

# **Legal Power of Electronic Evidence in Proving Criminal Cases Based on the 2023 Criminal Code**

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**Article History: Received: January 17, 2025; Accepted: February 25, 2025**

## **ABSTRACT**

E-commerce is a trade transaction that allows buying and selling without having to meet directly between the seller and the buyer. This trading system requires a strong sense of trust between one another, between the seller and the buyer. Recognition of electronic evidence as evidence that can be submitted to court and recognized as valid as evidence, has been carried out since 1977 through the Company Documents Law which stipulates that microfilm containing a recording of a company's documents can be submitted as evidence in court if a lawsuit arises later. According to the Company Documents Law, electronic document evidence is part of written evidence, while the Corruption Law explicitly explains that electronic information and electronic documents are an extension of indicative evidence. Because electronic mail in the form of electronic information or electronic documents has been recognized as one of the valid evidence in special crimes outside the Criminal Code in line with valid evidence in Article 184 of the Criminal Procedure Code is a new type of evidence, it is hoped that investigators, prosecutors, legal advisors and judges have an understanding of this electronic evidence. In the examination of criminal cases, it is expected that the judge in imposing a sentence based on two valid pieces of evidence and the judge obtains the conviction that the defendant is guilty of committing a crime, then the judge must impose the maximum sentence according to the prosecutor's demands, so that the defendant is deterred and the sense of justice of the community is fulfilled.

**Keywords:** Evidence, Electronic Evidence, Documents

## **1. INTRODUCTION**

The rapid development and advancement of technology today has brought many advances and changed the order, behavior, lifestyle and lifestyle of society, both nationally and internationally. This change is marked by the development of the use of internet technology (cyberspace) which is one part of the development of information technology. The benefits that can be felt with the presence of the internet are that this facility functions as a barrier-free path for sending and receiving information. In order to keep up with the development of existing technology, the criminal justice system in Indonesia requires procedural law that can clearly and firmly regulate the implementation of electronic evidence so that it is hoped that the validity of electronic evidence will no longer be a debate. With the current information era, electronic evidence is needed in handling various cases related to unlawful acts (acts against the Law) especially in resolving criminal cases in Indonesia. According to Luhut M.P Pangaribuan, criminal justice in the Criminal Procedure Code is divided into 3 phases, namely the pre-adjudication phase,



the adjudication phase, and the post-adjudication phase. A more general division is found in the criminal procedure process, namely there are 4 stages: the investigation stage, the prosecution stage, the trial examination stage in court and the execution of the decision. In every stage in the resolution of criminal cases, evidence plays an important role in seeking material justice (Ali, 2009b).

In handling and resolving criminal cases, it is stated in Article 184 paragraph (1) of the Criminal Procedure Code that valid evidence is witness testimony, expert testimony, letters, instructions and defendant's testimony. In this provision, several things have been listed that can be used as evidence, but have not accommodated electronic evidence as valid evidence. Electronic evidence is often used in the investigation stage, prosecution stage, examination stage in court and the decision implementation stage. The use of electronic evidence applies after the enactment of Law Number 11 of 2008 concerning Electronic Information and Transactions (UU ITE), which means that any act that misuses the use of cyberspace will be prosecuted by the Information and Electronic Crimes Law (UU ITE) (Ali, 2009a).

Electronic files are additional evidence and must be supported by other evidence to be considered by the judge. Civil procedural law is limited by the evidence that can be used to prove a case at trial, and has limited normativeness. Evidence is a stage that plays a crucial role for the judge to make a decision. The evidence process in the trial process can be said to be central to the examination process in court. Evidence is central because the arguments of the parties are tested through the evidence stage in order to find the law that will be applied (*rechto passing*) or that is found (*rechtsvinding*) in a particular case. The evidentiary legal system adopted in Indonesia is a closed and limited system where the parties are not free to submit types or forms of evidence in the problem-solving process. The law has firmly determined what is valid and valuable as evidence, restrictions on freedom also apply to judges where judges are not free and flexible to accept anything submitted by the parties as evidence. If the parties to the case submit evidence outside the provisions contained in the governing law, the judge is obliged to reject and set aside in resolving the case.

