
REJUVENATING HUMAN CAPITAL IN SYARIAH LEGAL INSTITUTIONS THROUGH FIQH FORENSICS FUNDAMENTAL MODULE: A PRELIMINARY REVIEW

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ABSTRACT

The development of science and technology today has contributed to the advancement of evidence law in the Civil Courts as well as Syariah Courts. The said application of science and technology refers to the scientific evidence produced from the results of analysis done by the experts in forensic science. Numbers of reported Syariah cases has applied forensic science analysis and test to produce scientific evidence. These cases have portrayed the admission of scientific evidence in Syariah Courts and indicate the readiness of human capital in the Syariah Legal Institutions to apply the scientific evidence. Therefore, this study carry three purposes, to examine the main issues in handling the scientific evidence, to provide suggestion to rejuvenate human capital in Syariah Legal Institutions, and to suggest solution for the issues pointed out throughout the discussion. The result of this study elucidates two main issues that play integral part in handling the scientific evidence, which are the lack of knowledge and adequate experience. In order to overcome these particular issues, rejuvenation on the existing human capital in Syariah Legal Institutions must be done. This study focused on the rejuvenation in the aspect of knowledge and skills of human capital. The said module should contain two main aspects, theoretical and practical aspect of forensic science. The target of this module is to serve the Syariah officers in the Syariah Legal Institutions as comprehensive guideline and instruction to lead the fundamentals of the forensic science in Syariah Courts into an appropriate platform. In conclusion, this study suggests the development of Fiqh Forensics Fundamental Module to curb the issues of lack of sufficient knowledge and adequate skills in handling scientific evidence.

Keywords: *Fiqh Forensics, scientific evidence, syariah officers, syariah legal institutions, rejuvenation*

Introduction

The development of science and technology today has contributed to the advancement of evidence law in the Civil Courts as well as the Syariah Courts. The application of science and technology for the purpose of proving the allegation has been long practised by the Civil Courts. Although it has been practiced in numbers of cases, it is still uncommon to hear evidence through science and technology used by Syarie lawyers or Syarie judges in Malaysia.

The said application of science and technology is referring to the scientific evidence. Scientific evidence is produced from the results of analysis done by the expertise in forensic science. Forensic science is defined as the utilization of scientific or technical practices to the recognition, analysis, collection, and interpretation of evidence for civil and criminal law or regulatory issues (Metwally, 2019). The application of forensic science in court is not only involve the forensic practitioners, but also legal practitioners including investigating officers, lawyers, and judges.

Various literatures have been produced in relation to the application of forensic science or scientific evidence in court system. Even in the Malaysian legal context, particularly Syariah legal system, numbers of studies been carried out and numerous literatures successfully produced from time to time. This indicates academicians in Malaysia are interested with this field of knowledge. As for the time being, central discussion put forward by Malaysian academicians is focussing on the admission of deoxyribonucleic acid (DNA) test and analysis in Syariah court. This is evident from the studies carried out by Tengku Fatimah Muliana, Siti Khatijah, and Najmiah (2011), Lukman and Wan Abdul Fattah (2012), Na'imah (2014), Ramlee (2015), Mohd Sabree, Mohamad Afandi, Mohd Al Adib, and Abu Suffian (2017), and Alias and Abdul Ghafur (2017). The focal point of these literatures is concerning the admission of DNA evidence in Syariah Courts. They only discuss the application of such evidence by appraising the Syariah Court Evidence Act and Enactments. However, they do not touch the procedure parts especially the exhibits management procedure, and the inspection toward scientific evidence tendered in court proceeding.

The exhibits management process and the inspection toward scientific evidence tendered in court proceeding is carry out by the human capital in Syariah Legal Institutions, particularly the Syariah Religious Enforcement Officers, Syarie Public Prosecutor, and Syarie judges. As for this study, Syariah Legal Institutions are referring to the institutions that related to the Malaysian Syariah law including Syariah Courts, State Syariah Prosecution Department, and Enforcement Division of State Islamic Religious Affairs Department.

Therefore, this qualitative study is concerning the issues that play integral part in handling the scientific evidence. Furthermore, this study have three purposes, first to examine the main issues in handling the scientific evidence, second to provide suggestion to rejuvenate human capital in Syariah Legal Institutions, third to suggest solution for the issues pointed out throughout the discussion.

This qualitative study applied documentary research method to examine the books written by scholars and academicians, as well as to appraise the findings of recent studies authored in quality and indexed journals. This method is used to collect and obtain data through studies of the documents, literatures and records that have been produced (Neely & Ponshunmugam, 2019; Prior, 2008). It primary objective is to educationally evaluate the particular documents (Payne & Payne, 2004; Walsh, 2014). Then, the obtained data were analysed by using content analysis method to understand, appreciate and glean meaningful interpretations of data that circulate in the texts (Leavy, 2017; Roller & Lavrakas, 2015). As this research is a qualitative work, the content analysis in this research is applied in an inductive manner (Julien, 2008). This process involved the development of a recurring process of data collection and analysis related to the application of a definition, rule, or procedure to successive results (Hayes, Navarro, Stephens, Ransom, & Dilevski, 2019; Leavy, 2017; Liew, Grisham, & Hayes, 2018).

The Admission of Scientific Evidence in Syariah Legal Institutions.

Scientific evidence has been widely admitted in civil courts. As noted by Reid (1953) in Raja Muhammad Zuha and Ramalinggam (2017), this long practice has begun since early 1950s by the application of forensic entomology in a murder case occurred at Penang. On the other hand, this practice is very restricted in the Syariah courts. According to Ridha Abdah (2015) and Muhammad Azhari

(2015), from year 2007 until 2014, less than 10 Syariah cases were found applying forensic experts and scientific evidence as part of the evidence.

