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Fakultas Hukum Universitas Airlangga, Jalan Dharmawangsa Dalam Selatan Surabaya, 60286 Indonesia, +6231-5023151/5023252
Fax +6231-5020454, E-mail: yuridika@fh.unair.ac.id
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The Development of Evidence Law in Civil Cases Towards the Unification of Civil Procedural Law

Deny Haspada and Efa Laela Fakhriah
denmuter@yahoo.com
Universitas Langlangbuana

Abstract
The proof is the most important stage in settlement of a case in court because it aims to prove that a particular legal event or relationship has been made as a basis for a lawsuit. Through the burden of the proof stage, the judge will get the bases to decide between settling a case. Nevertheless, the burden of proof regulation remains plural. There are even some regulations which regulate not only the material law but also the formal law. Such a situation affects the achievement of order and legal certainty in law enforcement efforts. As is known, the nature of the procedural law is formal law, namely the law concerning the rules of the game in settlement of disputes through the court, and is binding on all parties and cannot be deviated. That is why procedural law has a public nature. For the certainty of law, therefore, the procedural law must be in the codification form of unification nature so that it can generally apply to and binding on all parties. Therefore, it is necessary to reform the civil procedural law that is codified and nationally applicable.
Keywords: Proof; Reform; Unification.

Introduction

According to Mochtar Kusumaatmadja, Law is not only a set of rules or principles that govern human life in society but also includes the institutions and processes needed to realize the law in reality in society.[1] Therefore, it can be understood that, in general, the law can be grouped into material law (principles and rules) and formal law (institution and process). Material law is manifested in the form of unwritten laws which serve as guidelines for citizens on how people should act or not act in society, which in essence aims to protect human interests.

The implementation of material law, material civil law, in particular, can take

[1] Lili Rasyidi and Ira Thania Rasyidi, *Pengantar Filsafat Hukum* (Mandar Maju 2002).[74].

place silently between the parties concerned without involving the authorized official or institution. However, if the material civil law is violated so that it causes harm to the other party, then there is a disruption in the balance of interests in society. In such a case, the violated material civil law must be maintained or re-enforced. To implement or maintain the material civil law in the event of a claim for rights, a series of other legal rules are required in addition to the material civil law itself. These legal rules are called formal civil law or civil procedural law. As a formal law, the civil procedural law has the coercive (binding) nature, so that judges and litigant parties must submit and be bound to the provisions of the applicable civil procedure.

The Civil Procedural Law is a set of rules that regulate how a person must act against another person, or how a person can act against the state or a legal entity (and vice versa) if their rights and interests are disturbed, through a judicial body, to achieve a legal order.[2] The Civil Procedural Law applicable in Indonesia to date, based on Article 5 paragraph (1) of Emergency Law No.1 of 1951, includes *het Herzienne Indonesisch Reglement* (HIR), and *Rechtsreglement Buitengewesten* (RBg). Both HIR and RBg regulate the same thing, namely the civil procedure, but with different jurisdictions. However, the two cannot be unified because formally until now, there is no provision concerning the unification of HIR and RBg for implementation in all jurisdictions. It has been stated earlier that to date, and the Civil Procedural Law is still plural in nature. This is because in addition to being regulated in the HIR and RBg as well as in a number of regulations concerning the civil procedure, which are the products of the Dutch East Indies government, the civil procedural law is also regulated in various other laws and regulations concerning the civil procedure made by the Indonesian government to meet the needs of judicial practice.

One part of the civil procedural law is the law of evidence/process of proof, the regulation of which also remains plural in nature as the regulation on the burden of proof is also regulated in the material law (in this case Book IV of the Civil

[2] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Liberty 2006).[2].

Code) in addition to being regulated in HIR/RBg as the formal law. There are even several regulations that provide not only the material law but also the procedural law (including the proof) as formal law. Sometimes there are regulations that regulate the same thing differently so that they are not in harmony. Such a situation more or less affects the achievement of legal order and legal certainty in law enforcement efforts. Legal harmonization serves to provide legal certainty for the parties and for judges who handle cases, as well as suppress the disparity of decisions produced by judges.[3]

The provision on the recognition of electronic documents/data as legal evidence to be submitted in court, for example, is outlined in Law No. 11 of 2008 concerning the Electronic Information and Transactions as material law, not in procedural law as formal law. Thus, legal certainty cannot be achieved when the judge makes use of electronic documents as evidence in handling a civil dispute.[4] Provisions on electronic evidence are contained in various laws such as the Corporate Document Law and the Electronic Information and Transaction Law, which should be regulated in formal law, namely civil procedural law. Comprehensive understanding of relevant laws and regulations is needed to ensure the harmonization of laws and regulations.[5]

The Development of Law of Evidence In Civil Cases to Unify the Civil Procedural Law

The process of a civil case tried in a court consists of several stages to be passed, including a lawsuit, plea, replication, rejoinder, proof, conclusion, decision, legal remedy and execution of the decision. All are integrated into a continuous judicial process.

