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The Problems of Proving Electronic Evidence

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Abstract: *The purpose of writing this article is to present the results of research on the problems in the existence of electronic evidence in proving civil cases, criminal cases, and state administrative cases, as well as finding solutions to these problems. This article was written using a normative legal research method with a statutory approach and a conceptual approach. The results of this study determine that there is a need for synchronization of rules regarding electronic evidence as regulated in Law Number 11 of 2008 concerning Electronic Information and Transactions as amended by Law Number 19 of 2016, and rules of procedural law, both legal criminal procedure, civil procedural law and state administrative procedural law.*
Keywords: *Electronic Evidence, Synchronization, Procedure Law*

INTRODUCTION

Responding to the era of the Industrial Revolution 4.0, the law must be able to keep up with the development of information technology, despite the fact that the law can hardly keep up with the speed of its development. Satjipto Rahardjo who is famous for

his progressive law said that: "law is for humans, not humans for law" meaning that if the law is not appropriate, then it is not humans who must be forced to adapt to the law, but the law must be adapted to the development of demands for human needs.[1]

In line with the rapid development of progress in the field of information technology and telecommunications, in practice various types of new evidence appear which can be categorized as electronic evidence such as e-mail, witness examination using video conference (teleconference), short message service system/SMS. , hidden camera/CCTV recordings, electronic information, electronic tickets, electronic data/documents and other electronic means as data storage media.

The application of Electronic Courts (E-court) is very helpful in realizing the Vision of the Supreme Court to become a great Indonesian Judicial Body, which in point 10 the realization of the Vision of the Supreme Court in the Blueprint for Judicial Reform 2010-2035 is to create a Modern Judiciary Agency based on integrated information technology.[2]

The application of Electronic Courts (E-court) is very helpful in realizing the Vision of the Supreme Court to become a great Indonesian Judicial Body, which in point 10 of the realization of the Vision of the Supreme Court in the Blueprint for Judicial Reform 2010-2035 is to create a Modern Judiciary Agency based on integrated information technology2. In an effort to realize the Supreme Court's Vision, it has been stated that there is a Modernization of Case Management, starting from Electronic-based Case Reporting, Migration to Electronic-Based Case Management to Online Courts.[3]

The emergence of an electronic judiciary is expected to reduce or even eliminate the main complaints of the public regarding judicial services so far, such as the slow and complicated litigation process in court that causes high costs, difficult public access to justice and low integrity of the judicial apparatus due to

[1] Supandi, 2019, *Modernisasi Peradilan Tata Usaha Negara Di Era Revolusi Industri 4.0 Untuk Mendorong Kemajuan Peradaban Hukum Indonesia* Undip Press, Semarang, p.17-18.

[2] Mahkamah Agung, 2010, Cetak Biru Pembaruan Peradilan 2010-2035, Jakarta, p. 13-14

[3] *Ibid*, p. 35.

the wide openness of the judiciary. opportunities for mala-administration by the judiciary.[4]

For the judiciary, the position of electronic evidence is very important, because electronic information and/or electronic documents and/or printouts are legal evidence, which is an extension of evidence in the procedural law applicable in Indonesia, provided that electronic information and/or or the electronic document uses an electronic system in accordance with the provisions stipulated in Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Information and Electronic Transactions (hereinafter referred to as the Electronic Information and Transaction Law).

In formal juridical terms, the law of proof in Indonesia (in this case procedural law as formal law) has not accommodated electronic documents as evidence, while several new laws have regulated and recognized electronic evidence as legal evidence, namely in: Law Number 30 of 2002 concerning the Corruption Eradication Commission, Law Number 24 of 2003 concerning the Constitutional Court, Law Number 11 of 2008 concerning Information and Electronic Transactions and further Law no. 30 of 2014 concerning Government Administration, which has regulated the Electronic Official Decision (which has shifted the concept of the object in the TUN dispute, which is written).

However, even though there is an Electronic Information and Transaction Law and several other regulations, it cannot be said that Indonesian procedural law has regulated electronic evidence in its evidence, because the current regulation of electronic evidence is only in the field of material law. Given the nature of the procedural law that is binding on the parties who use it, including judges, the regulation of electronic evidence in formal law (procedural law), both civil procedural law, criminal procedural law and state administrative procedural law, is very necessary and must updated for achieving legal certainty.

