

A Preliminary Analysis on The Admissibility of Documentary Evidence via Forensic Science Method
According to Islamic Syariah Law

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Research Article

**A Preliminary Analysis on The Admissibility of Documentary Evidence via Forensic
Science Method According to Islamic Syariah Law**

^{1*}Wan Abdul Fattah Wan Ismail, ²Ahmad Syukran Baharuddin, ³Lukman Abdul Mutalib,
⁴Nik Salida Suhaila Nik Saleh & ⁵Mohamad Aniq Aiman Alias

Faculty Of Syariah And Law, Universiti Sains Islam Malaysia, Bandar Baru Nilai, 71800, Nilai, Negeri
Sembilan, Malaysia

E-Mail Address: ¹wanfattah@Usim.Edu.My, ²ahmadsyukran@Usim.Edu.My, ³lukman@Usim.Edu.My,
⁴salida@Usim.Edu.My, ⁵aniqalias@Raudah.Usim.Edu.My

***Corresponding Author:** Wanfattah@Usim.Edu.My

Abstract

Documentary evidence is one of the important methods of proof used in both syariah courts and civil courts. The rapid development in the field of science and technology indirectly has brought major changes in the forms of documents. This can be seen when the court begins to accept the forensic science method in documentary evidence such as a medical report, chemical report, deoxyribonucleic acid (DNA) test report and others. This is because this kind of method of proof can reinforce the other evidence presented in a court proceeding. However, there is no specific discussion regarding the admissibility of forensic science method in documentary evidence according to Islamic syariah law. The aim of this study is therefore to identify what is the Islamic perspectives on forensic science methods and then to analyse the position of the forensic science method in documentary evidence under the syariah court evidence law. Finally, this study will explore the admissibility of documentary evidence via the forensic science method under the Malaysian syariah court. The methodology of this study is a qualitative approach by using document analysis of the provision from the Holy Quran, Hadith, 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 (Federal Territories) Act 1997 [Act 561] concerning the acceptance of forensic science method in documentary evidence and its admissibility in Malaysian Syariah Court.

Keywords: Admissibility, Documentary Evidence, Forensic Science, Islamic Syariah Law, Syariah Court

1. Introduction

Forensic science is one of the new scientific disciplines that can be used to validate means of proof in court (Ahmad Syukran, 2017). By the twenty-first century, forensics had become extremely popular almost everywhere in the world, including Malaysia, which is a rapidly developing country. Forensics is similar to pure science or applied science, which has existed for a long time but has only recently shifted its focus 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 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 methods, including legal and jurisprudence, pathology, toxicology, digital and multimedia, and others. This is because, forensic science plays an

Important role, particularly in a legal jurisdiction, as it can assist judges and legal practitioners during a court proceeding (Ahmad Syukran, 2017).

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 *et al.*, 2020).

However, the question then arises on what is the position of forensic science method in documentary evidence under syariah court evidence law and how far it admissibility in malaysian syariah court. This article therefore will discuss the islamic perspectives on the forensic science method first and then explores the application of forensic science in the documentary evidence based on the syariah court evidence law. Finally, the researcher will come up with the admissibility of documentary evidence featuring with forensic science method under malaysian syariah court.

2. Literature Review

Before this research is conducted, only a few readings discuss the concept of the forensic science method from an islamic perspective and its application in documentary evidence under islamic syariah law. Instead, most available academic literature has only discussed the definition of forensic science, its function and the admissibility of forensic evidence in general forms.

Basically, the scientific method as such the use of forensic science method in documentary evidence is one of a new method of proof particularly use in the syariah court (Ahmad Syukran, 2017). Forensic science can be defined as the application of natural and physical science principles to criminal and civil law issues. Not only that, it can be used not only in the investigation and prosecution of crimes such as rape, murder, and drug trafficking but also in cases where no crime was committed but someone was charged with a civil wrong (see tort), such as wilfully polluting the air or water or causing industrial injuries (Jay A. Siegel, 2016).

