

The Practice of Using Electronic Evidence in Civil Procedure Law: Obstacles and Challenges

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Abstract

Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions has a significant impact on the regulation of Cyber Law in Indonesia, including the expansion of evidence recognized in the applicable Law of Procedure in Indonesia. The arrangement of the expansion of the evidence in procedure law provides legal certainty due to the shift in the habits of today's society which originally survived with conventional habit turning towards digital. The applicable procedural law in Indonesia is an old legal product, including regarding the expansion of valid evidence, but often in the settlement of civil dispute, electronic evidence submitted by private parties is rejected and not even considered at all by the panel of judges examining the case. This research aims to find out how the parties and the panel of judges treat electronic evidence in the examination of evidence. The problem of this research is that there are no

specific rules regarding the procedures for taking, examining, verifying and submitting electronic evidence in court. The research method used is normative legal research that uses secondary data and consist of primary, secondary and tertiary legal materials. Novelty in this research specifically discusses the vagueness of norms against the use of electronic evidence.

KEYWORDS *Civil Procedure Law, Electronic Evidence, Expansion of Evidence, Electronic Information and Transaction Law.*

Introduction

The Civil Procedure Law used and applicable in Indonesia at this time is a legal product of Dutch colonial heritage. *Het Herziene Indlansch Reglement* (HIR) is the first procedural law product formed and enacted on May 1, 1848. *Het Herziene Indlansch Reglement* (HIR) is a procedural law that accommodates the enforcement of material criminal law and material civil law¹. The establishment and enforcement of *Het Herziene Indlanchs Regrelement* only applies and is used for the islands of Java and Madura. For this reason, in 1858 the Dutch colonial government formed the *Rechtreglement voor de Buitengewesten* (RBg) as a procedural law that applies specifically to the outer islands outside of Java and Madura. With the different procedural laws that apply between Java and Madura and the outer islands outside Java and Madura, the Civil Procedure Law in Indonesia is pluralistic².

The specific reason for the difference in the application of procedural law on the islands of Java and Madura with the opposite island outside Java and Madura is due to differences in culture, habits, and influenced by the archipelago which at that time was divided into kingdoms causing the need for specific rules governing the provisions of procedural law tailored to the needs of each region, and *Het Herziene Indlansch Reglement* is a trial law product that was enforced in the archipelago at the time of its formation.

¹ Sutan Remy Sjahdeni, *Sejarah Hukum Indonesia: Jilid 1 Sejarah Hukum Indonesia Sebelum Proklamasi, Jilid 2 Sejarah Hukum Indonesia Menjelang dan Setelah Proklamasi, Jilid 3 Sejarah KUH Pidana Umum dan Militer, KUH Perdata dan KUH Acara Pidana* (Jakarta: Kencana: Prenadamedia Group, 2021).

² Efa Laela Fakhriah, "Penemuan Hukum Oleh Hakim Melalui Pembuktian dengan Menggunakan Bukti Elektronik dalam Mengadili dan Memutus Sengketa Perdata," *Jurnal Bina Mulia Hukum* 5, no. 1 (2020): 89–102, <https://doi.org/10.23920/jbmh.v5i1.50>.

Het Herziene Inlandsch Reglement and *Rechtreglement voor de Buitengewesten* are procedural laws that apply specifically to Bumiputera and foreigners living in the archipelago. Because during the colonial period there were European citizens living in the archipelago both as part of the Dutch colonizers and other European groups, special rules of procedural law were needed that applied specifically to European groups known as *Wetboek op de Burgerlijke Rechtvordering* (Rv) listed in 1987 Staatblad No. 52³. The current provisions of the Law of Procedure both regulated in the HIR and RBg have at least 13 differences that are of critical note as shown on Table 1.

TABLE 1. The Differences between HIR and RBg on Civil Procedure Law

No.	About	HIR	RBg
1	Procedure of filing a lawsuit	Article 118	Article 142
2	Oral lawsuit	Article 120	Article 144
3	Grant power of attorney	Article 123	Article 147
4	Appeal against a verdict of verstek	Article 129	Article 153
5	Swearing in of witnesses	Article 148	Article 176
6	Evidentiary proof of authentic deeds	Article 165	Article 285
7	Court costs	Article 182-183	Article 193-194
8	Executing the verdict	Article 195	Article 206
9	Foreclosure	Article 197 (1)	Article 208
10	Sale of confiscated property	Article 200 (1-3)	Article 218 (2)
11	Mortgage deeds and authentic debentures	Article 224	Article 258
12	Legal decision to perform an act	Article 225	Article 259
13	Prodeo litigation	Article 238 (2-3)	Article 274 (2-3)

Although there are 13 (thirteen) different arrangements in the Civil Procedure Law contained in *Het Herziene Indlansch Reglement* and *Rechtreglement voor de Buitengewesten*, for the sake of legal certainty the arrangements regarding the qualifications and types of Evidence are regulated equally by HIR and RBg. In addition, the qualifications and types of evidence in civil procedural law are not only regulated in the formal law (HIR and RBg) but also regulated in the material law (Kitab Undang-Undang Hukum Perdata/*Burgerlijk wetboek*). It is a big question when the *Burgerlijk wetboek* which is a material law regulates evidence. This is because during the formation

³ Rika Aryati, Hamzah Vensuri, and M Febrianto, "Sejarah Berlakunya BW dan KUHPerdata di Indonesia," *Journal of Criminology and Justice* 2, no. 1 (2022): 11–16, <https://journal.fkpt.org/index.php/criminology>.

of the Material Civil Law, some jurists had the view that there were 2 (two) types of formal law and two types of material law⁴.

Formal law that has material elements in it is a formal law that contains rights and obligations for legal subjects, inseparable from proof. Evidence is a formal law that has material elements in it that regulates the parties have the right and obligation to prove a legal event⁵. This is different from formal law which only has formal elements in it, which solely regulates procedural matters such as the panel of judges wearing togas, the parties sitting in front of the panel of judges and so on.

Specific to the types of evidence, the arrangements contained in HIR Article 164, RBg Article 284 and BW Article 1866 regarding the types of evidence are in principle the same. The types of evidence in civil procedural law in accordance with HIR, RBg and BW as shown on Table 2.

TABLE 2. Type of Evidence in Civil Procedure Law

No	Types of Evidence	Article
1	Written Evidence	138, 165, 167 HIR; 164, 285, 305 RBg; 1867-1894 BW
2	Witnesses	139-152, 158-172 HIR; 165-179 RBg; 1895, 1902-1912 BW
3	Presumption	172 HIR; 310 RBg; 1915-1922 BW
4	Confession	174-176 HIR; 311-313 RBg; 1923-1928 BW
5	Oath	155-158, 177 HIR; 182-185, 314 RBg; 1929-1945 BW

The types of evidence regulated in 164 HIR, 284 RBg and 1866 BW are limitative, and there are still evidences that can be used to explain a legal event aimed at obtaining justice in order to uphold legal certainty outside of the article above, namely Article 153 HIR, Article 180 RBg regulates Local Examination (Descente)⁶.

The implementation of the local examination in accordance with 153 HIR and 180 RBg can be requested by the parties to the dispute or the request of the panel of judges in their positions. This is useful to see more clearly the object of the parties' dispute by the panel of judges, so that the evidence will be left to the judgment of the panel of judges who examine, decide and hear the case.

In general, local examinations requested by the parties or by the judge because of his or her position apply to immovable objects, such as buildings and

⁴ Achmad Ali and Heryani. Wiwie, *Asas-Asas Hukum Pembuktian Perdata* (Jakarta: Kencana, 2012).

