



Porn Videos as Evidence of Adultery: A Comparative Study of Indonesian Criminal Law and Islamic Law

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Article	Abstract
<p>Keywords: Video; Evidence; Adultery; Criminal Justice.</p> <p>Article History Received: Apr 07, 2022; Reviewed: Apr 08, 2022; Accepted: Aug 28, 2022; Published: Sep 10, 2022;</p>	<p><i>Adultery is one of the categories of crimes that are prohibited under Indonesian law and is also categorized as a major sin according to Islamic law. With so many porn videos circulating through social media or the internet, the question of what if porn videos are used as evidence in court so that they can prosecute adulterers is raised. The purpose of this study is to find video criteria that can be used as legal evidence according to Islamic law and Indonesian Criminal Law. This study aims to find video criteria presented as legal evidence according to Indonesian criminal law and Islamic law so that it can be used as a reference for reforming Indonesian criminal law. This research was conducted by comparing Indonesian criminal law and Islamic law regarding video criteria as evidence of adultery. The results of this study found that according to Indonesian criminal law, because of the Constitutional Court's Decision No. 20/PUU-XIV/2016 there are limitations on videos that can be used as evidence in court, namely the method of acquisition must be in accordance with applicable legal rules. Meanwhile, according to Islamic criminal law, videos can be used as evidence of qorinah or instructions, but materially the content of the video contains the entry of almurud into the mikhalab. Based on these findings, the adultery video can be used as legal evidence, it can be referred to base on Islamic law by positioning it as evidence of guidance and although qotb'i there must be four men as witnesses on charges of adultery.</i></p>



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INTRODUCTION

A video is simply defined as an electronic capture of a particular event (Wang et al., 2018). A video represents the advancement of technology that may leave both positive and negative impacts on whoever uses such a technology, and porn videos certainly come as negative pieces resulting from the technology. Those committing adultery videotaped their sinful deeds for many reasons.

Adultery involves sexual intercourse between a man and woman not bound to marital ties, between a married man and a woman not bound by spousal connection

(Kipnis, 1998). In the perspective of criminal law, adultery is known as *overspel* or *gendak* as set forth in Article 284 of Criminal Code analyzing the clarification of the term *overspel* for a married man or woman committing adultery with another person of the opposite sex not as her/his spouse. Adultery is punishable by nine-month imprisonment but as a complaint offense, requiring a report or complaint submitted to police for further investigation (Widyawati, 2020).

A video containing adultery depicts intercourse between a man and a woman recorded in an electronic form accessible on the Internet. Indonesian Ministry of Communication and Information Technology reported that in 2019 the ministry received 431,065 complaints about inappropriate contents, and pornography-related complaints accounted for 244,738 complaints, representing the top number of complaints among other inappropriate contents (Clinton, 2019). However, the ministry reported that 1.8 million porn videos posted on social media were successfully deleted in 2020 (Meidinata, 2020).

Departing from the above picture of porn videos, this study learns that porn videos containing inappropriate contents of adultery can be categorized as a criminal offense, and they can be presented as items of evidence to reveal adultery. Considering porn videos as items of evidence leads to the idea implying that there should be standards the videos have to meet before they are accepted as evidence of adultery.

Videos presented as evidence are closely related to Law Number 8 of 1981 concerning Criminal Code Procedure, Law Number 11 of 2008 concerning Electronic Information and Transactions, and Law Number 44 of 2008 concerning Pornography. These three legislative products serve as the grounds for procedural law over the videos as valid items of evidence at court with different scopes and purposes of providing evidence. The videos can be presented as items of evidence if the reasons for adultery are found murky. This is in line with the law concerning Electronic Information and Transactions following the issuance of Constitutional Court Decision Number 20/PUU-XIV/2016 that has set the scope suggesting that not all videos are relevant for valid evidence at court; the videos are relevant as evidence when they are provided for the sake of law enforcement (Vikaresi, 2020). Giving a bit different view, Pornography Law highlights adultery as a criminal offense more than the production of inappropriate videos. That is, according to Pornography Law, videos can be presented as items of evidence to support sanctions imposed on those involved in the production of porn videos (Rumondor et al., 2022).