Ahmad Syukran (2017) in his research entitled “the integration of forensic science fundamentals and *Al-Qarinah* towards achieving *Maqasid Al-Shari’ah*”, forensic science is also playing an important role in the court proceeding because it involves the application of a broad range of scientific methods to answer questions of interest to the legal system. From the above studies, the previous study only mentions generally the definition of forensic science and its role in a court proceeding. However, there is no discussion in detail in regards to the islamic perspective on forensic science and its admissibility in documentary evidence according to islamic syariah law.

Besides, in the book entitled “Di Sebalik Fiqah Forensik” by Ahmad Syukran (2017), the role of forensic science is very important in the use of documents as a means of proof and may relate to testing the authenticity of electronic documents presented as evidence, signature forgery in a document, destruction of documents due to fire, and movement or addition of phrases/sentences in documents. This is because, according to Wan Abdul Fattah (2020), issues related to the use of documents as evidence include forgery and deception, as described in some hadith. From the previous literature, the previous authors also only mention a role and the importance of the application of forensic science method in the documentary evidence in general. However, the previous researchers did not emphasize specifically on what is the position of documentary evidence featuring the application of forensic science from the syariah court evidence law and its admissibility in the syariah court.

Not only that, in the study by Yusof *et al.*, (2019), the author has discussed the admissibility of forensic evidence in syariah courts in general. In this study, the author states that forensic evidence is known as *Qarinah*

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under islamic evidence law. Therefore, they concluded that forensic evidence should be accepted by the syariah courts as a means of proof in this age of modern technology because its

Position is recognized in islam and can help judges to uphold justice. However, this study only focuses on the general admissibility of forensic evidence in syariah courts.

Previous research has only focused on the definition of forensic science, its roles, and the admissibility of forensic evidence in general in syariah courts. This article therefore will study on what is the islamic perspectives on forensic science methods. Next, this article will analyse the position of the forensic science method in documentary evidence under the syariah court evidence law by referring to syariah court evidence (Federal Territories) Act 1997 [Act 561]. Last but not least, the researchers also will explore the admissibility of documentary evidence via the forensic science method under the Malaysian Syariah Court.

3. Methodology

According to Ahmad Syukran (2017), methodology plays an important role in achieving the objectives of a study. The methodology of this study uses a qualitative method since this research is based on the field of social science and law. Qualitative research enables the researcher to explore a topic in an open-ended way where there is no any predetermined factors or specific relationships exist (Creswell, 2016). It aims to provide an explicit rendering of the structure, order and broad patterns found among a group of participants.

In this study, the data collection is divided into two types: primary and secondary sources. The primary sources can be defined as the basic and original material for providing the researcher's raw evidence while secondary sources copy, interpret or judge material to be found in primary sources (Sapsford & Jupp, 1996). In this study, the primary source is from The Holy Quran, Hadith and the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]. These data sources categories as primary sources because the data collected from primary sources are clear, reliable sources, and their interpretation should not be swayed by one's views. The secondary source included books, article papers, journals, cases reported in law journals and related documents. Meanwhile, secondary data are those which have already been collected by someone else and which have already been passed through the statistical process.

Then, the data obtained will be analyzed using document analysis methods. According to Merriam (2009) and, Marshall & Rossman (2016) contended that data collection and data analysis must be a simultaneous process in qualitative research. The function of document analysis is for reviewing or evaluating documents wither printed nor electronic. The researcher will explore the findings of the previous study, then analyze the data and come out with the finding of this topic.

4. Discussion And Findings

4.1 The Islamic Perspectives On Forensic Science Methods

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, 2017). 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".

Therefore, it can be said that forensic science plays an important role in order to interpret evidence presented in a court. Not only that, there are a number of governmental and non-governmental organizations in malaysia that carry out forensic science methods, such as the forensic department either in governmental or nongovernmental hospitals, the malaysian communications and multimedia commission (MCMC), the forensic science analysis centre, the forensic laboratory of The Royal Malaysia Police College, and Cybersecurity Malaysia (Hazim *et al.*, 2019).