⁵ Ali and Heryani. Wiwie.

⁶ Efa Laela Fakhriah, *Kapita Selekta Hukum Acara Perdata* (Bandung: Mandar Maju, 2019).

land. For movable objects, the examination does not need to be carried out outside the court, because movable objects are easy to carry or present in court.

Expert testimony (*deskundigenbericht*, expertise) is one of the variables regulated in the provisions of civil procedural law, namely in Article 154 HIR, 181 RBg and is often used by parties and judges because of their position⁷. Expert testimony is testimony provided by a third party who has no relationship with the parties or the dispute. Expert testimony must come from people who have the ability to explain a fact objectively in accordance with their abilities and expertise. In addition to expert testimony can explain a legal event seen from a positive legal point of view, expert testimony can also enlighten the Panel of Judges about something that is deeply and in detail known by the Expert.

The expansion and addition of types of evidence in the applicable procedural law in Indonesia, first regulated in Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions as the first Cyber Law regime in Indonesia. Specifically for the expansion and addition of types of evidence in the applicable procedural law in Indonesia, it is regulated in Article 5 of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions⁸ which reads:

Article 5

- 1) **Electronic Information** and/or **Electronic Documents** and/or **their printouts** are legal evidence;
- 2) **Electronic Information** and/or **Electronic Documents** and/or **their printouts** as referred to in paragraph (1) is an **extension of legal evidence** in accordance with the applicable Law of Procedure in Indonesia.;
- 3) **Electronic Information** and/or **Electronic Documents** is declared valid if it uses an Electronic System in accordance with the provisions stipulated in this Law;
- 4) Provisions regarding **Electronic Information** and/or **Electronic Documents** as referred to in paragraph (1) does not apply to:
 - a. A letter which by law must be in writing; and

⁷ Fakhriah.

⁸ Republik Indonesia, "Undang-Undang Nomor 1 Tahun 2024 Tentang Perubahan Kedua Atas Undang-Undang Nomor 11 Tahun 2008 Tentang Informasi dan Transaksi Elektronik" (Jakarta, 2024), <https://peraturan.bpk.go.id/Details/274494/uu-no-1-tahun-2024>.

- b. Letters and documents which according to the law must be made in the form of a notarial deed or a deed made by a deed official

Expressively *verbis* Article 5 of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions states that Electronic Information and Electronic Documents and their printouts are evidence and the expansion of legal evidence in accordance with the applicable Law of Procedure in Indonesia. The Law of Procedure in question is not only limited to Criminal and Civil Procedure, but all branches of Law of Procedure in Indonesia.

Referring to Article 1 paragraph (1) of the Electronic Information and Transaction Law, it states that Electronic Information is one or a set of electronic data, including but not limited to writings, sounds, images, maps, designs, photographs, electronic data interchange (EDI), electronic mail, telegram, telex, telecopy or the like, letters, signs, numbers, access codes, symbols, or perforations that have been processed which have meaning or can be understood by people who are able to understand them⁹.

The expansion of evidence in the applicable Law of Procedure in Indonesia provides a new atmosphere in the context of law enforcement. The development of information technology and the massive use of digital means by the wider community provide the fact that in dealing with the development of information technology, it must also be balanced with adequate legal arrangements¹⁰.

The convergence of telematics (Telecommunications, Media and Informatics) causes legal actions by the wider community to be unlimited by time and space¹¹. This shows the difference between the telematics convergence period and the conventional or traditionalist actions of the past.

In the context of law enforcement, Chapter X (ten) and Chapter XI (eleven) of the Electronic Information and Transactions Law have accommodated the interests of Criminal Law Enforcement. As also regulated in Government Regulation Number 71 of 2019 concerning the Implementation of Electronic Systems and Transactions which explicitly states in Article 33 of the Government Regulation a quo “for the purposes of the criminal justice

⁹ Republik Indonesia.

¹⁰ Efa Leala Fakhriah, *Bukti Elektronik Dalam Sistem Pembuktian Perdata* (Bandung: Refika Aditama, 2017).

¹¹ Sugeng S.P., *Hukum Telematika Indonesia*, Edisi Revisi (Jakarta: Kencana, 2024).

process, the Electronic System Operator is obliged to provide Electronic Information and / or Electronic Data contained in the Electronic System or Electronic Information and / or Electronic Data generated by the Electronic System upon a valid request from the investigator for certain criminal offenses in accordance with the authority stipulated in the Law”¹².

In 2020, the Ministry of Communication and Information of the Republic of Indonesia has issued a legal product, namely the Regulation of the Minister of Communication and Information of the Republic of Indonesia Number 5 of 2020 concerning Private Scope Electronic System Operators which specifically in Chapter V concerning Providing Access to Electronic Systems and / or Electronic Data for the Interests of Supervision and Criminal Law Enforcement from Article 21 to Article 40 specifically talks about the interests of criminal law enforcement¹³.

Meanwhile, in the context of civil law enforcement, the provisions of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions, the provisions of Government Regulation Number 71 of 2019 concerning the Implementation of Electronic Systems and Transactions and the provisions of the Regulation of the Minister of Communication and Information of the Republic of Indonesia Number 5 of 2020 concerning Private Scope Electronic System Operators do not provide clarity on how to treat Electronic Evidence in the context of civil law enforcement interests.

Due to the lack of clarity and vagueness of the regulation on the treatment of Electronic Evidence as an extension of the mandate of the Electronic Information and Transactions Law on how to retrieve electronic information and / or electronic data in the context of civil law enforcement, making Electronic Evidence submitted by the parties in the settlement of civil disputes is often rejected by the panel of judges and not even considered as the principle of Procedural Law which states that decisions must be accompanied by reasons.

The rejection by the panel of judges examining civil cases in which the parties use Electronic Evidence and no explanation is given in the verdict, does

¹² Presiden Republik Indonesia, “Peraturan Pemerintah Nomor 71 Tahun 2019 Tentang Penyelenggaraan Sistem dan Transaksi Elektronik” (Jakarta, October 2019), <https://peraturan.bpk.go.id/Details/122030/pp-no-71-tahun-2019>.

¹³ Menteri Komunikasi dan Informatika Republik Indonesia, “Peraturan Menteri Komunikasi dan Informatika Republik Indonesia Nomor 5 Tahun 2020 Tentang Penyelenggara Sistem Elektronik Lingkup Privat” (Jakarta, November 2020), <https://peraturan.bpk.go.id/Details/203049/permenkominformasi-no-5-tahun-2020>.

not reflect the principle of legal certainty for justice seekers and is certainly not in line with the mandate of the Electronic Information and Transactions Law which states the expansion of both types of evidence and printouts.

As initial data in this study, there is a Decision of the Pelalawan District Court with Case Number: 65/Pdt.G/2023/PN.Plw, in which one of the parties attached an Exhibit in the form of a printout of the coordinate points of the disputed object, namely the land in the form of a screenshot / screenshot image on the google earth application, which in the consideration of the panel of judges stated that “*Regarding this evidence, it is not described how the coordinates are taken and plotted on the google earth application by experts, therefore the letter evidence must be ruled out*”¹⁴.

With the court's decision on the rejection of electronic evidence submitted by the parties in the settlement of the civil procedure, of course, it will raise problems regarding the existence of electronic evidence in evidence. For this reason, the problems contained in this study are what are the obstacles and challenges to the use of electronic evidence in civil law enforcement and how the concept of regulation of electronic evidence specifically in civil law enforcement.