The admission of scientific evidence in Syariah Courts was first been reported in the case of *Pendakwa Syarie Negeri Sabah lwn. Rosli bin Abdul Japar* (2007). The case involved Syariah criminal offense of adultery which gives birth to an illegitimate child. In this case, Sabah Syarie Prosecutor has submitted expert opinion and scientific evidence through DNA reports to support the allegation. The DNA test (paternity test) was conducted by a DNA specialist from the Department of Chemistry Malaysia named Mohd Izuan bin Othman, which also the third prosecution's witness in this case. The paternity test was carry out on Rosli bin Abdul Japar (the accused), Hasmawi Abdullah (the illegitimate child), and Murni binti Muhammad (Hasmawi's mother). The results of DNA test showed a consistency in paternity relation between Hasmawi and the accused. Thus, the Keningau Syariah High Court of Sabah has admitted this scientific evidence. The admission was made on ground of section 86(1) of the Syariah Court Evidence (Sabah State) Enactment 1992 and also section 190(1) and (2) of the Syariah Criminal Procedure (Sabah State) Enactment 1993.¹ The accused failed to raise doubt against the DNA result. Due to that, the Syarie judge convicted the crime committed by him. The accused was sentenced to a fine of RM3,000 and failure to pay the fine will be imprisoned for 6 months.

Furthermore, scientific evidence also has been applied by the Syariah Religious Enforcement in Syariah cases. As in the case of *Mohammad Sulasi bin Mohamad dan Johari bin Talib* (2002) reported by Amir Husin and Nik Azlan (2008), a breathalyser device had been used to detect the presence of alcohol in the accused body. The blood alcohol content (BAC) recorded from their breath by using the breathalyser on the breath of *Mohammad Sulasi bin Mohamad* was 0.03 BAC while *Johari bin Talib* was 0.009 BAC. Since the BAC measurements on them were below than 0.08 BAC, it indicates that they have consumed alcohol but not in a drunk state. Other exhibits found at the crime scene were a glass of Carlsberg beer in front of the suspect, and also two bottles of the Guinness Stout beer type on the same table. Furthermore, both of them have admitted that they drank those types of beers.

The admission of scientific evidence also has been discussed in *Eddyham bin Zainuddin lwn. Rahimah bt. Muhamad* (2015). This case is related to determination of *nasab* where the appellant intended to use DNA paternity test to deny his paternity with the child in dispute. Unfortunately, the Negeri Sembilan Syariah High Court rejected the test as it is not applicable in denying the paternity relationship. This decision has been affirmed by the Negeri Sembilan Syariah Appeal Court. The apex court ruled that such DNA test only applicable in proving the paternity relationship, and not for denying it. The denial only can be made through *li'ān*.² Similar ruling has been issued by the Federal Territories of Kuala Lumpur Syariah Appeal Court in *Zainul Abidin bin Mat Akhir lwn Ahmad Nazreen bin Zainul Abidin & Seorang Lain* (2016) where the denial of paternity must only be made through *li'ān*.

These are among the reported cases that portray the admission of scientific evidence in Syariah Courts. In addition, from these reports also it indicates the readiness of human capital in the Syariah Legal Institutions to apply the scientific evidence as part of the means of proving the syariah criminal offences.

¹ This Enactment has been repealed and replaced by the Syariah Criminal Procedure (Sabah State) Enactment 2004.

² *Li'ān* is defined as sworn allegation of adultery committed by either husband or wife (Wehr, 1976a).

Lack of Knowledge and Experience in Handling the Scientific Evidence

Despite of the admission of scientific evidence in Syariah Legal Institutions, there is another issue that plays an integral part in handling the scientific evidence. The issue in question is the lack of knowledge and experience.

The lack of knowledge related to forensic science and scientific evidence is the most crucial matter to be attended. This matter once has caught the attention of the former Chief Justice of Malaya, Tun Abdul Hamid (2014) which he stated his concern to this matter in his speech:

“The biggest challenge for Brunei (in the implementation of Islamic law) is how the Syariah Investigating Officers, Syariah Prosecutor Officers and Syariah Judges will carry out their duties in investigating, prosecuting and try the cases, at least, at the early stages. Over the years, their experience was limited to minor criminal cases like khalwat. When the law is implemented, they will suddenly be forced to deal with more complicated cases such as murder, rape and causing injury which will also involve the receipt of scientific evidence unless they will only wait for suspected persons to make confessions via iqrar, which is impossible to be happened. The judgments will reflect the quality of their administration of justice.” (Abdul Hamid, 2014)

The above-mentioned text refers to his concern on the implementation of the Shariah Criminal Code 2013 by the Brunei government. He questioned and argued on the practicality for syariah officers, including judges, to handle scientific evidence in court. This is because these officers do not have ample knowledge and experience related to forensic science and scientific evidence.