The position of a video presented as an item of evidence of adultery following the Constitutional Court Decision has positioned the video per se as an item of a clue, giving access to the interpretation of judges regarding the relevance of existing evidence. This has led to the unclarity of the video provided as evidence regarding the criteria that set the validity of a video as evidence at court and the video content. In other words, the authority to decide whether a video has met its relevance to be presented as an item of evidence lies only in the hands of judges. So, from the

description above, the problem formulation of this research is to unravel the legal position of video criteria as evidence according to positive law and Islamic law, so that it can be a reference in national law reform.

METHOD

This study is more focused on the criteria as procedural provisions a video should meet as an item of evidence presented at court, in which the video could serve as the basis by which adulterers are sentenced. The discussion in the study involved a comparative approach to compare positive law in Indonesia and Islamic law, where the result of the comparison could serve as the fundamental in criminal law reform that has been drafted.

This study uses a conceptual and historical approach (Ali, 2020) related to video criteria as valid evidence according to positive law and Islamic law. Researchers will describe the legal position of video as evidence and video criteria that can be used as evidence according to law from the perspective of positive law and Islamic law. This research will use a historical and conceptual approach in clarifying and disentangling video criteria that can be used as evidence from both legal perspectives. This study will dissect the Criminal Procedure Code, IET Law, Constitutional Court Decision No. 20/PUU-XIV/2016, while Islamic law is sourced from the Qur'an and As-Sunnah as the main reference and the views of scholars.

RESULTS AND DISCUSSION

Regulation concerning Electronic Elements as evidence

Revealing whether a person is involved in adultery through the evidence of a video presents a challenge for law enforcers. Prior to the effectuation of Law Number 11 of 2008, the video capturing the event when adulterers were committing adultery was presented only as an item of a clue as intended in Article 184 of Criminal Code Procedure. The clue presented represents relevance with other forms of evidence describing the deed committed or the event when adultery took place, indicating that offenders have committed a criminal offense (Sweeten, 2012). A video is not an independent item of evidence, but it only serves as a clue showing that an offense has taken place. A porn video shows adultery that eyes can witness.

Following the effectuation of Law Number 11 of 2008. Positioning a video as an electronic document with its evidentiary power provides legal protection. Article 5 Paragraph (1) and (2) of Law concerning Electronic Information and Transactions clearly state that videos are electronic documents serving as valid items of evidence to strengthen evidentiary written documents, relevant to how criminal law regulates the classification of lawful items of evidence. Determining whether a video can serve as a valid item of evidence requires a digital forensic examination performed by an expert to ensure the footage is real before it is declared valid for evidence (Faiz, 2018).

On 10 February 2016, Setya Novanto requested judicial review at Constitutional Court regarding the existence of an electronic document for evidence as outlined in Article 5 paragraph (1) and (2) of Law concerning Electronic Information and Transactions, and this request was granted by Constitutional Court, leading to the restriction of electronic evidence that met the requirements to be presented at court as a valid evidentiary item (A. Putra, 2020). The Constitutional Court decision has restricted the video only as an item of a clue that can be presented at court if it is intended to enforce the law. In other words, revealing adultery through the provision of the porn video as evidence presents a great challenge in terms of the condition where videos are no longer deemed to be electronic items of evidence accepted in inquiry processes.

Sanctions imposed on the offenders following adultery proven on porn videos must come after valid evidence is deemed valid by law so that the adultery committed could be proven real and obvious in terms of both procedural and substantive law to gain relevance to unpredictable criminal offenses. Some believe that adultery results from the development of information technology, where adulterers make use of the technology inappropriately by recording their immoral conduct.

The video showing the conduct committed serves as an indicator or an item that shows a crime has been committed. Positioning a porn video as a valid item of evidence should come as a solution to reduce the incidence of adultery.

