



Hukum Perdata (KUHPerdata), dan Buku IV Bulgelijk Weatbook (BW) menjadi pedoman ketika terjadi sengketa dalam beban pembuktian kontrak dan penyelesaiannya. Implikasi hukum yang banyak terjadi adalah kejahatan keabsahan dalam kontrak era digital belum diimbangi dengan kesiapan aparat penegak hukum.

**Kata Kunci:** Hukum Kejahatan, Kontrak era digital

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## INTRODUCTION

The development of technology provides space in creating new information technology. The existence of internet offers unlimited access for its users, especially in business world. With all benefits it brings, all business actors begin to move from conventional counter-models to digital contracts (e-contracts). Electronic contract is a legal and binding contract. Article 8 paragraph (1) of the United Convention on the Use of Electronic Communications in International Contracts states that electronic contract is a valid and binding contract, as we know it as *Pacta Sun Servanda* in Indonesia, so that electronic contract will be able to provide convenience in business transactions. The rapid development of technology including its use in financial sector has made the process of financial inclusion and literacy easier, especially for a country where its community does not have a high financial understanding. Indonesia as an archipelago country faces various problems due to its geographical condition. One of the problems faced in economic field is the issue of financial inclusion. Hence, a condition where all working-age people is able to get effective access to credit, savings, and payment systems needs to be immediately realized and developed in order to overcome poverty and reduce the gap in economic capacity of the society<sup>1</sup>. Currently, Indonesia has new rules on Electronic Information and Transactions, namely Law No. 11 of 2008 on Electronic Information and Transactions (UU ITE). The globalization era has changed people life with its development of information and transactions technology. Technology-based information has changed people's mindset and behavior where people who used to have to meet face to face are now shifted through computers and the internet<sup>2</sup>.

The recognition of electronic contracts in the Indonesian Civil Code is still a complicated matter. The Civil Code Article 1313 only states that an agreement is an act in which one or more people attach themselves to one or more other people. If referring to this definition, an electronic contract can be considered as a form of agreement that complies with the provisions of Article 1313 of the Civil Code. Even though in its practice, an agreement is usually interpreted as an agreement that is written in paperbased form and if necessary is stated in the form of a notary deed. Agreement is a translation of the word *oveerenkomst*. Contracts are usually made in the principle of contractual freedom. Basically, in the principles stated in the Civil Code, people are given freedom in making contracts both in terms of its form and content.

The principles provide freedom for the parties to; 1) the formulation of the agreement; 2) the parties involved; 3) the contents and the terms and condition of the agreement; and 4) the form of the agreement, both oral and written. A contract must fulfill the conditions of the validity of a contract, namely the agreement of two parties, the capability, and the contents. With the fulfillment of these conditions, an agreement will become a law for the parties involved which means that the agreement

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<sup>1</sup> Dwi Edi Wibowo, Handriyanto Wijay, dkk, The Analysis of Standard Agreement in Credit Transactions Through Financial Technology Viewed from Law No. 8 of 1999 Concerning Consumer Protection, *UNIFIKASI : Jurnal Ilmu Hukum*, Volume 06 Nomor 01.2019, pp.61-62

<sup>2</sup> Suwari Akhmaddhian dan Asri Agustiwi. "Perlindungan Hukum Terhadap Konsumen dalam Transaksi Jual Beli Secara Elektronik di Indonesia". *Jurnal Unifikasi*, ISSN 2354-5976 Vol. 3 No. 2 Juli 2016.40-60.

is legal and binding.<sup>3</sup> The question proposed in this study is; what is the legal analysis of crimes in the validity of contracts in the digital era?

## RESEARCH METHODS

This descriptive analytic study applying doctrinaire approach tries to obtain a systematic picture of legal analysis of electronic contracts in the Indonesian civil code. The type of the study itself was normative juridical. Therefore, secondary legal material both in the form of regulations and legal theories were used in this study.<sup>4</sup> The regulations on Electronic Information and Transactions used were Law No. 11 of 2008, Government Regulation on The Implementation of Electronic System and Transaction No. 82 of 2012, Law No. 2 of 2014 on Notary Position, Civil Code, HIR (*Herzein Inlandsh Reglement*), and Rbg (*Rechtriglement voor dee buitengewesten*). Secondary legal materials are supporting materials in processing the collected data along with primary legal materials, namely research results, seminars and other documents relating to the validity of electronic contracts based on Indonesian law.

