PARADOX: ELECTRONIC EVIDENCE ISSUE IN INDONESIA

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ABSTRACT

The position of electronic evidence in Indonesia has created a paradox in its use in the court. Some laws define electronic evidence as independent evidence outside of the evidence stipulated in the Indonesian Criminal Procedure Code. This is contrary to the proof system adopted by Indonesia, namely negatief wettelijke. Some other laws explain that electronic evidence is an extension of the evidence provided for in the Criminal Procedure Code (evidence of clues). However, the phrase "expansion of evidence" creates multi-interpretations. In addition, if electronic evidence is part of evidence, and then based on the Indonesian Criminal Procedure Code, the value contained in evidence (including electronic evidence) has independent evidentiary value, thus potentially weakening the evidentiary value of the electronic evidence and legal uncertainty might be occurred. As a result of this paradox, the regulation of electronic evidence in Indonesia has not met Gustav Radbruch's version of the Principle of Justice.

Keywords: Electronic Evidence, Negatief Wettelijke, Principle of Justice

INTRODUCTION

Electronic evidence is not a new idea in the criminal law verification in Indonesia. What does electronic evidence mean? There are some limited definitions found according to several International experts (Insa, 2007). In United Kingdom, the electronic evidence is attached in Police & Criminal Evidence Code of the United Kingdom that defines the electronic evidence as all information contained in a computer. Furthermore, Indonesian experts conclude that electronic evidence are saved or transmitted data in an electronic device, network, or communication system. The data contain all information about criminal acts that against the law. For this reason, The Council of Europe Convention on Cybercrime that is known as Budapest Convention is referred as the basis for acknowledging the use of electronic evidence.

Electronic evidence is early recognized as the valid evidence by Letter of the Supreme Court of Indonesia addressed to the Minister of Justice dated January 14, 1988 No. 39/TU/102/Pid which discusses microfilm or microfiche (Campbell, 1971) which can be equated with letter evidence (Alfitria, 2011). Moreover, this electronic evidence is adopted by several laws in Indonesia such as Law No. 8 of 1997 on Company Document, Law No. 31 of 1999, as amended by Law No. 20 of 2001 concerning the Eradication of Corruption. This Law is enhanced through Law No. 8/2010 concerning the prevention and eradication of the Crime of Money Laundering, Law No. 21 of 2007, concerning the Eradication of the Crime of Trafficking

in Persons, Law No. 11 of 2008 concerning Electronic Information and Transactions which was later amended by Law No. 19 of 2016 concerning Amendments to the ITE Law, Law No. 9 of 2013 concerning Prevention and Combating the Funding of Terrorism, Law Number 18 of 2013 concerning Prevention and Eradication of Forest Destruction and Law Number 28 of 2014 concerning Copyright.

Problems appeared because there is a paradox of the position of the electronic evidence in those laws (Suseno, 2012). Law No. 8 of 1997 concerning Company Document, and Law No. 20 of 2001 concerning the Eradication of Corruption and Amendments to the ITE Law define the electronic evidence as expansion of evidence (evidence of guidance) contained in Article 184 of the Criminal Procedure Code. Meanwhile, Law No.8 of 2010 concerning the prevention and eradication of the Crime of Money Laundering, Law No. 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons, Law No. 9 of 2013 concerning Prevention and Combating the Funding of Terrorism, Law Number 18 of 2013 concerning Prevention and Eradication of Forest Destruction and Law Number 28 of 2014 concerning Copyright define that electronic evidence is an independent evidence outside the provisions of the Criminal Procedure Code.

The paradoxes happen lead legal uncertainty regarding treatment, verification and use of electronic evidence as the evidence in a court. There are some criminal cases that use electronic evidence is rejected by the judge. One of the cases is defamation of the Omni International Hospital by Prita Mulya Sari. That case is started when Prita sent an email to customer_care@banksinarmas.com and her relatives entitle “Penipuan RS Omni Internasional Alam Sutra” (Alam Sutra Omni International Hospital Scam). The email contains complain about the hospitality given by the hospital to the customer. This email was suddenly exposed in some online platforms. Then, Prita was reported to the Police for defamation. According to the judge, Prita violated Article 45 paragraph (1) jo. Article 27 paragraph (3) of Law Number 11 of 2008 concerning ITE. Prita’s printed email that contains her complaints against the Omni International Hospital was used the evidence. In essence, sending an email to any person and writing anything are privacy similar with sending a letter (Hiariej, 2012). The problem is Pritas’s email was scattered. It should be the person who exposed the email to court, not Prita who wrote the complaint to convey her thoughts. The electronic evidence in the form of email and its printed should not prove Prita’s guilt, because there was no intention and purpose of the email to defame Omni International Hospital. In addition, the email is categorized as a person letter.

