case of *Pendakwa Raya lwn. Muhamed bin Sulaiman* [(1982) 2 M.L.J 320] had stated that “while the expert must be ‘skilled’, he need not be so by special study, he may be so by experience; and the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility” (Jasri Jamal, 2011).

The Syariah Courts have the jurisdiction to adopt expert opinions in determining the validity of a document. Nonetheless, the judges are not bound with the opinion or the theory stated by the experts. This is because the role of an expert is to provide a solution in certain cases and situations only. If the judge thinks that the available expert opinions are not satisfactory in solving a particular issue, the court has the power to order another expert to be called to testify. The judge may consider the opinions of the two experts and choose the most accurate opinion to be accepted in resolving a case.

This can be seen in *Pendakwa Syarie Negeri Sabah lwn Rosli bin Abdul Japar* JH XXIII/11 1428H/2007M where the judge had convicted the accused of having illegal intercourse and causing the woman to give birth to a child out of wedlock based on expert evidence and through scientific verification through DNA tests on the three contributors of the blood specimens. The tests were conducted by a DNA expert from the Chemistry Department of Malaysia, Petaling Jaya. Apart from that, the Court had also admitted the arguments by the Syarie Prosecutor that there was a strong *qarinah* to link the relationship of the accused with the birth of the illegitimate child which was successfully proven through scientific method (Jasri Jamal, 2011).

This article will explain the concept of experts in the eyes of Islamic law and the current legal provisions. In addition, this article will provide an emphasis on the respondents' knowledge on the methods of verifying documents by the experts and the respondents' knowledge on the method of verifying documents by the experts according to the Islamic law. The respondents are consisted of the syarie judges, syarie officers, syarie practitioners, academicians and students taking up syariah and law in Selangor, Negeri Sembilan and the Federal Territories of Kuala Lumpur and Putrajaya.

Research methodology

This study was conducted using mixed-method approach, which is a combination of the quantitative and qualitative approaches. For the quantitative approach, the respondents in this study are consisted of legal practitioners and also syarie judges, syarie officers, syarie counsels and academicians including lecturers and students taking up syariah and law. Four districts in Selangor, the Federal Territories of Kuala Lumpur, Putrajaya and Seremban were randomly selected to represent a fair division between syariah subordinate courts and syariah high courts. The respondents were selected through random sampling.

Meanwhile, for the qualitative approach, this study was conducted using in-depth interviews with the key informants and content analysis. The key informants consisted of forensic experts, syariah and civil law practitioners and they were selected through purposive sampling. On the other hand, content analysis was done on legal documents including the judgments passed by the syariah courts and civil courts in cases relating to deception and falsification of documents. Quantitative data will be analyzed using SPSS software whereas qualitative data will be analyzed using QSR NVivo software. This study was conducted in the Federal Territories (Putrajaya, Kuala Lumpur and Labuan), Selangor and Negeri Sembilan. The study is expected to give a great impact to the legal system in Malaysia through the suggestions on the revision of legal procedures in investigating and resolving cases relating to deception and documents falsification. In addition, this study will probably lead to amendments of the legal provisions pertaining to admissibility of documents as a method of proof in Syariah Courts in Malaysia.

Research outcome and discussion

Demographic characteristics of the sample

This study includes the knowledge of the respondents on the methods of documents verification by the experts and their knowledge on the methods of documents verification by the experts according to the Islamic law. 181 survey forms had been distributed to the respondents comprising of syarie judges, syarie officers, syarie counsels, academicians and students taking up syariah and law around Selangor, Negeri Sembilan and the Federal Territories of Kuala Lumpur and Putrajaya. Table 1 represents the demographic

Table 1. Demographic profile of the study

Demography	Frequency	Percentage
<i>Education Level</i>		
Ph.D	9	5.0%
Master Degree	24	13.3%
Bachelor's Degree	119	65.7%
Diploma, Certificates and Others	29	16.0%
<i>Occupation</i>		
Legal Practitioners (Syariah)	78	43.1%
Academicians	103	56.9%

profile of this study that shows the percentage based on education level, with 9 respondents (5.0%) being Ph.D holders, 24 respondents (13.3%) having Master degree, 119 respondents (65.7%) having Bachelor's degree and 29 respondents (16.0%) having Diploma, Certificate and others. The next one is based on occupation with 78 respondents (43.1%) being academicians and 103 respondents (56.9%) being syariah legal practitioners.

Respondents' knowledge on the methods of documents verification

Descriptive analysis was used in order to determine the respondents' knowledge on the methods of documents verification. Table 2 shows that the respondents have the most knowledge on Detection of Fingerprints (mean = 3.85 and sd = 0.87), DNA (Deoxyribonucleic Acid) Profiling (mean = 3.84 and sd = 0.82), Formal Letterhead of a Department (mean = 3.70 and sd = 0.92) and Official Stamp/Official Seal (mean = 3.68 and sd = 0.89). The respondents, however, have the least knowledge on Radio Frequency Identification (RFID) eg: Identifying digital signature on passports/bank account book) (mean = 3.20 and sd = 0.99), Internet Protocol Address (mean = 3.46 and sd = 0.92), Computer Data (Typewritten Evidence) (mean = 3.49 and sd = 0.79), Computer Printout Receipt (mean = 3.54 and sd = 0.82) and Digital Signature (mean = 3.55 and sd = 1.00). Overall, the respondents' knowledge on the methods of documents verification is at an intermediate level (mean = 3.59 and sd = 0.63).

