

The Strength of Electronic Evidence in the View of Islamic Law

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Abstract

Electronic documents are admissible as evidence under Law No. 11 of 2008 about Electronic Information and Transactions; consequently, it is vital to examine the use of electronic documents as evidence in positive Indonesian law and how electronic evidence is seen in Islamic law. Al-Qur'an and As-Sunnah have specified the requirements for criminal proof in Islamic law. This is normative juridical research pertaining to legal norms and regulations, court decisions, and living norms that arise in society. According to the findings of the study, electronic media can be utilized as evidence, but not as standalone proof. In the Islamic legal system, electronic proof is accomplished by *qarinah*/guidance, next creed/witness, and ultimately book/writing. Therefore, it is anticipated that this research will provide a theoretical addition to the subject of Islamic law so that the use of electronic media will no longer be a legal issue and the public would be able to continue using them as evidence.

Keywords: *Civil Law, Islamic Law, Electronic Evidence.*



A. INTRODUCTION

The development of information technology sweeping the world today cannot be avoided, and it cannot be denied either that these developments affect the order of human activity. It must be matched by a good and adequate understanding of technology, especially from a legal perspective (Rakhmawati, 2013). This is because the emphasis used today is very *Technologie Minded* (relying on technology), even though ideally we should look at it holistically with various perspectives, of course, both from a technological, legal, business, and social point of view so that the technological and industrial transformation can be carried out (Rifqi, 2020).

It cannot be denied that with the development of an era like this, crime does not mean that it will not increase. With the development of an era like this, like it or not, the law in Indonesia must also be updated, especially regarding evidence using electronic evidence (Damopolii, 2019). Law Number 11 of 2008 concerning Information and Electronic Transactions has positively responded to developments in this digital era.

Prior to 2008's Law Number 8 on Electronic Information and Transactions, a number of statutes acknowledged electronic evidence. Law Number 8 of 1997 Concerning Company Documents; Law Number 20 of 2001 Concerning Amendments to Law Number 31 of 1999 Concerning the Eradication of Corruption Crimes; Law Number 15 of 2003 Concerning the Eradication of Criminal Acts of Terrorism; and Law Number 25 of 2003 Concerning Money Laundering were the only instances in which they were utilized. Due to the position of electronic evidence in the Criminal

Procedure Code, however, this is still being contested among law enforcement officials such as judges, prosecutors, and attorneys (KUHAAP) (Lasmadi, 2014).

In Indonesia, even though most of the population is Muslim, they do not use Islamic law as the basis for criminal law. Islamic law in Indonesia is only used in several cases, such as marriage, zakat, endowments, and inheritance (Shomad, 2017). Islamic Inheritance Law is also sometimes used because the settlement of inheritance in Indonesia for Muslim communities is more inclined to settlement in a kinship or customary way. However, Islamic criminal law has begun to be enforced in Nanggroe Aceh Darussalam (NAD) even though the application of criminal law is still not fully implemented (Gunawan, 2018). According to Hikmatullah (2017), even though Muslims are the majority in Indonesia, the application of Islamic law is only available in the Religious Courts. Islamic Criminal Law, or *Fiqh Jinayah*, is the science of *syara'* law relating to the issue of prohibited acts (*Jarimah*) and punishments (*uqubah*), which are taken from detailed arguments, which are the *Shari'a* of Allah. In Islamic law, this proof is not much different from the legislation that applies in modern times. There are two kinds of judicial products, namely, decisions and decisions. Determination leads to truth, while decisions lead to justice (Ali, 2022). Allah Subhana wa ta'ala says, which means:

"The sentence of your Lord (Al-Qur'an) has been perfected as a true and just sentence" (QS al-An'am: 115).