The following case is Setia Novanto’s case (the Chairman of House of Representative of Indonesia / DPR-RI periode 2016-2019) in 2016. This case is started when a conversation among Setya Novanto, Riza Chalid (an oil businessman), and Maroef Sjamsoeddin (the Director of Indonesian Freeport) that discussed about Freeport contract extension recorded by Maroef Sjamsoeddin and reported to DPR. It is clear stated in the recorded conversation that Setia Novanto asked bribe in the form of company stock to process the contract extension of Freeport is running smoothly. Because the position of the electronic evidence (recording) in Indonesia is not certain, Setia Novanto got a chance to challenge (judicial review) Law 11/2008 on ITE to the Constitutional Court (Heryogi, 2017). The lawsuit was granted by the constitutional court through the Constitutional Court Decision Number: 20/PUU-XIV/2016 and stated that in accordance with Article 5 of the Constitutional Court Decision stated that the application of

wiretapping must be in accordance with applicable regulations, namely at the request of law enforcers. Therefore, the electronic evidence in the form of wiretapping is invalid and does not have the power of proof. Based on the Constitutional Court's decision, the only evidence that can prove Setya Novanto's guilt cannot be accepted, so Setya Novanto is free from lawsuits.

The next case is the murder of Wayan Mirna Salihin with the defendant Jessica Kumala Wongso at Olivier Café. Jessica Kumal Wongso was suspected as the murderer of Wayan Mirna Salihin by adding cynide to Mirna's coffee. The result of autopsy found bleeding in Mirna's stomach due to corrosive substance entering and damaging the gastric mucosa. Based on the crime scene and witness examinations, Jessica is declared as the suspect. In the proving process, Jessica's attorney presented CCTV (electronic evidence) recordings. The evidence was rejected by the judge; the legal basis for the rejection was Article 5 Paragraph (2) of the Constitutional Court Decision Number: 20/PUU-XIV/2016 on September 7, 2016. The article describes electronic information and/or electronic documents in the form of interception or wiretapping results. Recordings that constitute part of wiretapping must be carried out in the framework of law enforcement at the request of the police, prosecutors, and / or other institutions whose authority is determined based on law. The judge interpreted that the CCTV evidence presented by the defendant's attorney was invalid, because it was not in accordance with the procedures stated in Article 5 paragraph (2) of the Constitutional Court's decision. In addition, the judge considered the CCTV evidence recorded by expert witnesses by illegal means. The reason is that there is no examination report of handover from investigators to expert witnesses so that the authenticity value of the CCTV is very doubtful, and it cannot be ascertained if the CCTV has undergone changes or engineering in it.

The three cases show that accepting or rejecting the electronic evidence that has a strong evidentiary value is annulled by the judge contrary to the basic philosophy of law that is the principle of justice (Ruman, 2012). The principle of justice is a philosophical value that must be contained in every statutory regulation. Justice as the basic principle in law cannot be ignored. The problem is that if the electronic evidence is not requested by law enforcement officers or it is not valid according to law even though there is information that shows a criminal act occurred and the perpetrator of the crime. The provisions of the law are unfair and do not provide legal certainty.

The root of the problem as described above is the uncertain position, treatment process and verification of electronic evidence caused by the dualism of electronic evidence arrangements. This article will discuss the issue of dualism in the arrangement of electronic evidence, whether this electronic evidence is independent electronic evidence outside the evidence stipulated in the Criminal Procedure Code or is an extension of evidence and which is the best, according to the principles of justice in the law of proof in Indonesia.