Making a video available as an item of evidence is quite intriguing since Article 184 Paragraph (1) of Criminal Code Procedure governs only five valid items of evidence, constituting witnesses, experts' testimonies, letters, or clues, and testimonies of defendants (Nugroho, 2017). However, the acceptance of electronic data as electronic documents, including videos as intended in Article 1 paragraph (4) of Law concerning Electronic Information and Transactions (Directorate General of the Legislation of Ministry of Law and Human Rights 2008) should serve as the reference for further analysis regarding the position of a video. The categories a video must meet as evidence and the extent of a valid electronic item of evidence when it is connected to a valid item of evidence mentioned in Criminal Code Procedure, including the position of a video as a valid item of evidence following the Constitutional Court Decision Number 20/PUU-XIV/2016 need to be considered. All these matters were presented as a series of issues to be further analyzed based on the perspective of positive law concerning the criteria of a video as an item of evidence over adultery.

According to Islamic law, the provision of evidence as the basis of the allegation over adultery requires the presence of four witnesses directly witnessing the immoral conduct (Kisworo, 2020). An insufficient number of witnesses may lead to sentencing over fake allegations of adultery made by witnesses (Bezoušková & Lojek, 2015). Another issue arising over the case of the allegation of adultery in Islamic law regarding the requirement of the presence of four witnesses according to *šhar'ī*, while before the Qur'an was first revealed, videos did not exist. This has been questioned and it

encourages scholars to conduct more profound research to further analyze the qualification of videos from the perspectives of Islamic law. Moreover, the difference in the definition of adultery between positive law in Indonesia and Islamic law also triggers interest for further investigation.

Within the scope of legal studies, Roscoe Pound opined that law is a process and dynamic, whose interpretation should be related to social facts (Lathif, 2017). Pound further explained that a case may involve three steps: finding law, interpreting the law, and implementing the law (Lukito, 2018). Law exists and is overshadowed by social phenomena. Thus, the law must progress in line with evolving time. The existence of these phenomena requires legal findings to help settle the ever-changing social phenomena. This idea is relevant to the notion of Karl. N. Llewellyn suggesting that people are changing, and law aims to embrace the objectives growing in the society (Twining, 2012).

Scholten argues that law is a rule or authority that is logically formed and gradually changes, and these changes are not only restricted to people within a particular period. That is, the law is dynamic and conforms to sociological conditions and social development (Stark & McCarthy, 2020). Satjipto Rahardjo, citing the idea of Scholten, opined that legal finding may stem from analogy, the refinement of law (*rechtsverfijning*), and the interpretation of the analysis of law (Taqiuddin, 2019). The legal findings on contemporary issues need to be progressively carried out to provide certainty to people, suggesting that law exists so that justice is achieved (McGregor, 2018).

A popular adage in Islamic law “*Islam shalibun likulli zaman wa makan*” (Islam always conforms to evolving time and places) indicates that Islamic law is flexible, dynamic, and relevant to any alteration (Djamil, 2017). Abu Yazid argued that humans should be capable of serving as mediators between texts and context, which is inevitable due to the existence of a significant gap of history between the time when the revelation of the text took place and contemporary time (Aziz et al., 2021). *Nash* serving as the fundamentals of dispute settlement seems restricted, contrary to certain progress of the growth of society along with its growing problems for as long as human civilization remains in existence. Qur'an and Hadiths, however, remain unchanged and these two sources of law set forth only primary matters without giving elaboration on all problems.

The above issue shows that the interpretation of *nash* requires *ijtihad* and finding solutions to new problems is inevitable. Therefore, the result of *ijtihad* is often different among ulama due to different places, times, and social conditions, as we know four different schools of thought (*Madhhab or Mazhab*) that hold different views of the law. For example, Imam Syafii once issued *Qawl Qadim* and *Qawl Jadid*, both of which were different due to different social conditions. Another vivid example is the marriage registry that is compulsory these days, compared to the time of Prophet Muhammad when such a registry did not exist and this registry represents a good administrative

process in the modern time that has become more common (Lahaji & Muhammad, 2015).

