

# Online Trial, Between the Rights of Security Protection during the Covid-19 Pandemic and Access of A Fair Trial in the Case of Muhammad Rizieq Shibab

Henry Yoseph Kindangen<sup>1</sup>, FX. Joko Priyono<sup>2</sup>, R.B. Sularto<sup>3</sup>  
{henrydinasigi@yahoo.co.id<sup>1</sup>, Fransiskusjoko893@gmail.com<sup>2</sup>, Sulartorb@gmail.com<sup>3</sup>}

Universitas Diponegoro, Indonesia<sup>1,2,3</sup>

**Abstract.** The using of teleconference in criminal case trials (also known as online trials) in Indonesia was first established based on the Cooperation Agreement dated April 13, 2021 between the Supreme Court, the Attorney General's Office and the Ministry of Law and Human Rights to accommodate the continuance of the criminal justice system in the midst of the COVID-19 pandemic. Until June 2021, there were 859,659 trials held via teleconference throughout Indonesia. Apart from its usefulness, the existence of online trials still leaves a number of problems, namely the legal basis, effectiveness and rights of defendants to a fair trial. Those issues are embedded in the trial of Muhammad Rizieq Shibab (MRS) who refused to have his case tried online and later it was approved by the East Jakarta District Court Judge. This paper will focus on the aspect of a fair trial access for the defendant and on the other hand the right of community to security and order, as well as the judge's considerations in granting the defendant Muhammad Rizieq Shibab's request that the trial be held offline in the midst of the high number of Covid-19 transmissions in Jakarta.

**Keywords:** Frail Trial, Teleconference, Cross Examination, Security, Covid-19

## 1 Introduction

The Covid-19 pandemic that hit the world and Indonesia in early 2020 has changed the pattern of social interaction at all levels of society. Since the announcement of the first case in Indonesia on March 2, 2020, the spread of Covid-19 has grown rapidly with the number of transmissions continuing to increase, including the number of patients who died. The conditions of such rapid spread and limited knowledge about this pandemic have caused confusion and panic through the society. The Indonesian criminal justice system is without exception.

On March 23, 2020, the Chief Justice of the Supreme Court issued Circular Letter Number 1 of 2020 which contains restrictions on activities in preventing the spread of Covid-19 within the Supreme Court and its judicial body, including adjournment of criminal proceeding against defendants whose their detention still can be extended until the end of Covid-19 prevention period. A day after, Minister of Law and Human Rights through his letter dated March 24, 2020 officially stated that starting March 18, 2020, the admission of new prisoners and trial activities adjourned until further notification. The letter also request police offices and prosecutors to postpone sending detainees to detention facilities and correctional institutions on the grounds that detainees are consider as a vulnerable group

exposed to the Covid-19 pandemic. It was then followed by the Attorney General's Office which through the letter dated March 24, 2020 instructed Heads of Prosecutors throughout Indonesia to postpone handover of suspects and evidence from the Police. To the due of detention period, the detainee can be handed over provided that the detainee is temporarily deposited at the Police detention.

It is clear that during the early days of Covid-19 in Indonesia, each law enforcement agency partially implement its own policies in preventing the spread of Covid-19 in their institutions. It was then on April 13, 2020 the three institutions namely the Supreme Court, the Attorney General's Office and the Ministry of Law and Human Rights signed a Cooperation Agreement between to carry out criminal trials by teleconference in ensuring the maintenance of criminal justice system during the Covid-19 pandemic. The implementation of criminal trials via teleconference was later confirmed by the issuance of Supreme Court Regulation No. 4 of 2020 on The Administration and Trial of Criminal Cases in Courts through Electronic Means.

Until June 2021, there were 859,659 trials held online throughout Indonesia. Apart from its usefulness, the existence of online trials still leaves a number of problems, namely the legal basis, effectiveness and rights of defendants to a fair trial. Those issues are imbedded in the trial of Muhammad Rizieq Shibab (MRS) who refused to have his case tried online and later it was approved by the East Jakarta District Court Judge. This paper will focus on the aspect of a fair trial access for the defendant and on the other hand the right of community to security and order, as well as the judge's considerations in granting the defendant Muhammad Rizieq Shibab's request that the trial be held offline in the midst of the high number of Covid-19 transmissions in Jakarta.