Electronic Evidence as the Independent Evidence outside the Evidence Stipulated in the Criminal Procedure Code

Refer to the introduction; there are several laws that explain that electronic evidence is independent evidence. It should be noted that evidence in Indonesia is regulated in Article 184 paragraph (1) of the Criminal Procedure Code, which consists of five pieces of evidence that are witness statements, expert statements, letters, instructions, and confessions from the defendant

(Marpaung, 1992). Excluding to the five evidence, it cannot be accepted as evidence at trial. It means that electronic evidence not regulated in Article 184 paragraph (1) of the Criminal Procedure Code to be invalid. This is because the Indonesian Criminal Procedure Code adheres to the principle of negatief wettelijk. Negatief wettelijk is a theory which explains that a judge can decide if there are at least the evidence (two interconnected evidence) of evidence that has been determined by law (Evidence set out in the Indonesian Criminal Procedure Code), coupled with the conviction of the judge obtained from the evidence (Hamzah, 1984). Negatief wettelijk in Indonesia refers to Article 183 of the Criminal Procedure Code, in which a negative evidence system the limitatief evidence is determined in the law and the judge is also bound by the provisions of the law when it is used. In a limited statutory system or also referred to as a statutory system negatively as the essence of which is formulated in Article 183, it can be concluded as follows:

a. The final purpose of proof is to decide a criminal case, which if it meets the requirements of evidence can impose a crime.
b. Standards on the results of evidence to impose a crime (Harahap, 2010).

According to negatief wettelijk theory, evidence that is used in a court is limitatif (Sasangka, 2003). It indicates that excluding the evidence cannot be used to prove the defendant's fault. The chairman of the trial, the public prosecutor, the defendant, or the legal advisor, is bound and only allowed to use the evidence. They are not free to use evidence that they want outside of the evidence stipulated in Article 184 paragraph (1) of the Criminal Procedure Code. What is considered as evidence, and what is justified as having "proving power" is only limited to that evidence. Evidence by means of evidence other than that type of evidence, has no value and does not have binding evidentiary power. Negatief wettelijk theory is similar to the convicition in raisone proof system, because in negatief wettelijk there is an element of "judge conviction" which leads to convicition in raisone.

It is necessary to note that the Indonesian Criminal Procedure Code was codified in 1981, when the development of technology had not developed rapidly like the current digital era, so electronic evidence had not yet been thought of by legal experts at that time. This is in accordance with the statement of a legal science philosopher at Gajah Mada University, Jujun S. Sumantri (1990), who explained that law will always be left behind by social developments and technological civilizations. The development of technology which is increasing rapidly every time cannot be matched by law; this is evidenced by the paradox of electronic evidence discussed. The government seeks to catch up with the legal backwardness of technology with the government issuing laws and regulations supporting the Criminal Procedure Code, especially regarding evidence (Wijayanti, 2012), but it creates legal uncertainty in the use of electronic evidence.

In conclusion, referring to the proof system theory of Negatief Wettelijk, electronic evidence cannot be independent evidence, because of the limitative nature of the Negatief Wettelijk proof system theory. The question is whether this electronic evidence can be used as valid evidence in court. In the following, the position of electronic evidence as an extension of the existing evidence in the Criminal Procedure Code (evidence of clues) will be discussed.

1.2 Electronic evidence as the extension of evidence stated in the Criminal Procedure Code (evidence of clues)

It has been explained that electronic evidence is an extension of the evidence in the Criminal Procedure Code / KUHAP (evidence of clues). It should be noted that the evidence in Article 183 KUHAP has a hierarchy based on the strength / value of the evidence. This means that the first evidence (witness testimony) is the main or perfect evidence (Butarbutar, 2016). Evidence of clues on occupying the 4th position out of five pieces of evidence in the hierarchy of evidence in the Criminal Procedure Code. The evidentiary power of the evidence of clues is quite weak, and it has the nature of proof which is independent. This means that a judge is not bound by the correctness of conformity embodied by a directive, therefore the judge is free to judge and use it as an effort to prove and guide as evidence, cannot independently prove the defendant's guilt, he is still bound to the principle of minimum limit of proof. Therefore, for an indication to have sufficient evidentiary strength, it must be supported by at least one other means of evidence. In conclusion, evidence of clues can be taken into consideration by judges and judges can also set aside said evidence if there is no agreement with other evidence. Referring to the three cases described in the introduction, what if the electronic evidence is the only evidence that can prove a criminal act occurred and the defendant is guilty. It goes without saying that electronic evidence categorized as evidence will depend on other evidence, if other evidence does not correspond to electronic evidence; the electronic evidence will not be assessed by the judge. This will result in legal uncertainty and injure the principle of justice as a ground norm.