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[3] Neni Sri Imaniyati,[*et.,al.*] 'Kompetensi Pengadilan Dalam Eksekusi Putusan Basyarnas Pada Sengketa Perbankan Syariah Menuju Unifikasi Hukum' (2017) 3 Hukum Acara Perdata ADHAPER <http://www.jhaper.org/index.php/JHAPER/article/view/49>.[169].

[4] Efa Laela Fakhriah, *Bukti Elektronik Dalam Sistem Pembuktian Perdata* (Rafika Aditama 2015).[75].

[5] Maria S.W. Sumarjono in Ida Nurlinda, 'Telaah Atas Materi Muatan Rancangan Undang Undang Pertanahan' (2016) 1 Bina Mulia Hukum <http://download.garuda.ristekdikti.go.id/article.php?article=711493&val=11220&title=TELAAH ATAS MATERI MUATAN RANCANGAN UNDANG-UNDANG PERTANAHAN>.[12].

The proof is the most important stage in settlement of a case in court because it aims to prove that a particular legal event or relationship has been made as a basis for filing a lawsuit. At the proof stage, the judge will get grounds for decision making in settlement of a case. Both the plaintiff and the defendant must produce evidence in court to prove the occurrence of events or the existence of rights. The process of proof is a unitary arrangement to achieve a goal, namely to prove the truth of the arguments put forward by the parties, be it events or rights.

The proof is a system because the process of proof is a unitary arrangement consisting of the notion of proof, the object of proof (what must be proven), the subject of proof (who must prove), the principles of proof, the burden of proof, the power of proof, and evidence. The goal is to prove the truth of the arguments put forward by the parties in the case (Plaintiff and Defendant), be it events or rights. As we know, the civil procedural law as formal law has a binding nature and cannot be avoided, because it is the regulation on the procedures for proceedings in court. Nevertheless, over time, the procedural law also developed to adjust to the needs of judicial practices, such as the increase in several provisions on civil procedural law outside the HIR and RBg, which are scattered in various regulations. Likewise, the law of evidence has developed in line with the development in the needs of society.

The development in the civil proof system relates, among others, to the burden of proof and the principle of its distribution (*bewijslast*) as stipulated in Article 163 of HIR/283 of RBg, providing that principally in a civil case, the plaintiff must first bear the burden of proof.[6] (only then is the opportunity given to the defendant to the counterprove-the author). But in its development, this principle cannot be applied to any civil dispute. In certain cases, such as environmental[7] disputes or disputes over the faults of the medical profession, this principle cannot be applied. In this case, the applicable proof system is a reverse onus system with the principle

[6] Article 163 of HIR: "Anyone who claims a right over a thing, or cites an action to affirm his right or to deny the right of others, shall prove the presence of the right or the action".

[7] Andri G. Wibisana, 'Keadilan Dalam (Intra) Generasi: Sebuah Pengantar Berdasarkan Taksonomi Keadilan Lingkungan' (2017) 29 Mimbar Hukum <https://jurnal.ugm.ac.id/jmh/article/view/19143>.[297].

of direct liability or no-fault liability (*strict liability*). Koesnadi Hardjasoemantri translated it as absolute liability.

The concept of absolute liability has been introduced since the mid-19th century, at least for a number of cases mostly related to environmental risks. With the development of industrialization which results in increased risks and the increasingly complicated cause and effect relationship, the legal theory has abandoned the concept of fault and turned to the concept of risk. The concept of the reverse onus is also adopted by Law Number 8 of 1999 concerning Consumer Protection. For the burden of proof in court practice, therefore, a theory called fairness theory is applied, namely the burden of proof must (first of all-the author) be submitted/imposed by the judge to/on the party who is least disadvantaged in case of bearing the burden of proof, and afterward it is imposed on the opposite party to take a counterproof (the author).

The use of electronic evidence in society marks the change in the type of evidence to be used in the settlement of civil disputes in court. Both the HIR/ RBg and other regulations concerning the civil procedure have not yet regulated the electronic documents/data as evidence. In other words, the law of evidence in Indonesia has not accommodated the existence of electronic documents/data as evidence. While in its development, the existence of electronic evidence (perceived evidence) is now prevalent, such as electronic data/documents associated with digital signatures and statutory stamp duty for documentary evidence, witness examination using a teleconference, in addition to other evidence such as, for example, radio cassette recordings, VCD/DVD, photos, facsimile, CCTV, and even (*short message service/*sms).

The validity of electronic information as evidence in the Court is still questionable, even though in court practice in Indonesia, the use of electronic data as evidence has occurred. Whereas in some countries, electronic information recorded in electronic equipment has become a judge's consideration in deciding a case (civil or criminal). From the formal juridical point of view, the law of evidence in Indonesia has not accommodated electronic documents as evidence,

while practicing in the society, through electronic trading (*electronic commerce* or abbreviated *E-commerce*) transactions, electronic evidence has been widely used, especially in modern business transactions, such as in electronic banking. For example, when a customer makes a transaction through an ATM, all transactions carried out will be recorded electronically by the financial institution or bank concerned. Proof of using ATM remains an important problem to date because there is no written evidence other than a piece of paper (receipt).