To find the truth, valid and valid evidence is needed. In this case, the scholars differed on the evidence that could be used for crimes against souls (murder), not souls (injury), and against fetuses. The differences can be grouped as follows: First, according to the majority of scholars, three pieces of evidence are needed to prove *qisāṣ* and *diat*, namely: a) Confession, b) Testimony, c) Al-qasam. Second, according to some jurists such as Ibn Al-Qayyim Al-Jauziyah, to prove the *qishash* and *diat* finger, four methods are needed, namely: a) Confession, b) Testimony, c) Al-Qasam, d) *Qarinah*. The difference of opinion between these scholars is only found in *Qarinah*. Meanwhile, the other three pieces of evidence are often used in *hudud jarimah*. Meanwhile, *qasamah* is still disputed even though scholars from the four schools of thought have agreed on it (Habibi, 2021).

Proof in Islamic law is only used in some existing fingers. But only a few, such as finger fornication, *qadzaf*, *syurbul khamr*, theft, and *hirabah*. 12 In Islamic procedural law, making decisions based on news spread (*Khabar istifadlah*); what is meant by *Khabar Istifadlah* is news that has become famous and has spread, even though its degree does not reach the *mutawatir* level (Mustamiah, 2015).

The weight of the electronic evidence is considered to be positive. Both Indonesian law and Islamic law still require a definitive standing in the legal system. As a result, conducting additional research on electronic evidence, particularly as it relates to Islamic law, is not only recommended but also essential. The prosecutor builds his case by presenting evidence to show that the defendant is responsible for

the crimes that have been charged against him. This is required for as long as there are issues that are being litigated over or for as long as there is a dispute between the parties involved in the case. This proof seeks to obtain the truth of an event or right that has been presented to the judge, to convince and provide certainty to the judge about the existence of certain events, and to allow the judge, through the use of this proof, to evaluate, qualify, and constitute and make decisions as appropriate.

B. METHODS

This study employed normative juridical research, which refers to legal norms found in statutes and court rulings as well as norms that live and evolve in society (Soekanto, 2007). Researchers employ analytical descriptive analysis when examining data; data analysis is a qualitative approach to primary and secondary data. Primary data that is authoritative is data that is pertinent to the formulation of the problem, such as the Qur'an and Hadith, the Criminal Code, the Criminal Procedure Code, and laws that discuss electronic evidence, such as Law No. 8 of 2008 Concerning Information and Electronic Evidence. The secondary data for this study comprise legal documents, books, scientific journals, court decisions, legal reports, legal records, and other relevant literature.

C. RESULTS AND DISCUSSION

1. Electronic Evidence

The evidential system in the era of information technology is currently confronted with significant issues that demand careful management, particularly with regard to efforts to eradicate cybercrime (cybercrime). This is due to the fact that, for some parties, the forms of evidence utilized to capture criminals can no longer be used to capture criminals in cyberspace (cybercrime). How to apprehend cybercrime that undermines the feeling of justice connected with applicable criminal statutes is a vexing subject for law enforcement today (Ilmiyah, 2020).

According to paragraph 1 of article 184 of the Criminal Procedure Code, five (five) admissible pieces of evidence are recognized in criminal procedure law. In the absence of this proof, it cannot be utilized to prove the defendant's guilt, according to the sitting court. Public prosecutors, Defendants, and Legal Counsel are only permitted to use this evidence under strict restrictions. They are limited to the evidence provided in Article 184, paragraph 1, of the Criminal Procedure Code.

In disclosing a criminal case, there are at least three things that cannot be separated because they involve the validity or validity of a court decision, namely: the evidentiary system adopted by procedural law, evidence and strength of evidence, as well as evidence that will strengthen the evidence presented in the judge. So proving means giving certainty to judges about the existence of certain events, both in civil and criminal procedural law; proof plays a central role (Adjomi, 2020).

What about digital proof then? Can it be used as evidence in court? Law No. 8 of 1997, pertaining to company documentation, has begun to address the issue of evidence of electronic data, despite the fact that it does not control the subject.

Nonetheless, the government is attempting to regulate the recognition of microfilm and other media (information storage devices that are not paper and have a level of security that can guarantee the authenticity of transferred or transformed documents, such as Flash Disks, Compact Disk-Read Only Memory (CD-ROM), and Write-One-Read-Many (WORM)) (Mathilda, 2012).