Table 2. Respondents' knowledge on the methods of documents verification

No	Statement	Mean	Standard Deviation	Interpretation
1.	Identification of Handwriting (if the documents are handwritten)	3.56	0.91	Intermediate
2.	Official Stamp/Official Seal	3.68	0.89	High
3.	Digital Signature	3.55	1.00	Intermediate
4.	Formal Letterhead of a Department	3.70	0.92	High
5.	Barcode	3.61	0.93	Intermediate
6.	Identification of Fingerprints	3.85	0.87	High
7.	DNA (Deoxyribonucleic Acid) Profiling	3.84	0.82	High
8.	Internet Protocol Address	3.46	0.92	Intermediate
9.	Personal ATM Pin Number	3.58	0.94	Intermediate
10.	Computer Printout Receipt	3.54	0.82	Intermediate
11.	Computer Data (Typewritten Evidence)	3.49	0.79	Intermediate
12.	Radio Frequency Identification (RFID) eg: Identifying digital signature on passports/bank account book)	3.20	0.99	Intermediate
	Total	3.59	0.63	Intermediate

From the result of this survey, it depicts a significant difference in the respondents' knowledge on the verification of physical documents (non-electronic) in comparison to the documents produced by electronic devices. This portrays that the respondents' level of knowledge and awareness on the methods of verifying electronic documents needs to be elevated in line with the advance of modern technology if electronic documents are admissible as an evidence in Syariah Courts. This knowledge is essential to circumvent any confusion among syariah law practitioners. The methods of electronic documents verification which have been certified by the global community can be a guideline to be practiced in the Syariah Courts.

Respondents' knowledge on the methods of documents verification according to the Islamic Law

Table 3 shows that the respondents' knowledge on the methods of documents verification according to the Islamic law is the highest in respect of Identification of Fingerprints (mean = 3.51 and sd = 0.92),

DNA (Deoxyribonucleic Acid) Profiling (mean = 3.50 and sd = 0.89), Signature (mean = 3.43 and sd = 0.90), Formal Letterhead of a Department (mean = 3.38 and sd 0.89) and the Official Stamp/Official Seal (mean = 3.34 and sd = 0.90). However, the respondents have the least knowledge on the methods of documents verification according to the Islamic law in respect of Internet Protocol Address (mean = 3.14 and sd = 0.97), Computer Data (Typewritten Evidence) (mean = 3.15 and sd = 0.89), Computer Printout Receipt) (mean = 3.20 and sd = 0.95), Personal ATM Pin Number (mean = 3.25 and sd = 0.94) and Digital Signature (mean = 3.27 and sd = 0.92). Overall, the respondents' knowledge on the methods of documents verification according to the Islamic law is at an intermediate level (mean = 3.30 and sd = 0.76).

Table 3. Respondents' knowledge on the methods of documents verification according to the Islamic Law

No	Statement	Mean	Standard Deviation	Interpretation
1.	Identification of Handwriting (if the documents are handwritten)	3.33	0.96	Intermediate
2.	Official Stamp/Official Seal	3.34	0.90	Intermediate
3.	Signature	3.43	0.90	Intermediate
4.	Digital Signature	3.27	0.92	Intermediate
5.	Formal Letterhead of a Department	3.38	0.89	Intermediate
6.	Barcode	3.31	0.90	Intermediate
7.	Identification of Fingerprints	3.51	0.92	Intermediate
8.	DNA (Deoxyribonucleic Acid) Profiling	3.50	0.89	Intermediate
9.	Internet Protocol Address	3.14	0.97	Intermediate
10.	Personal ATM Pin Number	3.25	0.94	Intermediate
11.	Computer Printout Receipt	3.20	0.95	Intermediate
12.	Computer Data (Typewritten Evidence)	3.15	0.89	Intermediate
13.	Radio Frequency Identification (RFID) eg: Identifying digital signature on passports/bank account book)	3.06	0.93	Intermediate
	Total	3.30	0.76	Intermediate

The result of this survey illustrates the respondents' knowledge on the methods of documents verification according to the Islamic law is still at the intermediate level. This could be the result of the unavailability of a specific guideline in relation to the documents verification as prescribed by the Islamic law in comparison to the methods of documents verification in civil courts which are not bound by the Islamic law.