The use of electronic mail today is certainly inseparable from the role of the internet. Literally, the definition of the internet can be said to be a collection of computers around the world that are connected to each other into a network. The internet can also be interpreted as a large library that contains a lot of world news. Meanwhile, according to experts in the field of information technology, it is explained that the internet is a form of interconnection between computer networks that can provide services in the form of information in the form of complete



presentations. The internet is also claimed to provide various benefits in political, business, and entertainment matters. The internet was first created by the Advanced Research Projects Agency (ARPA) in 1969. At that time, the internet was still a computer network which was later named the Advanced Research Projects Agency Network (ARPANET).

This word is the forerunner to the formation of the internet network that is popular today. Then, in the 1980s, the internet began to be used by limited circles with the aim of connecting various campuses or In 1990, a similar graphical display-based service known as WWW (World Wide Web) began to be developed by CERN (European Organization for Nuclear Research) (Mokosolang et al., 2023). Then, InterNIC (Network Information Center) was founded in 1993 to run domain registration services. This is because the law of domain names and IP addresses in the form of numeric symbols and certain formats became computer system identifiers. The Internet Entered Indonesia after InterNIC, the internet entered Indonesia in 1994. At that time, the internet in Indonesia was known by a unique name, namely Paguyuban Network. Names such as RMS Ibrahim, Adisoemarta, Suryono, Muhammad Ihsan, Putu, Robby Soebiakto, Firman Siregar, Adi Indrayanto, and Onno Purbo are recorded as some of the figures who developed the early history of the internet in Indonesia, precisely around 1992-1994 (Mokosolang et al., 2023).

The internet has made significant progress, over time there are services that support human activities carried out via the internet. One of the famous services since the discovery of the internet is electronic mail (electronic Mail/E-mail). Where Electronic Mail was originally defined as a letter in the form of a text file sent via the internet. The use of Electronic Mail is very helpful in activities such as business activities, education, social and other benefits both economic and social. Including export and import transactions that have long used electronic Data Interchange (EDI). In Indonesia, EDI has been used from 1967 to the present. currently.

The development of information technology has provided facilities and convenience. One example is the use of electronic mail. Electronic mail (Email) is one of the world-famous information technology facilities because of its ease and fast process even with a very long distance compared to using letters in general so that people in general prefer to use electronic mail which is certainly more efficient and effective in terms of time. Current technological developments have provided facilities and convenience in all areas of human life, including in terms of relationships between one party and another. Along with the development of this technology, facilities have emerged that support human activities through the internet, one example of the use of electronic document letters. Electronic mail was originally interpreted as a letter in the form of a text file sent via the internet. Electronic mail is one form of information technology that is famous in the world



because of its ease in establishing information between each other with a fast process even with a long distance compared to letters in general.

Entering the current electronic development of ease of use, people began to think about using Electronic Mail services as spamming activities. Spamming is the misuse of electronic messaging systems to send advertising information and other needs in bulk. Electronic Mail Spam is generally defined as things that we don't want and are sometimes usually sent by people we don't know. The development of the internet is now causing various problems that are quite serious for its users. This is none other than because of the rapid acceleration of information technology. This electronic system causes many problems when associated with proof in terms of evidence of a transaction carried out electronically. This evidence is generally issued or sent by one party to another using Electronic Mail (Mokosolang et al., 2023).

The emergence of Law Number 11 of 2008 concerning ITE is to catch up with the lag of Criminal Procedure Law in following technological developments. The use of electronic evidence is used as an effort to expand what already exists in the Criminal Procedure Code, so Law Number 11 of 2008 was issued which has been amended to Law Number 19 of 2016 concerning Information and Electronic Transactions which has also been amended to Law Number 1 of 2024 concerning Information and Electronic Transactions, especially in article 5 which contains:

1. Electronic Information and/or Electronic Documents and/or printed documents are valid legal evidence.
2. Electronic Information and/or Electronic Documents and/or printed results as referred to in paragraph (1) are an extension of valid evidence in accordance with the Procedural Law in force in Indonesia.
3. Electronic Information and/or Electronic Documents are declared valid if they use an Electronic System in accordance with the provisions stipulated in this Law.
4. The provisions regarding Electronic Information and/or Electronic Documents as referred to in paragraph (1) do not apply in other matters in the Law.