## **2 Method**

This paper is normative legal research with legislation approach, case approach, and conceptual approach to legal material collected through literature study and then analyzed using grammatical, systematic, and extensive interpretation methods [1]. As a qualitative research, this paper focus on deep analysis of fact and phenomena rather than scientific measurement of the phenomena and appropriate generalization based on data analysis [2].

## **3 Finding and Discussion**

### **3.1 The principle of Face to Face Confrontation**

The illustration of Solomon's sword from the Bible has told us how about the wisdom of a judge in finding the truth that lies deeply beneath the witnesses testimonies which sometimes can be deceitful. In solving the dispute between the two harlots over a child, He test the mothers by a sword that he intend to use to split the living child in two half and give to each their part. Salomom saw the truth not by believing in one woman that says, *"Split it, that'd be fair"* but by the other who says, *"No, give it to the other"*. In the theater of the courtroom, Solomon's sword illustrated the core algorithm of the trial process. Judges sometimes find the truth not in the saying but in the eyes and expression of the person who say the word [3].

In the trial for his life, Socrates imply that peoples tends to believe in false speech by the accusers when presented to them in persuasive ways. Ironically, his said, that the audiences can be moved by a false argument an in the same way they fail to be moved by a true one. True arguments are not necessarily effective and effective arguments not necessarily true [4]. From his word we learn that the art of trials is based on how the accuser or the defendant can convince the judge with their argument rather than the truth itself.

It is believed that a way to convincing the court cannot be better achieved unless the accused and his or her accuser confront directly in the courtroom. The injustice of Sir Walter Raleigh trial who put to dead only by a piece of paper of confession wrote by lord Cobham echo through the centuries until the time of the adoption of the Bill of Rights. In 1603 Sir Walter Raleigh who are being accused of high treason demand his prosecutor sir Edward coke to face him with Lord Cobham whom his written testimony is being used to prove Raleigh's guilt. Cobham was nearby locked in the tower of London, but the prosecutor refused to call him to appear. The Court find Sir Walter Raleigh guilty and sentenced him to death [5].

The right of the accused to appear before the trial in person is consider as a fundamental foundation in criminal procedural law which aims to serve a fair trial principle. The right of confrontation was born from a belief that justice requires that accused and accuser meet face to face in the courtroom. Without a chance for the defendant or his lawyer to confront and cross examine the witnesses, a criminal trial is nothing more than formality to justify the prosecutor's case against the defendant.

Face-to-face confrontation at least serves two objectives in criminal trial. First, it provide a tool for the court to more properly assess credibility by observing the behavior of the witness and of the defendant directly when they tell their part of the story. It is more difficult to tell lies when you looking directly in to the eyes of the person that you may harm by making distorted or mistaken facts. Even when the witness tell lies, it will delivered in less convincing way if they being confront face to face with the defendant. Second, it allows the defendant or his lawyer to cross examined of the witnesses. The story that the witnesses has told may not have been the whole story because it sometime mix with their subjectivity. Cross examination is also very useful to challenge the witness's credibility, knowledge, or recollection of the story by testing their consistency or lack of qualifications or by introducing additional evidence to help the court understanding of the case [6].

Based on the above mention description, the right of the defendant to confront directly with his accuser or witnesses is seems to be inseparable with the principle of cross examination. But in 1990 the view of Supreme Court of the United States on the use of one way closed-circuit television to capture testimony of a child witness in a child abuse case has changed that perception. Confrontation clause and cross examination can be seen as two separate principles.