Moreover, Article 44, paragraph 2, of Law No. 30 of 2002 concerning the Corruption Eradication Commission states that sufficient initial evidence is presumed to exist if at least 2 (two) pieces of evidence have been found, including but not limited to information or data spoken, sent, received, or stored either conventionally or electronically or optically. Article 26 A of Law No. 20 of 2001 on Amendments to Law No. 31 of 1999 on the Eradication of Corruption Crimes specifies that other evidence in the form of information that was spoken, sent, received, or saved electronically with optical devices or a similar device is admissible. In addition, article 9 of Law No. 25 of 2003 concerning Money Laundering Crimes states that electronic papers are included in the definition of documents referred to by the law. This indicates that the law recognizes the presence of data or documents saved electronically and acknowledged as property or evidence (Lasmadi, 2014).

In its development, the government focused on the importance of regulating transactions in cyberspace; *therefore*, the government passed laws relating to the surveillance of cyberspace activities by issuing a new policy with Law No. 11 of 2008 concerning Information and Electronic Transactions. What confirms is that electronic evidence can be used as evidence in Indonesian courts (Lestari & Damayanti, 2018).

Electronic Information includes, but is not limited to, writing, voice, images, maps, plans, photographs, electronic data interchange (EDI), electronic mail, telegram, telex, telecopy, and the like (Article 1 paragraph (1) of the ITE Law), letters, signs, numbers, Access Codes, processed symbols, or perforations that have meaning or can be understood by people who can understand them. Electronic Information includes, for example, wiretapped telephone recordings that can only be made by the KPK or the State Intelligence Agency. They are admissible as evidence or legal proof. Moreover, regarding Electronic Documents, Article 1 paragraph (4) of the ITE Law states that any Electronic Information that is created, forwarded, sent, received, or stored in analog, digital, electromagnetic, optical, or similar form that can be seen, displayed, and heard through a computer or Electronic System, including but not limited to writing, sound, pictures, maps, plans, photos or the like, letters, signs, numbers, Access Codes, symbols, and the like, is protected. Likewise, electronic transactions are any legal actions conducted via computer, computer network, or other electronic media.

There are juridical requirements that must be met by a piece of electronic evidence so that the evidence is recognized as legal evidence and can be used in court; these conditions are as follows (Heniyatun et al., 2018):

- a) The parties to an electronic transaction may behave in good faith and incorporate the transaction in an electronic contract.

- b) Electronic proof does not apply to proof that is required by law to be in writing and proof that must be in the form of a notarial deed or official doing the deed.
- c) Utilizing an electronic system as required by law, namely a collection of electronic equipment and procedures that act to prepare, collect, process, analyze, store, show, announce, send, or distribute electronic information.
- d) Electronic information can be accessed, its authenticity can be verified, and it may be accounted for in order to explain a scenario or legal event.
- e) If a "electronic certificate" is used to support an electronic signature, the signatory must guarantee that all information associated with the electronic certificate is accurate and complete.
- f) A new electronic signature has legal force if the following conditions are met:
 - a. the electronic signature generation data is exclusive to the signer.
 - b. During the electronic signing procedure, only the signatory has access to the information required to create electronic signatures.
 - c. Any modifications to the electronic signature or electronic information connected to the electronic signature that occur subsequent to the signing can be determined.
 - d. The availability of specific techniques to identify the signatory;
 - e. The availability of specific methods to demonstrate the signatory's agreement to the relevant electronic information.

2. Electronic Evidence According to Islamic Law

Does Islamic law with its judiciary recognize the existence of electronic evidence? According to Abduh Malik in his book *Adultery Behavior Views of Islamic Law and Criminal Code* ⁹², cases of adultery usually happen using a camera or other electronic media; a camera is a recorder of images and sound by using videotape/cassette, video, or by using a compact disc (CD) disc. CDs can be engineered utilizing a computer to function as VCDs. VCDs consist of video (image recording devices) and compact disks. So another technological assistance is needed to determine the authenticity or falsity of the images seen. So the truth of the image obtained depends on the sophistication of other tools to examine its truth. Thus the level of truth of the images obtained needs to be more convincing and be trusted. He concluded that proof using VCD or other electronic media could be legalized if he had previously examined it using more sophisticated electronic equipment. Moreover, this can be done by someone with special expertise in their field. Furthermore, one more instrument in the study of the evidence must follow what was prescribed by the Prophet Muhammad SAW.