Based on the findings of this study, it can be said that the use of forensic science methods in documentary evidence generally 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 forensic science method in documentary evidence as shown in Figure 1.

Figure 1: The Acceptance Of Forensic Science Method From The Holy Quran And Hadith

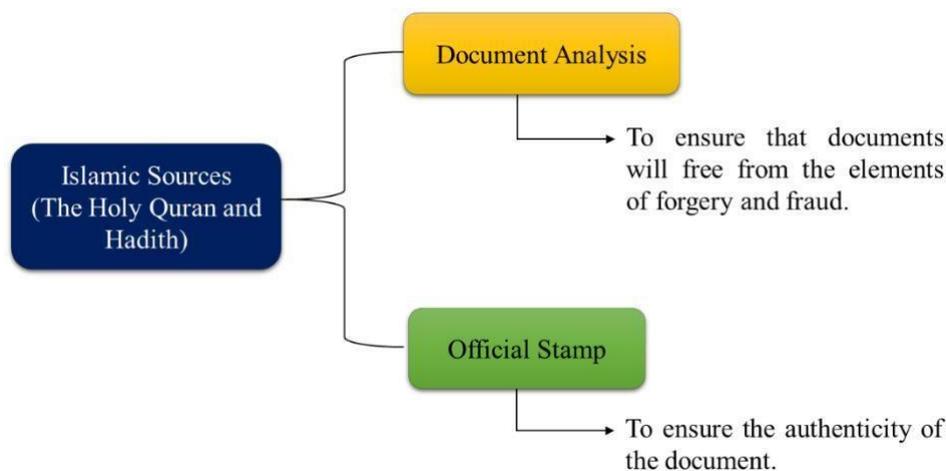


Figure 1 shows, it is important to make sure the authenticity of the document by using document analysis to ensure its originality. This is because, one of the challenges in admitting the document as a means of proof is its falsification (Wan Abdul Fattah, 2020). According to Ahmad Ibrahim (1347h), there are numerous cases of document falsification, such as fake signatures and content modification. Therefore, the document analysis is one form of documentary evidence featuring with forensic science method that has been seen as one of the solutions to ensure the authenticity of the document and free from the element of forgery.

Secondly, the official stamp also is one type of documentary evidence that employs forensic science methods. This is because, 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 methods 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, the application of forensic science in document form is permissible in Islam. This is because it is important to include the forensic science method in the documentary evidence as it will help the court to make an appropriate decision.

4.2 The Position Of Forensic Science Method In Documentary Evidence Under Syariah Court Evidence Law

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There is a various kind of documentary evidence featuring with forensic science method. Chemical, health and deoxyribonucleic acid (DNA) test reports are most of the common applications of forensic science that had been used as evidence in a trial proceeding. This is because, according to 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.