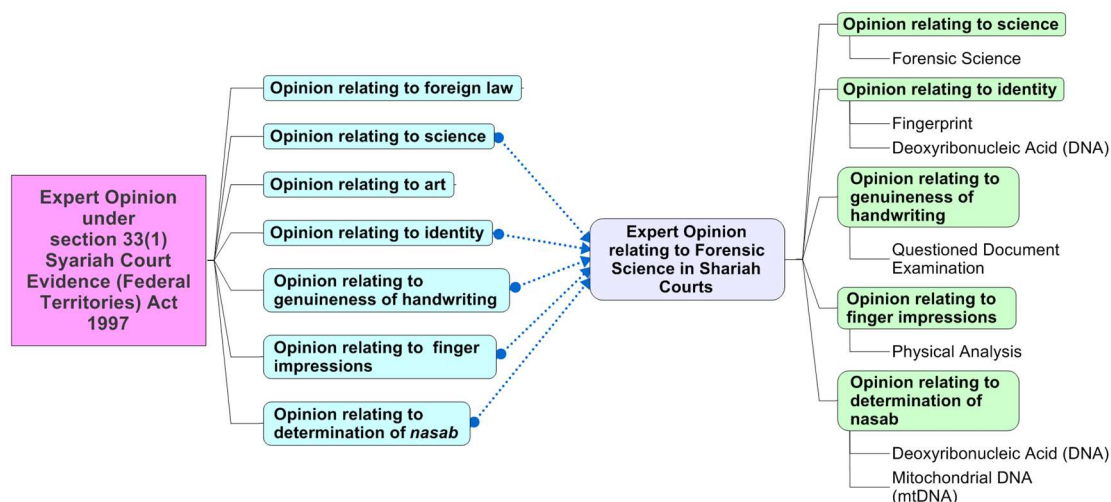


Figure 1: Expert Opinion relating to Forensic Science in Syariah Courts

Another inference could be made is from the lack of statutory interpretation toward section 33(1) of the Syariah Court Evidence Act and Enactments (Mohd Sabree et al., 2017). The said section is relating to Expert Opinion. This particular provision is the main road for the admission of scientific evidence in Syariah Courts by way of expert opinion from the forensic experts. Figure 1 is providing a clear picture of this concern. There are five types of expert opinions related to forensic science which are science, identity, genuineness of handwriting, finger impressions, and determination of *nasab*. By virtue of section 33(1) above, these opinions are admissible to be submitted before the Syariah Courts.

Furthermore, legal practitioners and academicians are not interested to interpret and discuss the relevant sections of the expert opinion provided under the Syariah Court Evidence Enactments (Mohd Sabree et al., 2017). Apart from that, Viswanathan (2007) elucidated that statutory interpretation is important

either to ascertain the meaning of certain provision in the statute or to learn the real intention of the lawmaker making the said provision. Despite of the importance of statutory interpretation, these officials must also have sufficient knowledge and skills to handle such scientific matters in order to produce a better interpretation. This indicates that there is a curricular gap that needs to be improved in order to empower Islamic legal institutions in Malaysia.

The lack of experiences is also a significant issue to be addressed. Numbers of studies have been conducted that pictured this issue among the human capital in Syariah Legal Institutions in handling the scientific evidence. The study of Ahmad Syukran (2017b), and Amir Husin and Nik Azlan (2008) indicated various problems aroused from the improper and inaccurate practice in managing scientific evidence, *inter alia*:

- (a) dismissal of the case to be brought into trial as a result of the expiration of evidence such as seized liquor that turned into vinegar when analysed;
- (b) dismissal of the case to be brought for trial due to loss of evidence in body fluids such as alcohol content in blood of the accused person in the custody of religious enforcement officers as a result of misconduct and mismanagement; and
- (c) non-compliance with the calibration and service schedules for forensic science instruments such as breathalysers used in detecting the BAC in the breath.

Furthermore, Thompson and Schumann (1987) and Schiffer (2009) elucidated that among the factors that led to miscarriage of justice was errors in understanding, collecting, analysing and evaluating forensic evidence presented before the court. In addition, the ignorance on the application of forensic science in an organized and orderly manner will caused the negative impact on Islamic law.

Taking a great lesson from “The Innocent Project” (IP) that occurred in the United States of America. The main objective of this IP is to exonerate the innocent people. One of their key method that had been used in deciding the case is through reevaluating of scientific evidence like DNA testing (Derenčinović, Vidlička, & Prtenjača, 2017; Innocent Project, 2019a). Since 1989 up to this date, there are 365 people in the United States have been exonerated by the DNA testing who were wrongly convicted (Innocent Project, 2019b; Nayak & Khajuria, 2019).

