

CHAPTER 1

INTRODUCTION

1.1 Introduction

Past research has shown that the use of forensic and scientific methods of proof has significantly played important roles in the administration of justice. It is important to ensure that any documents tendered as evidence in courts are genuine and authentic. Today, forgery of document is certainly a problem, and it has been spreading along with the growth of technology and science. Since most people greatly relied upon documents to fulfill their daily matters, there are various forms of fabrication and forgery of documents that may occur during those transactions. Despite the amount of studies on documentary evidence in Islamic law, minimal research attention has been given towards the application context of forensic document examination as a tool for examining questioned document in Syariah courts. Existing studies of documentary evidence are primarily focusing on its admissibility in Islamic law. By examining this topic using qualitative approaches, researchers, students and practitioners such as Syariah lawyers and judges can better understand the application of forensic document examination in Syariah courts in Malaysia and improvement can be made accordingly.

1.2 Background of the study

Documentary evidence or *al-kitābah* has become one of the frequently used methods of proof. Due to the fragile nature of documents, they can be easily modified, altered and fabricated by anyone through any means. Hence, one of the best ways to deal with this issue is by incorporating the elements of forensic science into 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 (Siegel & Saukko, 2012). A considerable amount of literature has been published on the long-existed connection between science and religion.

These studies found that there are many traces of forensic science which could be found in the manuscript of Shariah. Although modern-day forensic evidence has a strong basis in Islamic law, the application of forensic science in Shariah courts is still underdeveloped (Baharuddin et al., 2019). This study seeks to prove that the application of forensic document examination is as crucial as any other forensic evidences tendered in Syariah courts. Regardless of the fact that the current legal provision does provide for the scientific evidence to be accepted as evidence in court, in practice, unfortunately, the use of evidence in the form of expert opinion is very limited and requires improvement (Nasri & Md Noor, 2020b). This study argued that the forensic document examination as part of forensic evidence has significant roles in shaping the Islamic judicial system.

1.2.1 The Need to Authenticate Vulnerable Documents as Evidence

In Syariah Court, documents are considered as one of the most utilized form of evidence which assist Syarie judges in making decisions. Documentary evidence as a mean of proof plays important roles in the administration of justice (Arbouna, 1999). Among documents utilized in Syariah court include identity card, birth certificate, death certificate, marriage certificate, divorce certificate, wills, vehicle ownership grants and

many more. In this digital era, the documents are highly vulnerable to fraud and forgery. In order to ensure the authenticity of documents, questioned document examination or forensic document examination is one of the methods available to examine the genuineness of documents. Forensic document examiners may try to detect irregularities, inconsistencies or differences in a suspected document that could give lead to signs of forgery. Undoubtedly, forged documents have grave and far-reaching negative implications towards businesses, individuals and political entities. It is essential to utilize every possible way to deal with this issue and forensic document examination could be one of the effective methods in doing so.

The significance and necessity of evidence in the administration of justice is certain in Islamic law. One of the judicial principles in Islamic law is to decide based on evidence. Allah SWT says in the Qur'an:

﴿يَا أَيُّهَا الَّذِينَ ءَامَنُوا إِن جَاءَكُمْ فَاسِقٌ بِنَبَأٍ فَتَبَيَّنُوا أَن تُصِيبُوا قَوْمًا بِجَهْلَةٍ فَتُصِحُّوا عَلَىٰ مَا فَعَلْتُمْ نَادِمِينَ﴾

“O ye who believe, if a (Fasiq) wicked person comes to you with any news, ascertain the truth, lest ye should harm people in ignorance, and afterwards you become regretful for what you have done.”

(Al-Qur'an. Al-Hujurat 49: 6)

According to this verse, Allah SWT ruled that the authenticity of the news must be investigated thoroughly especially if they are coming from the sinners and the wicked. Otherwise, if the sinner's statement is accepted and a decision is made based on it, notwithstanding whether the information is right or wrong, the authorities will be taking the lead of the sinners. Allah SWT prohibits taking the route of the corrupt persons and sinners. This is the reasons why the scholars of Hadith refuse to take narrations from narrators whose reliability is not known (Ibn Kathir & Umar, 1999).