In order for this research to have novelty value, there are 3 (three) previous studies as a comparison of research substance, namely:

- 1) Research in the form of a Journal Article published in the University of Indonesia Journal of Law & Development, by Disriani Latifah Soroinda, Anandri Annisa Rininta Soroinda Nasution, with the title “The Evidentiary Power of Electronic Evidence in Civil Procedure Law” in 2022. The results of this study state that there are still different views in assessing and treating electronic evidence in civil law enforcement, so that in 2 (two) Court Decisions, namely the Pelalawan District Court Decision Number 11/Pdt.G/2020/PN.Plw and the Jombang District Court Decision Number 81/Pdt.G/2020/PN.Jbg which is the research data that uses Electronic Evidence in dispute resolution, it is rejected by the panel of Judges¹⁵.
- 2) Research in the form of a Journal Article published in the Journal of Bina Mulia Hukum, Padjadjaran University, by Efa Laela Fakhriah with the title “Legal Discovery by Judges Through Proof Using Electronic Evidence in

¹⁴ Pengadilan Negeri Pelalawan, Pengadilan Negeri Pelalawan Perkara Nomor 65/Pdt.G/2023/PN.Plw (April 16, 2024).

¹⁵ Disriani Latifah Soroinda and Anandri Annisa Rininta Soroinda Nasution, “Kekuatan Pembuktian Alat Bukti Elektronik Dalam Hukum Acara Perdata,” *Jurnal Hukum & Pembangunan* 52, no. 2 (2022): 384–405, <https://doi.org/10.21143/jhp.vol52.no2.3344>.

Adjudicating and Deciding Civil Disputes” in 2020. The results of this study state that although the regulation of electronic evidence is not contained in the Civil Procedure Law, namely HIR and RBg as formal law, judges can make legal discoveries by way of analogy or legal interpretation so that electronic evidence can be used, even though the regulation of electronic evidence is regulated in the material regulations contained in the Law on Electronic Information and Transactions¹⁶;

- 3) Research in the form of a Journal Article published in the Lex Renaissance Journal of the Islamic University of Indonesia, by Insan Pribadi with the title “Legality of Electronic Evidence in the Criminal Justice System” in 2018. The results of this study state that in the interests of criminal law enforcement, the use of electronic evidence as a result of the times is very much needed in terms of making decisions for defendants by making electronic evidence as valid evidence in criminal justice trials and the role of digital forensic is needed to determine whether electronic evidence can be used as valid evidence or not in trials¹⁷.

From the 3 (three) previous studies as above, it can be seen that the difference in research and the value of novelty between this research and previous studies is regarding the concept of regulating electronic evidence in the context of civil law enforcement interests which looks from the perspective of retrieval, authentication and presentation of electronic evidence in resolving civil disputes in court and differences with the use of electronic evidence in the context of criminal law enforcement in Indonesia.

In this research, the author uses a normative research method, which aims to find whether the existing laws / regulations have accommodated the use of electronic evidence, or there is a blurring of norms in their regulation and the implications of these arrangements in court decisions, both in court decisions in civil cases and criminal cases. Normative research will use secondary data, which consists of primary, secondary and tertiary legal materials¹⁸. The conclusion of this research uses a deductive method in which the conclusion takes from a general statement to a specific statement¹⁹. In order for this research to provide

¹⁶ Fakhriah, “Penemuan Hukum Oleh Hakim Melalui Pembuktian Dengan Menggunakan Bukti Elektronik Dalam Mengadili Dan Memutus Sengketa Perdata.”

¹⁷ Insan Pribadi, “Legalitas Alat Bukti Elektronik Dalam Sistem Peradilan Pidana,” *Lex Renaissance* 3, no. 1 (2018): 109–24, <https://doi.org/https://doi.org/10.20885/JLR.vol3.iss1.art4>.

¹⁸ Peter Mahmud Marzuki, *Penelitian Hukum* (Surabaya: Kencana Prenada Media Group, 2021).

¹⁹ M. Syamsudin, *Mahir Meneliti Permasalahan Hukum* (Yogyakarta: Kencana Prenada Media Group, 2021).

benefits, the SWOT (Strength, Weakness, Opportunities, Threat) method is used to see legal symptoms and problem solving in this research.

The Use of Electronic Evidence in the Settlement of Civil Procedure Law in Indonesia

The process of resolving civil cases by litigation in court must of course go through processes or stages as the procedure for filing a claim for rights in court. When there is a claim for rights submitted to the court, the most important stage is the proof²⁰. The evidentiary process aims to explain a legal fact clearly based on the evidence submitted by the parties, so that when the panel of judges decides, it can have values of justice, benefit and certainty²¹.

Proving in the trial stage is an activity to convince the Judge of the truth of the arguments raised in the prosecution of rights for the settlement of a dispute²². As mandated by Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions, especially Article 5 regarding the expansion of valid evidence applicable to all procedural laws in Indonesia, it provides a new style in the Law of Evidence in Indonesian courts. Of course, this enforcement is not only limited by the interests of criminal and civil law enforcement, but also other branches of procedural law.

Parties, whether represented by a Power of Attorney or not, as well as the panel of judges examining a civil case, must first be able to recognize the concept, character and parameters of proof. The concept of proof relates to the most fundamental thing in claiming rights.

There are 4 fundamental evidentiary concepts that cannot be deviated from, namely:

- 1) Evidence must be relevant to the claim of rights, so that the meaning of relevant can be understood as evidence that is directly related to legal facts that have implications for the essential truth of the claim of rights;

²⁰ Ema Rahmawati and Lastuti Abubakar, "Peranan Penyelesaian Sengketa Pasar Modal: Suatu Tinjauan Atas Perkara Perdata Terkait Transaksi Repo," *Jurnal Bina Mulia Hukum* 4, no. 1 (2019): 130–49, <https://doi.org/10.23920/jbmh.v4n1.8>.

²¹ Enju Juanda, "Kekuatan Alat Bukti Dalam Perkara Perdata Menurut Hukum Positif Indonesia," *Jurnal Ilmiah Galuh Justisi* 4, no. 1 (2016): 27–46, <https://doi.org/http://dx.doi.org/10.25157/jigj.v4i1.409>.

²² R Subekti, *Hukum Pembuktian* (Jakarta: Pradnya Paramita, 2007).

- 2) Evidence must be admissible. Evidence that is admissible by a panel of judges is relevant, but if it is not relevant to a legal fact in a claim of right, it is inadmissible. In certain positions, there is evidence that is relevant, but cannot be accepted by the panel of judges such as *testimony de auditu*/hearsay. It can be concluded that the *prima facie* of admissible evidence is of course relevant evidence. Of course, the acceptance or rejection of such evidence is based on the consideration of the panel of judges;
- 3) Evidence presented to the panel of judges must be evidence obtained unlawfully (exclusionary rules). When evidence is obtained unlawfully or illegally, it will result in the inadmissibility of the evidence submitted by the parties;
- 4) Any evidence submitted to the panel of judges that is admissible because it is relevant and obtained unlawfully, then the evidence must be able and can be evaluated by the panel of judges. The evaluation of evidence carried out by the panel of judges aims to determine the suitability of one piece of evidence with other evidence. So that in deciding, the evaluation will be taken into consideration by the panel of judges to make a decision with the aim of justice.

The 4 (four) concepts of proof as described above are fundamental in the law of evidence, given that this stage of proof is decisive. When a fundamental concept in evidence is not implemented properly and carefully, it will certainly have an impact on decisions that can harm parties who do not heed this evidentiary concept.