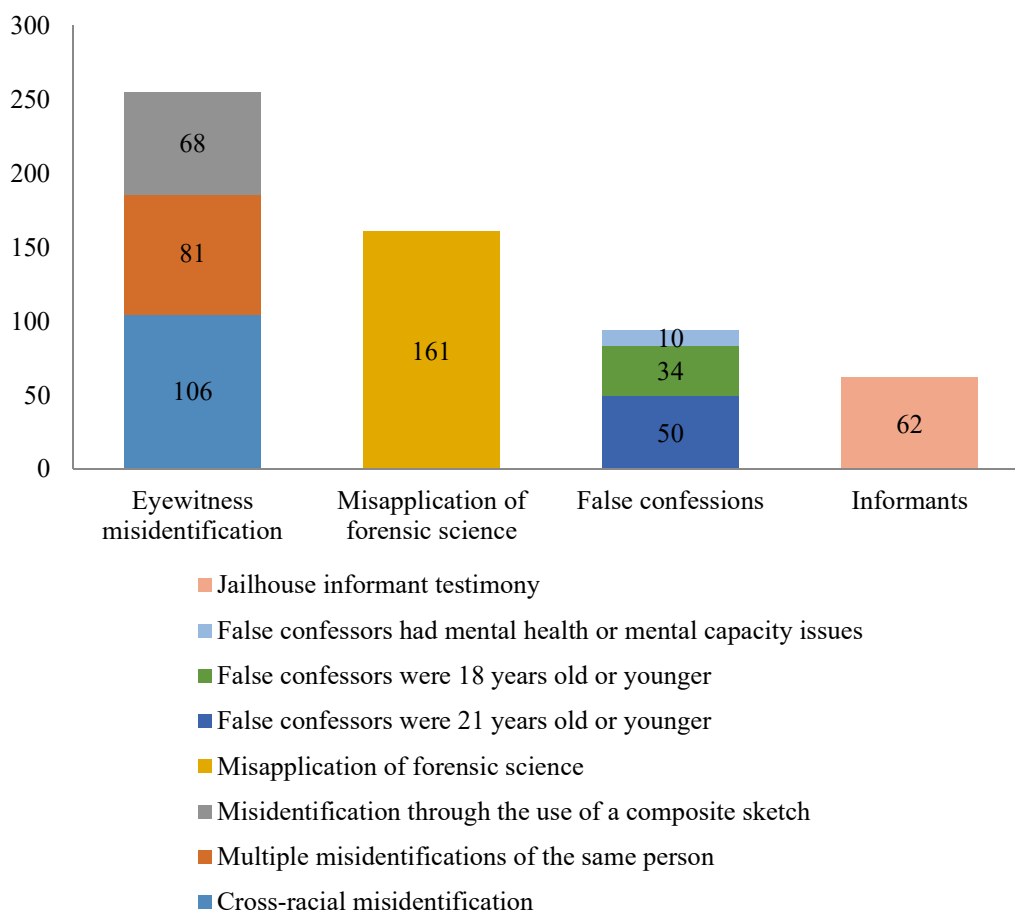


Figure 2: Statistic of DNA exoneration cases from 1989 to 2019 by the Innocent Project (2019b, 2019c, 2019d)

Statistic provided by Innocent Project (2019b) on the Figure 2 above elucidates the second highest exoneration factor next to eyewitness misidentification is involving misapplication of forensic science. There are approximately 258 cases involving eyewitness misidentification comprising cross-racial misidentification, multiple misidentifications of the same person, and misidentification through the use of a composite sketch. Meanwhile, there are relatively 161 cases involving misapplication of forensic science. Then, there are 94 cases deal with false confession covering false confessors’ age 18 to 21 years old or younger as well as false confessors that having a mental health or capacity issues. Last but not least, 62 cases involving informants from jailhouse informant testimony.

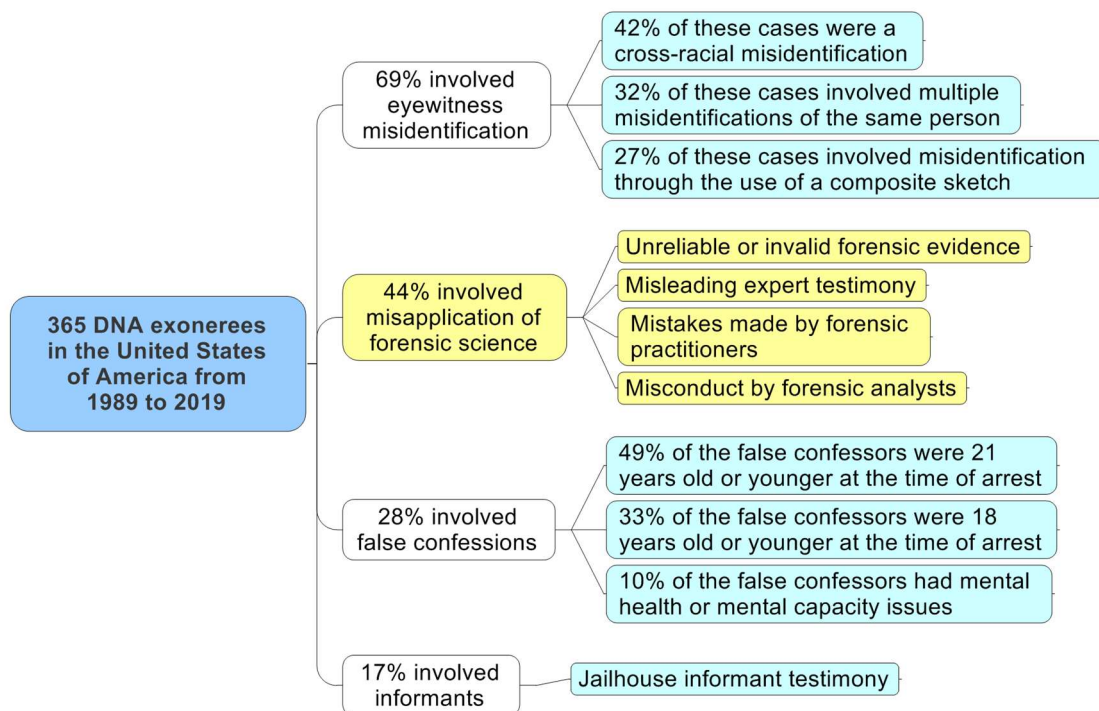


Figure 3: Exoneration Factors as provided by Innocent Project (2019b, 2019c, 2019d)

Furthermore, Figure 3 above provides the detail for each exoneration factors. As for the purpose of this study, there are four misapplication of forensic science that triggered and caused the DNA exoneration in the United States of America from year 1989 to 2019. The said misapplications are unreliable or invalid forensic science, misleading expert testimony, mistakes made by forensic practitioners, and misconduct by forensic analysts. In fact, these misapplications are actually involving the human capital in the related industries. In order to overcome this problem from happening in Syariah legal system in Malaysia, human capital in Syariah Legal Institutions must be equipped with sufficient knowledge and adequate training in order to lead the fundamentals of the forensic science in Syariah Courts to an appropriate platform.