In another verse:

﴿إِنَّا أَنْزَلْنَا إِلَيْكَ الْكِتَابَ بِالْحَقِّ لِتَحْكُمَ بَيْنَ النَّاسِ بِمَا أَرَاكَ اللَّهُ وَلَا تَكُنَ لِلْخَائِنِينَ خَصِيمًا﴾

“Surely, we have sent down to you (O Muhammad SAW) the Book in truth that you might judge between men by that which Allah has shown you, so be not a pleader for the treacherous.”

(Al-Qur’an. An-Nisa’ 4: 105)

The phrase, *“Surely, we have sent down to you (O Muhammad SAW) the Book in truth...”* in this verse means that the Qur’an is truly from Allah SWT and its narrations and commandments are true.

The lesson from this verse is reflected in a story that took place during the Prophet’s era. The incident involved a Muslim called Tu’mah who stole an Ansari’s coat of mail. He put the stolen goods in the house of a Jew to hide the evidence. Investigation was conducted and the stolen goods were recovered from the Jew’s house. The Jew pleaded not guilty and insisted that Tu’mah had placed them in his house. Tu’mah denied the claim and accused the Jew as the culprit. Prophet Muhammad SAW was about to believe Tu’mah and decide the case against the Jew when the whole matter was revealed through the verse 105 of Surah An-Nisa’. Allah SWT has forbidden the Prophet SAW from defending deceitful and untrustworthy Muslims and directed him SAW not to believe their claims (Ghazali, 2000; Haneef, Razak, & Laluddin, 2019). Based on this verse, Allah SWT has forbidden the Prophet Muhammad SAW to defend deceitful and untrustworthy Muslims and directed him SAW not to believe their claims.

The requirement to invite or preach (*da’wah*) to others based on evidence can be learned in another verse of the Qur’an from Surah Yusuf which stated that:

﴿ قُلْ هَذِهِ سَبِيلِي أَدْعُو إِلَى اللَّهِ عَلَىٰ بَصِيرَةٍ أَنَا وَمَنِ اتَّبَعَنِي وَسُبْحَانَ اللَّهِ
﴿ وَمَا أَنَا مِنَ الْمُشْرِكِينَ ﴾

“Say, “This is my way; I invite to Allah with insight, I and those who follow me. And exalted is Allah; and I am not of those who associate others with Him.”

(Al-Qur’an. Yusuf 12: 108)

These verses indicated that ascertainment of the truth or facts in any case are attained only by proof (Arbouna, 1999). It is vital to have systematic and scientific evidential rules to ensure the administration of justice. In Islamic law of evidence, a crime or a right is generally proved by the following sources namely testimony, admission and confession, circumstantial evidence, documentary evidence, evidence by expert, oath and knowledge of the judge (al-Zuhayli, 1982). Clearly, documentary evidence, being one of the methods of proofing is governed by the rules of admissibility of such evidence. Due to the vulnerability of documents to accidental or intentional alterations, it is best to consult the experts in determining the authenticity of such documents.

1.2.2 Absence of Guideline on the Admissibility of Documentary Evidence

In Malaysia, the admissibility of documentary evidence in Syariah Courts is regulated under several rules namely Syariah Court Evidence Enactments of each state and Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]. Documentary evidence is covered under sections 48 until 56 of Syariah Court Evidence (Federal Territories) Act 1997 [Act 561]. However, there are loopholes in terms of its enforcement where there is no clear guideline for the judges and practitioners regarding the admissibility of documentary evidences in Syariah courts (W. A. F. W. Ismail & Asutay, 2017). W. A. F. W. Ismail and Asutay (2017) in their study indicated that there

is a need to form a legal forensic model to ensure that the authentication of documents in courts is more structured, clear and practical. In the current study, the researcher suggested that there is necessity to produce a guideline in any form of rules or provisions which give mandatory implication for Syarie judges and lawyers to exercise it in Syariah courts.

Besides, considering the existing dual judicial system in Malaysia, civil and Syariah, civil courts have clearer guidelines regarding the authentication of documents compared to Syariah courts. The fact that Islamic law and civil law exist as parallel systems in this country should not prevent but lift the effort to harmonise Syariah and civil law. The harmonization process of these laws could be done through the implementation of common law principles in Syariah courts which are not contrary to Shariah law (Hasan, 2007). The adoption of guideline from civil courts' practice could be done provided that they are in line with Shariah principles and practice. Based on the past studies, most of the researchers are directed to discuss on the aspect of admissibility of documentary evidence (Arbouna, 1999; W. A. F. W. Ismail, 2016; Muda, 1998; Rohizan, Alkawaz, Ghazali, & Bachok, 2017). These studies do not include practical guideline, standard or recommendation in handling documentary evidence. Thus, this research aims to find out whether the application of forensic document examination in Syariah courts is applicable and practical to determine the genuineness of questioned documents.