With this ITE Law, it guarantees that electronic evidence has become valid evidence and provides legal certainty in society, prevents crimes based on information technology and can protect the community of service users by utilizing information technology. Electronic evidence is also valid evidence in the Company Documents Law, the Law on the Eradication of Terrorism, the Law on Money Laundering, the Law on the Eradication of Corruption and the Law on the Corruption Eradication Commission.



In Indonesian judicial practice, it is not common to use electronic data as valid evidence. However, in some countries or regions, judges consider electronic data in the form of Electronic Mail when deciding a case (civil or criminal), with the development of technology, the existence of this document has become a result of commercial practice. Its scope is very broad, such as approving, recording, and collecting various forms of data, including laws, opinions, research results produced during transactions, or research results obtained through the use of personal computers to exchange information. All evidence is recognized by law, but the court itself cannot simply accept electronic evidence in the form of email as valid evidence for the court. What you do in Indonesia via the internet media must not violate existing laws. Electronic Mail users up to this time are estimated to have reached millions of users. This can be reviewed by considering more use of general social networks, such as Instagram, Facebook and others that are connected using Electronic Mail (Sitompul, 2004).

The Electronic Information and Transactions Law is an umbrella regulation for all activities and transactions on all internet and electronic media. In Law 19 of 2016, an amendment to Law 11 of 2008 concerning Electronic Information and Transactions (hereinafter in this thesis abbreviated as the ITE Law), it also regulates the validity of email as evidence in court. In the provisions of Article 5 and Article 6 of the ITE Law, every electronic document that is valid according to the ITE Law can be used as evidence in court. The question arises when will electronic evidence become valid evidence in resolving criminal cases? Electronic evidence will be legally recognized in resolving criminal cases if the electronic evidence is guided by the Criminal Procedure Code and the Law that specifically expands the definition of evidence regulated in the Criminal Procedure Code and the evidence is included in written evidence, indicative evidence or stand-alone evidence.

## **2. RESEARCH METHODS**

The research conducted by the researcher is normative research. The type of normative research is also often referred to as doctrinal research. Usually this research is used for legal research in order to find the truth of the relationship between parts in the text marked by the use of language elements (cohesion), which are the existence of legal rules according to legal norms and the existence of norms in the form of commands or prohibitions according to legal principles.

## **3. RESULTS AND DISCUSSION**

### **Validity of Evidence Using Electronic Evidence in Resolving Criminal Cases**



Physical evidence in criminal cases is regulated in Article 184 paragraph (1) of the Criminal Procedure Code, namely witness statements, expert statements, letters, instructions and statements from the defendant. When the ITE Law was enacted, there was an expansion of evidence in the form of electronic evidence which can also be used as evidence in resolving criminal cases (Awaludin et al., 2024).

Article 5 paragraph (2) of the ITE Law states that:

1. Adding evidence as regulated in criminal procedure law in Indonesia, for example in Article 184 paragraph (1) of the Criminal Procedure Code, it is clearly explained that the evidence in criminal cases is witness statements, expert statements, letters, instructions and statements from the accused, so that with the regulation that Electronic Information and/or Electronic Documents are electronic evidence, this adds to the types of evidence as regulated in the Criminal Procedure Code.
2. Expanding the scope of evidence that has been regulated in criminal procedure law in Indonesia, for example in the Criminal Procedure Code. Printout of Information or Documents

The conditions that must be met so that Electronic Information and Documents can be used as legal evidence according to law are that 2 (two) conditions must be met, namely as follows:

1. Fulfillment of formal requirements as regulated in Article 5 paragraph (4) of the ITE Law, namely that Electronic Information or Documents are not documents or letters which according to law must be in written form (Rahmatullah et al., 2024).
2. Fulfillment of material requirements, namely as regulated in Article 6, Article 15, Article 16 of the ITE Law, which in essence requires that Electronic Information and Documents be guaranteed for their authenticity, integrity and availability.