The aforementioned development, concerning electronic evidence in particular, also affect the civil evidentiary system. According to the HIR/RBg system (applicable civil procedural law),[8] in a civil proceeding, the judge is bound to the legal evidence, which means that the judge may only make a decision based on evidence determined by law alone (in this case HIR/RBg).[9] This situation will certainly complicate the dispute settlement process, especially the process of proof in case of dispute over *E-commerce transactions.* Evidence is one of the *variables* in the proof system. Therefore, the development in the traffic of civil law involving the use of electronic evidence in society, especially in the fields of trade and banking, will affect the proof system. In the proof system, there are 2 types of proof, namely formal proof, and material proof. All this time, the proof adopted in the process of settling a civil case is formal proof that only seeks formal truth.

The recognition and use of electronic evidence in civil law relations, especially in the fields of trade and banking, also influence the development of civil procedural law as well as the proof system. As a comparison, research was carried out on the recognition and regulation of electronic evidence in civil cases and how the civil proof system applies in the Netherlands as a country employing the *Civil Law,* the legal system, and in Singapore as a country adopting the *Common Law legal system.* The data obtained are expected to be used as input in formulating the

[8] Efa Laela Fakhriah, 'Perkembangan Alat Bukti Dalam Penyelesaian Perkara Perdata Di Pengadilan Menuju Pembaruab Hukum Acara Perdata' (2015) 2 Jurnal Hukum Acara Perdata AD-HAPER <http://id.portalgaruda.org/index.php?ref=browse&mod=viewarticle&article=515141>. [145].

[9] Sudikno Mertokusumo (n 2).[141].

provisions on electronic evidence in the National Civil Procedural Law, which is currently still a draft. In Indonesia, there have been several actions leading to the use and recognition of electronic documents as valid evidence, for example:

1. The recognition of *online trading* in the stock exchange;
2. The provisions on microfilm and electronic facilities as storage media of corporate documents, which have been admitted as authentic written evidence in Law No.8 of 1997 concerning the Corporate Documents.
3. The provisions on electronic information and electronic documents as valid evidence is an enhancement of legal evidence set out in the civil procedural law, in Law No.11 of 2008 concerning the Electronic Information and Transactions.

However, this cannot be used as a legal basis by judges in court in deciding cases/disputes arising from transactions in cyberspace, because in the Indonesian civil procedural law system that originates in HIR/RBg, the proof is only valid if it is based on the evidence already regulated in the law (civil procedural law).[10] In formal juridical terms, electronic evidence has not been included (regulated) in the law/civil procedural law as evidence that can be used in litigation cases, while in practice it has been widely used. Such a situation will lead to legal uncertainty (which is one of the elements in law enforcement) for justice seekers. In enforcing the law there are 3 elements that must always be considered, namely: legal certainty (*Rechtssicherheit*), usefulness (*Zweckmassigkeit*), and justice (*Gerechtigkeit*).

In the effort of legal reform, it is necessary to note that the procedural law has the nature of formal law, namely the law concerning the rules of the game in settlement of disputes through the court, and is binding on all parties and cannot be deviated. That is why procedural law has a public nature. For the certainty of law, therefore, the procedural law must be in the codification form of unification nature so that it can be generally applicable and binding on all parties. This is in line with the thoughts expressed by Surjono Soekanto as stated in the previous description, that the law development is currently directed to codified and uniform written laws.

[10] Artaji,[*et.,al.*], 'The Implementation of Code Ethics of Advocate as a Profession in Indonesia' (2018) 15 Journal of Leadeship, Accountability and Ethics.[103].

Conclusion

Computer printout and computer output must be recognized as valid evidence and have the power of proof. Computer output should be given a formula as a statement or representation in the form of something that can be heard (audio) and seen, graphs, multimedia, printouts, pictorial magazines, writings or other forms produced by the computer. In addition, electronic documents and witness examinations through teleconference must be clearly regulated and recognized as evidence that can be equated with written evidence (documents) and testimony as long as the judge and the parties accept and approve them as evidence in the settlement of a civil case in court, and the power of proof is handed over to the judge (free power of proof).

The civil procedural law is generally public and binding in nature, it is necessary to establish a codified regulation on civil procedures to provide judges with legal certainty in resolving civil disputes in court, as well as to realize legal order in the context of law enforcement. Therefore, it is necessary to reform the civil procedural law that is codified and nationally applicable. Efforts to realize the desire to establish a national civil procedural law have long been made, but the establishment was conducted partially, not thoroughly.

The emergence of various types of electronic evidence and the growing use of them in civil law relations in society, it is time for them to be regulated informal law using a new civil procedural law. This is because even though the electronic evidence has begun to be normative through the Corporate Document Law and Electronic Information and Transaction Law, it is in the domain of material law. By reforming the civil procedural law that has accommodated the development of electronic evidence in line with the advancement in information and telecommunication technology to meet the practical needs, it is expected that legal certainty can be achieved, at least in the process of proof in civil cases in court. Legal certainty, as one of the factors in law enforcement, in addition to justice and expediency, is an element to realize the welfare of society in general.

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