The phrase, expansion of evidence, is contained in Article 5 Paragraph (2) of Law No. 11 of 2008 concerning Electronic Information and Transactions (ITE) which reads:

> *"Informasi Elektronik dan/atau Dokumen Elektronik dan/atau hasil cetaknya sebagaimana dimaksud pada ayat (1) merupakan perluasan dari alat bukti yang sah sesuai dengan Hukum Acara yang berlaku di Indonesia (Electronic Information, Electronic Documents, or the printed one thereof as referred to in paragraph (1) constitutes as the extension of valid evidence in accordance with the applicable procedural law in Indonesia)"*

The meaning of the phrase "expansion" is not clearly explained, giving rise to multiple interpretations for law enforcement officials, so there is a vague of law (vague of norm). Then, the Article was tried to be corrected by the Constitutional Court Decision No. 20/PUU-XIV/2016 which later became Law No. 19 of 2016 concerning Change in ITE. However, the Law also does not provide a clear definition of the phrase "expansion of evidence".

What is expansion of evidence? Legal experts generally interpret the phrase "expansion of evidence" as categorizing evidence on the evidence provided for in the Criminal Procedure Code without increasing the number of evidences. This does not contradict the theory of negatief wettelijk proof system, because it does not add the types of evidence provided for in the Criminal Procedure Code. The term "expansion of evidence" is a term coined by criminal law experts in Indonesia. It is noted that the phrase "expansion of evidence" is not found in the Criminal Procedure Code. There is not any single article in the Criminal Procedure Code that regulates the

expansion of evidence. Therefore, the "expansion of evidence" can lead to multiple interpretations (Sitompul, 2012) that lead to legal uncertainty.

In short, the position of electronic evidence as the extension of evidence cannot be accepted and can injure the principle of justice as a legal ground norm. In addition, the meaning of the phrase "expansion of evidence" can lead to multiple interpretations and lead to legal uncertainty.

The analysis of the Principle of Justice on the Use of Electronic Evidence in Indonesia

The principle of justice discussed is Gustav Radbruch's Theory of Justice which focuses on three basic values which are the objectives of law. According to Radbruch, there are three basic values of justice, namely a) Legal Justice; b) Legal Benefits; c) Legal Certainty (Erwin, 2012).

The principle of legal justice is the result of decision making that contains truth, is impartial, can be accounted for and treats every human being to an equal position in the law. The law was created so that every individual member of society and state administrators took the necessary actions to maintain social ties and achieve the goal of a common life or vice versa so as not to take action that could damage the order of justice. If the action being ordered is not carried out or a prohibition is violated, the social order will be disturbed because of the injury to justice. To restore order to social life, justice must be upheld. Each violation will be sanctioned according to the level of the violation itself (Mahfud MD, 2009).

If the rule of law does not cause doubts (multi-interpretations), has logical sense, synergizes with other norms in a whole system, and does not clash or cause conflict of norms, the benefits of the law can be seen. Law is the lifeblood of a nation to achieve the ideals of a just and prosperous society. According to Hans Kelsen, the law itself is a sollen kategorie (necessity category) rather than a seinkategorie (factual category). It is interpreted that the law is constructed as a necessity which regulates human behavior as a rational being. In this case, what is questioned by the law is not what the law ought to be but what the law is. Legal justice also depends on the law. A good law is a law that clearly regulates what it regulates and does not raise multi legal interpretations. Related to the rules on electronic evidence in Indonesia, the principle of legal justice according to Gustav Radbruch has not been fulfilled.

The second principle of Gustav Radbruch's theory of Justice is legal certainty. Legal certainty is interpreted as the clarity of behavior scenarios that are general in nature and binding on all members of society, including the legal consequences (Apeeldorn, 2002). Legal certainty explained by Apledorn can be created both in customary law and state statutory law (Dens Goulet, 1977). According to Gustav Radbruch, there are two definitions of legal certainty, namely legal certainty by law and legal certainty in or from law. Laws that have succeeded in guaranteeing a lot of legal certainty in society are useful laws. Legal certainty can be achieved if the law runs its responsibility to gain the justice.

Furthermore, the law is not allowed to provide conflicting provisions. It means that the law must be created based on rechtwekelfjkheid (the true rule of law). There is any term that has multi-interpretations (Budianto, 2011). In Indonesia, the importance of legal certainty is contained in Article 28D paragraph (1) of the third amendment of the 1945 Constitution

(Undang-Undang Dasar 1945) which explains that everyone has the right to recognition, guarantees of fair legal protection and certainty as well as equal treatment before the law.

Because this article refers to the provisions contained in the Criminal Procedure Code, the author needs to quote legal certainty according to Bismar Siregar in the Criminal Procedure Code which focuses more on legal certainty and protection of the rights of the accused from the justice enforcers themselves. What if there is a clash of legal between what is considered fair by the community and what is called legal certainty, a judge should not impose legal certainty rather than a sense of justice, otherwise the community will become victims. It can be concluded that the paradox in the position of electronic evidence creates distortion, overlapping power of evidence and legal uncertainty.