Therefore, the formal and material provisions and requirements regarding electronic evidence must refer to the Criminal Procedure Code, the ITE Law and other laws that specifically regulate electronic evidence.

There are several processes or stages to assess whether a piece of evidence is legally valid or not, where electronic evidence also has stages so that it can be said to be valid evidence, namely as follows:

1. Electronic documents/recording devices must comply with the specified standards.
2. The electronic evidence must be read by someone who is an expert.
3. The expert who reads the electronic evidence must be certified.
5. The tools used to read electronic evidence are in accordance with the standards for reading electronic evidence.

6. The process of reading electronic evidence must be correct
7. The laboratory or place where electronic evidence reading facilities are located must comply with the specified standards (Nilla, 2020).

The ITE Law itself stipulates the following minimum requirements for electronic evidence to be used as evidence in court:

1. Can re-display Electronic Information and/or Electronic Documents in their entirety in accordance with the retention period stipulated in statutory regulations.
2. Can protect the availability, integrity, authenticity, confidentiality and accessibility of Electronic Information in the implementation of the electronic system.
4. Can operate in accordance with procedures or instructions in the implementation of the electronic system.
5. Equipped with procedures or instructions announced in language, information or symbols that can be understood by the parties concerned with the implementation of the electronic system.
6. Having an ongoing mechanism to maintain the recency, clarity, and accountability of procedures or instructions (Awaludin et al., 2024).

Evidence is an important element in the tools or efforts that judges can use to decide matters. The subject also thinks about the meaning of evidence and evidence as follows; "Evidence is something to convince the truth of an argument or position. Evidence, evidence, proof efforts are tools used to prove the arguments of a party in court, for example: written evidence, testimony, conjecture, oath and others. A similar opinion was also expressed by Andi Hamzah who gave almost the same understanding of evidence and evidence as follows; "Evidence is something to convince the truth of an argument, position or accusation. Evidence tools are the means of proof through tools that are allowed to be used to prove arguments, or in criminal cases of allegations in a court session, for example the defendant's testimony, testimony, expert testimony, letters and instructions, in civil cases including allegations and oaths (Anshoruddin, 2004).

Evidence, or in English called evidence, is information used to establish the truth of legal facts in an investigation or trial. Patton in his book entitled A Textbook of Jurisprudence, as quoted by Sudikno Mertokusumo, states that evidence can be oral, documentary, or material. Oral evidence is words spoken by someone in a trial. Documentary evidence includes written evidence or written evidence. Material evidence includes evidence in the form of goods other than documents (Tapan, 2019).





The development of progress in the field of information technology and telecommunications, also develops theories and practices of the use of evidence outside of that which has been determined in the HIR/RBg and the Civil Code. This certainly raises a problem, namely when the evidence that is currently developing has not been recognized by the court to be recognized as valid evidence, meanwhile, the old regulations are not immediately replaced/updated which can accommodate the development of evidence outside of the existing regulations. When meeting with law enforcement officers who are the mouthpiece of the law, of course the existence of evidence that is not included in the existing regulations will be rejected, while when meeting with the development of progress in the field of information technology and telecommunications, theories and practices of the use of evidence outside of that which has been determined in the HIR/RBg above also develop (Sulistyo, 2019).

This certainly raises a problem, namely when the evidence that is currently developing has not been recognized by the court to be recognized as valid evidence, meanwhile, the old regulations are not immediately replaced/updated which can accommodate the development of evidence outside the existing regulations. If you meet with law enforcement officers who are the mouthpiece of the law, then of course the existence of evidence that is not included in the existing regulations will be rejected, while if you meet with progressive law enforcement officers, then new evidence that has not been mentioned in the old regulations will be considered and a way out will be sought, whether through the discovery of new laws, legal breakthroughs or constructing laws.