1.2.3 Misjudgment Risk Due to the Failure in Understanding the Principles of Forensic Document Examination

It is important to note that justice can never be achieved without clear and convincing proof. During a court proceeding, forensic experts from various disciplines play essential roles in implementing justice. For instance, computer experts and

accountants are relied upon to resolve issues involving breach of e-commerce transaction (Edmond, 2013; Haneef, 2006; Hopwood, Leiner, & Young, 2012; Inman & Rudin, 2000). Opinions by experts from more than one forensic discipline such as medicine, ballistics and anthropology are required as well to solve criminal cases (Haneef, 2006). Likewise, the use of forensic document examination is vital in order to authenticate the genuineness of documents in dispute.

In our contemporary time, the inability of our Syarie judges to adequately equip themselves with better ways of ascertaining the truth about cases is not supposed to be an excuse to commit errors in giving judgment. Allah SWT said in the Quran in Surah An-Nahl verse 43;

﴿وَمَا أَرْسَلْنَا مِنْ قَبْلِكَ إِلَّا رِجَالًا نُوْحِي إِلَيْهِمْ فَاسْأَلُوا أَهْلَ الذِّكْرِ إِنْ كُنْتُمْ لَا تَعْلَمُونَ﴾

“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.”

(Al-Qur’an. An-Nahl 16: 43)

It is important to refer to the experts in solving the problems that we have no knowledge in it. Ibn Qayyim, a long time ago, in his work had warned Muslims against the leniency in matters of justice when he says: “If a judge is not a man of insight into all the indicators pointing to the facts of a case nor does he take into account all supporting evidences relevant to it from the empirical indications to the testimonial depositions, parallel to his legal knowledge; much of the people’s rights will be wasted due to his inability to prove them” (al-Qayyim, 1953).

The late Hanafi Salih b. Muhammad al- ‘Umari, the author of *Iqaz Himam Uli al-Absar*, uses the hadith literature to support his interpretation of the Quranic term *ahl al-dhikr* as meaning “experts”. According to a tradition, one of the Muslims warriors was

being hit on the head by a stone. The man asked his comrades-in-arms for permission to use sand instead of water for the ablution before prayer. The permission was denied; he washed his head with water and later, died. When notified this, the Prophet Muhammad SAW was angry and said that if the warriors were ignorant about that medical point, they should have consulted experts. Al-'Umari concludes that, since the Prophet Muhammad SAW and his successors used to consult experts, shariah instructs rulers and judges to consult such experts as the physiognomist (*qa'if*) and the assessor (*kharis*) (Shaham, 2010). These events indicated that it is necessary to seek advice from the experts regarding the matters that are likely to be outside the experience or knowledge of the judge or jury.

According to Saks and Faigman (2008), science is such a universal force in modern society that judges are essentially failing their obligations if they persist in their scientific ignorance. The modern scientific means of proof would assist the judges to ascertain the truth and brings forth justice (Haneef, 2006). Baharuddin (2017) also stated that it is mandatory for Shariah officers including the judges to have enough knowledge on scientific evidence before making a decision especially when such issue is being raised in Syariah Court. Compared to the civil courts, the application of scientific evidence in Syariah courts is not yet extensive and rarely used (M. H. Ahmad et al., 2020). It has also been suggested that the application of expert opinion in Syariah court should be broader and comprehensive in nature (Nasri & Md Noor, 2020a). One of the early cases in Syariah court which applied scientific evidence is the case of **Pendakwa Syarie Negeri Sabah *lwn.* Rosli bin Abdul Japar** in 2007. In this case, the judge has convicted the accused for committing illicit intercourse to the point of giving birth to a child out of wedlock. Based on deoxyribonucleic acid (DNA) analysis conducted by the chemist on the three blood specimen contributors, the Prosecutor

stated that a strong *qarīnah* linking the accused to giving birth to children out of wedlock has been proven through scientific methods. Syariah High Court had accepted the evidence obtained through DNA analysis conducted by the chemist/DNA expert based on section 190 (1)(2) Syariah Criminal Procedure (Negeri Sabah) Enactment 1993.