Principally, the need for Ijtihad is progressive for as long as new social phenomena keep emerging. Social conditions are dynamic and changing and Islamic law never fails to remain relevant to these changes in social conditions that demand a decision, especially in present conditions where Ijtihad is certainly needed.

Earlier, Ulama stated “fatwa changes along with the changing time” (Abdul, 2017), while living in the past was mostly more organized and stable, as emphasized by Yusuf Qardhawi, suggesting that these differences emerged due to different ages and time, not due to varied arguments and propositions. He also opined that in social conditions these days, contemporary ijihad may involve three aspects: legislation, fatwa, and studies (Husain, 2019).

Regarding the criteria videos must have as items of evidence of adultery, legal findings with relevant methodologies are necessary, and this needs the existence of Ijtihad. Methods initiated by Imam Syafi’i in the form of *usbul Fiqh* represent the path to solving new problems, and these methods are incomparable to the content of Qur'an or Sunnah as the highest sources of law in Islam. Thus, more objective methodologies are expected to solve contemporary issues (Sanusi, 2018).

The criteria of videos presented as items of evidence according to Law in Indonesia

Videos presented as evidence, in this case, should meet the criteria mentioned earlier, where the videos should show a woman and a man not tied in marriage have consensual sexual activities involving sexual intercourse that culminates orgasm and stimulates the ejaculation of semen. This detail should be shown in these videos. However, the problem is that not all videos show this aspect. In some cases, what has been captured by the CCTV, for example, does not include a clear image of this intercourse where a man’s genital penetrates a woman, and this is contrary to the definition of *zina* or adultery where this intercourse aspect must exist.

When this is the case, the judges usually take it as only chunks of facts of the whole event that took place. Judges could measure the determining aspects and draw a correlation of this event, leading to the connectedness of evidentiary items. The system of evidence provision recognizes negative evidence (*negatief wettelijk*) or *conviction in raisone* (Hasan, 2020) to help determine whether a suspect has done any wrongdoings. Judges are bound to the items of evidence and their conscience as regulated in criminal code procedure.

Wettelijk, therefore, represents the manifestation of an item of evidence regulated by law and it is negative according to the existing evidence that serves as the basis for judges to decide whether a suspect is guilty (E. Putra & Iqbal, 2020).

In other words, the videos not showing any penetration of a man’s genital into a woman’s is still deemed valid since this evidence is left in the hands of the judges to

further decide whether the footage in the video could be considered as an event of adultery. In terms of the system of corroboration, Article 183 of Criminal Code Procedure also states “*unless evidence is corroborated, where at least two items of evidence are presented, judges cannot sentence a suspect. This corroboration should serve as the basis for judges to decide that the suspect is proven to have committed wrongdoings.*”

Judges are required to crosscheck the two valid items of evidence provided. Video contents are essential when they are connected to the definition of adultery and the District Court Decision of Klungkung Number 33/Pid.Sumir/1983 in conjunction with Constitutional Court Decision Number 854K/Pid/1983, implying that the situation where a man and a woman not having any marital ties to each other sleeping in the same room on the same bed may be alleged to be adultery (Disemadi, 2019). Evidence required to support an allegation in civil code procedure is like a clue outlined in criminal code procedure, from which the substance of jurisprudence of this case can be taken.

This jurisprudence intends to highlight a general acceptance implying that the situation where both man and woman are not bound to marriage under the same roof and on the same bed could indicate that adultery has taken place regardless of whether sexual intercourse was involved. In a nutshell, judging if a situation as discussed above is deemed to be adultery is thought-provoking. This general understanding could shift from facts that require proving to known legal facts (*notoir* facts) (Wahyuni, 2020) that require no further proof. In other words, it does not require the scene where a man’s genital penetrates a woman in which this sexual intercourse culminates orgasm and stimulates the production of semen to decide if adultery has taken place. Such sexual intercourse, as generally known, can be considered as a relationship only restricted to a husband and a wife bound in marital status to each other, and this activity is considered as a *notoir* fact.