The third principle is legal benefit. Some people argue that the benefit of the law is highly correlated with the purpose of punishment, especially as a special prevention so that the defendant does not repeat acts against the law, and the general prevention of everyone is to be careful not to break the law because it will be subject to sanctions. Therefore, the judge's decision must provide benefits to the world of justice, the general public and the development of science. According to Sudikno Mertokusumo, people expect benefits in implementing or enforcing law. Law is for humans, and then law enforcement must provide benefits to society. It is not expected that when the law is implemented or enforced, there will be unrest in the community itself (Ali, 2007).

Meanwhile, the legal benefit according to Jeremy Betham is that nature has placed mankind under government and two rulers, namely joy and sorrow. The two rules also determine what we will do and what must be done. In addition, they determine what we will do, what we will say and what we think. The law as an order of living together must be directed to support the rule of joy, and simultaneously curb the rule of sorrow. In other words, the law must be based on benefits for human happiness (Mertokusumo, 2011). Jeremy Bentham, the utilitarian, stated that a law can only be recognized law as law, if it provides the maximum benefit to as many people as possible. Moreover, John Stuart Mill taught that action should be aimed at achieving happiness, and it would be wrong to produce something that is the opposite of happiness with another sentence, namely: "Action are right in proportion as they tend to promote man's happiness, and wrong as they tend to promote the reverse of happiness (Mertokusumo, 2011)."

If the elements of justice and legal certainty have not been realized, then by itself the law cannot be utilized. It means that the community has not benefited from the law. This is the result of the paradox of the position of electronic evidence in Indonesia. So that the use of electronic evidence as valid evidence in court has not been able to satisfy the public in the context of legal usefulness.

Solutions

The solution proposed to solve the paradox is that law practitioners have to choose either the electronic evidence as the evidence that is independently from provisions of the Criminal Procedure Code or it is as the extension of an evidence in the Criminal Procedure Code. If the electronic evidence chosen as the extension of an evidence in the Criminal Procedure Code, ITE

Law must be amended. The amendment must define the evidentiary value of electronic evidence in detail.

If the electronic evidence is independent, the law practitioners must change the Criminal Procedure Code. It is informed that Indonesia is creating a new Criminal Procedure Code now. Act 175 RKUHAP explains that one of evidence recognized in RKUHAP is electronic evidence. If RKUHAP will be applied, the position of electronic evidence will be obvious and not contradict the principle of negatief wettelikje.

To determine that electronic evidence can be accepted in court, law practitioners need to make a special rule regarding the standard for handling electronic evidence, starting from the process of obtaining electronic evidence, the verification process in the form of examinations carried out by people who are experts in their field, which is proven with a certificate of expertise (legalized by a digital forensics agency) and all activities related to the confiscation, access, storage or transfer of digital evidence must be fully documented, preserved and available for review. However, the provisions should refer to the ACPO provisions that are used in the UK.

CONCLUSION

The paradox of the position of electronic evidence in Indonesia is due to overlapping rules regarding electronic evidence. In several laws, it is explained that electronic evidence is independent evidence outside the Criminal Procedure Code, and this has the potential to contradict the negatief wettelijke proof principle. On the other hand, several other laws state that electronic evidence is an extension of the evidence contained in the Criminal Procedure Code. The definition of expanding evidence can lead to multiple interpretations and the position of electronic evidence as an expansion of evidence will also weaken the power of proof of electronic evidence, thereby potentially creating legal uncertainty. As a result of this paradox, the regulation of electronic evidence in Indonesia has not met Gustav Radbruch's version of the Justice Principle. According to Radbruch, there are three basic values of justice, namely a) Legal Justice; b) Legal Benefits; c) Legal Certainty. These three elements have not been fulfilled. The solution is if electronic evidence is an extension of evidence, then the ITE Law must be amended. If electronic evidence is an independent evidence, legislators must immediately enforce the RKUHAP. It is because in R. KUHAP (the New Draft of Criminal Procedure Code) electronic evidence is independent evidence and does not contradict the principle of negatief wettelijke.

AUTHORS' CONTRIBUTIONS

The first author is the main researcher who conducted all processes of research. Meanwhile, the second, third, and fourth authors are the advisor and co-advisors of this research.

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