Using sophisticated technology, forensic document examiners may evaluate and verify the questioned document thoroughly. The failure to use the advanced methods of investigation and proof in general, and the failing to optimize the application of forensic document examination particularly would probably cause error in judgment and sheer injustices in the name of Islam (Haneef, 2006).

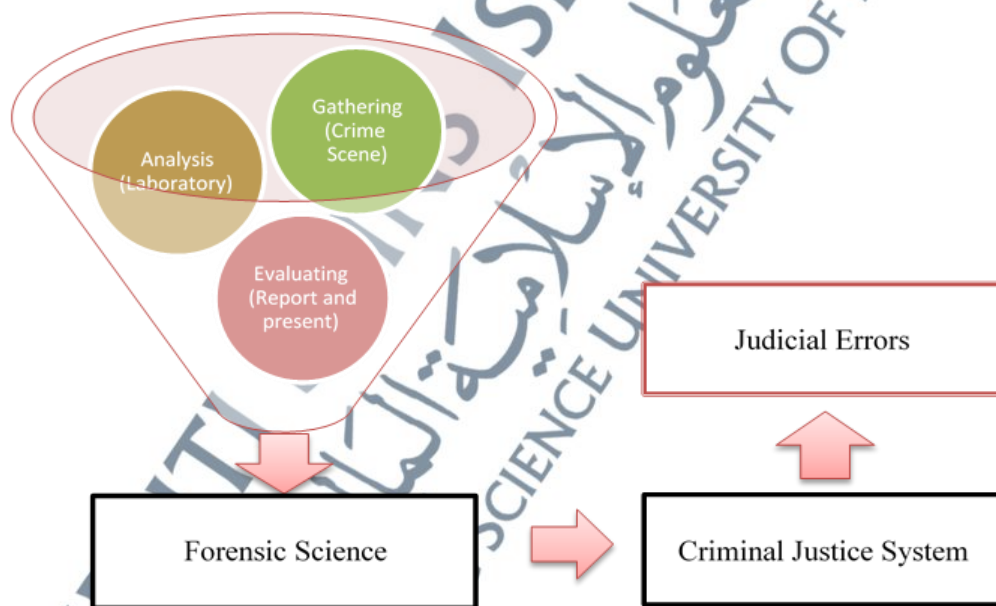


Figure 1.1: A Simplified Model of Forensic Science and Judicial Error by Schiffer (2009)

Besides, Schiffer (2009) explained that the misinterpretation and misunderstanding on part of forensic science or justice system influence the probability of committing judicial error as illustrated in Figure 1.1. He claimed that the judicial

error can occur within the analysis, gathering and evaluation process, or in the justice system itself such as the possibilities of misunderstanding statistical and probabilistic data presentation (Thompson & Schumann, 1987). The lack of understanding in the field of forensic science can possibly resulted in error during the process of judicial decision. Therefore, forensic document examination should have been understood through extensive research works in order to prevent such risk.

1.2.4 Lacunae in the Research Field Due to Lack of Literatures on Forensic Document Examination within Syariah Legal System

Due to the academic gap exist between the field of forensic science and Islamic legal system in Malaysia, there is not much research has been done to highlight the importance of integrating the forensic science principles within Syariah law. In an article entitled “*Qarīnah Sebagai Satu Sumber Keterangan: Tinjauan Di Beberapa Buah Mahkamah Syariah Malaysia, Pakistan Dan Indonesia*”, the author has discussed the classical legal authorities on the admissibility of *qarīnah* or circumstantial evidence in Syariah law (Aziz, 2015). The author has also written some cases and examples of the application of *qarīnah* in Syariah courts particularly. These authorities should be viewed in the light of forensic science to increase the reliability and strength of evidences tendered in Syariah court.