## RESULTS AND DISCUSSION

According to Van Dunne in Salim HS, agreement is a legal relationship in which two or more parties agree to do or not to do an act. Hence, it is not enough to look only at the agreement, but it also needs to look at previous acts.<sup>5</sup> At first, the agreement between two or more parties can only be in the form of verbal agreement.<sup>6</sup> Recognition of electronic contracts as a form of agreement in the Indonesian Civil Code is still a complicated matter. The Civil Code Article 1313 only states that an agreement is an act in which one or more people attach themselves to one or more other people. If referring to this definition, an electronic contract can be considered as a form of agreement that complies with the provisions of Article 1313 of the Civil Code. Even though in practice, an agreement is usually interpreted as an agreement that is written in paperbased form and if necessary is stated in the form of a notary deed. Article 1320 of the Civil Code states that a new agreement is valid if it meets subjective requirements (there is agreement between the parties and competent parties to make an agreement) and objective conditions (the object of the agreement must be clear and the agreement is carried out because of lawful reasons). In conventional transactions where parties meet each other, it is not difficult to see whether the agreement made fulfills these conditions. Problems arise in the event that transactions are carried out without a meeting between the parties.<sup>7</sup> Followings are some theories/teachings of agreements:

1. Theory of Statement, something is considered to be an agreement when a person accepts a statement and he agrees with the statement. For example, when A's ballpoint is dropped by B, and A accepts it, it is called statement. The disadvantage is that there is a lack of response because it happens automatically.
2. Theory of sending, something is considered to be an agreement when there is a 'sending' of the word 'agree' from the opposing party. The disadvantage is that there is a possibility where the party offering the agreement does not know even though it has been sent.

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<sup>3</sup> Sutan reni syahdeny, *kebebasan berkontrak dan perlindungan yang seimbang bagi para pihak dalam perjanjian kredit di Indonesia*, Jakarta : Institut banker Indonesia, 1993, p. 160

<sup>4</sup> Sunaryati hartono, *Penelitian hokum Indonesia pada akhir abad ke 20*, Bandung : Alumni, 1994 : p. 101

<sup>5</sup> Salim HS, *Pengantar Hukum Perdata Tertulis (BW)* Jakarta: Sinar Grafika : 2003, p. 161

<sup>6</sup> C.S.T Kansil, *Hukum Perdata I (Termasuk asas- asas Hukum Perdata*, Jakarta : PT. Prandya Paramita, 1991, p. 229

<sup>7</sup> Andi Aina Ilmih, *Ideal Electronic Contract Model As A Form Of E-Commerce Disputes Settlement*, Jurnal Pembaharuan Hukum, Volume VI No.1 Januari – April 2019, pp.77-79

3. Theory of knowledge, something is considered to be an agreement when the party offering the agreement knows that the offer is accepted, although the party receiving the agreement does not received the agreement directly.
4. Theory of acceptance, something is considered to be an agreement when the opposing party has already received an offer directly from one party.<sup>8</sup>

The internet, including electronic mail, developed until 1994 when science introduced the World Wide Web. The use of web is then widespread in business, industry and household activities worldwide.<sup>9</sup> Thus, it can be said that the development of technology has a great influence on all aspects of human life. The internet is the largest electronic information and communication technology utilized for various activities, such as browsing, searching for data or news, communicating, carrying out economic activities that are generally referred to as electronic commerce or e-commerce, and conducting agreements called e-contract. An electronic contract is a contract which is no longer written manually, but it switches to the use of technology using electronic media.<sup>10</sup> According to Article 1 paragraph 17 of Law No. 11 of 2008 concerning Electronic Information and Transactions, electronic contract is an agreement of parties entered by means of electronic systems.<sup>11</sup> The rapid development of technology has an impact on human life related to its use. The development of trade rules is also inseparable from the influence of technological development. This influence is now becoming more evident with the birth of e-commerce (electronic commerce).<sup>12</sup> According to Johannes Gunawan, all contracts made digitally, including the contract designed and distributed through website by one side of the contract maker (can be by business actors) to be digitally closed by consumers, refer to as electronic contracts. Meanwhile, according to Edmon Makarim, the use of the term online contract in an electronic contract (e-contract) can be interpreted as a legal relationship carried out electronically by integrating computer-based information system and telecommunication-based information system which can later be facilitated by the existing computer network, namely the global internet (network to network).<sup>13</sup>