Law concerning Electronic Information and Transactions recognizes a video as valid evidence, and the criteria of the video that can be presented as evidence are discussed above, meaning that videos presented as evidence, according to the perspective of positive law, should clearly show that sexual intercourse between a man and a woman not bound to marital ties takes place although this intercourse is consensual. On the other hand, philosophically, the law should be dynamic; regarding whether the penetration of a man’s genital into a woman’s is involved, *notoir* facts can be raised, suggesting that any intimate activities between a man and woman without any marital ties, regardless of whether sexual intercourse is involved, is generally understood as adultery. In the scope of jurisprudence, the situation where a man and woman stay in one room and are unmarried to each other or one of them is married is deemed to be adultery.

However, the view and consideration of judges to decide whether what is shown in a video is categorized as adultery and whether the video meets the requirements to be an item of evidence are needed since judges have the authority to determine the

validity of the video. The analysis given above is a description indicating that there should be a scientific explanation indicating that the footage shows adultery. Therefore, the positive law highlights the originality of the video, that is, it is essential that the footage in the video is not fake. Whether what is shown in the footage can be considered adultery and whether sexual intercourse should be an indicator of adultery is within the authority of judges

The criteria a video must meet as a valid item of evidence have been through several changes following Constitutional Court Decision Number 20/PUU-XIV/2016. Previously, it was stated that a video can serve as a valid item of evidence in the form of a printed document to allow it to be valid evidence in a judicial process, as intended in the following articles:

Article 5

- (1) Electronic information and/or electronic documents and/or printed version can serve as valid evidence.
- (2) Electronic information and/or electronic documents and/or printed version as intended in Paragraph (1) is an extension of valid evidence according to procedural law applied in Indonesia.

Article 44

Evidence required in inquiries, prosecution, and investigation at court according to this Law is defined as: b. another item of evidence in the form of electronic information and/or electronic documents as intended in Article 1 point 1 and point 4 and Article 5 paragraph (1), paragraph (2), and paragraph (3).

However, Constitutional Court implies that “electronic information and/or electronic documents” must be obtained for the sake of law enforcement to be valid as evidence, as clearly intended in Article 33 paragraph (3) of Law Number 11 of 2008, stating “Interception is performed pursuant to Law to enforce the law on behalf of the police, prosecutors, and/or other institutions as law enforcers.” This indicates that the definition of interception seems to be narrowed down. To provide legal certainty, the judges of Constitutional Court give assertion to the definition of Article 5 Paragraph (1) and (2) and Article 44 letter b of Law concerning Electronic Information and Transactions, implying that every process of interception must be conducted lawfully and for the sake of law enforcement. This narrowing definition is addressed to due process of law without violating the rights of the citizens as intended in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Thus, abuse of power over the privacy rights of the citizens could be averted. Constitutional Court Decision Number 5/PUU-VIII/2010 states that interception violates the rights of privacy as set forth in the provision of Article 28J Paragraph (2) of the 1945 Constitution of the Republic of Indonesia, and these rights are categorized as derogable rights governed by law.

The Constitutional Court Decision mentioning “Electronic information and/or electronic documents” still serves as valid evidence for as long as these electronic items clearly indicate that a criminal offense has taken place, while *benijisvoering* evidencing

could be referred to in terms of investigating whether an item of evidence is valid. This evidencing system describes the presentation of an item of evidence to judges. Eddy opines "in due process mode, the state upholds human rights, especially suspects' rights, and suspects were often released in pre-trial due to unlawful legal evidence" (O.S Hiariej, 2012). Hebert L. Parker's notion regarding *bewijsvoering*, believed that illegally acquired evidence must not be presented as evidence at court (Herbert, 2016). That is, videos must be acquired legally to possess evidentiary values.