With the non-accommodation of electronic evidence formally in the provisions of the procedural law, it will be difficult for judges to resolve and decide disputes if the parties submit electronic documents and or electronic information as evidence or

[4] Sudarsono, 2019, Legal Issues Pada Peradilan Tata Usaha Negara Pasca Reformasi, Kencana Prenada Media Group, p. 202.

submit witness examinations using teleconferences, especially which is often done during the COVID-19 pandemic. at the moment. However, this cannot be used as an excuse by the judge not to accept and examine and decide on the case submitted to him, even though the reason is that the law is not clear or there is no regulation. In addition, judges are also required to make legal discoveries (rechtsvinding) by reviewing the norms that grow in society to resolve disputes.

RESEARCH METHOD

The writing of this article uses a normative legal research method with a statutory approach and a conceptual approach. A statutory approach is needed to determine the legis ratio of the legislators, especially in the field of evidence using information technology and electronic transactions. A conceptual approach is needed to find answers to the problems of proving electronic evidence in court.

RESULT AND DISCUSSION

Along with the advancement of information technology and telecommunications, evidence has developed with the emergence of evidence in the form of electronic information and/or electronic documents known as electronic evidence.

Electronic evidence was first regulated in 1997, namely in Law no. 8 of 1997 concerning Company Documents. The law does not explicitly state the word electronic evidence, but article 15 states that data stored on microfilm or other media is considered as valid evidence. The word electronic was first raised in Law No. 20 of 2001 which is an amendment to Law No. 31 of 1999 concerning the Crime of Corruption. Article 26A states that information stored electronically is evidence of instructions. This is emphasized again in the ITE law in Article 5 which states that electronic information,

electronic documents and their printouts are recognized as legal evidence. Based on these regulations, the definition of electronic evidence is data stored and/or transmitted through an electronic device, network or communication system. This data is needed to prove a crime that occurred in court, not the physical form of the electronic device.

Information technology has a definition which is a technique for collecting, preparing, storing, processing, announcing, analyzing and/or disseminating information, as specified in Article 1 paragraph (3) of the Electronic Information and Transactions Law. With the enactment of the Electronic Information and Transaction Law, there is a new regulation regarding electronic document evidence. Based on the provisions of Article 5 paragraph 1 of the Law and Electronic Transactions, it is determined that electronic information and/or electronic documents and/or their printed results are legal evidence. Furthermore, in Article 5 paragraph 2 of the Law and Electronic Transactions it is determined that electronic information or electronic documents and/or their printed results as referred to in paragraph 1 is an extension of legal evidence and is in accordance with the procedural law in force in Indonesia. Thus, that the Law on Information and Electronic Transactions has determined that electronic documents and/or their printouts are valid evidence and are an extension of legal evidence in accordance with procedural law that has been in force in Indonesia, so that it can used as evidence in court.

Furthermore, based on the provisions of Article 5 paragraph 3 of the Electronic Information and Transaction Law, it is determined that electronic information and/or electronic documents are declared valid if they use an electronic system in accordance with the provisions of the Electronic Information and Transactions Law. Thus, the use of electronic documents as evidence that is considered valid if using an electronic system is in accordance with the provisions as stipulated in Article 6 of the Electronic Information and Transaction Law, which determines that electronic documents are considered valid as long as the information

contained therein is accessible, displayed. Its integrity is guaranteed and can be accounted for so as to explain a situation. In addition, electronic documents whose position can be equivalent to documents made on paper, as specified in the General Elucidation of the Law on Information and Electronic Transactions.

From what has been described above, it can be concluded that in general the forms of electronic evidence are electronic information, electronic documents and other computer outputs, Article 1 paragraph (3) of the Law on Electronic Information and Transactions.

From the explanation above, it can be concluded that electronic evidence is electronic information and/or electronic documents that have met the formal requirements and material requirements stipulated in the Electronic Information and Transaction Law.

However, because the natural characteristics of digital evidence are very inconsistent, digital evidence cannot be directly used as evidence for the trial process so that standards are needed so that digital evidence can be used as evidence in court, namely:[5]

1. Acceptability, namely the data must be able to be accepted and used for the sake of law starting from the interests of the investigation to the interests of the court;
2. Original, ie the evidence must relate to the incident/case that occurred and not fabricated;
3. Complete, ie evidence can be said to be good and complete if it contains many clues that can assist investigations;
4. Can be trusted, ie evidence can say what happened behind it, if the evidence can be trusted, then the investigation process will be easier and this condition is a must.

