

Fiqh Forensics: Integration between Sciences and Islamic Law for Autopsies and Identification of Deceased

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Abstract

The emergence development on technology in forensic science has become a phenomenon to *muslim* community around globe. It is expected that forensics field will constantly grow in this 21st century with more sophisticated and impressive beyond belief technologies. The term *fiqh* forensics is a combination of 'the theory and philosophy of Islamic law' and 'the scientific approach in investigation' which can explain on the crucial need to combine and integrate on these two fields. This article attempted to explore more on the concept of *fiqh* forensics and its application towards human life especially in the field of *al-Uqubat* (punishment). Focus of this study is related to the issue of autopsy and identification process of deceased. Deductive, inductive and historical methods on textual analysis were used in this research. Finding shows that the combination of these two fields is a must in order to fulfil the *maqāsid al-Ammah* and the integration must be in accordance to Islamic guideline, ethics, maxims, and approaches.

Keywords: Fiqh forensics; autopsy; identification of deceased; forensic ethics; *zunnar*

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1.0 INTRODUCTION

As in history sciences and religion were never been separated. The prophet (p.b.u.h.) once said to the companion regarding the pollination of date trees by bringing the male parts into contact with female parts showing that Islam does not have any restriction in worldly matters likewise in the matter of technology. What should be taken into consideration is the way on how we use the technology, the ethics, the approaches made, and the principles related if it has anything to do with the integration within the boundaries of what Islam suggests or offers to humankind. The use of DNA for example shows how human being blessed with 'aql to colour up life accordingly to the needs of fitrah. Every human action in the world will be counted accordingly as taklif from Allah. Redefining the meaning of all these word in a simple introduction, sciences could not be separated from religion, as religion is the guidance in applying the sciences into worldly matters to ensure that the *maqasid al-Shari'ah* is fulfilled. With that, this paper aimed to elaborate on the concept of *fiqhforensics* within the limitation of forensic pathology and identification of deceased.

2.0 THE CONCEPT OF FIQH FORENSICS

This paper introduced a new concept in integration between the application of sciences and Islamic law. The term '*Fiqh Forensics*' originally suggested in this paper to demonstrate on the integration between sciences and Islamic law in order to show the importance of these two elements. In general the concept of *fiqh* forensics has not been properly discussed in Islamic classical references. Its existence in classical references is in separation chapter sometimes mainly discussed under the topic of *al-Qarinah*, *al-Bayyinah* and *al-Qiyafah*. Furthermore, classical manuscripts also show that the topic of forensics (referred to forensic pathology in this paper) is appeared to be highlighted under the *ahkam al-Jarahah* (rule of wound), *mafqud* (al-Zayla'i, 1992) and *al-Janaiz* (al-Sharbini, 1994).

The word '*fiqh*' is an Arabic word which literally defined as deep understanding, full apprehension and obtaining sufficient knowledge of the religion (Ibn Manzur, 1994). In al-Bahr al-Muhit by al-Zarkashī (1994) *fiqh* is *al-'Ilm bi Ahkam al-Shar'iyyah al-'Amaliyyah min Adillatiha al-Tafsiliyyah* which is translated as the practical knowledge of revealed rulings derived from detailed evidences or scripts. Khatibal-Sharbini (1994) describes the relevancy of *fiqh* is under the knowledge in concerning the actions of *mukallaf* whether permissible, prohibited, recommended and others. *Fiqh* termed a vast scope in everything related to the practical of human life such in Muamalat, Munakahat, Mawarith, Ibadah, and even '*At'imah* (foods) (al-Zuhayli, n.d.).

The word 'forensic' derived from Latin word '*forensis*' or '*forum*' which originally to demonstrate on the act of debating in legal circumstances. In Ancient Roman period, the Roman used to have senate to have public debate in discussing political issues and government policies which believed to be known as '*forum*'. Until now, some of universities, college and high schools in European countries named their debating team as '*forensics team*' for any debate competition or occasion. In comparison, basic science is a systematic combination of knowledge and some definite methods such as experiment and observation while forensic science is the skill of

carrying out scientific approaches to solve cases or investigation. These cases or investigation are not limited to criminalistics basis but extended to other types of investigation. In this manner, *fiqh* forensics termed as a practical knowledge derived from the revealed rulings gained from detailed scripts concerning the actions of applying scientific methodology in legal purposes or investigation purposely to the Islamic court.