The practice in the courts that has long been going on and has become a permanent jurisprudence, the Supreme Court regarding the recognition of new evidence outside of that which has been determined in the HIR/RBg/Civil Code is a photocopy of a letter or deed. In the Decision of the Supreme Court of the Republic of Indonesia No. 71 K/Sip/1974 dated April 14, 1976, it was stated that a photocopy can be accepted as evidence if the photocopy is accompanied by a statement or by any means it can be legally shown that the photocopy is in accordance with the original. The submission of photocopies as evidence in the 1970s was an extraordinary breakthrough and a bold step to break out of the existing rules because at that time photocopies, although they had been used in daily activities by the community, photocopies as evidence in court were still something new in court practice, so that by accepting photocopies as new evidence, it means that the court has broken the old rules whose value has become obsolete.

The Supreme Court has dared to use a futuristic interpretation in its decision relating to the use of evidence outside the HIR/RBg. This Supreme Court decision was the forerunner to the emergence and recognition of other evidence outside the HIR/RBg/Civil Code that can be applied





in civil proceedings in court. Printed photos (portraits) or negative film (cliché) and sound or image recordings stored on cassettes, vinyl records, CDs, DVDs and so on, at the beginning of their appearance could not be used as evidence in civil or criminal cases because they could be the result of technological engineering so that they could not explain what actually happened. With the development of technology today, slowly these evidences in court practice have begun to be recognized even though there are no rules that recognize their validity as evidence in court (Hendra, 2012).

Electronic information evidence or electronic documents are very susceptible to manipulation. So the authenticity of electronic information evidence and electronic documents is very important in proof. According to Anugrah, the validity of electronic information evidence and electronic documents still requires further proof. This proof is closely related to the originality of electronic information evidence and electronic documents. Given the assessment of the validity of electronic information evidence and electronic documents is very difficult, because the existence of electronic information evidence and electronic documents must not harm others. In addition to the problem of the originality of electronic information evidence and electronic documents in making data or documents as valid evidence in criminal/criminal cases is the problem of retrieving data that can be used as evidence. Because retrieving evidence is not easy. The second reason is because until now there has been no Standard Operating Procedure (SOP) in retrieving electronic evidence. Whereas considering cases that intersect with cyberspace and electronics have developed. Considering that the person in charge of collecting evidence is the investigator, so an SOP is needed immediately from the investigator in relation to retrieving electronic information evidence and electronic documents.

The development of the use of electronic media using the internet has influenced aspects of human needs and behavior. The presence of the internet that knows no boundaries and without barriers (borderless) has destroyed geographical boundaries, both on a national and international scale. The aspect of global human interaction allows for various transactions that occur every day. The emergence of electronic commerce transactions (e-commerce) which gave birth to electronic transcripts as evidence to the parties if a dispute occurs in the future.

In the process of litigation that has important urgency, namely the evidence stage, where the outcome of the judge's decision will be known. For judge's decisions that have permanent legal force (*inkracht van gewijsde*), the next stage of implementing the decision (execution) will be carried out. So the duties and responsibilities of a judge play a very important role in handling a case, namely having to see to what extent the arguments of the dispute between the parties are



proven, so that the judge will determine the winning and losing parties in a court decision. In Law No. 48 of 2009 concerning Judicial Power in Chapter II concerning the Principles of the Implementation of Judicial Power, in Article 3 paragraph (2) it is stated that "Any interference in judicial affairs by other parties outside the Judicial Power is prohibited, except in cases as referred to in the 1945 Constitution of the Republic of Indonesia".

The provision provides an affirmation that the judicial institution is a state institution that is independent and free from interference from other parties outside the judicial authority. As a state institution, the court is included in the level of judicial power which has an important role in receiving, examining, deciding, and resolving disputes submitted to it. Therefore, every case examination process in court has a standard examination reference that must be adhered to and is binding on the parties including the panel of judges, because ignoring the provisions of procedural law as a reference in examining cases in court can result in the decision (verdict) handed down by the panel of judges being "null and void". Evidence is one of the provisions in the stages of a case examination trial according to the procedural law applicable in court, bound by the rules of evidence, starting from the type of evidence, burden of proof, strength of proof and matters relating to evidence have been regulated in the main provisions of the applicable procedural law. It can be understood that the evidence process has its own codification rules as in other stages of case examination.