[5] Muhammad Neil el Hilman, 2012, Pemeriksaan Alat Bukti Digital Dalam Proses Pembuktian, Seminar tentang Digital Forensik, Semarang, hlm. 12.

The Information and Electronic Transactions Law determines the minimum requirements so that digital evidence can be used as evidence in court as follows:[6]

1. Can display electronic information and/or electronic documents in full in accordance with the retention period stipulated by the laws and regulations;
2. Can protect the availability, integrity, authenticity, confidentiality and accessibility of electronic information in the operation of the electronic system;
3. Can operate in accordance with procedures or instructions in the operation of the electronic system.
4. Equipped with procedures or instructions announced in language, information or symbols that can be understood by the party concerned with the operation of the electronic system; and
5. Have a sustainable mechanism to maintain the renewal, clarity and accountability of procedures or instructions.

Then, in the Electronic Information and Transaction Law, this provision is excluded, as referred to in Article 5 paragraph 4 of the Electronic Information and Transaction Law, which stipulates that there are several types of electronic documents that cannot be used as legal evidence if they are related to the manufacture of electronic documents. A letter which according to the law must be made in written form and a letter and its documents which according to the law must be made in the form of a notarial deed or a deed made by the official making the deed.

The material requirements are regulated in Article 6, Article 15 and Article 16 of the Law on Information and Electronic Transactions, which essentially means that information and electronic documents must be guaranteed their authenticity, integrity and availability. To ensure the fulfillment of the material requirements referred to in many cases, digital forensics is

[6] Dewi Asimah, *Menjawab Kendala Pembuktian Da;am Penerapan Alat Bukti Elektronik*, Jurnal Hukum Peratun, Vol. 3, No. 2, Agustus 2020, p. 102.

needed.[7] With regard to digital forensics, it is an absolute requirement that must be done so that electronic documents can be used as evidence in court. Without going through digital forensics, an electronic document cannot be used as evidence because the validity of the electronic document cannot be guaranteed.[8]

The development of information technology has a significant impact on legal developments. One of the implications is the recognition of the existence of electronic evidence in the evidence at trial. However, these developments can also increase acts of violating legal norms or unlawful acts, so regulations should also be improved in accordance with the development of existing technological advances, especially in terms of submitting evidence that is used as a means of proof in court. Regarding the law of evidence, this raises a dilemma position, on the one hand it is hoped that the law can keep up with the times and technology, on the other hand there is also a need for legal recognition of various types of digital technology developments to function as evidence in court.[9]

The Supreme Court has issued rules regarding administration and trials electronically in Supreme Court Regulation Number 1 of 2019 concerning Administration of Cases and Trials in Courts electronically, but in its implementation, especially regarding Proof, in general, trials are still carried out conventionally, therefore the procedural law of proof especially in the application of electronic evidence is very important to be studied more deeply. Proof is one of the stages in the trial that is decisive in the case process, because from the results of the evidence it can be known whether or not a case or dispute between the parties is true.

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[7] http://www.hukumonline.com/klinik/detail/syarat-dan -kekuatan-hukum-alat-bukti-elektronik, diakses tanggal 08 Juli 2022.

[8] Santhos Wachjoe P, *Penggunaan Informasi Elektronik Dan Dokumen Elektronik Sebagai Alat Bukti Persidangan*, Jurnal Hukum dan Peradilan, Vol.2 No. 1, p. 13

[9] Munir Fuadi, 2006, Teori Hukum Pembuktian (Pidana Dan Perdata), Citra Aditya Bakti, Bandung, p. 151.

The regulation of electronic evidence must be based on the system and principles of procedural law in force in Indonesia. Subekti stated that the law of proof is a series of disciplinary rules that must be heeded in carrying out a fight before a judge, between the two parties who are seeking justice.[10] Meanwhile, Hari Sasangka defines the law of proof as part of the procedural law that regulates various types of evidence that are legal according to the law, the system adopted for proof, the requirements and procedures for submitting such evidence, and the judge's authority to accept, reject and evaluate a case proof.[11]

In the proof stage, there are 2 (two) elements that play an important role, namely: First, the elements of evidence. The parties in the proof stage must use valid evidence according to the law of evidence and may not use evidence that is not regulated in the legislation. Second, the Rules of Evidence. That the evidence regulated in laws and regulations is considered as valid evidence and can be used as evidence in court, this is because the laws and regulations regulate the method of manufacture, use and strength of evidence as evidence.