Apart from the 4 (four) concepts of proof, then the parties and the panel of judges also know about the character of proof. The characters of evidence are:

- 1) The law of evidence is something that is very broad, with the breadth of the evidence, it must pay attention starting from the collection of evidence, how to submit or submit the evidence to the panel of judges, the assessment of evidence by the panel of judges to the burden of proof;
- 2) The development of the times which includes information technology will greatly affect the Law of Evidence. With the recognition of the birth of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions, it will affect the style of evidentiary law including ongoing cases;

- 3) The law of evidence is not an organized legal system. The assessment of the weakness or strength of the evidence carried out by the parties depends on how the parties present evidence regarding one fact with other facts, which can be proven and convince the judge. So that the claimants must be able to prove their claims with the main facts and be able to convince the judge. The compatibility between one fact and another (*factum probandum*) is considered important because that is where the evidentiary assessment lies. When the facts do not match, the assessment will be weak;
- 4) Each field of law has its own evidentiary law. Even with the development of information technology, the expansion of evidence has received a variety of responses, both those who accept and those who reject it on the grounds that the expansion of evidence is not regulated in formal law as a provision of procedural law.

At the evidentiary stage of the trial, where the parties use electronic evidence, there are still various responses from the plaintiff / defendant and the panel of judges examining the case. This variety of responses is inseparable from the unclear regulation of the use of electronic evidence in applicable procedural law, especially civil procedural law, so that legal obscurity arises regarding the validity of using electronic evidence. The vagueness of a rule will cause legal uncertainty and injure the values of justice²³.

Although the types of new evidence as expanded in Article 1 paragraph (1) of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions are of various types, in the practice of using electronic evidence, only a small part is used as evidence, such as photos, images, videos, voice recordings, and electronic mail. This is related to the habits of the wider community who often document every existing legal event, both in the form of audio and audio visual which aims to prove the occurrence of a legal event itself.

Although there are still a small number of new types of evidence used by the wider community in the purpose of proving a legal event, and the panel of judges examining a civil dispute case in its examination must follow the existing evidentiary parameters. The evidentiary parameters referred to are;

- 1) *Bewijstheori* is a theory of evidence used as the basis of proof by the panel of judges in court. Specifically in the context of civil law enforcement, the legal

²³ Rosyidi Hamzah et al., "Imperfect Information of Bankers Clause in Credit Agreements in Banking Institutions: Further Legal Impact," *Lex Scientia Law Review* 7, no. 2 (2023): 529–68, <https://doi.org/https://doi.org/10.15294/lesrev.v7i2.76529>.

theory of evidence used is *Positief wettelijk bewijstheori*. *Positief wettelijk bewijstheori* means that the judge in deciding a civil dispute is bound by legal evidence that is valid according to law²⁴. Whether an act is proven or not, depends on the evidence submitted by the parties and without the need for conviction, the judge can make a decision. There is no need for a judge's belief as the *Positief wettelijk bewijstheori* used in civil procedural law, because the truth sought is formal truth;

- 2) *Bewijsmiddelen* is evidence that is used as an object used to prove the occurrence of a legal event. In the context of civil law enforcement, the regulation of evidence has been regulated in the provisions of HIR, RBg and BW which explicitly explain the valid evidence in Civil Procedure Law are Written Evidence, Witnesses, Suspicion, Recognition and Oath²⁵. In the provisions contained in the HIR and RBg, Local Examination (field trial/descente) and Expert Testimony (expertise) are also evidence. With the provisions of the Electronic Information and Transaction Law, which as is known is a Materiil Law that regulates the Formiil Law therein, stipulates the expansion of evidence beyond that regulated by the HIR, RBg and BW;
- 3) *Bewijsvoering* means that how to submit evidence to the Panel of Judges examining the case in court. The submission of evidence is not only to submit evidence literally to the Judge, but starting from the collection and collection of evidence must not be unlawful or unlawful legal evidence²⁶;
- 4) *Bewijslast*, namely regarding the distribution of the burden of proof. When one party feels that their rights have been disturbed or reduced due to a legal event, and submits a claim for rights against the other party to the court, then based on the provisions of Article 163 HIR; 1865 BW states that the party who submits the claim for rights has the obligation to prove the claim for rights, this is based on the principle of *actori incumbit probatio* which means that whoever sues, he is the one who must prove. The distribution of the burden of proof is carried out in a balanced manner, both by the plaintiff and the defendant. When the plaintiff or defendant cannot prove the claim or refute the claim, then he must be defeated²⁷;

²⁴ M. Yahya Harahap, *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan*, Edisi 2, vol. Cetakan 1 (Jakarta: Sinar Grafika, 2017).

²⁵ Riduan Syahrani, *Sistem Peradilan dan Hukum Acara Perdata di Indonesia* (Banjarmasin: PT Citra Aditya Bakti, 2016).

²⁶ Eddy O.S Hiariej, "Kinerja Polisi," *Kompas*, 2003.

²⁷ H. Anshoruddin, *Hukum Pembuktian Menurut Hukum Acara Islam dan Hukum Positif* (Yogyakarta: Pustaka Pelajar, 2004).

- 5) *Bewijskracht* is defined as the power of proof. The power of proof relates to the evidence used at trial. This is directly related to the 4 (four) concepts of proof previously described;
- 6) *Bewijs Minimum*, which means that the judge in examining and ruling on civil disputes requires at least 2 (two) pieces of evidence. The term preponderance of the evidence in civil law is also known, namely regarding the standard of proof²⁸, This is where the judge is able to find the fact that the claim with the evidence submitted is probable or not.

The concept, character and parameters of proof as above, apply in the law of evidence, especially in the context of enforcing the violated material civil law. As a result of technological developments, there has been a paradigm shift in the law of evidence, especially regarding the type of evidence used to explain a right in court²⁹.

After the enactment of Law Number 11 of 2008 concerning Electronic Information and Transactions, the first legal subject to be charged after the enactment of the Law was Sdri. Prita Mulyasari in a case of insult and/or defamation against Dr. Hengky Gosal and Dr. Grace H. Yarren Nela as specialist doctors at Omni International Hospital Tangerang³⁰.

The insult and/or defamation committed by Sdri. Prita Mulyasari using electronic mail. In the decision of this case, both in the realm of criminal and civil law enforcement, each panel of judges examining the case accepted all electronic evidence, both submitted by the Public Prosecutor and by Prita Mulyasari as the original cassation petitioner/respondent/appellant. The reason why the panel of judges accepted the electronic evidence submitted was in accordance with the mandate of Article 5 of Law Number 11/2008 on Electronic Information and Transactions.

After the birth of the Prita Mulyasari case verdict, more and more parties in civil dispute resolution or public prosecutors in the criminal realm use electronic evidence as new evidence in order to explain an event. However, even though electronic evidence is used and has a clear legal basis, there are still many

²⁸ Reyhan Nabillah Azhari, "Understanding the Contents of Indonesian Civil Law: A Book Review Perkembangan Hukum Perdata Di Indonesia, Sudikno Mertokusumo, Genta Publishing Yogyakarta, 2019, 206 Pages, ISBN 978-602-0757-08-7," *Journal of Indonesian Legal Studies* 5, no. 1 (2020): 263–66, <https://doi.org/10.15294/jils.v5i1.34809>.

²⁹ Munir Fuady, *Teori Hukum Pembuktian Pidana dan Perdata*, Cetakan Ke-3 (Bandung: PT. Citra Aditya Bakti, 2020).

³⁰ Mahkamah Agung, Putusan Mahkamah Agung Perkara Nomor: 225 PK/PID.SUS/2011 (September 17, 2012).

rejections by judges due to the vagueness of the regulation regarding the use of electronic evidence in civil dispute resolution.