Apparently, minimal research attention has been given towards the application of forensic science in Islamic law in evaluating the genuineness of documents. Several studies investigated on the relationship of forensic science and evidence with Islamic law. For instance, Haneef (2007) in his work analysed the position of forensic evidence in Islamic law and compared it with the position in common law. Baharuddin (2017) in his work found that the integration of forensic science with *al-qarīnah* through its fundamentals is proven possible to realise *maqāsid al-sharī'ah*. Moreover, a study on

the acceptance of scientific evidence in Syariah court (M. H. Ahmad & Baharuddin, 2019) found that forensic science has been accepted in shariah law for over a millenium before it was introduced using more scientific and contemporary names, terms, and concepts. Another study conducted by Kallil and Yaacob (2019) showed there is necessity to amend the Syariah Court Evidence and Procedure statutes and to create a guideline or Standard Operating Procedure (SOP) for evidences in the form of digital as a reference for judges, lawyers and parties involved in Syariah courts. There are also researches done on DNA (deoxyribonucleic acid) evidence in Syariah courts (M. H. Ahmad, Razak, Saharudin, Nasir, & Baharuddin, 2019; Haneef, 2015; Shariff et al., 2019). Previous studies on the fundamentals of forensic science somehow did not cover and highlight the importance of scientific examination of documents in Syariah courts.

A profound research and discussion are required to rebuild and integrate the field of forensic science especially forensic document into Islamic legal system. This study is significant to fill the gap in our knowledge by integrating the elements of forensic document examination into Syariah legal system so that it can be a future reference for the legal practitioners. The current work is hoped to be the extended version of previous work where the field of forensic document within Syariah judicial institution is being discussed further.

1.3 Problem Statement

Identifying research problem is essential in any study. The main purpose of problem statement is to state the logic of the study and to identify the lack of information or gaps in the knowledge with regard to the particular aspect of the topic. Based on earlier background of the study, the researcher has identified several gaps. It is the best to read these statements together with the background of the study for more explanation.

Firstly, evidences in the form of document are highly vulnerable to fraud and forgery especially during this digital era. This is an age of documents where most of us depend on them in many of our encounters with the complexities of modern life. In the past years, documents have become an increasingly important form of evidence in the court of justice. Unfortunately, documentary evidences are more likely to engage in fraudulent and forgery activities. In reality, documents are at times suspected and attacked, and even occasionally dismissed. On the contrary, great numbers of forged documents are being passed as authentic (Osborn, 1910). Therefore, to prevent this, a comprehensive approach is essential to solve the issue of forgery relating to documentary evidence.

Next, despite the amount of studies conducted on documentary evidence in Syariah court, there has been absence of guideline regarding the admissibility of documentary evidence in Islamic legal system. The current study seeks to explore the role of forensic document examination from Islamic law perspective and how it may serve as guideline in Syariah courts. This gap in our knowledge is what will be addressed in this particular study.

Thirdly, the importance of understanding the principles of forensic document examination is especially relevant for the judges. Any misunderstanding or failure to comprehend the nature of evidence, in this case, documents, will lead to misjudgment and risks of tendering falsified documents. One of the ways to prevent such errors is by consulting the experts in cases where documents are disputed.

Lastly, the current body of literature, though informative, does not explain on forensic document examination in Syariah legal system. There are plenty examples of studies conducted which integrate forensic evidence in Islamic law. However, little is known about how forensic document examination may operate within Syariah legal

system. To gain a sound understanding of how forensic document examination may operate within Syariah courts, in depth qualitative research is required. Hence, this study aims to provide better understanding on the application of forensic document examination in Syariah courts. The data acquired in this study will be contextualized with a review of recent literature on the forensic document examination and Islamic law perspective on this field of knowledge.

1.4 Objectives of the Study

The specific objectives of this study are as follows:

1. To identify the forms of document forgery that happened in Syariah courts' cases.
2. To explain the principles and process involved in forensic document examination.
3. To examine in what ways forensic document examination may be applied in Syariah courts.

1.5 Research Questions

The questions of this research are as follows:

1. What are the forms of document forgery that happened in Syariah courts' cases?
2. What are the principles and process involved in forensic document examination?
3. What are the ways in which forensic document examination may be applied in Syariah courts?

1.6 Significance of the Study

This research is important for the following reasons:

1. This research will provide an overview on the forms of document forgery that happened in Syariah courts' cases.
2. This research will assist Syarie judges and lawyers in dealing with documentary evidences and eventually reduces gaps between Islamic judiciary and forensic science field.
3. This research will add to the literature on the admissibility of documentary evidence and act as a reference for the future researchers, academicians and students.