In Maryland v. Craig, a school teacher who was charged with sexual abuse of a six year-old child, the Court allow the child witness to testify in a separate room with only the attorneys present while the judge, jury, and defendant remained in the courtroom and can only view the examination through one way closed-circuit television. According to the Supreme Court, the main concern of the Confrontation Clause is not solely lies on face-to face confrontation, but rather to ensure the reliability of the evidence against a criminal defendant. Reliability of the evidence is assured by providing the defendant with not only a personal examination but also the right of cross-examination, the giving of statements under oath and an opportunity to assess demeanor and, hence, credibility [7].

Based on the description above, it is clear that although the face to face confrontation clause is considered to be the basic foundation of the fair trial, there are exceptions to this principle in the name of greater concern of the public. But while the face to face confrontation can be overridden in such reasonable conditions, the assurance of the testimony reliability that upholds the fair trial cannot. In *Coy v. Iowa*, the United States Supreme Court added that exceptions to physical confrontation only can be permitted if it does not impermissibly impinge upon the defendant's right to a fair trial and that a finding must be made to assure that the alterations are needed to advance an important public policy [8].

### **3.2 Trial by Teleconference in the Perspective of Indonesian Law**

The principle of face-to-face confrontation is embedded in criminal procedural law in Indonesia. Article 154 paragraph (4) of the Criminal Procedure Code stipulates that the defendant must be present in the courtroom for the judge to commence a proceeding. Without the presence of the defendant, the examination of the case cannot be carried out. Article 185 paragraph (1) further stipulates that witness's testimony shall only have evidentiary value if submitted directly in court. The right of the defendant or his legal adviser to ask questions to the witness through the intermediary of the judge is stipulated in Article 165 paragraph (2).

According to Article 162 of the Criminal Procedure Code, the face to face confrontation can only be deviated if the witness after giving testimony during an investigation dies or due to reasonable obstacles cannot attend the trial namely because the place of residence of the witness is far from the place of trial or for other reasons related to the interests of the state. Under these conditions, his testimony can be read before a trial and if the testimony has previously been given under oath, then it shall have the same value as if the testimony given at the trial. Exception to the provision that witness's testimony must be heard before the defendant is also regulated in Article 173 which stipulates that the court can hear witness's statements regarding certain matters without the presence of the defendant. However, the examination of the case may not be continued until the defendant has been informed of all matters in his absence.

The exceptions to the principle of direct confrontation stipulated in Article 162 and in Article 173 mentioned above were then reaffirmed by the issuance of Law Number 13 of 2006 on the Protection of Witnesses and Victims as amended by Law Number 31 of 2014. Article 9 of the Law stipulates that with the approval of the judge, witnesses can give testimony without being present in person at the court when it will place him in a serious threat. In that condition the witness either can write a sworn testimony or his testimony can be heard directly through electronic means accompanied by an authorized official. A similar exception is also stipulated in separate laws regarding special cases such as terrorism and concerning child witnesses based on Law No. 15 of 2003 on Combating Terrorism and Law Number 11 of 2012 on the juvenile criminal justice system. Examples of the use of teleconference in criminal cases is among others former president Habibie testimony in 2002 in Bulog's non-budgetary fund deviations case, terrorism cases on behalf of Defendants Abu Bakar Ba'asyir and Defendant Ali Gufron in 2003 and 2011, examinations of cases of gross human rights violations at the Central Jakarta Ad Hoc Human Rights Court in 2002 and 2003, as well as the Jakarta International School case in 2010 [9].

### **3.3 Trial via Teleconference during the Covid-19 Pandemic, between fair trial and emergency measure**

The impact of Covid-19 on the functioning of justice systems globally has drawn UNODC attention. In May 2020 UNODC published the Guidance Note Ensuring Access to Justice in the Context of COVID-19 which state the office's concern on how the justice systems around the world respond to the pandemic. If Courts are closing or reducing their operations, then it will contribute to increased case backlogs, and lead to increased length of judicial and administrative proceedings. Finally, persons detained awaiting trials may not be brought before a judge in a timely manner [10]. On the other hand, UNODC also concerned on how the adoption of emergency measures can cause the derogation of the rule of law and due process. It was not clear on how UNODC position to the use of videoconference trial at that time. It just say that a review should be undertaken of the types of cases that could be dealt with remotely (via teleconferencing for example) without compromising due process rights [10].