With the limitation of research to the autopsy and identification of deceased which is known to be some of the most important parts in forensic science (Sachs, 2003). Autopsy or also known by the word cadaver, necropsy and post-mortem is performed by specialized pathologists either for the legal or medical purposes. When it comes to the forensics term which is autopsy for legal purposes, it is called forensic pathology (Anthony J, 2008). Meanwhile, to identify a dead body is the most important part in forensic pathology. Mainly identification of a dead body acquired by making comparison between the characteristic (*ante-mortem* data) of a missing individual with evidence found from unidentified body (*post-mortem* data). The analysis can be done by analysing characteristics of the face, various external peculiars, body features and/or personal belongings. These methods however become irrelevant due to the principle of progressive changes (Kamdar & Pandey, 2011; Sharma, 1989) which some features of the body may lost because of the external implication such as incineration and decomposition (al-Amad, 2009). In this case, scientific approaches for example fingerprint, DNA, medical and dental characteristics analysis is crucial to be carried out as these methods are in similar level of certainty.

■3.0 HISTORY OF AUTOPSY AND IDENTIFICATION OF DECEASED IN ISLAM

As mentioned before, the topic of forensic pathology in Islam appeared to be focussed in certain chapter of *fiqh* discussions. In Mughni al-Muhtaj by al-Sharbini (1994) if a dead pregnant woman known to be buried with her alive child in the womb, the body of should be exhumed and the child have to be saved. This action is also applied to the same case whenever some other's belongings or property such as very expensive ring is confirmed to be buried with the dead that cannot be replaced by any kin or deceased relatives it is permissible to exhume the body to get it back (al-Haythami, 1983).

Related to the identification of dead body, in reference to *fiqhi* manuscripts research found that the identification of deceased is discussed under few topics. In a discussion of *al-Tashabbuh bi al-Kuffar*, certain definite debates on the topic of wearing apparels which formally declared as religious wears of *ahl al-Dhimmah* such as *Zunnar* (girdle), *Ghiyar* (distinctive clothing), cross and other apparel termed as (*ziyy al-Kuffar*) (al-Tikriti, 2005; Ibn al-Qayyim, 1997; Levy-Rubin, 2011). Highlighting that the discussion on if *John Doe* is found in Muslim territory wearing those mentioned before, the apparel wore by the person can be some sort of recognition element of the dead body. al-Nu'mānī (1998) and al-Qurtubi (1964) in their exegesis of verse 273 Sūrah al-Baqarah stated that:

“There are conclusion that can be gathered from sign...even if one saw a deceased (unknown) in Muslim territory, and upon it girdle and he is not circumcised, do not bury him in Muslim cemeteries, and provides this case further accordingly to the law of territory...as said by majority of scholars”

This paper is not going to elaborate more on the topic of *al-Tashabbuh bi al-Kuffar* and its implication towards faith but the most interesting part to be focussed is how Islam has made mentioned the guideline in handling dead body which its identification is unknown. How al-Qurtubi (1964) and al-Nu'mānī (1998) gave a prescription on how to distinguish between the body of *muslim* and *non-muslim* in his period of time based on the regional situation and climate on politic and governance. The prescribed girdle, apparel and circumcision mentioned are some sorts of external peculiars in forensic pathology analysis. As in this new dawn of technology, the girdle and circumcision may not determine religion of dead body, but may give extra evidence by analysing the fabrics, circumcision rate of people, and apparel wear. Medical report of patient in circumcision may be considered as support to identification process. It really helps to minimize the use of biological analysis such as DNA analysis because the analysis is high in cost.

The father of surgery and pathology, Abu Qasim al-Zahrawi signifies on the importance of surgery to identify and find the cure of diseases. The first ever published encyclopaedia entitled *al-Tasrif li man 'ajiza 'an al-Ta'lif* although detailing on the pathology practice and thinking, the imperious illustration, efforts, work, and contribution on the manuals of surgery has opened the new horizon towards surgery (al-Tikriti, 2005). The most important part of the encyclopaedia incorporates three books of surgery namely: cauterization; incisions, wounds and venesection; and bone-setting (Golzari et al., 2013). The incisions became pioneer to autopsy nowadays of the Y-shaped incisions procedure, T-shaped incisions, and the tools and instrument design from his surgery records are still being used by pathologists.