Decision of the Pekanbaru Religious Court, Case Number: 1284.Pdt.G/2017/PA.Pbr, *Verzet* effort on the Divorce Decree in which some of the evidence submitted to the panel of judges was a printout of a conversation using the WhatsApp application to explain the basis for why the divorce suit was filed. However, in one of the considerations of the panel of judges examining the case stated that “although photos are not included as evidence that can be legally considered, they must be ruled out”³¹.

The problem in this decision can be seen from the analysis of the consideration of the panel of judges who decided the case. One of the new types of evidence regulated is photographs. Therefore, photos are actually valid evidence as stipulated in Article 5 of Law Number 11/2008 on Electronic Information and Transactions. The rejection of the photo evidence, also does not explain the concrete reasons whether the photo is rejected because it is not clear that the photo prints to explain a legal event, or there is a defect either in the form of addition or subtraction (edit) in the photo and / or the procedure for taking the photo prints is against the law. So that when the photo is ruled out by not giving a clear reason for it, the purpose of justice is not achieved as it should be.

Decision of the Lolak Religious Court, Case Number: 3/Pdt.G/2022/PA.Llk efforts to sue for divorce in which one of the evidence submitted is Electronic Evidence in the form of photo printouts. In the legal considerations of the panel of judges, it is explained that “That all electronic evidence submitted by the applicant as referred to in Article 1 paragraph 4 and Article 5 paragraph 1 of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions states that Electronic Information and / or Electronic Documents and / or their printouts are valid legal evidence, However, all electronic evidence submitted by the Applicant is not supported by other evidence that can guarantee its integrity and authenticity so that it cannot be accounted for its authenticity to explain a situation or event but because it is recognized by the Respondent, therefore the evidence has also met the material requirements because it is relevant to the subject matter of the case, and in accordance with Article 296 RBg. The Tribunal is of the opinion that the evidence is only of a preliminary quality so

³¹ Pengadilan Agama Pekanbaru, Putusan Nomor: 1284/Pdt.G/2017/PA/Pbr (January 31, 2017).

that other evidence is still needed, in order to reach the minimum threshold of proof³².

In the case of divorce in the Lolak Religious Court Case Number 3/Pdt.G/2022/PA.Llk, both parties both use Electronic Evidence at the evidentiary stage. The electronic evidence submitted by the applicant according to the panel of judges has fulfilled the formal elements, but does not fulfill the material elements due to the absence of further explanation regarding the Electronic Evidence submitted. But in the end, because there was recognition by the respondent, the electronic evidence was acceptable with the quality of preliminary evidence and there must be other supporting evidence.

Meanwhile, in the panel of judges' consideration of the evidence submitted by the respondent, although it has fulfilled the formal requirements, it does not meet the material requirements and there is also nothing, namely digital forensic, that can state that the evidence submitted by the respondent can be accounted for, so that the electronic evidence submitted by the respondent is ruled out.

In the court decisions mentioned above, the treatment of electronic evidence submitted respectively by the applicant and the respondent is the same and different. This equation can be seen from the fulfillment of the formal and material requirements for Electronic Evidence considered by the Panel of Judges, but the difference lies in the Applicant's Electronic Evidence which received recognition from the respondent to get the quality of preliminary evidence, so that other evidence is needed to be able to reach the minimum limit of proof.

The interpretation as made by the panel of judges is certainly still a long debate. When the evidence is qualified as preliminary evidence and other evidence is needed to reach the minimum limit, the judge must be able to give consideration that the minimum limit (*bewijsminimum*) must be associated with the quantity and quality of evidence³³. If based on the quantity of evidence, both the applicant and respondent have met the minimum threshold of proof, but in terms of quality, it must still be assessed and evaluated whether it is relevant and acceptable and given value to the evidence.

³² Pengadilan Agama Lolak, Putusan Pengadilan Agama Lolak Perkara Nomor: 3/Pdt.G/2022/PA/Llk (February 15, 2022).

³³ Pandri Zulfikar, "Epistemologi Kebenaran Terhadap Hukum," *JUNCTO: Jurnal Ilmiah Hukum* 4, no. 1 (2022): 78–95, <https://doi.org/10.31289/juncto.v4i1.1158>.

Although in some of the above court decisions that reject electronic evidence only by considering in terms of material and formal requirements for electronic evidence, it is different from the Decision of the Bitung Religious Court Case Number: 192/Pdt.G/2020/PA.Bitg. In this Child Custody Revocation Lawsuit case, the plaintiff submitted at least 22 (twenty-two) Electronic Evidence consisting of 19 (nineteen) screenshot images on the Whatsapp and Instagram applications, along with 2 (two) recorded conversations.

In the Legal Considerations of the Panel of Judges, all electronic evidence submitted by the Applicant is ruled out (cannot be accepted as evidence) because all Electronic Evidence submitted does not meet the material requirements as Electronic Evidence. The legal basis for the panel of judges in rejecting the electronic evidence was because it did not fulfill the elements of articles 6 and 7 of the Law on Electronic Information and Transactions³⁴.

The absence of digital expert testimony and forensic tests regarding the validation, suitability, authenticity, integrity and availability of the submitted electronic evidence is the reason for the panel of judges to rule out the electronic evidence submitted by the applicant. Since the electronic evidence submitted by the applicant in this case was ruled out entirely (against electronic evidence), the panel of judges provided an explanation of the validity of the electronic evidence as follows³⁵:

- 1) Considering, that based on the aforementioned provisions (Article 5 Paragraph (4), Article 6, Article 15 and Article 16 of Law Number 11 of 2008 concerning Electronic Information and Transactions), the principle of audit trial becomes fundamental in the collection and submission of evidence in the form of electronic information or documents in the trial. The principle of audit trial requires technical and practical records of the steps taken on electronic evidence from the start, including in the event that examination and analysis takes place, so that when the electronic evidence is examined by a third party, the third party must get the same results as the results that have been carried out by the previous investigator or forensic analyst;
- 2) Considering, that the use of the audit trial principle in the collection and presentation of evidence in the form of electronic information or

³⁴ Pengadilan Agama Bitung, Putusan Pengadilan Agama Bitung Perkara Nomor: 192/Pdt.G/2020/PA.Bitg (2020).

³⁵ Pengadilan Agama Bitung, Putusan Pengadilan Agama Bitung Perkara Nomor: 192/Pdt.G/2020/PA.Bitg (2020).

documents in the trial is something that ensures the fulfillment of one of the evidentiary parameters, namely *Bewijsvoering*, which refers to the description of how evidence is presented in court. The fulfillment of these parameters is fundamental considering that evidence in the form of electronic information or documents is closely related to personal data protected by Law Number 11 of 2008 concerning Electronic Information and Transactions as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions because it is part of privacy rights. (Currently, provisions regarding Personal Data are specifically regulated in Law Number 27 of 2022 concerning Personal Data Protection);

- 3) Considering that the electronic evidence submitted by the Plaintiff's Attorney at the trial has been matched, which is an effort made to ensure the material validity of the evidence presented at the trial, including data availability, data integrity, authenticity, security, accessibility;
- 4) Considering that there are differences regarding the testing of the validity of electronic evidence in civil and criminal cases, matching the authenticity of electronic evidence is an obligation which in this case has been carried out by the Panel of Judges;
- 5) Based on the above considerations, the Panel of Judges is of the opinion that the electronic evidence submitted by the Plaintiff's attorney can fulfill the formal requirements as evidence. Meanwhile, regarding the evidentiary power of electronic evidence, it is free.