These issues need to be addressed and solved as it is the crux of the matter in handling the scientific evidence. Furthermore, these issues are closely related to the human capital in Syariah Legal Institutions.

Human Capital from Islamic Perspective

Human capital symbolizes one of the key resources for the advancement of organizations and nations (Mahmood, Hashmi, Shoaib, Danish, & Abbas, 2014). The theory of human capital comprises the accumulation of information services, science, healthcare, education, culture, and art (Prichina, Orekhov, Evdokimova, Kukhareenko, & Kovshova, 2019). According to Habib, Abbas, and Noman (2019), human capital is a blend of training and skills gained by personal exertion during education and job. When the workers committed in learning and acquiring new skills, the levels of human capital will increase.

Meanwhile, from the Islamic perspective, human capital is viewed as the ability of human being to accomplish the responsibility and obligation as a successor and servant of Allah on this Earth (Abdullah, 2012). The said ability comprises moral, ethical, intellectual, and physical advancement without omitting the improvement of skills and expertise (Amrizah, Nawal, Md. Mahmudul, & Siti Akmar, 2018). These ideas were derived from two verses of al-Qur'an:

وَإِلَى ثَمُودَ أَخَاهُمْ صَالِحًا قَالَ يَا قَوْمِ اعْبُدُوا اللَّهَ مَا لَكُمْ مِنْ إِلَهٍ غَيْرُهُ هُوَ أَنْشَأَكُمْ مِنَ الْأَرْضِ وَاسْتَعْمَرَكُمْ فِيهَا فَاسْتَغْفِرُوا لَهُ ثُمَّ تَوْبُوا إِلَيْهِ إِنَّ رَبِّي قَرِيبٌ مُجِيبٌ

“To the Thamud people (We sent) Salih, one of their own people. He said: “O my people! Worship Allah: ye have no other god but Him. It is He Who hath produced you from the earth and settled you therein. Then ask forgiveness of Him, and turn to Him (in repentance): for my Lord is (always) near, ready to answer.”

(Surah Hud (11): 61)

وَإِذْ قَالَ رَبُّكَ لِلْمَلَائِكَةِ إِنِّي جَاعِلٌ فِي الْأَرْضِ خَلِيفَةً

“Behold, thy Lord said to the angels: “I will create a vicegerent on earth.”

(Surah al-Baqarah (2): 30)

A part from that, human capital in Islam also has been associated with the term and concept of *ahliyyah* (Hashi & Bashir, 2009). Literally it refers to *ṣalāḥiyyah* (eligibility) (Wehr, 1976b; Zaydān, 1976), and *istiḥqāq* (qualification) (al-Zuhayli, 2006). In technical aspect, Abdul ‘Azīz al-Bukhārī (1997), al-Jurjānī (1983), and Abu Zuhrah (1958) refer it as eligibility of a person to hold duty and obligation. In addition, Hashi and Bashir (2009) explained that while the term *ahliyyah* primarily typifies the human nature in the Islamic jurisprudence, administratively, acquiring *ahliyyah* denotes to attain the level of intellectual maturity and mental adequacy. This is where the individual entitled to be adequately responsible and accountable, and presumed to contribute to the amelioration of the human life. They also have elucidated the Islamic perspective of human capital development strive to advance human capital (*ahliyyah*) from the state of ignorance (*jahl*) to knowledge (*‘ilm*), from laziness (*kasl*) to hardworking (*kadh*), from carelessness (*hazl*) to serious (*jadd*), and finally from coercion (*ikrāh*) to freedom (*huriyyah*).

It is clear that the theory of human capital in Islam is not similar with the theory of human capital introduced by the western. Abdullah (2012) has drawn clear distinction between both perspectives as follows:

“Therefore, there is difference in the theory of human capital in Islam. While in the general context, the objective of human capital development is to achieve economic growth then in Islam, the aim of human capital development is to achieve the quality and competence to fulfil the responsibilities and duties of human being which is ordained by Allah (s.w.t.). The development of human capital in Islam covers all kinds of physical, intellectual, psychological and spiritual aspects of development. So, Islam conversely with the general theory of human capital takes care of the spiritual parts of human being and considers human being as a social animal. As the objective of the development of human capital is to achieve the quality to fulfil the responsibilities which is ordained by Allah (s.w.t.) then it always focuses on social welfare and collectivism due to Islamic laws calls for welfare and collectivism.” (Abdullah, 2012)

Islam extrinsically encourages the amelioration of the human life especially in working environment. It is provided under verse 105, surah at-Tawbah:

وَقُلْ اَعْمَلُوا فَسَيَرَى اللَّهُ عَمَلَكُمْ وَرَسُولُهُ وَالْمُؤْمِنُونَ

“And say: “Work (righteousness): Soon will Allah observe your work, and His Messenger, and the Believers...”