Opinions by the legal practitioners and academicians on the methods of documents verification

From the interview with the experienced individuals comprising of judges, civil and syariah lawyers, academic staffs as well as forensic experts, each one of them have their own personal opinion with regard to the documents falsification. In the opinion of a syariah counsel to be named as Officer A, in respect of the authentication of documents such as marriage certificates in foreign countries such as Thailand or Indonesia, the Syariah Courts will refer the case to the consular officials in those countries to verify whether the marriage had been solemnized or otherwise. The consular officials involved usually have the standards or procedures that need to be adhered to in ensuring that the marriage certificates tendered in courts are valid. For instance, they must ensure that the marriage officiant is licensed by the government of Thailand, the place of solemnization of marriage is similar to the one stated in the marriage certificate and they must verify that both parties were present during the solemnization of the marriage. However, this is not similar to the documents verification by the forensic experts but merely a normal procedure practiced by the Syariah Courts in Malaysia to verify that a marriage certificate was indeed issued by the government of Thailand.

As stated by an academician that will be named as Officer B, the authentication of documents in the Syariah Courts is not conducted by the forensic experts as ordinarily practiced in the civil courts. However, he is of the opinion that the Syariah Courts should recognize scientific evidence by the forensic experts to support a contention pertaining to the falsification of documents or certificates. According to a judge with 20-year experience in the legal field to be named as Officer C, there were cases in the Syariah Courts that involve documents falsification being referred to the forensic experts to verify its authenticity. For example, there was a high-profile case involving the top official of the Royal Police of Malaysia (PDRM) and his subordinate. In this case, the official denied that the signature as a witness in one transaction was his. He requested the court to instruct a DNA test to be conducted to determine whether the signature was falsified or otherwise. He stated that it should be done by calling the forensic experts to take the sample of the applicant's signature and to analyze the documents disputed in the proceeding.

Nevertheless, the Syariah Courts are not bound to refer a case to the forensic experts because a case should be settled by giving priority to the Islamic law. For example, in the case of determining the lineage, the court will not determine the lineage through scientific method as long as it can still be determined through a method prescribed under the Islamic law considering the high cost to be incurred should the matter be referred to the forensic experts. In review of the opinion by Officer D, a forensic expert with an experience of 20 years in the forensic science field, the methods used by the forensic experts in determining the validity of a document in Syariah Courts have no difference with the practice in the civil courts. Usually, in cases involving the falsification of signature, a few samples of signature will be taken from the accused in random for a few days. For instance, the accused will be asked to put down his signature 20 times on different dates and time. From his experience, if the samples of signature have been collected, the responsible forensic experts will conduct an examination as to the measurement, marks, dent, pressure and also the dots before issuing a report on whether the particular signature was falsified or not.

Officer C stated that, the methods utilized by the forensic experts do not transgress the Islamic law. Moreover, the law of evidence in Islam acknowledges the expert opinions as *qarinah* in proving a case. However, *qarinah* cannot be used as the main basis of conviction. First and foremost, the court will refer to the living testimony. In the event that the living testimony is sufficient, the court will verify the documentary evidence. However, if the living testimony is being doubted in respect of his credibility as a witness, the documentary evidence will support the conviction. This opinion is substantiated by Officer B, having similar opinion with Officer C. In a nutshell, the court will not prioritize *qarinah* in proving a particular case but the court accepts *qarinah* to support an admission, oath, testimony and so on.

Conclusion and suggestion

In this ever-changing world, the methods of proof will also keep on changing in accordance with the advancement of technology. It is absurd that the methods practiced since 1400 years cannot be developed when the knowledge on modern technology is becoming more advanced from day to day. One thing that needs to be realized is that the objective is to attain justice. This is the one and only objective while the methods to attain it are many as long as they do not transgress the Islamic law. 181 survey forms had been distributed to the respondents comprising of syarie judges, syarie officers, syarie counsels, academicians and students taking up syariah and law in Selangor, Negeri Sembilan and the Federal Territories of Kuala Lumpur and Putrajaya. From the interviews with a number of experienced legal practitioners, there are cases in which the Syariah courts had referred the forensic experts to determine the authenticity of doubtful documents. In fact, the methods used by the forensic experts are in line with the Islamic law. The law of evidence in Islam also accepts expert opinion as a form of *qarinah* in proving a case.

However, the issue here is that *qarinah* cannot be used as the main basis of conviction. Instead, the court will refer to the living testimony. However, if the living testimony is being doubted in respect of his credibility as a witness, the documentary evidence will support the conviction. In other words, the court will not prioritize *qarinah* in proving a particular case but will only accept *qarinah* to substantiate an

admission, oath, testimony and so on. Based on the survey that had been conducted, the respondents' knowledge on the methods of documents authentication by the experts and their knowledge on the methods of documents authentication by the experts according to the Islamic law are at an intermediate level. At the same time, the number of cases involving falsification of documents reported from day to day is growing some concern. The respondents' knowledge is at the intermediate level due to the lack of exposure to the matters pertaining to documents falsification and the procedures of documents verification. Most of the crime relating to falsification of documents and documents verification occurred in the civil courts. Apart from that, such crime also falls under the jurisdiction of the civil courts. These are the reasons behind the unavailability of a complete manual of the procedures in proving the falsification of a document in Syariah Courts. Therefore, the Syariah Courts require two different interventions in order to safeguard the syariah judiciary in Malaysia. Firstly, an effort to improve the present syariah law must be put forward. Secondly, the awareness of the importance of documents verification and its procedures in syariah court proceedings should be instilled at all levels including the legal practitioners, academicians and university students.

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