Of the 5 (five) important notes in the Legal Considerations of the Panel of Judges of the Bitung Religious Court Decision Case Number: 192/Pdt.G/2020/PA.Bitg explains why all electronic evidence submitted by the Applicant was ruled out (rejected). In the first consideration number 1), the submission of electronic evidence in resolving civil disputes must implement the principle of audit trial. The implementation of an audit trial is literally not only limited to taking electronic evidence, but how the procedure for obtaining, treating electronic evidence that is vulnerable, and the success of electronic evidence must be guaranteed in order to explain a legal event or fact in the trial. Audit trials cannot be carried out by lay people, legal counsel, public prosecutors or judges, but can be carried out by third parties who are competent in digital forensic or labor forensic science³⁶.

³⁶ Scoot M Giordano, "Electronic Evidence and the Law," *Information System Frontiers* 6, no. 3 (2004): 161–74, <https://doi.org/https://doi.org/10.1023/B:ISFI.0000025783.79791.c8>.

Further consideration number 2), the Panel of Judges paid attention to aspects of the Evidentiary Parameters, specifically *Bewijsvoering*. *Bewijsvoering* literally talks about the procedure for obtaining evidence, whether the evidence is obtained by legal provisions or unlawfully. Then the evidence, especially electronic evidence, is treated differently, because the nature and type of electronic evidence itself is very vulnerable to change, the addition or reduction of the value of the electronic evidence itself to how to submit the electronic evidence to the Panel of Judges to be examined, assessed and evaluated regarding relevance, acceptance, and evidentiary value.

Further consideration number 3), the Panel of Judges as a progressive effort due to the expansion of evidence as stated in Article 5 of the ITE Law, the matching of the Electronic System used as a means of exchanging Electronic Information and/or Documents with the printout as an attachment to electronic evidence is carried out to ensure that the electronic evidence submitted is safe, intact, authentic, available and can be accessed again.

Further consideration number 4), the Panel of Judges realizes that there are different treatments for Electronic Evidence when used in the field of Criminal Law and Civil Law. In the field of criminal law, electronic evidence is submitted by the Public Prosecutor as a State Representative, of course it has passed through certain stages to ensure that the electronic evidence can be recognized, and even from several criminal case decisions, it is clear that the electronic evidence submitted can be accepted and is no longer considered by the Panel of Judges regarding the formal and material requirements of the electronic evidence submitted.

Furthermore, consideration number 5), the Panel of Judges has recognized that the electronic evidence submitted in the case has met the formal requirements as electronic evidence, but due to the absence of forensic testing of the evidence, the electronic evidence submitted by the applicant was ruled out. Even so, if the electronic evidence has met the formal and material requirements, its evidentiary power is free which is expressive verbis returned to the Panel of Judges whether the evidence can be accepted as evidence, or must be rejected or set aside.

The use of electronic evidence in the settlement of civil disputes after the enactment of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions has been widely used by the general public, especially justice seekers. The use of

electronic evidence is inseparable from the paradigm shift in people's lives from conventional to digital³⁷.

This paradigm shift is not only for the efficiency and effectiveness of life support, but also aims to prove that a legal event has occurred³⁸. Proof that is carried out digitally / electronically should make it easier for legal subjects to interact with each other and make technology a means of support that leads to proving what has happened between the legal subjects themselves.

When the output of the use and utilization of technology in this case the electronic system has been widely used for evidence, but its use is rejected / set aside by the Panel of Judges who examine, hear and decide cases in the context of resolving civil disputes will certainly be a problem in itself. The loss of legal certainty regarding the use of electronic evidence which has an impact on the values of justice to be achieved will certainly harm the parties who use Electronic Information and / or Documents as evidence in court. Apart from that, there are differences in the treatment of the use of electronic evidence between civil dispute resolution and criminal law enforcement, causing disparities in the acceptance of electronic evidence in the applicable procedural law in Indonesia even though expressly *verbis* this electronic evidence applies to all procedural laws, but in reality in the settlement of civil disputes from several court decisions analyzed, it shows that the Panel of Judges examining civil disputes does not accommodate the mandate of Article 5 Paragraphs (1) and (2) of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions.

Currently, courts throughout Indonesia have implemented Supreme Court Regulation Number 7 of 2019 concerning Amendments to Supreme Court Regulation Number 1 of 2019 concerning Electronic Case Administration and Court proceedings. Starting from the case registration stage until the verdict handed down by the judge can be implemented in the E-Court application. This is a concrete manifestation of the Supreme Court towards Court Excellence to keep up with the development and utilization of

³⁷ Denira Palmanda Sedana and I Gusti Ayu Agung Ari Krisnawati, "Kedudukan Dan Kekuatan Surat Elektronik Sebagai Alat Bukti Dalam Hukum Acara Perdata," *Jurnal Kertha Wicara* 7, no. 3 (2018): 1–11, <https://ojs.unud.ac.id/index.php/kerthawicara/article/view/40641>.

³⁸ Eman Suparman, "Doktrin Penyelesaian Sengketa Perdata: Analisis Dan Perkembangan Dewasa Ini Di Indonesia," *Borneo Law Review* 2, no. 1 (2018): 37–58, <https://doi.org/https://doi.org/10.35334/bolrev.v2i1.719>.

information technology³⁹. Regarding Evidence, especially electronic evidence, there is still no clear regulation, both in procedural law and technical rules for the collection, identification, presentation and assessment by the Panel of Judges, so this needs to be regulated further.

Modernization of the Court today is not only about administration which has an impact on the principle of fast, simple and low cost but also must provide legal certainty in its implementation. Modernization of the Court with the E-Court Application in addition to facilitating justice seekers and Advocates who represent the interests of the power of attorney, but the process of seeking justice lies in the process of proof⁴⁰. When evidence that uses Electronic Evidence but is not recognized so that it has no value, then the ultimate goal of seeking justice will certainly affect the process of examining electronic evidence that is not carried out using technology as well. This will certainly harm the parties who use electronic evidence as evidence to explain a legal event. In normative facts, electronic evidence is recognized as Article 5 of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions, but in empirical facts the use of electronic evidence is often rejected by judges due to several conditions, especially judges' doubts about the absence of digital forensic tests and/or expert testimony.

Obstacles and Challenges in the Use of Electronic Evidence in Civil Procedure Law

The Legal Theory of Evidence or Evidence System in Indonesian Civil Procedure Law is the *Positief Wettelijk Bewijstheori*. This means that the Panel of Judges in rendering a verdict on a civil claim is bound by valid evidence in accordance with the provisions of the applicable civil procedure law in

³⁹ Dian Latifani et al., "The Revitalizing Indonesia's Religious Courts System: The Modernization Impacts And Potentials Of E-Court," *Jurnal Hukum Unissula* 40, no. 1 (2024): 1–13, <https://doi.org/10.26532/jh.v40i1.32279>.

⁴⁰ Dian Latifani et al., "Can Advocates' Legal Culture in Civil Law Enforcement Drive Reform in Indonesia's Modern Justice System?," *Journal of Law and Legal Reform* 5, no. 3 (October 2024): 913–42, <https://doi.org/https://doi.org/10.15294/jllr.v5i3.12988>.

Indonesia, namely *Het Herziene Indlansch Reglement* (HIR), *Rechtreglement voor de buitengewesten* (RBg) and *Burgerlijk Wetboek* (BW)⁴¹. The positive proof system in this civil procedure law that the panel of judges is looking for is the formal truth. The formal truth in question is that the judge in handing down his decision must not exceed what is demanded or submitted by the parties, so this is directly related to the breadth of the subject matter examined by the panel of judges.