Ibn Qayyim, al-Qarrafi, Ibn Farhun later made mentioned in their manuscripts in recognition and emphasise on the philosophy of forensic evidence to be highlighted to ensure justice could be given in the right way. Moreover their manuscripts also emphasised on the importance of bringing circumstantial evidence to court in order to fulfil the realisation of *maqasid al-shariah* (Ibn al-Qayyim, n.d.; Ibn Farhun, 1986; Ibn Qayyim, 1991).

■4.0 THE ISLAMIC MAXIMS OF PERFORMING AUTOPSIES AND IDENTIFICATION OF DEAD BODY AND ETHICS

Islamic jurists whom agreed upon the permissibility of conducting autopsy have come out with guidelines and maxims in handling autopsies. The permissibility of conducting autopsies and identification of deceased are restricted to regulatory from various interpretations of scripts. Due to the principle of *al-Qasd* derived from the maxim of *al-Umur bi maqasidiha* (matters are judged by intentions) the act of conducting autopsies is permissible based on the intentions. This maxim is sourced from the authentic narration of 'Umar al-Khattab (al-Bukhari, 2001). As long the autopsies and identification are intended to solve the puzzles, completing investigation and not aimed to harm and embarrassed the body it is allowed. Organ theft is the most common issue relating to autopsies (Campion-Vincent, 2002; Regamey, 2012). There were many cases showed that stealing organ during autopsies has become worst case scenario. Islam has strictly barred and prohibit any kind of exploitation to dead body except for the purposes of court evidencing procedure, investigation on to know the murderer or causes of death and also for clinical purposes (diseases analysis, human anatomy study etc.).

From the maxim of the necessity which render what would otherwise be prohibited into permissible (*al-Darurattubih al-Mahzurat*) lead the autopsies which could be considered as prohibited in Islam as it brings harm and dishonoured dead body which contradicts scripts such as the prohibition of chopping off the face of dead enemy (*tumatthil*) (Muslim, n.d., No. 1731), the rules of honouring the dead body of human (Surah al-Isrā': 70), and the prohibition of damaging and breaking any kind of bone from the deceased (Abu Dāwud, n.d., No. 3207; Ibn Ḥanbal, 2001, No. 24379; Ibnu Mājah, n.d., No. 1616) as Islam is very strict at this stage. However, when it comes to the necessity principle, few regulations applied:

1. Autopsy conducted is aimed for legal purposes within the approval of *al-Qadi* or judge.
2. Autopsies have to be done in order to preserve *maslahah al-'Ammah* in order to accomplish any crime investigation.
3. Other alternative methods such as three dimensional (3D) imaging tools should be given priority rather than incisions.

The maxim of *al-Darurah tuqaddar bi qadar al-Hājat/ bi qadarihā* (necessities is limited to the extent of thereof) out the borderline and limit of conducting autopsy. The application of the maxim here is autopsy is allowed only with the permission of judge or authority if there is any sign of doubt on the causes of death. Let say if the dead body identified been poisoned from external peculiar, judge in order to bring justice to the dead body and family has to order pathologists to conduct autopsy and analyse the chemical evidence from the deceased. Pathologists have to first determine the least incision that they could made to minimise the damage to the body. If there is alternative such analysing blood or any fluid related without any incision, it is a better choice.