In November 2020, International Commission of Jurists (ICJ) with the support of UNODC published a book with the title Videoconferencing, Courts and COVID-19. In its recommendation, ICJ urge that the trial by means of a video link or similar technology shall not be proceed without the accused freely given and fully informed consent, ICJ also stated that any time that videoconferencing are used, authorities must ensure that the accused are able to effectively participate in the proceedings, including by ensuring: (i) the accused can see witnesses providing testimony and can cross-examine and otherwise respond to them (ii) the accused can inspect and submit evidence during proceedings (iii) proceedings are suspended when interruptions in video-communications occur and until they are resolved; and (iv) technical support is available at the court and detention facilities [11].

The description above tell us about the dilemma on the use of teleconference as an alternative to face to face confrontation trials during the Covid-19 pandemic. Despite of its great concern on how the judicial system can operate in the emergency condition such as Covid-19 pandemic, UNODC support the ICJ view that the teleconference trial shall not be conducted without the consent of the defendant. It is clear that such recommendation cannot be implemented without causing a pile of cases that cannot be tried in the absence of consent from the defendants. It will then make the overcapacity in detention even worst and paving the way for the spread of Covid-19 between detainees and prisoners.

Based on Supreme Court Regulation No. 4 of 2020, the authority to determine that trials are conducted via teleconference di Indonesia is entirely left to the judge's decision either because of his position or at the request of the prosecutor and/or defendant. Thus, the consent of the defendant is not a requirement for the trial by teleconference. Although the defendant can still express his objections, the final decision is belong to the judge to decide.

According to Article 2 paragraph (3), if the trial is held by teleconference, in all session the participants must be seen on the monitor screen with a bright and clear voice. According to Article 17, in the event that there are obstacles due to technological interference used during the trial, by law the trial is suspended and will be reopened after the disturbance ends. In the event that the technological disruption does not solved in 60 (sixty) minutes, by law the trial is postponed and will be resumed according to the trial schedule.

### **3.4 The Muhammad Rizieq Shihab Cases**

Habib Rizieq Shihab (MRS) was brought before the East Jakarta District Court in three cases at once with a total of 18 indictment related to violations of the Covid-19 health protocol at Petamburan, Ummi Hospital-Bogor and Mega Mendung. If he is found guilty in all three cases, he can be sentenced to up to 10 years in prison [12].

As a leader of big mass organization Front Pembela Islam (the Islamic Defenders Front), MRS has many followers and sympathizers who are follows him anywhere he goes. MRS's return to Indonesia on November 10, 2020 after spending a while in Saudi Arabia was greeted by thousands of followers, causing paralysis of access to Soekarno Hatta Airport and delaying the departure of more than 100 flights. Various activities that Rizieq attended or carried out caused mass crowds, including in Petamburan and Mega Mendung which violated health protocols and caused clusters of Covid-19 transmission, even including HRS himself who was treated at the Ummi Hospital in Bandung [13].

On March 16, 2021, the first trial of MRS cases was postponed due to technical problems with the sound system and unclear images. MRS who attended the trial from a room at the Indonesian Police Headquarters protested and requested that his case be heard in person. He argue that the teleconference trial violated his right to a fair trial considering that he could not follow the examination process clearly because of the unclear sound and picture [14].

On March 19, 2021, the reading of indictment by prosecutor was marked by a protest by MRS refusing to enter the courtroom at the Indonesian National Police Headquarters, although in the end MRS was able to be brought into the room accompanied by a number of police officers but refused to give any statement regarding the charges. Finally, at the trial on March 23, 2021, the judge granted MRS's request that the trial of the case be held face-to-face, after previously the trial was colored by debates between the public prosecutor and the defendant's counsel [15].