(Surah at-Tawbah (9): 105)

According to Zulkifli (2017), this verse indicates that Islam encourages its people to work hard at every job they do. This is because; working is one of the ways or means to make a living. Besides that, there are also numbers of hadith that embolden everyone to work diligently and become assiduous in improving their human capital. This pragmatic approach has been provided in the following hadith:

عَنْ عَائِشَةَ، قَالَتْ: سَأَلْتُ أُمَّ الْمُؤْمِنِينَ عَائِشَةَ، قَالَتْ: قُلْتُ: يَا أُمَّ الْمُؤْمِنِينَ كَيْفَ كَانَ عَمَلُ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ؟ هَلْ كَانَ يَخْصُ شَيْئًا مِنَ الْأَيَّامِ؟ قَالَتْ: لَا، كَانَ عَمَلُهُ دِيمَةً، وَأَيْكُمْ يَسْتَطِيعُ مَا كَانَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَسْتَطِيعُ
Alqama reported: I asked 'Aishah, the mother of the believers, saying O mother of the believers, how did the Messenger of Allah (p.b.u.h.) acted? Did he choose a particular act for a particular day? She said: No. He act was continuous, and who amongst you is capable of doing what the Messenger of Allah (p.b.u.h.) did? (Hadith. Muslim. Bāb Faḍīlat al-'amal ad-dā'im min qiyāmi al-layli waghairihi: Vol. 1: #783)

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا، أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: اكْلُفُوا مِنَ الْعَمَلِ مَا تُطِيقُونَ، فَإِنَّ اللَّهَ لَا يَمَلُّ، حَتَّى تَمَلُّوا، وَإِنَّ أَحَبَّ الْعَمَلِ إِلَى اللَّهِ أَدْوَمُهُ، وَإِنْ قَلَّ، وَكَانَ إِذَا عَمِلَ عَمَلًا أَتَيْتَهُ
Narrated 'Aishah: The Messenger of Allah (p.b.u.h.) as saying: "Choose such actions as you are capable of performing, for Allah does not grow weary till you do. The acts most pleasing to Allah are those which are done most continuously, even if they amount to little." Whenever he began an action, he would do it continuously. (Hadith. Abū Dāud. Bāb Mā yu'maru bihi min al-qasdi fi al-ṣalāt: Vol. 2: #1368)

Both above-mentioned hadith portrayed how our beloved Prophet Muhammad (p.b.u.h.) done his work in which he maintained and committed all of his work continuously (al-Munāwī, 1937, 1988; Ibnu Ruslān, 2016). By applying his action, it is possible for us to improve our human capital. This is due to the continuous practice that will hone our knowledge and skills. Furthermore, al-Ṣan'ānī (2011) opined the reason our beloved Prophet Muhammad (p.b.u.h.) done his work continuously is because Allah loves whoever excel in his doing. The reasoning behind it is based on the following hadith:

عَنْ عَائِشَةَ، قَالَتْ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: إِنَّ اللَّهَ تَعَالَى يُجِبُّ إِذَا عَمِلَ أَحَدُكُمْ عَمَلًا أَنْ يُنْقِنَهُ
Narrated by 'Aishah: The Messenger of Allah (p.b.u.h.) as saying: "Allah loves that whenever any of you does something, he should excel in it." (Hadith. Al-Baihaqī. Al-Amānāt wamā yajibu min adā'ihā ilā ahlihā: Vol. 7: #4930)

On the above hadith, al-Ṣan'ānī (2011) explained the work done includes work related to religion (*dīnī*) or worldly (*dunyāwī*) matters. Furthermore, al-Munāwī (1988) explicated this hadith refers to whoever does something properly and complete it, the benefits gained will be doubled, and that person shall be loved by Allah more. This hadith also introduces the concept of *itqān* (diligent) in working. *Itqān* is derived from the root word of *taqana* which refer to maintaining something (Ibnu Faris, 1979). *Itqān* in working means fulfilling or executing a request from the person as that person wishes without the least degree of perfection while accompanied by a vigorous effort not to delay the work (Zulkifli, 2017).

Based on the cited authorities above, it is clear that Islam extrinsically encourages the amelioration of the human life especially in working environment. This can be done through the positive commitment in working, such as work diligently. This is because by working diligently, it can gradually hone and improve the human capital especially on the knowledge and skills.

Rejuvenating Human Capital in Syariah Legal Institutions

Human capitals in Syariah Legal Institutions for this study are referring to the syariah officers' position of LS41, LS44, LS48, LS52, and LS54 as prescribed under *Pekeliling Perkhidmatan Bilangan 1 Tahun 2016*. These include Syarie Judges, Syarie Public Prosecutors, and Religious Enforcement Officers. Furthermore, Ahmad Syukran (2017b) suggested to include 'Syariah oriented' forensics experts to be of the human capital in Syariah Legal Institutions. This is due to the provisions related to Expert Opinion as prescribed under Syariah Court Evidence Act and Enactment that allowed the opinion of forensic expert to be admitted as part of the expert opinion evidence. In fact, they are the most appropriate person to be called during court proceeding to explain the forensic analysis carried out by them to the court. Figure 2 simplified the idea rejuvenating human capitals in Syariah Legal Institutions.

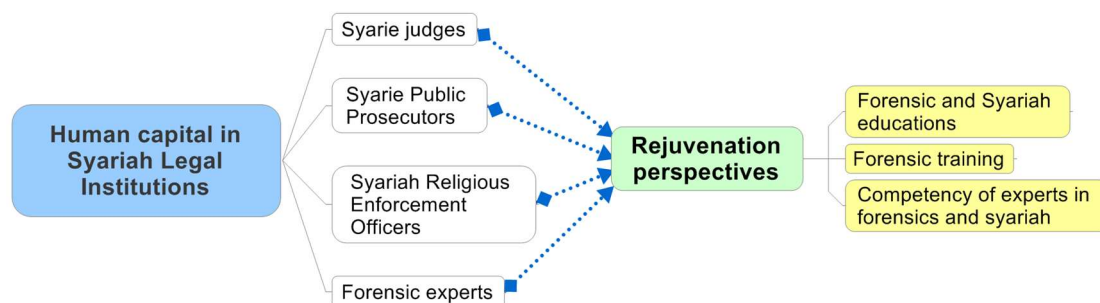


Figure 4: Rejuvenation Framework of human capital in Syariah Legal Institutions

This study suggests rejuvenating the existing levels of human capital in Syariah Legal Institutions. The rejuvenation intended is from the perspective of knowledge and skills as these are among the essential attributes that influenced the level of human capital in a particular organisation and nation.