Relatively, there are few other maxims *qadai* could be applied such as *al-Thābit bi al-Burhāni ka al-thābit bi al-A'yān* (what is established by evidence is similar to that established by seeing) (al-Zuhayli, 2006). As the data from autopsies could be as authentic as the *al-Shahādah* in evidencing cases, the pathologists have to testify anything related to the autopsy as expert witness and provide the documented details to the court for the court to make consideration. It is either can be used in defending and accusation of a case. Furthermore, the maxim of *Dalilu al-Ashya' i fi al-Umūri al-Bātinah yaqūm maqāmahu* which demonstrates that in invisible matters, the evidence of the thing stands for it. The word '*dalil*' here refers to *al-Qarinah* while *al-Batinah* described as indiscernible matters, that impossible to be see or recognized in which the interpretation could be varied and need explanation and clarification (al-Harayri, 1999, p. 160). Zarqa' (1989, pp. 345-346) in his explanation of this maxim stated that appearance of something (circumstantial evidence) can be the judge in the case of indiscernible mater for example, the intention of killing is considered to exist if the tool used on the act is normally used to caused death and if this happened, there is a consequence of *al-Qisas*. To be detailed, there are also few ethics that need to be followed by pathologists in conducting autopsies of forensic experts in identification of deceased procedure. The ethics are as follow:

1. To minimize the body part that needs to be analysed-derived from the maxim of *al-Darurah tuqaddar bi qadar al-Hājat/ bi qadarihā* (Zarqa', 1989).
2. Honour the deceased as it is alive and not to humiliate the dead body (al-Bukhari, 2001, No. 1393).
3. Keep the secret of the body and its *aurat*-due to the principle of necessity, minimizing the body part to be uncovered is the best as the rule of *aurat* applied even to the dead body (al-Sharbini, 1994).
4. To be professional and handling the process with care and soft in action (al-Nawawī, 2005, 56).
5. To return any organ removed in the process to its place and perfect any stitch in wound/incision made.
6. Cover the dead body with appropriate cloth when not in used or before/after procedure.
7. To be done in calm and silent condition, suggested to praise and remembering Allah in handling the procedure-noisy and external disturbance considered as dishonouring deceased.
8. Avoid delaying the burial process if every procedure of autopsy done (al-Bukhari, 2001, No. 1315).

With that, the autopsy could be in sync with shari'ah guideline. It is suggested that the authority to be in charge with these ethics and regulations. These ethics could also be applied on the autopsy for clinical purpose.

■ 5.0 REALISATION OF MAQĀSID AL-AMMAH THROUGH AUTOPSY AND IDENTIFICATION OF DECEASED

The perfection of Islam appropriately deals with the entire pivotal elements of humankind. Islamic law fulfilled the needs of humankind and the society hierarchically based on the nature of human. Every single aspect of Islam has its own significant which Allah has made mentioned of them in various scripts of al-Quran and al-Sunnah. The theory of *maqāsid* begins in the 9th century when al-Tirmidhi al-Hakim wrote books entitled '*al-Salah wamaqasiduha*' and '*al-Hajj wamaqasiduha*' which explain on the 'secrets' behind each acts of worship in *al-Salah* and *al-Hajj* (Auda, 2010) until now still being one of the most discussed topic in Islam. *Maqasid al-Shari'ah* is the knowledge on the objectives of legislated rule in Islam derived from Quranic verses and the authentic scripts of al-hadith. All in all, to be brief figure below shows on how of scholars have conclude of the hierarchy of *maqāsid* in Islam.