Civil procedural law as a formal element also has formal and material elements in it. The material elements contained in civil procedural law regarding authority such as the rights of the defeated party, namely the existence of further legal remedies⁴². While the formal elements are about the procedures for exercising this authority, such as the procedures for appealing or opposing efforts. Judges in seeking formal truth only need to prove by “*preponderance of evidence*”, so this distinguishes criminal judges who seek material truth must be proven “*beyond reasonable doubt*”. Therefore, in the Civil Procedure Law, the judge's belief is not an essential thing to be able to assess the truth.

Because civil procedural law is a form of law enforcement for violations of material civil law relating to property, for this reason, when the panel of judges handed down a decision in a civil case, the first thing the panel of judges said was “Grant the Plaintiff's Lawsuit in its entirety or Grant the Plaintiff's Lawsuit in Part”. From the contents of the decision in the adjudication section, it is clearly illustrated that the settlement of civil disputes is not related to the deprivation of a person's freedom as a result of his own actions as applied in criminal decisions that deprive a person of freedom for a certain period of time such as confinement or imprisonment which deprives a person of the freedom to socialize among fellow citizens without being limited by space and time.

In the practice of using electronic evidence in the settlement of civil cases, there are obstacles and challenges in its use. This is clearly different from the use of electronic evidence in criminal law enforcement which has a definite legal basis. In addition, the obstacles that occur in the use of electronic evidence in civil dispute resolution are:

- 1) The Vagueness of the Norms on the Use of Electronic Evidence in Procedural Law

⁴¹ P.N.H Simanjuntak, *Hukum Perdata Indonesia* (Jakarta: Prenada Media Group, 2015).

⁴² Anita Afriana et al., “Batasan Asas Hakim Pasif Dan Aktif Pada Peradilan Perdata,” *Jurnal Bina Mulia Hukum* 7, no. 1 (2022): 142–54, <https://doi.org/10.23920/jbmh.v7i1.1078>.

As Article 5 Paragraphs (1), (2) and (3) of Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions implies that due to the development of modern community life supported by advances in the field of information technology, causing changes or shifts in public habits, especially in terms of proof that was previously conventional towards digital. So with the expansion of digital / electronic evidence, the evidence that has been specifically regulated in the Law of Procedure for each field of law, has increased in type in accordance with the explanation of Article 1 Paragraph (1) concerning Electronic Information which is a new type of evidence in procedural law, as well as Article 1 Paragraph (4) concerning Electronic Documents which are the output of the use of Electronic Information whether made, forwarded, sent, received or stored.

From several Court Decisions that have been presented in the previous chapter, it states that electronic evidence submitted in the settlement of civil disputes can be formally accepted, but not materially accepted. The Panel of Judges is of the view that the use of electronic evidence in resolving civil disputes must pay attention to formal and material elements⁴³. The formal elements of electronic evidence are contained in Article 5, while the material elements are regulated in articles 6, 7 and 16.

Problems with the use of electronic evidence in the settlement of civil disputes arise when the panel of judges questions the material elements of electronic evidence, where electronic evidence must be guaranteed to be authentic, authentic, able to be displayed again and its security⁴⁴. That in the examination of evidence in the settlement of civil disputes, the parties who attach printouts of electronic evidence have also adjusted to the Electronic System used together with the panel of judges. If the printout of the electronic evidence is sourced from an Electronic System such as the Whatsapp, Instagram, Facebook, X and Tiktok applications, it is displayed again and adjusted to the printout. However, in the consideration, the panel of judges still set aside the electronic evidence because it did not fulfill the material elements of electronic evidence and was not

⁴³ Fauziah Lubis and Sofia Ramadhani Purba, "Analisis Kritik Pembuktian Elektronik Dalam Hukum Acara Perdata: Tantangan dan Prospek Di Era Digital," *Judge: Jurnal Hukum* 05, no. 02 (2024): 39–47, <https://doi.org/10.54209/judge.v5i02.570>.

⁴⁴ Radina Stoykova, "Digital Evidence: Unaddressed Threats to Fairness and the Presumption of Innocence," *Computer Law and Security Review* 42 (2021): 1–20, <https://doi.org/10.1016/j.clsr.2021.105575>.

accompanied by a digital forensic examination and digital forensic expert testimony regarding the procedures for taking, collecting and submitting it to the panel of judges to be accepted as evidence. This is in accordance with the consideration of the panel of judges in the case of Bitung Religious Court Decision Number: 192/Pdt.G/2020/PA.Bitg, Lolak Religious Court Decision Case Number: 3/Pdt.G/2022/PA/Llk, Pelalawan District Court Case Number 65/Pdt.G/2023/PN.Plw, Pekanbaru Religious Court Case Number: 1284/Pdt.G/2017/PA/Pbr.

The essence of the problem of refusal to use electronic evidence in court in resolving civil disputes is that there are no clear legal rules governing the procedures for taking, collecting, authenticating and submitting electronic evidence to the panel of judges, so that there is doubt in the panel of judges in accepting electronic evidence

Unlike the case in criminal law enforcement, apart from being specifically regulated in Article 43 Paragraph (3) of the ITE Law which implies that when there is a search and/or seizure of an electronic system used in a criminal offense, it must obtain permission from the chairman of the local court. When the permission of the head of the court has been obtained, the electronic system containing electronic information and documents can be used as evidence after the issuance of a seizure warrant from the investigator, both investigators from the police and from the prosecutor's office. In criminal law enforcement, the electronic evidence submitted no longer talks about the formal and material requirements of electronic evidence, but rather goes to the stage of whether the relevant electronic evidence is admissible or not⁴⁵.

Likewise, it is regulated in Government Regulation Number 71 of 2019 concerning the Implementation of Electronic Systems and Transactions, especially in Article 33 which implies that for the benefit of the criminal justice process, investigators can ask Electronic System Providers to provide Electronic Information and / or Electronic Documents upon valid request from investigators in the context of criminal law enforcement.

When in criminal law enforcement, investigators are given the authority to request Electronic System Providers for Electronic Information and Documents that exist in Electronic System Providers, so

⁴⁵ Trio Yusandy, "Kedudukan Dan Kekuatan Pembuktian Alat Bukti Elektronik Dalam Hukum Acara Perdata Indonesia," *Jurnal Serambi Akademika* 7, no. 5 (2019): 645–56, <https://doi.org/10.32672/jsa.v7i5.1522>.

that electronic evidence presented by the Public Prosecutor to the panel of judges is certainly valid because the collection, collection, authentication, validity, authenticity and security are maintained until the submission of electronic evidence to the panel of judges.

The same thing is also regulated in the Regulation of the Minister of Communication and Information Technology Number 5 of 2020 concerning Private Scope Electronic System Providers explicitly in Chapter V Providing Access to Electronic Systems and / or Electronic Data for the Interests of Supervision and Criminal Law Enforcement which implies that in the interests of criminal law enforcement, Private Scope Electronic System Providers are required to provide the requested Electronic Information and Documents no later than 5 (five) calendar days from the time the request is sent.

So that with the regulation of requests and retrieval of Electronic Information and Documents from investigators to Electronic System Providers, there are no obstacles in criminal law enforcement related to the submission of valid electronic evidence in accordance with statutory regulations. So that it is very clear the difference in the treatment of judges in criminal and civil cases, which can be seen by the authority to request, retrieve and collect electronic evidence to be used as legal evidence.