Previously, the software had let users switch off the identification feature, but the technology would turn it back on each time the computer was restarted. By default, the chip would transmit its unique serial number internally and to websites that requested it; it helps verify a user's identity. Intel defended its user-identification chip on the grounds that it enhanced security on computer networks. Critics, however, saw the technology as enatfling websites and merchants to compile electronic dossiers on customers and their transactions.<sup>14</sup> Currently, e-contracts or commonly known as electronic agreements are widely used in business transactions. The email account that is the basis for electronic contracts is often used as a loophole to steal the data of business actors and consumers. Hence, in its development, the protection of e-mail accounts needs to be increased as the development of technology is always followed by the development of crimes.

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<sup>8</sup> Salim HS, *Perkembangan Hukum Kontrak Innominaat di Indonesia*, Jakarta : Sinar Grafika, 2003 pp. 30-31

<sup>9</sup> Tammy S Trout, *Personal Jurisdiction and the Internet : Does the Shoe Fit 21*, Jakarta Hamli , 1997, p. 223

<sup>10</sup> Roger Leroy Miller dan Gaylord A. Jentz, *Law for E-Commerce (United States of America: West Legal Studies in Business,2002)*, p.146

<sup>11</sup> Pasal 1 angka 17 Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik.

<sup>12</sup> Aan Aswari, Syamsudin Pasamai, *Legal Security On Cellphone Trading Through Electronic Media In Indonesia*, jurnal Dinamika Hukum, vol.17 nomor 2 may 2017, p.182

<sup>13</sup> Sylvia Christina Aswin, *Keabsahan Kontrak Dalam Transaksi Komersial Elektorik*, (Tesis, Program Pasca Sarjana Universitas Diponegoro,2006), p. 66

<sup>14</sup> Eillen P.Kelly, dll, *Ethical and online privacy issues in electronic commerce*, **Business Horizons**, Volume 43, Issue 3, May-June 2000, pp. 3-12

In business world, the level of vigilance and the presence of strict protection are important parts as some data can quickly be stolen. For example, when entering a credit card number that is only a few digits away, this could be a gap to break into the card so that the customer becomes in debt without his knowledge. Another example in breaking into data happens on mobile phones, that is, when users sell their mobile phones to others, they need to contact customer service. Hence, the government applies SIM Card registration with the system of one card for one name. It is a protection effort made to be able to conduct a good, friendly and comfortable business with the existing business standard. In the same sense, in a digital agreement, the legal force of the agreement becomes weak if it is not accompanied by a strict protection. The definition of crime in the Criminal Law has no specific and clear meaning. In the Criminal Code, the definition of crime is regulated in Article 104 to Article 488. A number of experts give a different understanding of crime. R. Soesilo argues that the notion of crime is distinguished into two points of view, namely a juridical and a sociological point of view.<sup>15</sup> In a sociological point of view, according to R. Soesilo, crime is interpreted as a deviated act carried out by someone. Thus, from a sociological point of view, crime can be interpreted as an act done by someone that causes harm to others as well as disturbs public order, peace and balance. Meanwhile, crime on the internet which is often referred to as cyber-crime is defined in Law No. 11 of 2008 concerning Electronic Information and Transactions:

1. Crimes related to illegal activities are in the forms of:
  - a. distributing or transmitting data accessed from illegal contents, namely:
    - 1) Crimes of propriety as stated in Article 27 paragraph (1)
    - 2) Crimes of gambling as stated in Article 27 paragraph (2)
    - 3) Crimes of affront and/or defamation as stated in Article 27 paragraph (3)
    - 4) Crimes of extortion and/or threats as stated in Article 27 paragraph (4)
    - 5) Crimes of false and misleading information as stated in Article 28 paragraph (1)
    - 6) Crimes that cause hatred based on ethnic groups, religions, races, and inter-groups (SARA) as stated in Article 28 paragraph (2)
    - 7) Crimes that send information containing violence threats or scares aimed personally as stated in Article 29
  - b. carrying out illegal access in any way as stated in Article 30
  - c. carrying out illegal interception of electronic information or documents and Electronic Systems as stated in Article 31
2. Crimes related to interference, namely:
  - a. crimes in data or Electronic Documents interference as stated in Article 32
  - b. crimes in electronic system interference as stated in Article 33
3. Crimes of facilitating prohibited acts as stated in Article 34
4. Crimes of manipulating information or electronic documents as stated in Article 35
5. Additional crimes (*accessoir*) as stated in Article 366
6. Crimes of incriminating criminal threats as stated in Article 52.