The criteria of videos to fit the requirements of evidentiary items according to Islamic Law

The discussion of the criteria for this video in the perspective of Islamic law first understands the definition of adultery in the definition of Islamic law. Islam views every sexual relationship that is not carried out by the legal partner as an adultery, if we compare it with the applicable law in Indonesia, Islamic law seems to have more broad meaning of adultery. In the matter of accusations of adultery, in general it can be said that if someone accuses someone by saying "O adulterer" or omitting lineage by saying "O child of adulterer", then those who say it is obligatory to provide witnesses which are in accordance with bringing in four witnesses which are in accordance with the verse of Al - Qur'an Surah An-Nuur verse 4 which reads: "And those who accuse good women (of adultery) and they do not bring four witnesses, then lash them (who accuses it) eighty times. chastisement, and accept not their testimony forever, and they are the wicked."

But along with the times, in modern times we know and see that there is a video which can be used to record actions, one of which is adultery, as we analyzed above that video can be used as evidence with reference to corroborated Qarinah evidence according to experts' opinions. The next question raised regarding this video is what video materials can lead a person to punishment over adultery or in terms of an accusation of adultery made against a person by showing the video as evidence, what criteria should an accuser establish to indicate that adultery has taken place?

Rasulullah SAW has described the classification of adultery in a hadith, stating that "every child of Adam has been destined for adultery and this is something that is certain to happen, it cannot be helped. The adultery of both eyes is to see. Zina both ears by hearing. Oral adultery is by speaking. The adultery of the hand is by touching. The adultery of the feet is by stepping. Adultery of the heart is to desire and daydream. Then, it is the genitals that will later confirm or deny that. The definition of adultery basically has the same substance among the scholars, and Maliki scholars once stated that *zina* involves intercourse committed by the mukallaf to the *farji* (vagina) of a women) that does not lawfully belong to the man committing it, while the definition in the view of the Hanafiah scholars implies that adultery is unlawful intercourse in the will of a woman who is still alive in a state without coercion and the woman does not belong to her. In the view of the Syafi'ah scholar's, adultery is defined as penetration

of a penis into the farji which is forbidden because this act undoubtedly causes lust, while the Hanabilah scholars define adultery as a heinous act against both Farji and the anus (Ardiansyah et al., 2022).

The scholars do require the existence of *ghiyabul hasyafah* or the loss or the penetration of part of a male's genital into the females. This was based on the question of the Prophet Muhammad to Maiz who admitted to adultery: "Perhaps we only held or only saw?". Maiz replied, "Not only that, O Messenger of Allah". Rasulullah SAW asked again in detail, "Like the penetration of almurud into the mikhalah? And like the bucket lowered into a well?". Maiz responded firmly, "True!!!". From the above hadith and from several definitions of the Madhab Ulama, it is expressly stated that adultery involves the penetration of a penis into *farji*.

Regarding the discussion of video criteria that can be used as evidence, the video material is very closely related to the definition of adultery in the perspective of Islamic law, all Madhab scholars firmly state that adultery occurs when the penis enters the farji, while from the hadith of Rasulullah who asked Maiz, it is clear that adultery must require the entry of a male's genital (*Zakar*) into a female's (*Farji*), like a bucket lowered into a well or like almurud entering the mikhalah or like a cap gripping the mouth of a bottle, this condition is very important. It is very important to remember that if a man's penis does not enter a woman's farji or it can be said to touch the surface or bent without any further penetration, this condition cannot be said as adultery. The video that presents adultery material that shows the penis entering *farji* can serve as a reference or strong evidence proving that someone has committed adultery. Based on the hadith above, if the material only shows someone who is not husband and wife are alone in a room, then just hold on to it without being in the video the material that contains the entry of the penis into the vagina, so we can't call the video a video with evidence of adultery.

The existence of this classification regarding adultery has been explained by Rasulullah SAW, elaborating on adultery by seeing where a man is aroused by the look of a woman he looks at. This situation is also related to viewing pornographic videos that are considered as adultery by hearing, in which the conversations one listens to can arouse lust. Adultery in a verbal form, however, involves talking to someone who is not a muhrim about matters that entice them into adultery. Adultery by touching involves only groping the body parts of a woman not as a spouse of the man groping, or it could also involve the feet that goes towards the place of adultery. Adultery of the heart which is daydreaming and all of that by the Prophet it was stated that the genitals that justify all of them mean adultery that rests on the genitals which is the main concern. Therefore, the video material should be the most important focus from the discussion in this study. According to several hadiths and the formulations that have been put forward, adultery involves a male's genital entering the females as described above, such as the gripping lid (*Almurud*) on the mouth of a bottle (*Mikhalah*) or a bucket lowered into the well. That is, the author's view suggests that the video cannot