The main requirement for a valid electronic document is to use an electronic system that has been electronically verified by the government as regulated in Article 13 of Law No. 19 of 2016 concerning electronic information and transactions.

Article 14, Electronic certification organizers as referred to in Article 13 paragraph (1) to paragraph (5) must provide accurate, clear and definite information to every service user, which includes;

1. The method used to identify the signatory;
2. Things that can be used to find out the personal data of the person who created the electronic signature; and
3. Something that can be used to show the validity and security of an electronic signature.

Another requirement is to place an electronic signature, inserting it into a standard electronic contract. Regarding the evidentiary force attached to an electronic signature, it is contained in article 11;

1. Electronic signatures have legal force and valid legal consequences as long as they meet the following requirements:

2. Electronic signature creation data relates only to the signatory;
3. The data for creating an electronic signature during the electronic signing process is solely under the control of the signatory;
4. Any changes to the electronic signature that occur after the time of signing can be identified;
5. Any changes to the electronic information related to the electronic signature after the time of signing can be known;
7. There are certain methods used to identify who the signatory is; and
8. There are certain ways to show that the signatory has given consent to the relevant electronic information.
9. Article 12 of the ITE Law:
10. Every person involved in electronic signatures is obliged to provide security for the electronic signature they use.
11. Electronic signature security as referred to in paragraph (1) at least includes:
  - a. The system cannot be accessed by unauthorized persons;
  - b. The signatory must apply the precautionary principle to avoid the use of
  - c. unauthorized access to data related to the creation of electronic signatures;
  - d. The signatory must, without delay, use the method recommended by the electronic signature provider or other appropriate method and must immediately notify a person who the signatory considers to trust the electronic signature or the party supporting the electronic signature service if:
- and. The signatory is aware that the electronic signature creation data has been compromised; or
- f. Circumstances known to the signatory may give rise to significant risks, possibly resulting from the breach of electronic signature creation data; and
- g. In the event that an electronic certificate is used to support an electronic signature, the signatory must ensure the truth and integrity of all information related to the electronic certificate.
11. Any person who violates the provisions referred to in paragraph (1) is responsible for all losses and legal consequences that arise.

Apart from what has been explained in articles 13, 14, 11, and 12 regarding the requirements for electronic information/documents to be used as valid legal evidence, the law on information and electronic transactions also stipulates that there must be formal and material



requirements that must be met so that electronic information/electronic documents, in this case electronic mail, can be used as valid legal evidence, namely;

1. Formal requirements are regulated in Article 5 paragraph (4), namely that electronic information or documents are not documents or letters that according to the law must be in written form. In addition, the information and/or documents must be obtained in a legal manner. When evidence is obtained in an illegal manner, the evidence is set aside by the judge or considered to have no evidentiary value by the court (Fatimah, 2020).

2. Material requirements are regulated in Article 6, Article 15, and Article 16 of the Electronic Information and Transactions Law, which in essence electronic information and documents must be guaranteed for their authenticity, integrity, and availability. To ensure that the material requirements are met, digital forensics is needed.

### **Precedents that can be used in a Criminal Case**

Precedents in the Indonesian legal system, especially in the context of criminal law, play a very important role even though their status is not explicitly binding. Nevertheless, court practice shows that the president issued by the Supreme Court is often used as a guideline in decisions taken by judges at the district court level. However, despite this, not all presidents are automatically accepted and applied by judges. There are several cases where judges feel that the existing president is not relevant to the facts in the case being examined. This often occurs in cases that have just emerged or that touch on issues that have not been previously decided by the Supreme Court. In this case, judges tend to take a policy to adjust the decision to the needs and developments of existing law, even without referring to the existing president.

However, there is also a pattern where the president of the Supreme Court is strictly followed by lower courts. In this case, the judges consider that following the president will provide clarity and stability in the decisions taken, as well as provide legal certainty for the parties involved in the case. Therefore, although there is no binding legal obligation to follow precedent, the courts tend to prefer to follow the guidelines set by the Supreme Court. The application of precedent in Indonesian criminal law is also inseparable from the practice of judicial activism, where judges sometimes use a broader and more flexible interpretation of the existing president.