1.7 Scope of Study

The scope of the study refers to the parameters under which the study will be operating (Simon & Goes, 2013). It is important to note that the main focus of this research is to understand Syariah courts' perspective on forensic document examination. Since Islamic law of evidence is a broad scope of field, this study focused on the fundamental concept of documentary evidence and its position in Malaysia Syariah courts. Furthermore, the data on the concept of documentary evidence in Islamic law will include not only the laws in statute, but also legal cases and comparable statutes in civil courts jurisdiction. Besides, this study limits its discussion to the questioned or disputed documents as this is where the role and function of forensic document examination is addressed.

The researcher made reference specifically to the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] as it is substantially similar with other Syariah Court Evidence Enactments of each states in Malaysia. Moreover, to have a better

understanding on the concept of forensic document examination, this study makes reference to the position of documentary evidence under common law stated in the Evidence Act 1950 [Act 56]. The researcher believes that it is appropriate to do so since Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] itself was enacted in accordance with the provisions in the Evidence Act 1950 [Act 56], the civil law. Due to time and monetary constraints, along with the pandemic cases of Covid-19 which is yet to subside, the researcher limits the research to online library database resources. In this research, the data sources collected by the researcher included various Qur'anic verses and hadith, Muslim jurists opinions, court cases, statutes and provisions regarding the discussion of documentary evidence in this study.

1.8 Operational Definitions

For the purpose of this study, some of the basic terminologies are defined to guide the research through certain terms and definition and to avoid any misapprehension throughout the study.

1.8.1 Forensic Document Examination

Forensic science is the application of science to the law while forensic document examination is one of the branches in the field of forensic science. Forensic document examination refers to the application of science and analytical techniques to questions concerning documents (J. Lewis, 2014). The discipline of forensic document examination is more often referred to as “questioned document”. David Ellen in his writing use the term scientific examination of documents to elaborate on forensic document examination (Ellen, Day, & Davies, 2018). Hence, the term forensic document examination in this study refers to examinations conducted on disputed

documents to assist in the giving of evidence in the court of law. Throughout this study, the researcher used the term “forensic document examination” and “questioned document examination” interchangeably which connote the same meaning.

1.8.2 Questioned Document

The term ‘questioned document’ in this study refers to any handwriting, typewriting, signature, or mark whose genuineness is in question or doubtful. A questioned document is a document which is in dispute because of its origin, texts or circumstances regarding its creation arouse suspicion as to its genuineness. Typical cases involving questioned document include fraudulent checks, threatening letters, questioned signatures on wills, trusts, business documents, mortgage documents, typewritten documents, altered business documents, medical records, and photocopied documents (J. Lewis, 2014).

1.8.3 Syariah Courts

Malaysia is one of the countries with unique legal system. This country is practicing a dual legal system namely the common law and Shariah legal system. Since Malaysia was colonised by the British from 1824-1957, the common law system is adopted from the British legal system. Meanwhile, Shariah legal system is implemented based on Islamic law and principles (Muhammad, 2011). Under the Federal Constitution of Malaysia, the distribution of law-making authority between the Federal and State Governments is provided under the Ninth Schedule. Based on this provision, each state is free to enact its own version of Islamic law, and is free to establish its own state Islamic courts to adjudicate disputes arising under the state's Islamic laws (Shuaib, 2012). Since Malaysia consists of thirteen states and three federal territories, an

increasing amount of Islamic legislation are being passed by those states through their legislative assemblies respectively. This includes the establishment of Syariah courts with jurisdiction over Muslims.

State Syariah courts can adjudicate matters involving Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, and guardianship as provided under the State List of the Ninth Schedule of Malaysian Federal Constitution. In the present study, Malaysian Syariah Courts refers to Syariah courts with jurisdiction over Muslims, and the laws applicable for them were the laws legislated by the State legislative council of each states.

1.9 Summary

This chapter elaborates on the introductory part of the study which consists of introduction, background, statement of the problem, significance, scope of the study and the operational definitions involved. Four issues have been highlighted which built the problem statements in this study. This study aims to answer and achieve three research questions and objectives respectively. This study is significant for three reasons. In short, this chapter gives an overview of the research.