Islamic judiciary is very closely related with the juristic deduction (*ijtihad*) principle. *Ijtihad* means independent reasoning or juristic deduction based on the Qur'an and hadith, calling on the jurist to reach a solution, explanation, or a rule (*hukm*) on a religious matter (Badri, 2018). In the Islamic judiciary context, *ijtihad* connotes to independent reasoning based on the *Hukum Syarak* made by the Syarie judge to reach a solution in resolving the disputing parties (W. M. al-Zuhayli, 2007). In fact, majority of the Islamic school of thoughts have deemed it as mandatory requirement in order to become a Syarie judge (Zaydan, 2011). Their reasoning is guided from the hadith encouraging the judge to give a verdict according to the best of his knowledge and there's a reward promised in doing it.

عَنْ عَمْرٍو بْنِ الْعَاصِ، أَنَّهُ سَمِعَ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ إِذَا حَكَمَ الْحَاكِمُ فَاجْتَهَدَ ثُمَّ أَصَابَ فَلَهُ أَجْرَانِ، وَإِذَا حَكَمَ فَاجْتَهَدَ ثُمَّ أَخْطَأَ فَلَهُ أَجْرٌ.

Narrated `Amr bin Al-`As: That he heard Allah's Messenger (p.b.u.h) saying, "If a judge gives a verdict according to the best of his knowledge and his verdict is correct (i.e. agrees with Allah and His Apostle's verdict) he will receive a double reward, and if he gives a verdict according to the best of his knowledge and his verdict is wrong, (i.e. against that of Allah and His Apostle) even then he will get a reward". (Hadith. Al-Bukhārī. Bāb Ajri al-hakīm izā ijtahada faṣāba aw akhṭā'a: Vol. 9: #7352)

The consensus of jurists states if a person has been appointed as judge, he shall judge equally and evenly (al-Rāzī, 1981; W. M. al-Zuhayli, 2009). Judging equally and evenly refers to making judgments based on inspection and examination on the evidence provided during the trial (al-Qurtubi, 2006). It is clear that in order to uphold justice, a judge must have broad knowledge and understanding related to Syariah law of evidence. This is the *fiqh* that must be acquired and mastered by the Syarie judge.

The fact that there is a hadith that prohibits the judge from giving judgment without knowledge and information about what he needs to adjudge and declare.

عَنْ ابْنِ بُرَيْدَةَ، عَنْ أَبِيهِ، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: «الْقَضَاءُ ثَلَاثَةٌ: وَاحِدٌ فِي الْجَنَّةِ، وَاثْنَانِ فِي النَّارِ، فَأَمَّا الَّذِي فِي الْجَنَّةِ فَرَجُلٌ عَرَفَ الْحَقَّ فَقَضَى بِهِ، وَرَجُلٌ عَرَفَ الْحَقَّ فَجَارَ فِي الْحُكْمِ، فَهُوَ فِي النَّارِ، وَرَجُلٌ قَضَى لِلنَّاسِ عَلَى جَهْلٍ، فَهُوَ فِي النَّارِ. قَالَ أَبُو دَاوُدَ وَهَذَا أَصْحَحُ شَيْءٍ فِيهِ يَعْنِي حَدِيثُ ابْنِ بُرَيْدَةَ الْقَضَاءُ ثَلَاثَةٌ»

Narrated Buraydah ibn al-Hasib: The Prophet (p.b.u.h.) said: "Judges are of three types, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a man who knows what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to Hell; and a man who gives judgment for people when he is ignorant will go to Hell". Abu Dawud said: On this subject this is the soundest tradition, that is, the tradition of Ibn Buraidah: "Judges are of three types". (Hadith. Abū Dāud. Bāb fī al-qāḍī yukhtī'u: Vol. 6: #3573)

In the said hadith, among the judges that was sent to Hell is who deliver his judgment for people when he is ignorant although his judgment coincided with the truth but he still sent to Hell due to his act delivering his judgment while he is an ignorant (al-'Azīm Ābādī, 1995; Ibnu Ruslān, 2016). Therefore, it is important for Syarie judges to be equipped with vast knowledge and deep understanding of Fiqh Forensics in advance before being able to handle scientific evidence in the Syariah Court. Plus, it is also essential for them to make a better juristic deduction based on the evidence submitted before them (Ahmad Syukran, 2017b).

The term of Fiqh Forensics is a combination of the words 'fiqh' and 'forensic'. It refers to the knowledge and understanding of Islamic law regarding the practice of forensic science in the Muslims daily life based on Islamic legal sources (Ahmad Syukran, 2014, 2017a, 2017b).

The need for this knowledge is not limited to Syarie judges, albeit to all Syariah officers in the Syariah Legal Institutions. This is because human capitals with the knowledge of forensic science are very important resources. Regardless of the rank and position of Syariah officers, from the Religious Enforcement Officers who carry out the investigation and arrest, the Syariah Public Prosecutor who brought the case and prosecute the accused, up to the Syarie Judge, the interpretation of scientific evidence should be handled with care and as good as possible. During the evidence management process, the crime scene officer³ should take immediate action for the sample collection and exhibits management. Similarly, Syariah Public Prosecutor should scrutinize the best scientific evidence to be submitted before the Syarie judge. Same goes to Syarie judge who shall make the best juristic deduction and reasoning on such scientific evidence before delivering his judgment.