In some cases, judges try to develop criminal law principles that are more in line with current developments (Gunawan et al., 2024). This occurs especially in cases related to social developments, such as crimes related to technology or crimes involving human rights. Nevertheless, precedents are still considered a useful tool in creating uniformity in law enforcement. The application of precedents allows judges to reduce legal uncertainty and provide



fair and consistent decisions. In this case, the president provides clear direction on how legal principles should be applied to certain facts, as well as providing a sense of justice for the community involved in criminal cases. However, challenges arise when the existing president is outdated or no longer in accordance with the developing social and legal conditions.

In such a situation, judges are faced with a dilemma between following the existing president or making a decision that is more in line with current conditions. Therefore, although the president has an important role in the legal system, flexibility in its application is also very necessary so that the law remains relevant to the times. Overall, the application of precedents in Indonesian criminal law has a positive impact in creating legal certainty. However, its application must be adjusted to social needs and changing legal developments.

This shows that although precedent is important, substantive justice must also be a primary concern in every court decision. Ultimately, although the president serves as a guideline, judges still have the freedom to interpret the law according to the existing situation and conditions. The use of appropriate precedent will strengthen the integrity of the Indonesian criminal justice system, while ignoring the existing president can create legal uncertainty that is detrimental to the parties involved in the judicial process.

### **The Probative Power of Electronic Evidence**

According to Edmon Makarim, the evidentiary power of electronic information can be divided into three, namely weak, medium and strong, (1) Weak, validity is not guaranteed in explaining a recorded legal event and is unable to explain or ensure the legal subject responsible (2) Medium, guaranteed validity can explain a recorded legal event and is able to explain or ensure the legal subject responsible but the accountability/reliability of the electronic system used does not work well (not accredited), can be easily denied and (3) Strong, guaranteed validity can explain a recorded legal event and is able to explain or ensure the legal subject responsible here the accountability/reliability of the electronic system used also works well (accredited), so that as long as it cannot be proven otherwise what is stated by the system can be considered technically and legally valid (Gaol, 2016).

Electronic evidence with strong evidentiary power is the one whose evidentiary power can be materially equated with an authentic deed, namely having perfect evidentiary power. Electronic information/documents meet the criteria to be valid legal evidence as long as they are not excluded and can meet the requirements of the functional equivalent approach or functional equality and come from an electronic system that meets the requirements of the law.



In the ITE Law, electronic information and/or electronic documents are considered valid as long as the information contained therein can be accessed, namely the digital data found can be accessed by the electronic system; can be displayed, namely the digital data can be displayed by the electronic system; guaranteed integrity, namely the digital evidence produced by the examination and analysis process must have complete contents; can be accounted for, namely what is produced from the document creation process to delivery can be guaranteed authenticity. So far, written forms have been identical to information and/or documents written on paper alone, whereas in essence information and/or documents can be poured into any media, including electronic media. Electronic information has legal value because functionally its existence is equivalent to or equal to information written on paper, as mandated in UNCITRAL regarding the legal value of an electronic record because it meets the elements of being written, signed and original.

In the scope of electronic systems, the original information with its copy is no longer relevant to distinguish because the electronic system basically operates by means of duplication which results in the original information being indistinguishable from its copy as evidence, an authentic deed has the power of external, formal and material proof if it is connected to an electronic document then the integrity of its contents must be guaranteed and formally accountable. Electronic evidence is valid evidence and is an extension of valid evidence in accordance with the applicable procedural law in Indonesia, how is the interpretation of the extension of valid evidence? Does that mean that electronic evidence has the same power as the five pieces of evidence regulated in Article 164 HIR/284 RBg? There are still differences in interpretation here, there are judges' decisions that have not recognized electronic evidence, electronic documents and their printouts do not have strong or perfect evidentiary power, even printouts of electronic documents are still considered as evidence in the form of photocopies, electronic evidence is free evidence which for its evidentiary power still requires supporting evidence such as digital forensic experts. Likewise, in terms of examination in court as part of the law of evidence, there are no firm regulations that can be used as guidelines for how electronic evidence is brought to be submitted to the trial and how to show it to the judge and the opposing party. The problems in electronic evidence will ultimately cause injustice to the community (Luhut, 2013).