be said that it indicates adultery if it does not show any adultery scene as defined above, regardless of the scene showing the footage of two people in the same room without any marital ties between the two. Positive law implies that the situation where two people without any marital bound between the two in the same room without any scene showing the penetration of a male's genital to a female's can be categorized as a fact that is *notoir* or general in nature, strengthened by the existence of a permanent jurisprudence. However, in Islamic law, the signs required by Rasulullah are very clear, as is in the maiz case implying that adultery involves the penetration of the genital. In other words, the absence of the scene as elaborated above indicates that no adultery has taken place, as in line with the above elaboration. In this case, the perpetrators of adultery are carefully determined in Islam. In a more specific discussion about this video, punishing the perpetrators is a complex matter in Islam, we can refer to the maiz case above, indicating that Rasulullah also pursued the certainty of confession from maiz. It means that only Maiz has admitted that he is not immediately prosecuted, but Rasulullah saw Maiz's confession to the depths. This precautionary principle must also be applied in viewing videos as evidence in terms of the content of the video material.

Criteria of valid evidence for a video

Law is expected to adjust to the shift of time, social changes, and to stay relevant to changing criminal cases. Law capable of adjusting to shifting time is the best law. The vigor of positive law and Islamic law in adjusting to current development that has given great contributions is positive recalling that law is playing a significant role in governing human life, the connection between humans and their counterparts, and humans and their God.

From the perspectives of the two laws, a video can be presented as an item of evidence, but its content determines whether the video is eligible to be evidence. In line with the development of crime and the changing social structure, extraordinary rules are required. Law must keep growing lively and have the capacity to accommodate social needs. In brief and according to the laws in Indonesia, a video presented as an item of evidence refers to the following:

1. Following Constitutional Court Decision Number 20/PUU-XIV/2016, all electronic evidentiary items could be presented as evidence at court, including videos if they are acquired according to the legal procedures in place.
2. Videos not acquired according to legal procedures are still eligible to be presented as evidence at court, but they need to be corroborated by an expert's notion to ensure that the content is original.

The shifting position of videos presented as items of evidence at court has put porn videos uploaded on social media and the Internet in conflict with procedural provisions in which they can be provided as valid items of evidence as long the way they are acquired complies with Article 33 Paragraph (4) of Law concerning Electronic

Information and Transactions. This has set a scope emphasizing that not all videos can be presented as electronic evidentiary items at court.

Constitutional Court Decision Number 20/PUU-XIV/2016 was issued from dissenting opinions of two judges (Heryogi et al., 2017). First, in terms of procedures, the petitioner did not have any legal standing to be a petitioner and in terms of substantive aspects, this case is categorized as a matter that could be filed for judicial review at Constitutional Court, recalling that the petitioner served as the member of the House of Representatives with particular provisions related to the matter filed. Second, the difference lies in the interception that is governed in Law concerning Electronic Information and Transactions, not allowing all people to perform interception according to Article 31 paragraph 1 in conjunction with Article 46 paragraph (1) of Law concerning Electronic Information and Transactions. However, there should be a line between evidentiary items and how they are acquired, not petitioning for judicial review to incorporate an evidentiary item and how it is acquired.

An exemption from the implementation of *syara'* law that requires at least four male witnesses to be present could take place as long as this exemption abides by *maqashid al Syariah* (Harahap, 2017). Law aims to conform to time and to acquire solutions to contemporary issues that are laden with murkiness in *syara'* law. The search of effectiveness in law for a particular case according to a single provision due to the changing social culture may encounter some issues since the legal provision may have changed and may be no longer relevant to the objective of sentencing for a perpetrator.