Meanwhile, for the forensic experts, they also need to have sufficient knowledge about the expert (*al-khabīr*) requirements prescribed under *Hukum Syarak*.⁴ There are nine eligibility requirements to enable forensic experts to be regarded as experts and qualified to provide expert evidence in Syariah trial cases ('Azzām, 2009; Ahmad Syukran, Amidon, Mohammad Amir, Aminuddin, & Abdul Rahim, 2015; M. M. al-Zuhaylī, 2011; Ayman Muhamad Ali, 2008):

1. A person who is free and not owned by anyone as a slave.
 - a. Evaluation in the current context is that experts should be free from any stress or disturbance that may affect their technical evaluation.
2. Comply with general requirements for giving testimony in Islam.
 - a. Must be a person of intellect (*‘āqil*), adult (*bāligh*), and just (*‘adl*).

³ It can be either Religious Enforcement Officers or police officers

⁴ *Hukum Syarak* here refers to the discussions provided in the prominent Islamic jurisprudence books from Hanafi, Maliki, Shafie, or Hanbali schools of thoughts.

3. Having a high level of knowledge and understanding of the particular field, recent developments in the area and the number of competent instruments (not limited to specific tools in the analysis).
 - a. Experts only provide evidence based on experience, research, practice, and testing that have been implemented and conducted for many years in the field. The expert is also skilled in using a variety of tools and devices that can help the task (M. M. al-Zuhaylī, 2011).
 - b. Experts must also be members or registered members in competent institutions.
4. Have a very sufficient and adequate basic knowledge about the field.
5. Qualified and efficient.
 - a. Qualified in written law.
 - b. Efficiency in Islam including the ability to be polite, calm, and free from adversity, either from itself or others (Ahmad Syukran, 2017b).
6. Just (*'adl*).
 - a. Free from social relations with *fāsiq* or bad guys (Ayman Muhamad Ali, 2008).
7. Individuals should be appropriate to the case.
 - a. For example, if the case requires a DNA forensic expert to give evidence or opinion, the individual must be in accordance with the prescribed suit.
8. Undergo regular tests or examinations in the field of expertise within the prescribed time.
9. Having basic knowledge of Syariah law including the specific and general procedures such as court procedures and general submissions.

If the forensic experts managed to fulfil all the prescribed requirements above, then he or she can be admitted by the Syarie judge to give his or her opinion as an expert in the Syariah Courts. His or her opinion as an expert shall be recorded by the Syarie judge and be considered as qarinah to the case.

Suggestion

All problems in the world have their solutions. Same goes to the problems concerned in this study. As discussed above, the intended rejuvenation is relating to the perspective of knowledge and skills belong to the human capital in Syariah Legal Institutions.

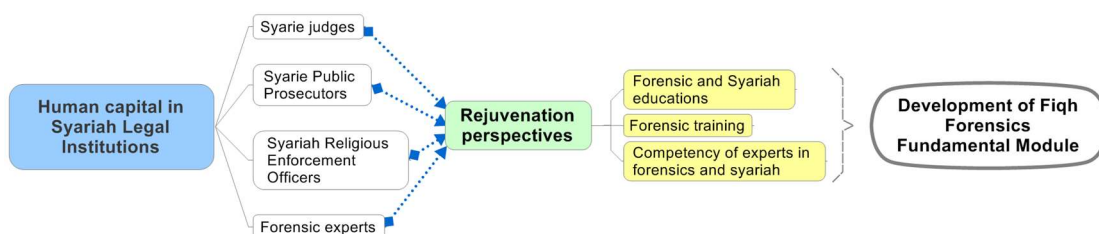


Figure 5: Rejuvenation of human capital in Syariah Legal Institutions through Fiqh Forensics Fundamental Module

In upholding the said rejuvenation, this study suggests the development of Fiqh Forensics Fundamental Module as shown in Figure 3. This module is specifically developed for the purpose of enhancing the human capital of Syariah officers in Syariah Legal Institutions. The salient ingredients of this module shall cover both perspectives, which are theoretical and practical aspects of forensic science. As the module's title suggest, this module is integrating the work of forensic science with Islamic law and Malaysian Syariah law within the context of Malaysian legal system.

By developing this module, this study believes that the level of human capital in Syariah Legal Institutions shall be fostered to a certain level as the syariah officers will gain new knowledge related to forensic science and the application of forensic science procedures as well as scientific evidence within the Syariah law of evidence. Furthermore, syariah officers also will continuously undergo

practical training with expertise in forensic science to gain more experience in handling the scientific evidence.

Conclusion

In a nutshell, this study has pointed out two main issues that play as integral parts in handling the scientific evidence, which are, lack of knowledge and adequate experience. These issues need to be resolved as soon as possible since the Syariah Courts have begun to pave the way to accept the scientific evidence as part of the means of proving. The purpose of this study is not only to point out the issues, but also provide suggestion to overcome it. The suggestion given is through the development of Fiqh Forensics Fundamental Module which covers the theoretical and practical aspects of forensic science. The said module integrates the work of forensic science with Islamic law and Malaysian Syariah law. By suggesting the development of this module, this study believes that the issues put forward can be resolved since the module will provide sufficient information and adequate training for the targeted reader, Syariah officers in Syariah Legal Institutions.

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