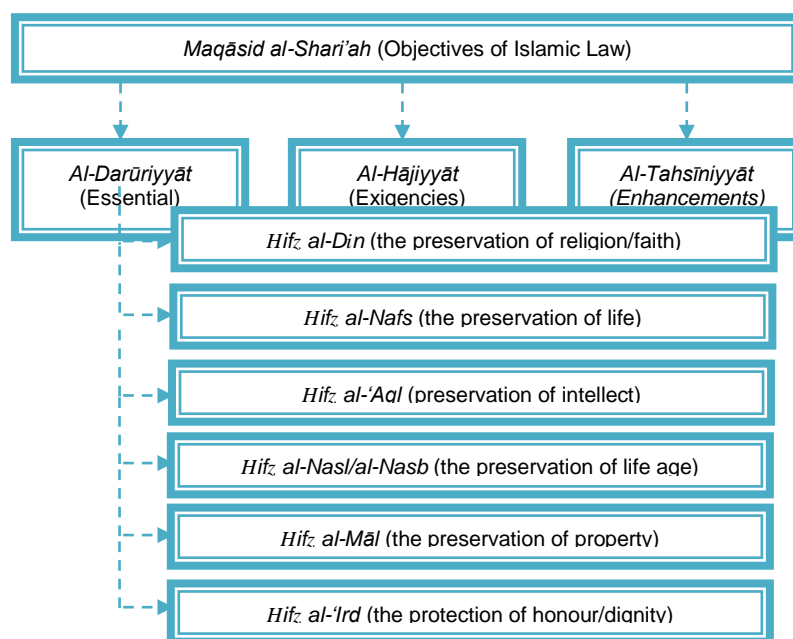


Figure 1 Hierarchy of the objectives of Islamic Law (dimension of levels of essential) adapted from al-Ghazali (1993, 1/172), Auda (2010, p. 3), al-Shātibī (1997, 3/47) and Ibn 'Arabi (1999, 5/478)

Majority of scholars agreed to classify *Hifz al-'Ird* (the protection of honour/dignity) under *Hifz al-Nasl/al-Nasb* (the preservation of life age). Five important elements that need to be fulfilled in systematic arrangement under the classification of necessity are also the most important elements in human life. As for this paper, autopsy and the identification of deceased have their own role in realising these five elements of *maqasid*.

First of all, the tragedy of Malaysia Airlines Flight 17 (MH17) in Malaysia has opened the eyes of the world on the importance of identification of deceased in forensic pathology towards humankind. MH17 was a scheduled international passenger flight from Amsterdam, Netherland to Kuala Lumpur, Malaysia that was shot down on 17 July 2014, killing all 283 passengers and 15 crew on board. The Boeing 777-200ER airliner lost contact about 50 km from the Ukraine–Russia border and crashed near Torez in Donetsk Oblast, Ukraine. Remember on how few *tafsir* scholars urged to identify deceased from the appearance and decide to bury the deceased based on the identification of the dead body which later elaborated by jurist scholars to be synchronized with their customs, *'urf*, and governance code. Every religion has its own burying ritual and the ritual signifies as religious protocol in which *muslims* are strictly prohibited to follow other religion. In the tragedy of MH17 airline, the identification of deceased is the most important part in forensic approaches as well as finding the culprit for the crime. Each body or piece of tissues found at crime scene has to be analysed to make it possible for the burying process. As an experienced forensic scientist, Bassindale (2014) considered this tragedy as a mass disaster when almost all of the identification of 283 passengers and 15 crews of mixed background of religion have to be identified through the guidance of forensic analysis for similar cases such as earthquake, volcanoes, tsunami and flood (Budowle, Bieber, & Eisenberg, 2005). Once victims or person have been identified, the kinship of the family could be confirm for the other purpose such as taking further action on the *al-mawārith*, *al-'iddah*, and other rule, if not the person who cannot be found could be considered as *al-mafqūd* which bring other ruling code for their kin. Hence, forensic analysis conducted on dead body could lead into the preservation of other elements of necessity such as the preservation of property through the completion of inheritance rule, the preservation of lineage through the confirmation of death, cause and time relating to the *ahkam al-'iddah* for pregnant women or not. In fact that to preserve the necessity of property, some scholar opined that it is allowed to exhume dead body for the purpose of fulfilling the *maslahah* relating to property and life age (al-Haythami, 1983; al-Sharbini, 1994)

As in Islam, the preservation of religion is the highest ranking in necessity which to be preserved more. In this case, the preservation of religion in burial ritual can be attained from the determination of deceased by any method of analysis. This case study although cannot directly prove that forensics analysis could determine someone religion, at least it is an evidence that forensics could lead to the perfection in preserving religion as every religion has its own burial code. Without determination by forensics analysis, there will be lacks in distinguishing mingled deceased. It is as likely the same as other essential elements of necessity. Of course in any case relating sudden death, murder cases, attacks, and killing through poison, the post mortem helps a lot in preserving human life (*Hifz al-Nafs*). As in Islamic law, the rule of *Hudud*, *Diyat*, *Ta'zir*, and *Qisas* could be given chances in urging on a new perspective of shari'ah court as it can be accepted in court as *al-Qarinah* by major scholar and also as *al-Bayyinah* as opined by other scholars (Ramlee, 1997).