The following is a comparison of the types of evidence in the realm of civil procedural law, criminal procedural law, and state administrative law:

Evidence for Civil Procedure Law	Evidence for Criminal Procedure Law	Evidence for State Administrative Law Procedure
Writing or letter	Witness Testimony	Letter/Writing
Witnesses	Expert Description	Expert Description
Allegations	Letter/Document	Witness Testimony
Confession	Indication	Confession from Each Parties
Swear	Accused Testimony	Legal Knowledge

[10] Subekti, 1995, Hukum Pembuktian, 11th ed, Pradnya Paramita, Jakarta, p. 2.
[11] Hari Sasangka and Lly Rosita, 2003, Hukum Pembuktian Dalam Perkara Pidana, Mandar Maju, Bandung, p.10.

Referring to the provisions regarding evidence as regulated in the procedural law applicable in Indonesia, there must be a testing tool for electronic evidence so that the evidence can be declared valid at trial, the same as for other evidence, namely formal requirements and material requirements. These requirements are determined based on the type of electronic evidence referred to in the original form or in its printed form. The material requirements for electronic evidence are regulated in Article 5 paragraph (3) of the Electronic Information and Transaction Law, namely Electronic Information and Documents are declared valid if they use the Electronic System in accordance with the provisions stipulated in the Electronic Information and Transaction Law.

The formal requirements for electronic evidence are regulated in Article 5 paragraph (4) and Article 43 of the Electronic Information and Transaction Law are as follows:

1. Such Electronic Information or Documents do not apply to:
   a. A letter which according to the law must be in written form;
   b. The letter and its documents which according to the law must be made in the form of a notarial deed or a deed made by the official making the deed.
2. A search or seizure of the Electronic System must be carried out with the permission of the chairman of the local district court.
3. Search or confiscation and maintain the maintenance of public service interests.

Article 30 of the Electronic Information and Transaction Law regulates the prohibition against unlawful and unauthorized access to other people's computers and electronic systems. This causes there is no mechanism that can be done if someone refuses to provide password access on their device. The absence of clear rules and procedures regarding electronic evidence can create legal uncertainty for investigators and digital forensic experts who confiscate devices containing electronic evidence and make it difficult for courts to assess the integrity of the data/electronic documents presented.

The weakness of electronic evidence in terms of proof is that when the letter/deed is digital, it is very vulnerable to be changed, falsified or even made by people who are not actually made by people who are not actually the parties who are authorized to make them but act as if they were parties. the truth, as often happens in hoaxes.

Information/electronic data as evidence is not only not accommodated in the procedural law system in Indonesia, but in reality the data is also very vulnerable to be changed, intercepted, falsified and sent to various parts of the world in a matter of seconds. So that the impact is also so fast, even very powerful.

The integrity of the electronic evidence presented in court must be guaranteed. One thing that can guarantee is that the electronic evidence has been checked with the correct procedure. If the electronic evidence has been examined with the correct procedure, it can be concluded that there has been no change to the evidence or in other words the integrity of the electronic evidence is still maintained so that it has evidentiary value at trial. However, currently there is no procedure for examining electronic evidence that is generally applicable in Indonesia. In practice, the procedure for examining electronic evidence is left to each institution that examines the electronic evidence. This can cause the procedures that are owned by each institution are not the same. In addition, this can make it difficult for judges to see whether an electronic evidence has been examined with the right procedure so that it has evidentiary value.

Currently, there are no rules regarding how to present electronic evidence in court. In practice, electronic evidence is displayed in different ways, such as presenting the printed results, to presenting the electronic evidence carrying device and showing the data in it directly. The absence of this rule creates legal uncertainty about how electronic evidence should be presented in court.

In practice, in addition to the problems of evidence in court as described above, there are several obstacles in the application of Electronic evidence in the Judiciary, namely:

1. Obstacles of Evidence in Procedural Law.
2. Attitudes of judges who are still diverse in viewing electronic evidence.[12]
3. How to submit and how to show electronic evidence.
4. Authentication Electronic evidence.
5. Electronic signature.