In Islamic law, three concepts of evidence can be used to prove a dispute or finger in *cybercrime cases*: evidence of instructions/ *qarinah*, witnesses/ *shahadah*, and writings/ *al-Kitab* because these three things can be brought up in court if there are cases such as *cybersex*, *cyberterror*, and *cybercrime*. The perpetrators are called hackers (perpetrators of criminal acts entering a computer system network that is confidential belonging to individuals or government agencies by way of breaking the law) or terrorists (perpetrators of criminal acts that spread threats to the general public

throughout the world through a computer network system by way of breaking the law) (Mubarak, 2020). This will be explained further below.

a) Testimony

Using witnesses as proof for a finger is a common method because testimony is very important to prove expressing a finger. The basis of testimony in the word of Allah SWT:

"....And testify with two witnesses who are just among you and you should uphold the testimony for the sake of Allah.." (QS. Ath-Thalaq: 2)

In the case of cybercrime crime, the evidence used includes the classification of maliah punishment according to Imam Syafi'I and Imam Ahmad, proof for a finger whose punishment is maliah, such as diat and/or compensation, can be with two male witnesses, or one male. A man and two women, or a man and the prosecution (victim) oath, or the defendant's reluctance to swear the oath. Malikiyah has a different opinion from the Imam with Imam Syafi'i and Imam Ahmad; they (Malikiyah) allow proof for a finger whose sentence is maliah with the witnesses of two women plus the prosecution's oath, while Imam Syafi'i and Imam Ahmad do not allow it. Their (malikiyah) reason was that two women could replace a man in his position as witnesses in property matters. Because of this, two women can also be used as witnesses in a malice sentence to prove their crime.

Meanwhile, according to Imam Abu Hanifah and his followers, two male witnesses, or a male and two female witnesses, can be used for a crime whose punishment is maliah. They do not allow the use of a man. Meanwhile, according to Imam Abu Hanifah and his followers, for criminal acts that are punishable by maliah, two male witnesses, or a male and two female witnesses, can be used. They are not allowed to use a man.

In the above conception of Islamic law, one can see how Micheal Chissiick and Alistair Kelman (2002) concluded that one type of electronic proof is of three types, namely the Drive Evidence type. This can be seen in how a person as a prosecutor (witness) charges a defendant regarding a crime. Because he (the witness) knew there would be an error in the calculations and computer data that the defendant had made in a way that was against the law. Furthermore, with the concept of a translator, it is more emphasized that an event demanded by the prosecution is true. By looking deeper into the case, the author can conclude that the translator is an expert witness.

b) Convincing hint

If someone comes out of an empty house in a state of fear and trembling while he has a knife covered in blood in his hand, then someone else enters the house and sees the body of a person who was killed, then there is not the slightest doubt. The person who killed the person was the person holding the knife earlier; the judge, as the breaker of a legal decision, must be observant in looking at the case above because, in this case, the karinah is motivated by considerations and 'ruf for the community. Therefore this karinah is named *"Karinah-karinah based on the letter of society."*

In the development of science in various fields, in the end, all humans flocked to fix scientific concepts in various fields, especially in technology. This matter follows the times and the development of the human mindset. In Islamic law, it turns out that a case of espionage = *Cyber Espionage* already existed, namely in the word of Allah SWT, Surat al-Hujurat 12:

Meaning: *"O you who believe, stay away from most presumptions (suspensions), because some of these presumptions are sins. And don't look down on people and don't gossip about each other. Is there anyone among you who likes to eat the flesh of his dead brother? So of course you feel disgusted with him. And fear Allah. Indeed, Allah is Most Repentant, Most Merciful"* (Surah Al-Hujurat, 49:12))

c) Written evidence

At the present time, authentic evidence is considered the most important to prove the truth of the indictment. Only a few people were good at writing in the past, so this written evidence could have been more popular. Even in Islamic law, this written evidence is not used except for dealing with deferred debt issues. Jumhur fuqaha believe that making written evidence, as well as providing witnesses, is something that is recommended, not obligatory. In the meantime, Ath Thalabi and Daud required writing. In line with other scholars who stated that written evidence could be validated in this proof, Ahmad ad-da'ur and Sayyid Sabiq conveyed this. Moreover, following the development of the thoughts of the Mutaakhirin scholars based on iktisan, they accepted the written evidence.