6.0 DISCUSSION

Given, post-mortem aims to realize *maqasid al-Shari'ah* brings calmness and tranquillity to society through justice and law. This field develops very quickly as for the time of this paper prepared, new horizon of post mortem analysis and identification could be a solution for

the religious issue regarding maxims and ethics in conducting autopsies and identification process. Let us take a look on the shows the hype cycle for emerging technology presented by Jackie Fenn (2010).

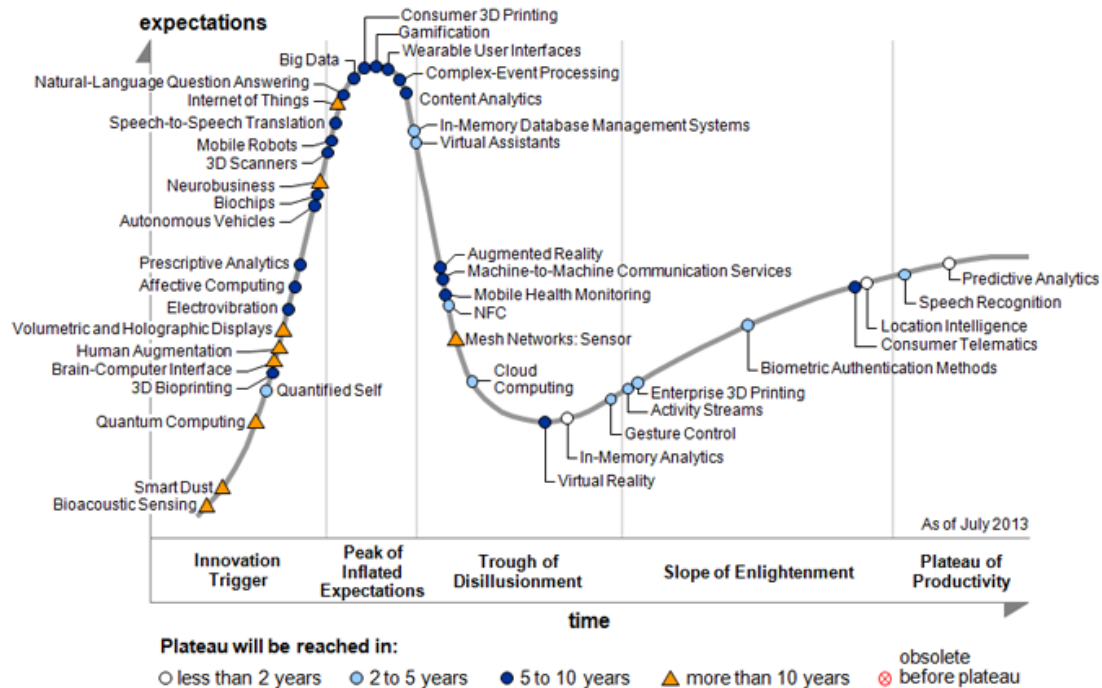


Figure 2 Hype cycle for emerging technology

As 3D technology is developing drastically in the coming 10 years, virtual autopsy for now could be recognized as a ‘shari’ah compliant’ way to conduct autopsy. No incisions will be made onto dead body and get fast results without holding the body for long time (as suggested by Islamic bioethics in autopsy) and analysis will be more accurate within the supervision of forensics experts. Regarding this 3D topic, forensics experts also could consider applying the 3D method on facial reconstruction, footprints identification, and fingerprint examination thus will help judge in considering the truth of any cases as circumstantial evidence in civil court, or as *al-Qarinah* in Shari’ah court. As the precision and the accuracy can be improved by time, it then could be suggested as *al-Bayyinah* in shari’ah court by adapting the opinions of al-Zayla’i (1992), al-Qarafi (1994), Ibn Farhun (1986) and al-Zayla’i (1992).

7.0 CONCLUSION

To sum up the foregoing, the integration of sciences and religion through the concept of *fiqh* forensics has proved that sciences and Islam are in need of one another. Any attempt to separate the science with Islam could lead to the redundancy of any of each. Research suggests more elaboration on other topic relating to the concept of *fiqh* forensics to give a strong support in order to rejuvenate the role of Islamic law in the eyes of world. *Wallahua 'la wa a'lam*.

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