Based on this description, in the opinion of the researcher, the biggest obstacle in implementing or proving electronic evidence in court is that the evidence and proof has not been regulated in procedural law as formal law. The regulation of new electronic evidence is regulated in material law.

Among the legal distinctions are substantive law (material, substantive law) and procedural law (formal, adjective law, procedural law). Soerjono Soekanto and Purnadi Purbacarakan define Substantive Law as the law that formulates the rights and obligations of legal subjects, while the Procedural Law is a law that provides guidelines on how to enforce or defend the Substantive Law in practice.[13]

Sudikno Mertokusumo said that material law is a reference for community members about how people should act or not act in society, while procedural law is a legal regulation that regulates how to ensure compliance with material law through the mediation of judges, which concretely regulates how to file rights claims, examine and decide it and the implementation of the verdict.

The form of procedural law regulation must be in law (in de wet). As outlined in Article 28 of the Law on Judicial Power as follows:

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[12] Minanoer Rachman, 2012, Penggunaan Informasi Atau Dokumen Elektronik Sebagai Alat Bukti DalamProses Litigasi, Alumni, Bandung, p. 17

[13] Soerjono Soekanto and Purnadi Purbacaraka, 1989, Aneka Cara Pembedaan Hukum Citra Aditya Bakti, Bandung, p. 27-28.

"The composition, powers and procedural law of the Supreme Court and the judicial bodies under it as referred to in Article 25 are regulated in law".

Based on these provisions, the arrangement of the procedural law may not be regulated in the form of statutory regulations other than the law. Regulations of the Supreme Court may contain provisions of a procedural law if there are attributes/delegates van wetgevings from the law or are formed under the authority of the Supreme Court to fill legal voids.[14]

Changes or updates to several procedural law regulations are urgently needed to respond to the development of information technology and resolve obstacles to the application of electronic evidence, including those concerning the regulation of evidence which was originally closed to open, as contained in the Civil Procedure Code which states that "proof can be done with all evidences unless the law stipulates otherwise".[15]

In addition, the regulation of evidence which was originally regulated in a limited and sequential manner in one article, has become openly and separately regulated in several separate articles, and only provides limitations and requirements regarding the evidence. Thus the judge is no longer bound to the evidence that has been mentioned in the law only to examine and decide a case. Likewise, the examination of witnesses using a teleconference which must be carried out at this time during the COVID-19 pandemic, even though it is not stated in a limitative manner in the arrangement, can be accepted as evidence at trial. Therefore, through changes to the procedural law, it is hoped that there will be a change in the evidentiary system, from what was originally closed to an open evidence system with limitations as determined by the law itself.

[14] Maria Farida Indrati Soeprapto, 2007, Ilmu Perundang-Undangan: Jenis, Fungsi Dan Materi Muatan, Kanisius, Yogyakarta, p. 55-56.

[15] Efa Laela Fakhriah, 2017, Bukti Elektronik Dalam Sistem Pembuktian Perdata, Refika Aditama, Bandung, p. 95.

With the inclusion of strict regulations on electronic evidence in the new civil procedure law, it is hoped that judges can examine cases (which use electronic evidence as evidence) to completion and then make a decision, so that legal certainty can be obtained through the judge's decision in order to provide a sense of justice for the people. Public. Because justice can be achieved on the basis of legal certainty that is applied to certain events or vice versa a legal certainty is achieved on the basis of justice.

CLOSING

The existence of electronic evidence has a legal umbrella in the Electronic Information and Transaction Law. The provisions of Article 5 of the Law on Information and Electronic Transactions have explicitly stated that electronic documents and their printouts are valid evidence and have the same evidentiary power as other evidence. However, in law enforcement practice, there are still some problems related to the existence of electronic evidence in the form of electronic documents.

Some of them are that there is no regulation regarding electronic evidence in formal law or procedural law, procedures for submitting and examining electronic evidence, and verification of the correctness of electronic evidence and electronic signatures. Answering these problems, it is necessary to reform the existing procedural law, both civil procedural law, criminal procedural law, and state administrative law. This is necessary so that there is a synchronization of existing legal rules, both in laws and regulations and policy regulations. This synchronization aims to achieve legal certainty and guarantee law enforcement based on laws that are lex scripta, lex stricta, and lex certa.

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