The merit of determining the objective of the law is reflected from *maqashidal-Syari'* (God's purpose) and *Maqashid al-Mukallaf* (*Mukallaf* purpose), while *Maqashid al-Syari'ah* has four provisions to fulfill:

1. The existence of sharia is for the merit of the people on earth and in the hereafter.
2. Syariah is a regulation that must be comprehended
3. Syariah represents *taklifi* law ones must abide by; and
4. Sharia aims to encourage people to abide by law (Aulia & Al-Fatih, 2017).

To arrive at this merit, five aspects such as soul, mind, descendants, and asset have to be manifested (Al-Fatih et al., 2021), and the manifestation should at least comply with three categories set as a benchmark in legal breakthrough. First, *Maqashid al-Daruriyat* is intended to maintain five main principles of human life, ensuring that not all the five are threatened. Second, *Maqashid al-Hajjiyyat* aims to improve the maintenance of the five aspects. Third, *Maqashid al-Tahsiniyat* aims to encourage human beings to perfectly maintain the five aspects (Nurhayati et al., 2022).

To be more understandable from the legal position of video criteria as legal evidence in court, a comparison between positive law applicable in Indonesia and Islamic law is detailed as follows:

Table 1 Comparison Between Positive Law Applicable in Indonesia and Islamic Law

Indonesian Criminal Law	Islamic Law
<ul style="list-style-type: none"> • After the Constitutional Court's decision, video cannot be directly used as legal evidence. The decision provides limitations that the method of obtaining the video that will be used as evidence is for the purpose of legal examination in accordance with criminal procedural law. • Video is an extension of the evidence in the Criminal Code Procedure, which is included in the instructional evidence, but the position of the evidence cannot stand alone, it must be based on the judgment delivered by the judge. • Video can be used as evidence if it refers to evidence of expert's testimony after the video is used as evidence. So, expert's opinion is needed to strengthen this evidence. Expert's opinion can also result in the issuance of expert certificates and can also provide testimony as expert witnesses, both of which are valid evidence. • The material that can be used as evidence if it shows at least there are two persons without marital status between the two in the same room together and one of them is married. In such a case, the video material can be presented as evidence. 	<ul style="list-style-type: none"> • According to Islamic law, videos can be used as evidence, and this refers to evidence of Qarinah (Guidance) which is based on several traditions of the Prophet as well as those in the Qur'an • After referring to the evidence of Qarinah (Hints) the video can also be referred to using evidence of expert's testimony (Al-Khibrah) which is based on the opinion of some scholars who say that Mudhillah's wound can lead to a statement made by the doctor • 3. Video material that can be used as evidence is video material that shows a male's genital penetrating a woman, as explained by Rasullulah in the maiz case, that such as a penetratio of Almurud into Mikhalah can be compared to a bucket lowered into the well

Source: Author analysis, 2022

This comparison is expected to be presented as material supporting reform of the law in Indonesia in addition to its originality and availability, as a video must meet the criteria to serve as an item of evidence. The content of the video should explain how adultery takes place. With this, substantive truth is expected to be achieved.

CONCLUSION

Pornographic videos under criminal procedure law can be used as legal evidence in court, but they cannot stand alone as evidence. That is, other evidence is needed to strengthen the existence of video evidence in the form of expert witnesses. The expert witness's testimony should give the statement explaining that the video could be used as evidence by the judge. However, the judge will have to test and evaluate the evidence by conducting confrontations between evidence to find the connection between the adultery crime incident. Unlike the case under Islamic law, in *qothb'i* it is clearly explained that the accusation of adultery is only limited to being proven through four male witnesses, but in its development the video can be used as legal evidence with the position of *qorinah* (guidance), but the video as evidence for the instructions must have qualifications that show the act of inserting a male's genital into a female, as compared to a bucket lowered into the well. Thus, the video presented as evidence to prove if adultery has taken place, according to Islamic law, must show the qualifications of certain acts. On the contrary, Indonesian criminal law highlights the suitability of events to allow judges to confidentially assess evidence in the trial. There needs to be an alternative that shows the existence of the act of adultery so that an event recorded in the video is truly an act of adultery, not something else.

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