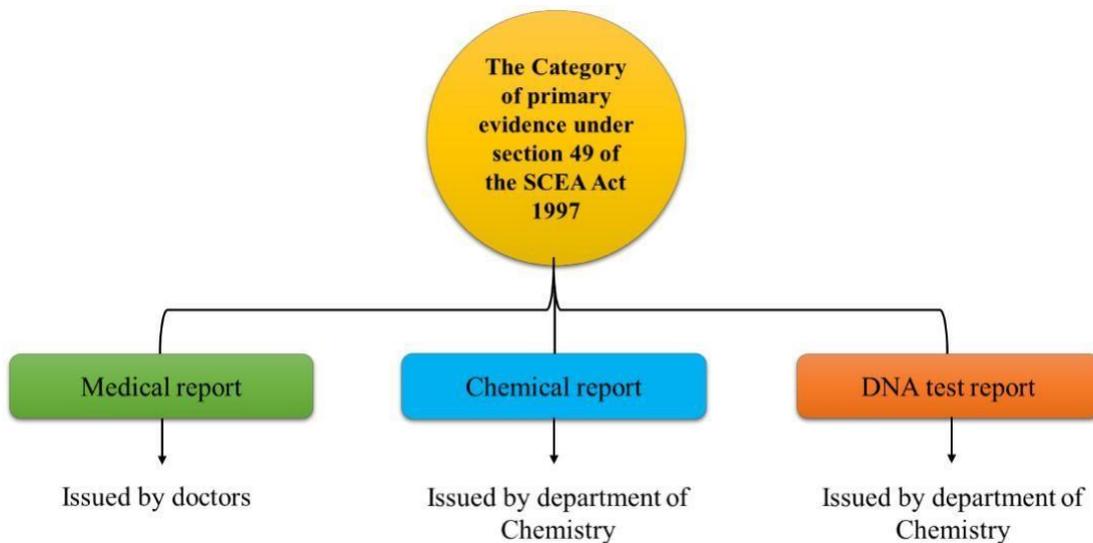
Where a document is executed in counterparts, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

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.

Therefore, forensic science is basically defined as the document itself that is produced for the court's inspection. Figure 2 shows, the categorization of primary evidence under this clause.

Figure 2: The Category Of Primary Evidence According To the Section 49 Of The Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]



From the figure above, there are 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 medical reports is to provide written information on the health and condition of patients who have received treatment at a hospital. Not only that, these reports may only be provided by the medical officer of the clinical department at which the patient received 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.

This is because, according to section 33 of the same act also states that, the evidence submitted not in the category of syahadah because forensic experts do not observe crimes committed by Orang Kena Tuduh (OKT). Instead, the evidence only describes the procedures and processes by which scientific evidence is analyzed using technological equipment. As a result, such reports must be validated by experts. According to the Holy Quran, Surah An-Nahl, Verse 43, Allah (SWT) instructs us to seek experts for any case that the people are unable to resolve.

And We sent not before you except men to whom we revealed [our message]. So ask the people of the message if you do not know.

(Quran, An-Nahl, 16:43)

In this verse, god commands us to refer to an expert in a particular field if needed. Courts should therefore seek the opinions of those who are experts in the relevant field, as provided in Section 33 Of The Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]. Figure 4 Shows, The Several Categories Of Forensic Expert Opinion Under This Section:

Figure 3: Forensic Expert Opinion According To The Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]

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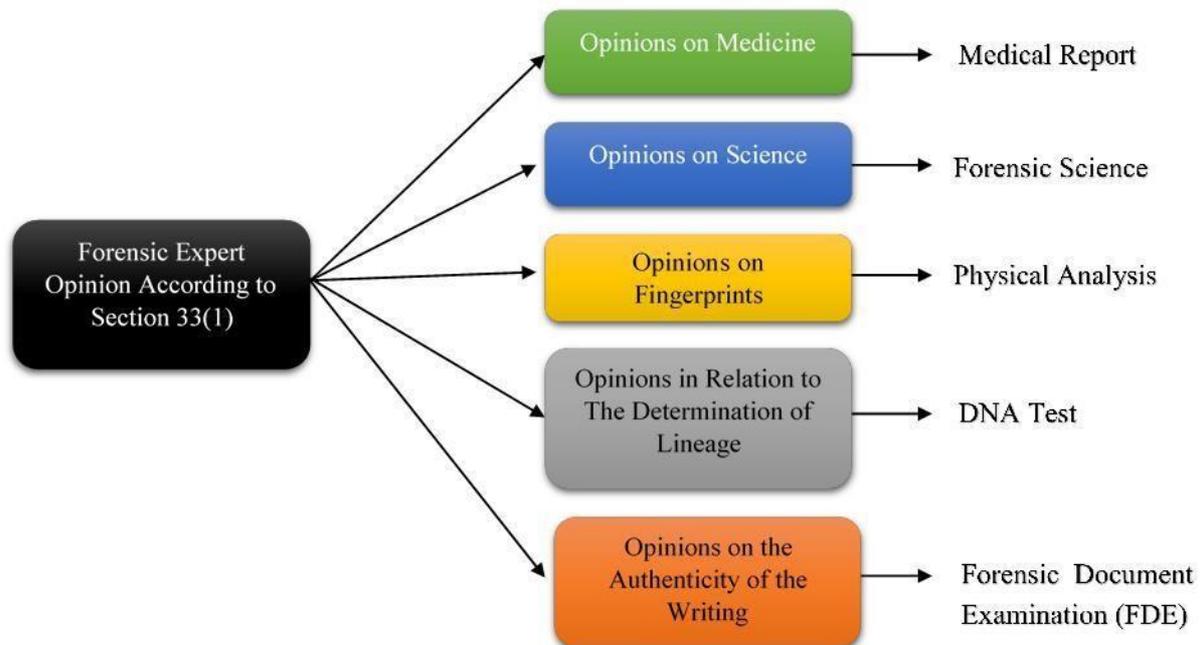


Figure 3 highlights, it is need to integrate expert opinion and forensic science. This is because, the field of forensic science falls under the category of science provided for in section 49, since forensic science is a scientific discipline. Therefore, cases involving scientific evidence should be made comprehensive by debating the credibility of the expert who supplies the scientific evidence. Not only that, the expert's opinion also is based on their high level of professional experience (Wan Abdul Fattah, 2018).

However, Section 33 (1) does not provide details on the conditions, criteria, or qualifications that enable a forensic scientist to be allowed to testify as an expert. Apart from Section 33 (1), forensic experts can also be admitted to the syariah court through Sections 194 (1) and (2) in the same act, as used by the keningau sabah syariah high court judge in the case of the *Pendakwa Syarie Sabah V. Rosli Bin Abdul Japar* ([1428h] Jhxxiii/Ii). If the forensic expert acts under section 194, they are not subject to the conditions of the expert witness as they only need to submit a report on the results of the analysis they have undertaken, without having to appear in court. However, if the court orders them to come to court and elaborate on their report, they will be subject to the eligibility requirements under Section 33 (1).

The researchers also refer to Section 89, 119–129 Of The Syariah Court (Negeri Sembilan) evidence enactment 2003 to show that the law stipulates the credibility, qualifications and expertise of forensic experts must be ascertained before they give evidence in court. According to Mccarthy And Nicdaeid (2018), the forensic expert should be evaluated according to two aspects, namely their depth of knowledge of the field in question and their length of experience in that field. Furthermore, the credibility of forensic experts can be assessed according to their academic qualifications, their confidence when answering questions posed by lawyers or judges, their attitudes and behaviors, and their status as government employees (Mccarthy and Nicdaeid, 2018).

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 law as mentioned above. This is because, the researchers think that, it is important to apply the scientific evidence as such forensic science method 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 need to expose this new form of evidence like this to help them dealing a case in court.

4.3 The Admissibility of Documentary Evidence Via Forensic Science Method Under Malaysian Syariah Court

In general, the forensic science method consists of the application of scientific knowledge and have been used to address legal issues and problems for both individuals and society (Min Shen & Duarte Nuno, 2016). According to Syazwan *Et Al.*, (2019), the majority of syarie judges in malaysia are not yet ready to fully accept forensic evidence in a court proceeding. 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* ([1428h] Jhxxiii/Ii) as one of the earlier cases related to the use of forensic science method in documentary evidence under malaysian syariah courts. In this case, the accused, rosli bin abdul japar, was called to defend himself against the charge of committing adultery and producing a child therefrom. Drawing on scientific tests and expert evidence provided by chemists (Deoxyribonucleic Acid, DNA Test Report), Encik Mohd Izuan Othman, the Sabah State Syarie Prosecutor, stated that there was a strong *Qarinah* linking the accused with the victim to the point of producing a child out of wedlock.

In this case also, rosli bin abdul japar was accused of having illicit intercourse with the pure daughter of Muhammad until she gave birth to a son named Hasmawi Bin Abdullah. However, the punishment of *Hadd* could not be imposed on them just by considering the views of experts, because the practice in malaysia is to refer crimes of adultery to the punishment of takzir. This is because, according to section 86 (1) of the syariah court evidence enactment (State Of Sabah) 1992, "Evidence In Cases of adultery carrying hudud punishment is not acceptable unless it is witnessed by four men". The DNA test results requested by the defense (Rosli) From different chemists failed to be presented in court. As the results of the prosecution's Dna Test (Pure) were not challenged, the court was satisfied with the results of the single dna test submitted by Pendakwa Syarie Negeri Sabah.

The defense in this case argued that the Dna Expert's Testimony Was Unacceptable As It Was Contrary To The Provisions Of Section 86 (1) of the Syariah Court Evidence Enactment (State Of Sabah) 1992. However, the judge ruled that the burden of proof in section 86 (1) did not apply in this case. This was because the punishment that would have been imposed if the accused had been convicted would not be a *hudud* punishment but only a *takzir* punishment. Therefore, the syar'ie prosecutor was not bound to bring four male witnesses. In this case, expert scientific evidence through dna testing was the most appropriate way to prove that the offense of illegal intercourse has been committed by the accused, since the elements of proof by pledge (confession) and syahadah (testimony) could not be undertaken. *Qarinah* in this case could be accepted as the sole evidence as the defense brought no other evidence to oppose it.

Keningau Sabah Syariah High Court judges accepted this scientific evidence through dna analysis by referring to section 86 (1) of the syariah court evidence enactment (state of Sabah) 1992. Furthermore, sections 190 (1) and (2) of the syariah criminal procedure enactment (state of Sabah) 1993, now known as the syariah criminal procedure enactment (state of sabah) 2004, indirectly recognize scientific evidence as suitable for application in syariah courts.

The researcher noted that, there is not many cases reported under syariah court due to the fact, the syariah law practitioners are less exposed to case related to it. This is because, generally the jurisdiction of the syariah courts is quite limited compared to that of civil courts as they start to accept the evidence in document's form 1950s until today. However, the passage of time that requires jurisdiction in the syariah court needs to be expanded like a civil court. According to Wan Abdul Fattah (2020), legal practitioners in syariah courts do not reject scientific evidence; rather, they are rarely exposed to cases related to it. From this findings, the researchers think that the use of forensic science method in the syariah courts also should be brought to the attention of syariah law

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practitioners in terms of standard operating procedure (sop) and its implementation when using this kind of method of proof.

5. Conclusion

In conclusion, islam allows the use of forensic science methods in a legal matter based on the provisions from the holy quran and hadith. This is because these two kinds of sources allocated that, it needs to apply forensic science as such document analysis and official stamps in order to make sure the authenticity of the document. In addition, this study refers to the provisions of section 49 (that discuss on primary evidence) of the syariah court evidence (federal territories) act 1997 [act 561], highlighting that medical report and chemical report, for example, are two of the forensic science method categorized in this section. Not only that, this evidence should be strengthened by experts in the field (*al-ra'yu al-khabir*), as provided in section 33 of the syariah court evidence (Federal Territories) Act 1997 [Act 561]. This is because, it is important for the syariah lawyer to test the credibility of the witness, by way of examination in chief, cross and re-examination. Finally, the researchers discovered a reported case such as *Pendakwa Syarie Sabah V. Rosli Bin Abdul Japar* ([1428h] Jhxxiii/Ii), Which Indirectly

Shows that syariah courts admit this kind of proof method. It is aspiring that, this study will be a reference to the future researchers, judges, legal practitioners, academicians and the public in Malaysia.

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