Letters or writings, whatever and however their form, nature, and content, are none other than those made by humans. Either intentionally or not. Humans only live for a short time, but letters or writings can live thousands; if Allah and His Messenger admit that living humans (witnesses) are evidence, then the writings or letters cannot be ignored. Also, as evidence. If human testimony is given by using his mind and then initiated orally, then the spark of human reason can also be manifested in letters or writing. The Al-Qur'an orders to write down non-cash transactions in the field of muamalah in Surah Al-Baqarah 02:282

Meaning: *"O you who believe, if you do mu'amalah not in cash for a specified time, you should write it down."* (QS. Al-Baqarah. 02: 282).

Rasulullah saw ordered to write down the verses of the Mushaf of the Qur'an. Rasulullah saw made the Hudaibiah agreement, an agreement between the Muslims and the polytheists of Mecca. It is also written, The transmission of the Al-Qur'an and Hadith to the present, which are the main source and guideline for Islamic teachings, is through writing. So it is quite reasonable if writing or letters are used as evidence.

In an archive system which states that electronic information is still recognized. Because the definition of archives never states that archives must be in written form only on paper media, but it is also possible to store them in other media. Moreover,

this is also the procedure for today's modern banking system, all of which use computers as officers who automatically debit customer accounts (e.g., withdrawals via ATM or checks and demand deposits) or automatically add interest to customer funds. Everything is recorded by a computer and stored in file form; thus, it is impossible to prove all banking cases related to customer funds based on the original document; in paper form, it is only a printout of computer files at the bank concerned with the receipt of the checking account as a tool letter proof. Then this can be the basis for investigators to use printouts of computer files as documentary evidence.

Of the three concepts above, the authors argue with the arguments that have been strengthened previously. The three pieces of evidence are conclusively and convincingly admissible at trial. The author is of the view that electronic evidence is the same as real evidence (real evidence), even though it has to go through the process of authenticating a document which is technically the same in the judicial process, namely by hearing the statements of witnesses, listening to expert statements, and show the electronic document until the document is valid and legally used as evidence in electronic media. In the principle of proof, Islamic law already has several evidence concepts. However, if we look at a cybercrime case, what is closer to proof, in that case, is written evidence/*al-Kitab*, instructions/*qarinah*, and witnesses/*shahadah*.

D. CONCLUSION

The value of the strength of proof inherent in an electronic evidence instrument is legally equivalent to that of a paper document. This indicates that the evidentiary weight of electronic evidence in civil cases is equivalent to the evidentiary weight of printed evidence (letters). Electronic evidence has the same evidential value as court-admissible evidence; each piece of evidence has its own evidentiary value. This technological evidence cannot stand alone in Islamic criminal law evidence, particularly Islamic criminal law evidence. The status of this electronic evidence in criminal evidence under Indonesian Positive Law and Islamic Law, especially Islamic Criminal Law evidence, can often be classified as evidence that cannot stand alone. One of the legitimate Islamic academics, M. Abduh Malik, stated that electronic evidence is valid if submitted at trial. However, such evidence must be examined with more sophisticated tools before trial. Proof in the Islamic legal system that can be categorized as an electronic proof is the concept of guidance/*qarinah* evidence. Next is the witness/*Creed*; through the witness's statement, the real truth will be obtained that an event has occurred even though the proof must be obtained from electronic media. Furthermore, finally, the concept of electronic proof, in the view of Islamic law, is writing/*al-Kitab* with a thorough interpretation of writing in that writing is not just written by hand on paper but writing made by computer calculations. So the evidence can be valid at trial.

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