In the issue of whether electronic evidence is evidence that can stand alone or is merely an extension of evidence, Edmon Makarim explained that there are indeed differences of opinion among legal experts regarding this issue. For legal experts who are positivistic, they will say that the ITE Law clearly states that electronic information/electronic documents are merely an extension of evidence, whereas electronic information/electronic documents should also be able to





become separate evidence, not just as an extension of evidence, which is a consequence of the formulation of Article 5 paragraph (1) of the ITE Law which recognizes electronic information or electronic documents in their original electronic form. In addition, paragraph (3) of the same article stipulates that the existence of new electronic evidence can only be considered valid if it meets the provisions stipulated in the ITE Law.

When the law is not able to answer all legal problems in society because the development of society has not been able to be accommodated by law or in terms of what is regulated in the law is not always clear and does not provide a solution to every problem that arises in society, including regarding electronic evidence, then the answer to the legal problem can only be given by the judge in court. The judge must be able to find the law/*rechtsvinding* by exploring the values that exist in society/living law, as regulated in the law that the court may not refuse to examine and try a case filed on the pretext that the law is not or is less clear, but is obliged to examine and try it (Isma & Koyimatun, 2014).

In making a decision, a judge must be guided by the law. As long as there are rules in the law, the judge is bound by the provisions of the law but it is also regulated that the judge is not merely a mouthpiece of the law. Therefore, the freedom of the judge in exercising judicial power is not absolute, the judge must make legal considerations in his decision which must contain the reasons and basis for the decision, also contain certain articles of the relevant laws and regulations or unwritten legal sources that are used as the basis for judging. The decision is the crown for a judge, in his decision the quality of a judge can be seen and of course must be accountable.

As a legal principle, judges in making a decision will use a comprehensive legal analysis method to solve legal problems in a case they are handling by prioritizing several aspects: (1) the legal aspect, namely in accordance with the provisions of applicable laws and regulations as the first and main approach; (2) the sociological aspect, namely in accordance with the cultural values that apply in society and (3) the philosophical aspect, namely based on truth and a sense of justice (Mokosolang et al., 2023).

As stated by (Soekanto and Purbacaraka, 2017) that if only the legal aspect is considered, then a decision will not be alive, if only the sociological aspect is considered, then the decision will only be a means of coercion, and if only the philosophical aspect is considered, then the decision will be unrealistic. Therefore, a judge's legal considerations in his decision always include three things, namely legal certainty, justice and benefit.

In addition to the interests of the parties, court decisions also have a public function. In Supreme Court decisions, decisions have a role model and predictive function where the contents

of the decision must be able to inform the wider community how the Supreme Court applies the law and become a role model if a similar case may arise. The judge's decision consists of several parts, how is the binding force of each of these parts? The binding force of the decision is generally not limited to the dictum alone but also includes the part of the decision which is the basis of the decision basically examining the judge's considerations in all judge's decisions not limited to judge's decisions at the Supreme Court but also including at the district court and high court levels, this is important because a judge's decision can create or eliminate legal relations, create new legal rules with legal discoveries and especially will bind the disputing parties and become law. Legal science always follows the courts to find out how legal regulations are created in judicial practice and which new regulations are created by the courts. This makes a judge's decision important, in this case how the judge responds to electronic evidence.

#### 4. CONCLUSION

In its development along with the dynamics of society, so that when society changes or develops, the law must change to organize all developments that occur in an orderly manner amidst the growth of society. Globalization has become a driving force in the era of the birth of the information technology era, where relations between people in the global dimension are no longer limited by the territorial boundaries of the country (borderless). The presence of the internet with all the facilities and programs that accompany it, such as Electronic Mail, video chatting, video teleconference, website, facebook, and so on, has made global communication possible without recognizing national boundaries.

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