The MRS trial reaffirmed the difficulties as illustrated by the UN's views on minimum standards of judicial administration during the Covid-19 pandemic. The boundaries between the protection of individual rights to a fair trial and the interests of the wider community sometimes have unfavorable consequences. In order to preserve safety and the law, the judicial system need to find alternative mechanism such as trial by teleconference for the criminal justice system to work in emergency condition. Surely it has the risk in derogating the quality of certain right of the defendant especially the face to face confrontation. But like the nature of all coercion known to the criminal law, we must place this deviation from face to face confrontation principle as the necessary evil to serve the greater good of the society.

It was in such condition that Machiavelli wrote that sometime decisive act must be taken by the Prince if it deemed to be necessary to create a strong government and preserve order which enable the state to perform it duties effectively in protection its people [16]. Thus, leaving choices in each individual on the basis of the protection of human rights as recommended by UNODC and ICJ is not the most appropriate step in this emergency condition. One can imagine the over capacity of police station's detention cells which are not designed to accommodate large numbers of detainees when the court stop to commencing trials or if the choices to go to trials is put in the hand of the defendant. In the end police officers will hesitate to take action in handling public complaints especially when it comes to arresting suspects regarding those suspects cannot be tried by the prosecutors and courts.

As a tool of social control, the judicial system are aimed to control the level of crimes within reasonable limits and provide security in society. Crimes never sleep or stop to move even in the state of worst pandemic. Thus, if the criminal justice systems stop working, this will lead to a chaos an panic in society as if the state gives permissions for future offenders to commit crimes without punishment or in other word gives tolerances to the community to put judgement in their own hands against the perpetrators of crimes.

#### 4 Conclusion

It is clear that a trial via teleconference does not necessarily violate the principle of fair trial. The main concern of the Confrontation Clause is not solely lies on face-to face confrontation, but rather to ensure the reliability of the evidence against a criminal defendant. Reliability of the evidence is assured by providing the defendant with not only a personal examination but also the right of cross-examination, the giving of statements under oath and an opportunity to assess demeanor and, hence, credibility. Such protection can still be provided even though the trial is conducted by teleconference.

Leaving choices in each individual on the basis of the protection of human rights as recommended by UNODC and ICJ is not the most appropriate step in this emergency condition It was in such condition that sometime decisive act must be taken by the state if it deemed to be necessary to create a strong government and preserve order which enable the state to perform it duties effectively in protection its people. In that regard like the nature of all coercion known to the criminal law, we must place the using of teleconference on criminal trial in the emergency condition such as Covid-19 pandemic as the necessary evil to serve the greater good of the society.

#### References

- [1] P. M. Langbroek, K. Van Den Bos, M. Simon Thomas, J. M. Milo, and W. M. van Rossum, "Methodology of legal research: Challenges and opportunities," *Utr. law Rev.*, vol. 13, no. 3, pp. 1–8, 2017.
- [2] E. M. Al Amaren, A. M. A. Hamad, O. F. Al Mashhour, and M. I. Al Mashni, "An introduction to the legal research method: To clear the blurred image on how students understand the method of the legal science research," *Int. J. Multidiscip. Sci. Adv. Technol.*, vol. 1, no. 9, pp. 50–55, 2020.
- [3] C. Nesson, "Solomon's Sword: The Loser Gets Process," *Regent UL Rev.*, vol. 19, p. 479, 2006.
- [4] W. T. Braithwaite, "An Introduction for Judges and Lawyers to Plato's Apology of Socrates," *Loy. U. Chi. LJ*, vol. 25, p. 507, 1993.
- [5] P. Mirfield, "The Right To Confront One's Accusers," *Singapore J. Leg. Stud.*, pp. 423–439, 2019.
- [6] R. N. Jonakait, "The Origins of the Confrontation Clause: An Alternative History," *Rutgers LJ*, vol. 27, p. 77, 1995.
- [7] M. C. McAllister, "Two-way video trial testimony and the confrontation clause: fashioning a better Craig test in light of Crawford," *Fla. St. UL Rev.*, vol. 34, p. 835, 2006.
- [8] A. Odeen, "Defendant's Right to Confront the Witnesses against Him-Is There an Exception behind the Screen: Coy v. Iowa," *John's L. