

CHAPTER 5

DISCUSSION AND CONCLUSION

5.1 Introduction

This chapter summarises and discusses the findings, thus details the implications of study. Section 5.2 summarises all the findings according to their objectives followed by the discussions of findings from all the three objectives. This chapter also provides for the implication of the study in sections 5.3. The suggestion of study has been added for future research in section 5.4 followed by conclusion in section 5.5.

5.2 Summary and Discussion of Findings

5.2.1 Summary and Discussion (Research Objective 1)

The first research question of this study is to identify the forms of document forgery that happened in Syariah courts based on decided cases. To answer this, the researcher has conducted analysis over the few selected cases involving the act of forgery relating to documents. The data were obtained from 14 cases from the following sources; Jurnal Hukum (1), Syariah Law Report (7), Malayan Law Journal (3), Current Law Journal (Sya)(2), Malayan Law Journal (Unreported)(1). These data were found through keyword search of the terms 'forgery', 'document forgery', 'forgery in document' and 'forgery in Syariah case'. The results of this study reveal that the forms of forgery in Syariah court cases include cases relating to the process of marriage and polygamy and those involving distribution or division of property.

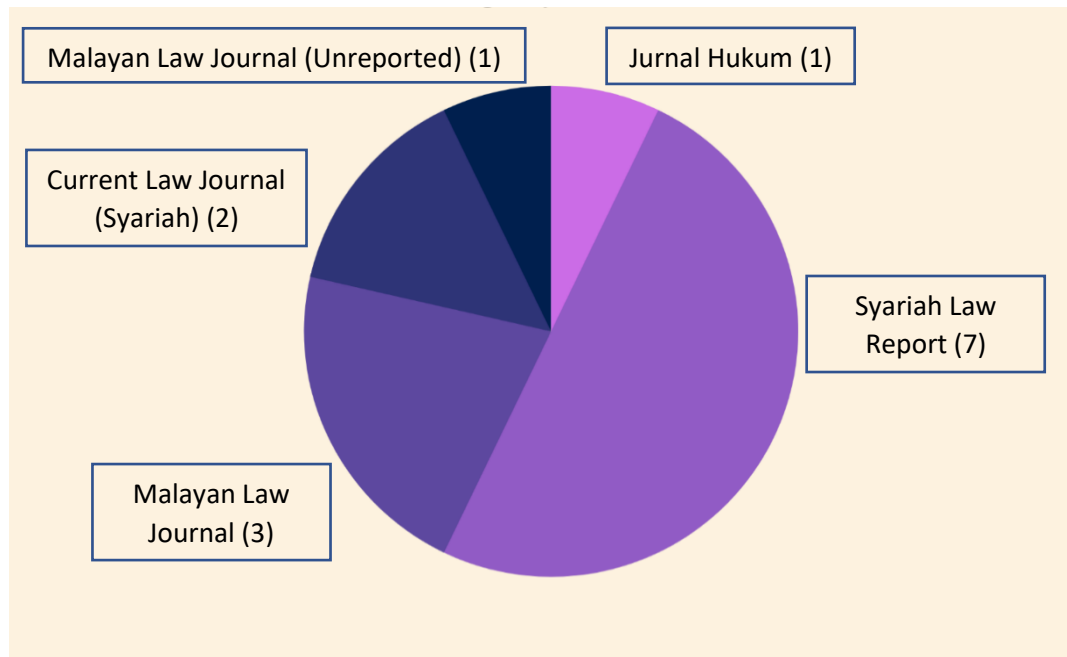


Figure 5.1: Cases of Forgery in Documents in Syariah court cases

In analyzing the data from these 14 cases, two themes emerged which will be discussed in this section. The themes are divided as follows. The first theme is the cases involving marriage or polygamy while the second theme is the cases involving the distribution of property. Based on the forms of forgeries identified in these cases, it can be observed that the courts in giving decision will decide the status of a questioned document as to whether it is genuine or not. These cases were decided according to the evidences presented in courts and the wisdom of the judges. Alternatively, the court may consider the opinions and evidence from the expert in deciding those cases in order to improve the judicial process in one way or another. For example, looking at the practice in civil courts, the judge in the case of **Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34** stated that it is not proper to attempt making any conclusion on the genuineness of a signature in a document by comparing two similar handwriting without resorting to the opinion of a handwriting expert who is specialized in this field.

Based on the results, there are many circumstances and forms of forgery happened in Syariah court cases. For instance, in the case of **Kholed bin Dinyati *lwn.* Ketua Pendakwa Syarie Melaka [2009] JH 29 BHG. 2 275**, the appellant obtained a marriage certificate by making a false declaration using the identity card of another person. In the case of **Syarie Prosecutor v Azlan Daniels bin Abdullah [2008] 2 ShLR 158**, the accused had made a false declaration that he was still a bachelor and was not previously married when requesting permission to contract the second marriage. **Pendakwa Syarie Kelantan *lwn.* Mat Rahim Saman dan satu lagi [2004] CLJ (Sya) 2004 513** is another case involving questioned documents where the prosecution had failed to show that the nikah documents as produced by the accused were tainted with forgery or obtained through forgery or improper means.

Among the forms of forgery include false declaration of identity, false declaration of being unmarried and forged marriage documents. The forms of document forgery identified in these cases suggested that it is crucial to have a decent mechanism to prevent fraudulent acts from happening. Notwithstanding the fact that in the modern office, the electronically mailed document is of growing importance, the traditional document in the form of paper still has its place, and thousands of different kinds are used for documentation purposes. In fact, the threat of illegal document forgery exists and will always exist (Pfefferli, 2000). The discovery of various forms of forgery in documents proves that forgery of documents could easily happen in many ways. Hence, the examination of questioned document can serve as a good tool to prevent the increase of document forgeries.

The cases of **Abd Halim bin Md Hashim v Azila bt Ramli @ Ismail [2017] 2 ShLR 57**, **Rosniza bt Mustaffa v Abu Bakar bin Dawam [2013] 4 ShLR 28** and **Norazimah bt Man v Mohd Hamdan bin Ismail [2013] 3 ShLR 45** showed how the non-

fulfillment of conditions in marriage can render a marriage certificate fake and invalid. In these three cases, the fifth pillar of marriage which is the presence of *wali* has not been fulfilled and thus the marriages are deemed to be invalid.

These results mirrored the previous research carried out by Mohd Zahiruddin Fahmi (2015) who examined the non-compliance of marriage application procedure among the Muslims in Wilayah Persekutuan Kuala Lumpur Syariah Court. Similarly, a study by Karim and Rauf (2020) stated that among the factors that lead to unauthorized marriage include polygamy and complicated marriage procedure. The findings of these two studies indicated that there is a high risk that documents are being fabricated especially within the marriage and polygamy application.

The study conducted by W. A. F. W. Ismail et al. (2015) used survey to identify the concept of document forgery from *fiqh* perspective. Meanwhile, the current study views the forms of forgery from court's perspective particularly based on decided Syariah cases. In accordance with the present results, previous studies have shown that signature forgeries and factual alteration of medical certificates are the most prevalent forms of document falsification (W. A. F. W. Ismail, 2017). Hence, the present study contributes more perspectives and insights into the issue of forgery involving document.

These days, there are many types of document being fabricated including business records, checks, financial instruments, property records, insurance claims passport and college transcripts. More precisely, all documents are subject to forgery. It is apparent from these findings that among the forms of document forgery which happened in Syariah courts are those relating to marriage and polygamy matters. The findings provided further proof that there are many marriage application which are not in compliance with the procedure and rules of the Syariah courts. Based on the past studies, a possible explanation of such might be due to the failure and refusal to comply with

procedural rules and law during marriage or polygamy process (Karim & Rauf, 2020; Mohd Zahiruddin Fahmi, 2015).

Besides, the results showed that forgery of documents happened during the disposal of property and estate especially those involving *faraid*, *waqf*, *hibah* and division of matrimonial property. For example, in the case of **AHMG v AGMG & Ors [2019] 3 ShLR 1**, the validity of Form 14A in a gift or *hibah* transaction was challenged due to the alleged forgery of the deceased's fingerprints in the document. This case showed that one of the ways in which forgery could happen is through the forged fingerprints on the document.

In the case of **Sulaiman bin Ahmad & Ors (beneficiaries for the estate of the deceased, Jemain bin Mohamed ½ portion and beneficiaries for the estate of the deceased, Kechot bin Mohamed ½ portion held by Zabidah bt Sembob as administratrix and trustee) v Jemain bin Mohamed & Ors [2020] 11 MLJ 616**, the plaintiff applied to the court to declare that the transfer of the land to the third defendant is null and void on account that the title of the land was acquired through fraud or forgery and/or through a void instrument.

The case of **Mohd Salim bin Said & Ors v Tang Pheng Kee & Anor and another appeal [2014] 3 MLJ 504** involved the fraudulent transfer of three pieces of land owned due to the allegation that the power of attorney (PA) and the memorandums of transfer were forged. The forgery of PA and the memorandums of transfer is not a recent issue. These issues have been reported in many cases in Malaysia (Ainul Jaria, 2008; Mat, Nazri, Fahmi, Ismail, & Smith, 2013). For instances, **Letchumanan Chettiar Alagappan (as executor to Sl Alameloo Achi Alias Sona Lena Alameloo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697**, **R. Thangaratnam d/o Vythilingam v Vinayagamoorthy a/l Rajaratnam and Others**

[2008] 3 MLJ 61 and **Tan Ying Hong v Tan Sian San & Ors** [2010] 2 MLJ 1. The forgery of PA is mainly due to the fact that any PA ought to be registered at the High Court first before it could be registered at land office to become valid and enforceable (Harun et al., 2015). Moreover, the validity of PA will not be disputed as long as there is an official seal of the High Court affixed to it. The registering authority is not trained to detect any defects on the instrument and will simply register the dealing presented (M. Ismail, 2011). A possible explanation for this is associated with the limited power of the Registrar. His duties are limited to quality checking and auditing whether an instrument is fit for registration (Zakariah, Samsudin, & Ngadiman, 2020).

The case of **Zainuddin bin Annuar v. Khadijah bte A Hijazi** [2012] MLJU 101 showed how the validity of the faraid certificate is disputed due to the absence of seal from Syariah court. This shows how an official certificate produced by the court could be tampered and the authority would only questioned the authenticity of the document through its physical defect. In the case of **Shariffa Zainab bt Syed Wadzid Ali v Ismail Fekri bin Ishak** [2009] 2 ShLR 101, the contract offer document tendered by the respondent is found to have been forged after it was inspected by Jabatan Pentadbiran Bahagian Pengurusan Perolehan, Dewan Bandaraya Kuala Lumpur. The document was falsified since the said department has never issued such document in the first place. The document was not primarily existed and only created by the forger for personal gain.

Besides, in the case of **Ahmad bin Abd Majeed lwn. Habibah bte Abdul Majid dan satu lagi** [2007] 3 MLJ 418, the court held that since defendant named the brother of the deceased as the heir instead of the plaintiff, this was fraud deliberately committed by the defendant over the rights of the plaintiff on the deceased estate. Based on the facts of this case, the documents contained false information and the Land

Administrator has given the order based on the false documents. This case implies the serious implication of fraud and forgery where the legal heir was denied his rights.

In the case of **Majlis Agama Islam Negeri Pulau Pinang v Abdul Latiff bin Hassan (as executor of the estate of Hj Mohammad bin Hj Abdul Rashid, deceased) & Anor [2018] 2 ShLR 15**, the defendants have failed to satisfy the court that the deed poll and indenture granted for the *waqf* property were not genuine documents. The plaintiff on the other hand had successfully proved that the said documents were validly made and executed. The court held in favour of the plaintiff. In this case, the evidence presented plays significant role in the judge's decision. It primarily affects the court decision. The examination conducted by forensic document examiners can help to determine whether the documents are valid and can be served as a form of evidence in court.

In the case of **Mst Kulsoom Bibi and Anor. v. Muhammad Arif & Ors [2006] 1 CLJ (Sya) 262**, the Supreme Court held that the gift-deed executed by the deceased in favour of his brothers (the defendants) was forged and fictitious and the very transaction of gift in original has not been proved by the so-called donees. Therefore, the gift becomes non-existent and nullified, regardless of whether it is made during *maradh al-maut*. This case indicates that the instrument of transfer such as a gift-deed is also vulnerable and open to fabrication. While this is true, the researcher believes that it is pertinent to call upon a forensic document examiner to determine the real maker of the document and to resolve the issue through scientific analysis. In today's digital age, forensic document examiners can delve into the apparent and invisible traces on a document to extract details that can help confirm its validity and give critical information for the investigation.

In sum, it can be observed from the facts of these cases that the use of expert opinion are yet to be widely applied. There has been inadequate attention given to the issue of forgery in document despite of serious consequences it entails. This finding affirms the study conducted by Nasri and Md Noor (2020b) where the application of evidences in the form of expert opinion particularly in Syariah courts is considered as restricted and inadequate. A study carried out by Guerreiro and Santos (2017) claimed that the courts are currently dealing with a great number of forgery cases involving documents. The study also emphasized the need to combat this issue with the help of expert in document analysis i.e. forensic document examiner.

It is rather inappropriate to make a strong generalization from the analysis of the data here since the sample size implemented in this study was small and limited. Nevertheless, the general finding of this study imply that forgery in document is one serious issue that requires appropriate solution. It is not just an issue of non-compliance with the procedural rules but also a form of deprivation against the rights of others. The implications of forgery are far-reaching than the way it was addressed and should not be taken lightly. The lack of use of scientific-based or forensic evidence especially the underutilized of forensic document examination may impair the judgment in courts. These findings proved that there is necessity to develop a clear guideline and mechanism to deal with the forgery issue especially forgery of documents. The findings have answered the first research question regarding the forms of document forgery in Syariah courts' cases.

5.2.2 Summary and Discussion (Research Objective 2)

This section of the discussion revolves around the principles involved and applied by forensic document examiners in forensic document examination. Previously,

background of the field of forensic document examination has been described in the literature review section in Chapter 2. The second objective of this study and basically the main topic discussed in this section is the main principles applied in forensic document examination. This section present the important findings of analysis conducted over handwriting and signature examination, followed by identification of printing process, analysis of ink, analysis of paper and other examinations performed by the forensic document examiners.

The findings from this study suggest that the principles used in forensic document examination are various in nature and different according to the types of analysis and examinations conducted by the examiner. Questioned document examination is a well-known and crucial field in forensic science. Basically, it is an important analysis or examination conducted by the expert in order to identify the genuineness of questioned document.

There are various classification or types of examination addressed by the scholars including examination of handwriting, signature, alteration, typewriting, identification of printing process, examination of indentation, examination of charred documents, analysis of ink, analysis of paper and consultancy services related to document examination. However, for the purpose of this study, several types of examination are chosen as the center of discussion namely handwriting and signature examination, identification of printing process, ink analysis and paper analysis. Other examinations performed by the forensic document examiners were also discussed but only the surface and not in depth.

The results showed that the most common examination of document in the field of forensic document examination is handwriting and signature examination. This is mainly due to the fact that the key element of forensic document examination focuses

on handwriting. In handwriting examination, there are several major principles established by practitioners and forensic document examiners. Different scholars have different approaches in describing those principles. For instance, in the study carried out by Thompson et al. (2018), the authors explained that “everyone's handwriting was considered to be unique, and hence, a sample of a given individual's handwriting (if sufficiently extensive) was presumed to be distinguishable from the handwriting of any other individual.” The explanation of the principle is centered on the individuality and uniqueness of handwriting of an individual which becomes the ground for the examiner to conduct analysis and comparison.

Other than that, Baxter (1980) in his study stated that “in the examination of handwriting, one must be ever aware of two essential axioms, (i) that no writer ever exactly replicates a previous writing, thus, each writing is unique, and (ii) that each writing is produced by one person at one time and thus, is again unique”. Baxter’s explanation described not only the individuality and uniqueness of writing but also included the principle that there exists variation in each writing even if it is produced by the same person. The principle of variation is that no two writings by the same person are identical.

The fundamental principles of forensic document examination stated by J. A. Lewis (2014) is more comprehensive where it includes not only the fact that handwriting is individual and each person has natural variation in his or her handwriting, but also mentioned that each person has a skill level that he or she generally cannot surpass.

The principles identified from a number of past studies including the abovementioned excerpts can be encapsulated into three fundamental principles (Desai & Kalyan, 2013; Ellen et al., 2018; Koppenhaver, 2007). First, no two people write

exactly alike. This means that there is no two people share the same combination of handwriting characteristics and there is element of individuality in every handwriting. Second, all writing contains natural variation. Even if two handwritings are produced by the same person, the handwritings would not be identical and contain variation. Third, no writer can immediately exceed his or her skill level of writing.

The next part of the result is the general procedure of handwriting examination which begins with analysis of document, followed by comparison of the disputed document with standard sample, evaluation and finally end with verification. The analysis is performed by the qualified examiner adhering to the policy to achieve quality control and the result is subject evaluation by another qualified examiner for quality assurance.

The results shows that there are many factors that may influence the development of one's handwriting including physical and emotional conditions. Depression, drug abuse, physical illness can all affect one's handwriting (Houck & Siegel, 2015). People develop individual styles of writing as a result of differences in education, culture, and/or personal preference. However, a general statement about overall style is usually not enough to discriminate between the writing of different people. Account must usually be taken of the details of construction of individual letters (Ansell, 1979).

Turning now to the next type of examination which is identification of printing process, forensic document examiner needs to understand how the document may have been produced. It is true that the original document is always the best evidence for examination to provide a meaningful conclusion (Leaver, 2006). Nevertheless, examination can still be conducted on photocopies of document through identification of the printing process. The finding reveals that different printing processes applied different principles. It is based on the general principles that the existence of an adequate

combination of class and individual characteristics exceeding the limits of an accidental coincidence (Gupta, 1966).

Corzo (2018) in his work stated among the printing processes available include inkjet printing, toner printing and intaglio printing. Meanwhile, Ellen et al. (2018) described the identification of printing methods for letterpress, lithography, gravure and matrix methods of printing. In another study, Blayo and Pineaux (2005) explained the basics of a number of printing processes namely offset lithography, flexography, gravure, screen printing, ink jet printing and electrophotography.

From the findings, the types of printing process identified can be divided into two groups based on the methods of image transfer that is either directly or indirectly. The picture is transferred directly from the image carrier to the substrate in direct printing. Gravure, flexography, screen printing, and letterpress printing are all types of direct printing. The image is transferred from the image carrier to the blanket cylinder and then to the substrate in indirect or offset printing. Lithography is an example of indirect or offset printing which is currently the dominant printing technology (Jacobson, 2019).

Another type of examination carried out by forensic document examiner is ink analysis. Generally, people with normal vision can certainly match the color of an ink. In the world of inks, however, having the same color does not always entail having the same ink. Ink analysis involves determining the composition of an ink sample as well as the chemical changes that occur as it dries. Almost all inks are made by combining several dyes and pigments to achieve the desired hue. Many differently coloured dyes and pigments can be combined to obtain essentially the same colour (Gaensslen et al., 2008).

Chemical analysis can be used by forensic scientists to examine the dyes or pigments in a specific ink sample. In this method of analysis, inks that appear to be the

same yet have different compositions must be from different writing instruments (Harris & Lee, 2019). The production dates, geographic distribution, and predominance of an ink can all be ascertained after the formulation has been verified. (Jones & McClelland, 2013). As stated in the findings, there are considerable differences between the ink used in printing and those employed for writing. Thus, the types of ink used are different according to the types of writing or printing instruments. For instance, fountain pen inks contain a complex mixture of chemical compounds including colorants and various additives. Ballpoint pen inks consist of a very complex mixture of dyes, pigments, solvents, resins, viscosity adjustors and ball lubricants. For printing inks, they are generally oil-based and have a high inorganic content (Ellen et al., 2018).

By understanding the composition of the inks, it is easier for forensic document examiners to characterize and compare the inks. Although it is impossible to match an ink sample to a specific writing instrument, it is conceivable to demonstrate that a suspect pen, for example, might be part of a population of pens that could have produced a document, or that it could not have written a document at all. (Houck & Siegel, 2015).

Since most documents are based on paper, it is important for the forensic document examiners to understand the components and characteristics of paper for its analysis and identification. The methods of paper manufacturing give rise to differences in end product that can be tested in laboratory. This study found that there are several techniques adopted by the forensic document examiners in conducting paper analysis. Among the techniques include energy-dispersive X-ray fluorescence (EDXRF) spectrometry, mass spectroscopy, Raman spectroscopy, fourier transform infrared (FTIR) analysis, and inductively coupled plasma mass spectrometry (ICP-MS). Besides, forensic experts also carried out examination of the security features of the paper is by

looking for the watermark, sensitizing, visible colored fibers, invisible fluorescent fibers and security threads.

The current study indicates that forensic document examination has its own role in combating the issue of document forgery in Syariah courts. The finding shows that the principles established in the field of questioned document or forensic document examination and relied upon by the forensic document examiners play significant roles in uncovering forged documents. It is important to note that the work of the forensic document examiners is established on sound principles (Nickell, 1996). In forensic science, the primary idea is to compare whatever is unknown or questioned with known standards in order to make an identification. In fingerprinting, for example, a latent print discovered at the scene of a crime is matched to fingerprints on file or recently acquired from suspects. The same is obvious when it comes to handwriting analysis. To determine a suspect's guilt or innocence, any questioned writing is compared to known examples of his or her handwriting or printing.

Some document examinations can be performed without causing harm to the specimen under test, while others require the removal and destruction of a small portion of the specimen. Thus, non-destructive techniques are preferred over chemical analysis or destructive tests. Each analysis of a questioned document begins with simple optical methods that allow observations in the ultraviolet (UV), visible (natural daylight, filtered or unfiltered artificial light), or near infrared (IR) parts of the electromagnetic spectrum. These methods examine the color and brightness of ink on paper, as well as security fibres in paper, and aid in the identification of obliterated writings, exposing alterations, erasures, and substitutions, and distinguishing between inks that appear to be of the same color (Aginsky, 2000).

These results are seem to be consistent with those of Baharuddin (2017) who found that the application of forensic science is appropriate to be applied in evidencing the cases, both criminal and mal. It is beyond the scope of this study to further discuss the other topics in forensic science field such as DNA profiling, ballistics and anthropology. These findings may be somewhat limited to the topic of forensic document examination only. Hence, future studies should be conducted in other branches of forensic science to have a comprehensive understanding on forensic evidences.

5.2.3 Summary and Discussion (Research Objective 3)

As mentioned earlier, the key objective of the present study is to examine the application of forensic document examination in Syariah courts. The findings of the third research question can be summed up into several points. First and foremost, the findings showed that the application of forensic document examination can be seen in light of the admissibility of expert opinion in Syariah courts. This means that forensic document examination is applicable and admissible in Syariah court since it falls under the category of expert opinion. Islamic law recognized expert opinion as one of the means of proof based on the arguments that will be discussed below. Secondly, this study found that expert opinion is admissible as *qarīnah* according to section 33 of Syariah Court Evidence (Federal Territories) Act 1997 [Act 561], hence, forensic evidence falls under the scope of *qarīnah* or circumstantial evidence.

Other than that, what constitute as expert opinions may include various definitions and meaning based on Syariah cases analysed in this study. Besides, the results indicated that the application of expert opinion from civil court is broader in term of its application compared to Syariah cases. There is also specific duties and responsibilities

that must be undertaken by the expert witnesses for them to provide independent, impartial, and unbiased evidence to the court.

The present study demonstrates a correlation between the use of forensic or scientific examination and their contribution in the court of justice. Undoubtedly, the principles identified in forensic document examination are applicable in Syariah court. This is in line with the finding of the study investigated by Baharuddin (2017) where the application of forensic evidence in accordance to the division of fiqh indicated that the role of forensic science in cases is not limited to criminal offences only, but also extends to the non-criminal cases. In other words, the application of forensic science is appropriate and practical to be applied in evidencing the cases, both criminal and civil. Thus, the use of forensic examination to inspect questioned documents particularly in Syariah courts is not impractical.

Forensic evidence in general is admissible in Islamic law of evidence within the ambit of expert opinion. The main argument of the ulama' for the acceptance of expert opinion in Islam is based on verse 43 in Surah Al-Nahl which indicated the need to inquire from a person who is skillful in a field or issue which we have no knowledge in. Since judges do not and are not expected to have the knowledge in every matter, it is only right for them to take help of experts in the matters outside of their expertise.

The validity of expert opinion is also derived from the story of Prophet Yusuf AS where he struggled to escape from the grip of the wife of al-Aziz resulting in his shirt got torn from the back. In such a case, a wise man from the woman's family claimed that the shirt being torn from the back was a sign of Prophet Yusuf's assertion being true (Haneef, 2007; Othman & Hisam, 1996). The man's skill is similar to that of a forensic expert today. This story constituted an authority of opinion from skilled person which is similar to forensic expert in our age. Furthermore, the Prophet SAW's practice of

determining paternity of a boy based on bedding (*firash*) between his parents exemplifies the application of expert opinion (Othman & Hisam, 1996).

The recognition of expert opinion has been adopted by the four Caliphs (Khulafa' Ar-Rasyidin). For instance, during Umar's time, there was a woman who accused a man for committing fornication with her. 'Umar had consulted 'Ali to see if the fabric was smeared with semen, as alleged by the woman. 'Ali then soaked the remnants of the stains in boiling hot water, which turned them solid white. It has been proven that the stain is egg white and not semen (Haneef, 2007; Nawi, 2002). This decision serves as a strong basis for the admissibility of expert opinion and forensic evidence into the Islamic judicial system.

From the findings and previous discussion, there is no doubt that forensic document examination is beneficial to the justice system. Issue of document forgery in Syariah court can be resolved by forensic means. To bring perspectives, under the common law, evidence by the expert are considered as circumstantial in nature. The circumstantial element, on the other hand, is accepted as credible proof. In other words, evidence derived from conclusions drawn from scientific examination results is referred to as circumstantial inference and is discussed under the heading of circumstantial evidence.

Evidence gathered from the experts would likewise come under the category of circumstantial evidence, or *al-qarīnah*, according to Islamic evidence law. This is because a court can only infer the presence of the fact in question, such as the identification of the perpetrator's signature or handwriting, but this does not prove the fact explicitly, as in the case of DNA profiling data. In fact, most authorities, particularly modern legal scholars, consider forensic evidence to be a form of *qarīnah* (Haneef, 2006, 2007). This is in line with the provision provided under section under

section 33 of Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] which deals with expert opinion in regard to matters 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 courts may rely and infer the existence of fact in issue based on the results of analysis conducted by the document examiner which are expressed through reports and oral testimony.

The admissibility of *al-qarīnah* can be gleaned by references to several Quranic verses and the practice of the Prophet SAW and the companions. An example of the acknowledgement of *qarīnah* in the Qur'an can be traced in Surah Yusuf, verse 18 whereby Allah says “*And they brought his shirt, stained with false blood. He responded, “No! Your souls must have tempted you to do something ‘evil’. So ‘I can only endure with’ beautiful patience! It is Allah’s help that I seek to bear your claims”*”. The association of this verse with the issue of *qarīnah* can be understood by the fact that regardless the shirt was stained with blood, it was not torn to the extent that it should have been. If Prophet Yusuf AS has really been devoured by wolves, as his brothers wrongly claimed, tooth or claw marks should have been left on his clothes. The fact that the shirt was still in good shape was a *qarīnah*, indicating that Prophet Yusuf AS was still alive at the time (Zaydān, 2007).

The Prophet SAW had once decided the paternity of someone on the basis of *qiyāfah*. He is also said to have sentenced a woman to be publicly flogged after discovering she was pregnant while still unmarried. The companions of Prophet Muhammad SAW had followed the same path. For instance, Caliph ‘Umar convicted a person based on the odour of wine exuded from his mouth. (Haneef, 2006). Apparently, this situation is similar to the use of breathalyzer in today’s examination conducted by police officer.

Another important finding was that the interpretation of expert opinion may include various meanings. For example, in the case of **Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor [2012] 1 ShLR 23**, the High Court ruled that the ruling issued by Syariah Advisory Council (SAC) constitutes as an expert opinion in respect of Islamic finance matters and it derives its binding legal effect from the impugned provisions enacted pursuant to the jurisdiction provided under the Federal Constitution.

In the case of **Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2010] 2 ShLR**, the three expert witnesses involved are the Director General of the Syariah Judicial Department Malaysia, the Rector of the International Islamic University of Malaysia and the Dean of the International Institute of Islamic Thought and Civilisation. In the case of **Fathul Bari Mat Jahya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors [2012] 4 CLJ 717**, among the expert witnesses include the Syariah Legal Adviser at the Attorney General's Chambers, the Mufti of Negeri Sembilan and the Chairman for 'Aqidah (Belief), Islamic Religious Council of Negeri Sembilan. The court agreed that all of them are all worthy expert witnesses on Islam. In these cases, the court looked at the expert witness's education, training, experience, memberships, connections, publications, and reputation to determine his reliability.

The role of expert witness and its importance can be seen in several decided cases. For example, in the case of **Shahnaz bt Majid v Dato' Seri Mahmud Abu Bekir Taib [2018] 3 ShLR**, the court satisfied that the expert witness, a registered chartered accountant in this case was competent and the statements given are acceptable and relevant since the witness was expertise on the related field. The case of **Pendakwa Syarie Negeri Sabah Iwn. Rosli bin Abdul Japar [2007] JH 23/2 237** is an important land mark case where the court convicted the accused based on the evidences in the

form of DNA evidence that has been tendered by the prosecution in proving the offence. Looking at the case of **Indastri bin Saion v Sharifalaili bt Hussin @ Mukhtar [2018] 2 ShLR 70**, the court could not accept medical report as documentary evidence which supported the defendant's claim because the defendant did not call the document maker and/or the expert in the field to verify it. It can be inferred from the above decided cases that even though the opinion of an expert is not binding on the court, the role of expert witness is crucial in giving relevant opinions in court which eventually affect the decision given by the judges.

Besides, the results indicated that the application of expert opinion from civil court is broader in term of its application compared to Syariah cases. This is in line with the previous study evaluating expert opinion whereby it has been observed that the use of evidences in the form of expert opinion in Syariah court cases is limited (Nasri & Md Noor, 2020b).

The admissibility of expert opinion evidence is provided under section 45 of the Evidence Act 1950. Third-party opinions, while normally inadmissible, become significant when there are issues that require the expertise of an expert for observation, analysis, or description. Expert testimony is only allowed in court to provide scientific information that is likely to be outside of a judge's expertise and knowledge (S Augustine Paul, 2010). In certain cases, the court has the authority to exclude expert testimony, such as when dealing with matters that are for the judge to decide or when the judge can reach his or her own judgment based on the facts of the case without the assistance of an expert. There is also specific duties and responsibilities that must be undertaken by the expert witnesses for them to provide independent, impartial, and unbiased evidence to the court (Sutherland, 2009). If an expert has not proved his

independence or has not met his overriding duty to the court, the court may dismiss the testimony.

The actual role of the expert is to present all of the documents to the court, together with the reasoning that led him to that conclusion, so that the court, which is not an expert, can reach its own judgment based on its own observations of those materials. An expert witness is subject to examination and cross examination in court. No reliance can be placed on the opinion without examining the expert as a witness (Parakh, 2011).

The civil court cases are analysed in this study to understand the application of expert evidence from civil court perspective. The association of law and science in the evidentiary context can be seen from the case of **Daubert v Merrell Dow Pharmaceuticals, Inc. [1993] 509 US 579**. In this case, the court held that the judges are gatekeepers who must evaluate the methodological bases of proffered scientific evidence. In other words, it is incumbent upon the judges to understand the basic scientific methods and statistics (Faigman, 2006). The case of **National Justice Compania Naviera SA v Prudential Assurance Company Limited (No.1) [1993] F.S.R. 563** or “**Ikarian Reefer**” case outlined the duties and responsibilities of expert witnesses in civil cases. One of the duties is to provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise.

In this study, references have been made to court cases in order to understand further the category of expert evidence on handwriting under section 45 of the Evidence Act 1950. The case of **State (Delhi Administration) v Pali Ram AIR 1979 SC 14** showed that the judge should not decide in the matter of handwriting comparison. A prudent course is to obtain the opinion and assistance of an expert. In the case of **Syed Abu Bakar Bin Ahmad v PP [1948] 2 MLJ 19**, it was held that the case would only be properly concluded with the aid of expert evidence. The evidentiary value of the

evidence of a handwriting expert can be seen in the case of **Public Prosecutor v Mohamed Kasim bin Yatim [1997] 1 MLJ 64**. The court held that it is settled law that evidence by a handwriting expert can never be conclusive. In the case of **Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61**, the court held that the opinion evidence of a handwriting expert must never be acted upon, unless substantially corroborated. In the case of **United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182**, the court held that the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written and cannot be relied upon. Therefore, these cases implied that the expert evidence on handwriting opinion requires corroboration and is unsafe to be relied upon independently.

The next part of findings is in regards to the qualifications of an expert. In the case of **Junaidi bin Abdullah v PP [1993] 3 MLJ 217**, the specialty of the skill required of an expert under section 45 would depend on the scientific nature and the complexity of the evidence sought to be proved. The more scientific and complex the subject matter, the more extensive and deeper will the court be required to enquire into the ascertainment of his qualification or experience in the particular field of art, trade or profession. In the case of **PP v Muhamed bin Sulaiman [1982] 2 MLJ 320**, it was held that while the expert must be 'skilled', he need not be so by special study, he may be so by experience. The case of **Dato Mokhtar bin Hashim v PP [1983] 2 MLJ** held that one can acquire expert knowledge in a particular sphere through repeated contact with it in the course of one's work notwithstanding that the expertise is derived from experience but not from a formal training. The court also held that the competency of an expert is a preliminary question and is one upon which, in practice, considerable laxity prevails. Though the expert must be "skilled", by special study or experience, the

fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

As evidenced by the aforementioned cases, it is imperative that the individual providing the opinion be "specially skilled" in the relevant field. To be appointed as an expert, one must have a professional certification, professional experience, particular study in the subject, special understanding of the field, or some observation in the field. Nonetheless, the expert may be qualified either by formal education or through experience. The person who introduces an expert witness bears the burden of proof.

The application of expert opinion can be seen in the recent case of **PP v Dato' Sri Mohd Najib Hj Abd Razak [2020] 8 CLJ 319**. In this case, initially, the defence brought in the expert document examiner to demonstrate the alleged several disputed documents. Nevertheless, the expert report was never adduced before the court. Therefore, the documents tendered were ruled as genuine since the report from the expert was never adduced before the court. It is apparent from this case that an expert evidence plays important role in determining the authenticity of document.

In the case of **Mohamed Nor v PP [1949] MLJ 231**, the court conceded that the Director of Chemistry could be considered a handwriting expert within the meaning of section 45 of the Evidence Ordinance. This case implied that when the opinion of an expert is sought under section 45 of the Evidence Act, the expert should give direct oral evidence. Mere submission of a report expressing himself cannot be admitted (Zafrullah, 2018).

Indeed, evidence by the expert has no binding effect on the judges. In other words, the judges are not required or conditioned to follow the opinion given by the experts. The expert simply provides an opinion, not a conclusion, because it is the role of the judge to do so. This is affirmed in the case of **Ong Chan Tow v R [1963] MLJ 160**,

where the court held that the experts cannot give evidence on matters which the court can decide by itself as otherwise they would tend to usurp the function of the court.

To clarify, it is not the intention of this research to merely claim that the application of forensic document examination would be the best methods or bring the best evidence in court. It is rather to highlight the fact that scientific examination is able to serve as a useful and beneficial methods of proving. In fact, it is undeniable that there are some shortcomings in term of its practice. Some of the opinions derived from techniques conducted by forensic document examiners are yet to be validated (Edmond, 2013). Nevertheless, the expertise of forensic analysis are always relevant since legal practitioners and judges tend to have lack technical and scientific proficiency. David L Faigman in his work claimed that judges who are scientifically illiterate pose a serious threat to the judiciary's power and legitimacy (Faigman, 2006).

The current study highlights and emphasized this issue by focusing on the application of forensic document examination in Syariah court. Hence, this finding suggests that one of the possible ways to cope the issue of forgery is by promoting and improving the practice of using expert witness in Syariah court cases.

When a judge is faced with a perplexing issue, he or she should seek advice from someone who is knowledgeable about the subject (Othman & Hisam, 1996). However, this comes with a condition that a judge should always exercise caution before accepting any opinion or advice. It is crucial to note that the proof in the form of *qarīnah* can be convincing at times and weak at others. To put it another way, not all *qarīnah* will be accepted by the court.

In the midst of Covid-19 pandemic and while the current study was conducted, interestingly, Department of Syariah Judiciary Malaysia has issued a practice direction regarding the acceptance of forensic evidence in Syariah courts' proceeding namely

Arahan Amalan No. 4 Tahun 2020 (Pengemukaan Bukti Forensik Dalam Prosiding di Mahkamah Syariah). Under this protocol, it has been agreed and confirmed that forensic evidences can be heard, considered, evaluated and accepted as one of the methods of proving in Syariah courts' proceeding.

Undeniably, this new rule will act as a cornerstone for Syariah courts to improve and enhance the application of forensic evidence. Nevertheless, detail explanation and clearer guideline are required to understand the extent of the use of forensic evidence in Syariah courts and eventually implementing them successfully. Having a clear procedure and guidelines are essential to bring uniformity to judicial operations in courts. For instance, when there is a detailed guideline provided in handling questioned document cases in Syariah court, it is easier for the legal practitioners to apply and follow and thus, reduce the risk of an unwanted event. Besides, training courses on the practical aspect of the procedure can increase understanding of the legal practitioners on technical aspects of forensic field. To achieve this, collaboration from Syariah practitioners and forensic experts are required to develop suitable procedure and ultimately execute such procedure successfully.

5.3 Implications of Study

The findings of the current study has significant implications towards society in general and Syariah judicial institution in particular. There are many adverse consequences if a fraudulent document is allowed to enter the court without question only because it is not the major issue in the case. Lacy (1953) in his work claimed that any document worth introducing deserves a thorough examination to confirm its authenticity. In fact, documentary evidence is often introduced to substantiate the main issue in trials. Hence, a thorough study on this field from Syariah perspective is essential

to have some insights into the process and procedure involving disputed or questioned document.

The results of this study show that one of the best ways to deal with the issue of document forgery is by ensuring that forensic document examination is ideally applied and utilized in Syariah legal system to authenticate any documentary evidence which are classified as questioned document. The idea is to solve any issue relating to the genuineness of documents by conducting scientific examination to verify the questioned document. The field of questioned document examination has developed over time due to the courts' needs to correctly interpret and resolve the questions relating to documents' genuineness, authorship and sources. Hence, the present study affirms the need to improve the application of forensic document examination in the light of expert opinion as one of the significant methods of proving.

From academic point of view, this study has added to the literature of academic discussion on the admissibility of documentary evidence and may act as a reference for future researchers, academicians and students. More importantly, this research has a great implications towards Syariah judicial institutions in the sense that it will assist Syarie judges and lawyers in dealing with forgery of documents through the application of forensic document examination and eventually reduces gaps between Islamic judiciary and forensic science field.

5.4 Suggestion for Future Research

With the advent of revolution in the field of information technology, opinions from the expert can be regarded as necessary to aid the courts in administration of justice. Therefore, realizing the importance of strengthening science to improve justice, the following solutions are suggested by this study in order to cater for the relevancy and

admissibility of expert evidence from forensic document examiners in trials at Syariah courts. This research suggests that comprehensive guidelines is provided to deal with the issue of document forgery using the proper equipment and eventually improve the reliability of documents as the most common form of evidence tendered in court. There should be an appropriate standard operating procedure (SOP) on the process and procedure of gathering and handling questioned document to conduct forensic document examination. Other than that, training courses can be held to expand the understanding of Syariah practitioners on the application of forensic evidence in Syariah courts. Since Syariah law enforcement officers as well as scientists and technicians in forensic labs, must rely on new technology and scientific advancements to efficiently identify, gather, and process evidence related to forgery activity, these recommendations must be taken into account seriously.

5.5 Conclusions

Forensic document examination is an evolving field of study where forensic scientists conduct researches continuously to develop the best techniques and methods in examining documents. In concise, this chapter has summarised and discussed the findings according to the objectives of this study. It can be deduced that the issue of forgery in documents is not a mere trivial but a significant one that needs to be addressed and prevented accordingly. This study has found the existence of various forms of document forgery which happened in Syariah court cases. This study respectfully argues that the principles in forensic document examination particularly and forensic science in general is indeed in sync with Syariah evidential principles. The relevancy and admissibility of forensic document examination in the eyes of Syariah principles have been proven and verified. It is also submitted that the application of forensic

document examination will become a handy tool for the Syariah court in arriving at an impartial decision. This is so as the report by the forensic document examiners could be used by the court to combat the issue of forgery in document.

By addressing this issue, this study suggests a practical solution by appraising the importance of consulting expert witness to obtain an opinion which the judges have no or less knowledge in it. From the findings, it appears that the time has come for the courts to value more and normalize seeking opinions from the expert in reaching a decision. In conclusion, the application of forensic document examination in Syariah courts is truly significant especially during the age where science is used in a wide variety of legal contexts. This study suggests more comprehensive researches are conducted in other fields of forensic science besides forensic document examination.