Even in Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions, Government Regulation Number 71 of 2019 concerning the Implementation of Electronic Systems and Transactions and Regulation of the Minister of Communication and Information Technology Number 5 of 2020 concerning Electronic System Operators in the Private Sphere, there are no provisions regarding the interests of civil law enforcement, so this makes the main weakness in the use of electronic evidence in resolving civil disputes, for this reason it cannot be denied that in the claim of civil rights, the use of electronic evidence that can explain a right is rejected by the panel of judges who examine, decide and try the case. The lack of clarity in this regulation has led to disparity in the verdicts handed down by the panel of judges in criminal cases and civil cases.

The omission of this will provide legal uncertainty in the use of electronic evidence in civil dispute resolution even though its use has been explicitly regulated, and have an impact on the values of justice to be

achieved by parties who specifically use electronic evidence to explain a right in civil dispute resolution.

2) Digital Forensic Examination and Forensic Expert Testimony

From several court decisions in the previous chapter, the panel of judges in their legal considerations explained that the absence of digital forensic expert testimony and digital forensic examination of the electronic evidence presented caused the evidence presented to be unsuccessful. Whether the electronic evidence submitted by the parties is in accordance with the method of collection, then whether after being taken and collected there are changes, either adding or subtracting the contents of the electronic evidence.

It cannot be denied that electronic evidence is a new type of evidence that is very vulnerable to changes if the procedures for collection and collection are not appropriate⁴⁶. So, there is the role of digital forensic examination and digital forensic expert testimony to be able to explain further about the electronic evidence used.

However, when this happens, every settlement of civil disputes using electronic evidence must go through the procedure of digital forensic examination and added with digital forensic expert testimony, it will certainly injure the principle of simple, fast and low-cost justice. In criminal law enforcement, an electronic evidence that is carried out a digital forensic test in a forensic laboratory, the cost burden will be borne in the law enforcement budget of a criminal case, which in a sense uses law enforcement money sourced from the state. If this is applied in civil dispute resolution, the cost of the digital forensic examination must be borne by the party submitting the request for digital forensic examination.

Digital forensic examination cannot be done quickly, because digital forensic examination of electronic evidence is based on scientific investigation and uses other comprehensive technologies, so that the output of the examination results cannot be done quickly⁴⁷. Even so, when all civil disputes using electronic evidence must go through the digital

⁴⁶ Pavol Sokol et al., "Formal Concept Analysis Approach to Understand Digital Evidence Relationships," *International Journal of Approximate Reasoning* 159 (2023): 1–19, <https://doi.org/10.1016/j.ijar.2023.108940>.

⁴⁷ Paul de Hert, Cihan Parlar, and Juraj Sajfert, "The Cybercrime Convention Committee's 2017 Guidance Note on Production Orders: Unilateralist Transborder Access to Electronic Evidence Promoted via Soft Law," *Computer Law and Security Review* 34, no. 2 (2018): 327–36, <https://doi.org/10.1016/j.clsr.2018.01.003>.

forensic examination procedure, it will burden the performance of forensic laboratories, which both the number of forensic laboratories and human resources are limited, of course it will be a problem in itself later, both in terms of the processing time of digital forensic examination and the costs incurred by the parties who must first test the evidence.

Expert testimony in court is an explanation of the expertise in each field of expertise of the experts. Specifically, regarding electronic evidence, expert testimony will provide a new perspective for the panel of judges and the parties regarding electronic evidence. The information provided by the expert can be in the form of information on how to take electronic evidence, what methods are used to test electronic evidence submitted by the parties, and which methods are in accordance with the characteristics of testing electronic evidence in accordance with what is submitted by the parties themselves.

Usually, the presence of an expert at trial is a request from the parties to explain a certain fact that either the parties or the panel of judges themselves are still hesitant to assess a fact but is not limited to providing information on the use of electronic evidence in the settlement of civil cases. Due to the limited number of forensic experts in Indonesia, in terms of time, parties who bring digital forensic experts to court must adjust the time of an expert to be able to attend court directly. Although expert examination can be carried out virtually, psychologically the presence of experts directly in court is more desirable, because the flexibility of the parties and the panel of judges who want to ask for expert testimony directly can be felt directly in a literal way compared to virtual expert examination. Electronic trials in civil dispute resolution can also be conducted as long as the parties agree to it.

Because experts have the ability to explain a fact, there is a cost that must be incurred for that, namely the fee for an expert to provide testimony. The fee not only includes the costs agreed by the expert with the party requesting him to provide information, but also includes the cost of expert accommodation when an expert is outside the area. For this reason, the digital forensic examination which takes a relatively long time and incurs considerable costs as well as the costs incurred to bring an expert to be able to provide information about digital forensics, indirectly

injures the value contained in the principle of simple, fast and low-cost justice⁴⁸.

The obstacles that occur in the acceptance of electronic evidence in civil dispute resolution as explained above, result in the rejection of electronic evidence submitted by the parties of interest, and cause the weak position of the party using Electronic Information and Documents as valid evidence as stipulated in Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions. Apart from the existence of obstacles in the recognition of electronic evidence in civil dispute resolution, there are challenges to the use of electronic evidence in civil dispute resolution. These challenges stem from the lengthy ratification of the Draft Law on National Civil Procedure which has entered the stage of the National Legislation Process (*prolegnas*). In fact, the discussion of the Draft Law on Civil Procedure has been carried out since 1987 at the National Symposium on the Plan for the Preparation of the Draft Law on Civil Procedure held in Yogyakarta and was compiled in 1999 in Jakarta. But until now the draft is still being discussed⁴⁹.

In addition, the different views of judges in addressing the regulation of electronic evidence also affect its acceptance in civil dispute resolution. There are still judges who are of the view that the expansion of electronic evidence in the material law governing electronic information and transactions does not remember because it is not regulated in the Law of Procedure as it should be a source of evidentiary law, making it difficult to accept the electronic evidence submitted. Judges who examine, decide and adjudicate civil cases, of course, to obtain the values of justice, search for concrete events, select and concretize and identify the evidence submitted along with the regulations to find a solution to the problem. Even when the judge believes that the evidence can explain a fact and has been adjusted between the printout and the electronic system used, the judge can exercise discretion in order to achieve the values of certainty, justice and expediency.

This challenge will have a tremendous impact on justice seekers in the settlement of civil disputes that use electronic evidence in the evidentiary process. For this reason, special tools and special arrangements are needed regarding electronic evidence so that it can be accepted by the panel of judges in

⁴⁸ Eman Suparman, "Verplichte Procureurstelling Untuk Peradilan Yang Sederhana, Cepat, Dan Biaya Ringan," *Veritas et Justitia* 5, no. 1 (2019): 80–104, <https://doi.org/10.25123/vej.3288>.

⁴⁹ Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Yogyakarta: Maha Karya Pustaka, 2021).

resolving civil disputes, both from the level of Laws, Government Regulations, Ministerial Regulations and even to Supreme Court Regulations so that judges remember internally.

Conclusion

Electronic evidence is regulated in Law Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Electronic Information and Transactions, especially Article 5. The law is a material law that also regulates the formal law in it, but in practice it is not binding for judges who examine, decide and try civil cases because it is not the main source of civil procedural law even though its existence has been recognised. Evidence must be regulated in the Law of Procedure, so that it has value and provides certainty for justice seekers. On the one hand, if the provisions regarding Electronic Evidence are accommodated in the Civil Procedure Law, it will take a long time, because until today the reform of the Civil Procedure Law has not been implemented. For this reason, this is a challenge for the Supreme Court of the Republic of Indonesia to make a legal breakthrough, namely through the Regulation of the Supreme Court of the Republic of Indonesia to fill the legal vacuum regarding the authentication of electronic evidence used by the parties and can cooperate with other agencies related to digital forensic examination.

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