The current legal aspects of e-contract security are limited. In making e-contracts, the followings need to be considered:

- 1) Article 18 paragraph 1 states that Electronic Transactions that are stated in Electronic Contracts shall bind on both parties. Hence, e-contracts are automatically recognized and legally valid. Yet, the legal basis that specifically regulates legal certainty of e-contracts does not yet exist in Indonesia. All forms of agreements and business transactions in the

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<sup>15</sup> R. Soesilo, “*Kitab Undang-Undang Hukum. Pidana serta Komentar-Komentar Lengkap Pasal Demi Pasal*” Politeia, 1985, p. 34

- form of e-contracts are still based on the Civil Code and Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Electronic Information and Transactions.
- 2) In Book IV Burgerlijk Wetboek (BW), it is stated that the resolution of a dispute related to the agreement must through the verification mechanism. Hence, the resolution still refers to the written evidence in the form of authentic writing as regulated in Article 1867 of the Civil Code. One of the weak points of e-contract is that its intangible nature can have an effect on the weak validity of the documents. The basic principle is the aspect of the signature where the position of e-signature has been legally recognized. E-signature has been implemented in several shipping companies. Thus, people who already have e-signature can easily attach it to the agreement. It also results in the emergence of a new agreement with a wet signature or e-signature. Nowadays, e-signatures are not only used in business world, but it can also be found, for example, in a Driving License.
  - 3) Business actors need to consider the aspect of legal regulations that needs to be included in e-contracts as it can be used as a basis in facing a dispute that may happen in the future.<sup>16</sup>

In the Implementation of Electronic Systems and Transactions, as stated in Government Regulation No. 82 of 2012, a detailed regulation of the mechanism of electronic signatures is regulated. In this case, the government has begun to apply electronic signature in various fields. In the private sectors, the use of e-signatures has even become an obligation in financial technology (fintech). For example, the Financial Services Authority has required Peer to Peer (P2P) lending services to use e-signatures as stated in the Financial Services Authority Regulation No.77/POJK.01/2016 concerning Information Technology-Based Fund Lending and Borrowing Services. The principle of knowing the customers in financial institutions that cannot be strictly applied to the P2P *fintech* model has been minimized by the use of electronic signatures. Hence, the existence of electronic signature has been able to prevent P2P as a means of money laundering by using electronic signatures that will be able to support the transfer of various physical documents into electronic documents. One of the objectives of e-signature is to save storage space and be more environmentally friendly without having to eliminate its legal certainty over the authenticity of the documents. Thus, the use of digital signatures will guarantee the legal certainty in carrying out transaction in digital media with the authenticity of the identity of the parties. The legal implications that often occur are crimes in the validity of digital contracts in this digital era, especially in the falsification of signatures that have not been matched by the readiness of law enforcement officers.

## CONCLUSION

Even though people do not using an electronic system as it is required, the existence of good faith is a major factor that is seen and considered in making a contract. Subjective conditions as consequences of not fulfilling one of the elements are that the contract can be voidable by an interested party (*vernietigbaar*). If the contract is not canceled by one of the parties, then it is still considered valid. Thus, this electronic system is a form of electronic contract. The validity of electronic contract system has been included in the Electronic Information and Transactions Law. The validity of a contract as implied in the Civil Code is that it must fulfill 4 (four) conditions, one of which is a good faith. Meanwhile, the prevention efforts are regulated in the Electronic Information and Transactions Law because the character of this system is unique and varied.

In terms of the Civil Code, Indonesia has not yet formally regulated e-commerce and e-contracts. Indonesia is still in an effort to formulate regulations regarding some electronic matters,

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<sup>16</sup><https://islam.nu.or.id/post/read/106575/transaksi-e-contract-dalam-perjanjian-bisnis-di-era-digital>, 5 January 2020. 13.24.

namely the Draft of Law on Electronic Information and Transaction. In the Draft, it is stated that electronic documents were not valid for making and carrying out wills and securities, except stock and securities agreements, agreements on immovable property, documents, letters, and deeds legalized by a notary. This provision implies that there are certain authentic deeds that cannot apply electronic systems.

## SUGGESTION

The recognition of the position of e-contracts in Indonesia is still a problem that needs to be regulated by standard regulations so that there is a guarantee of legal certainty for the society.

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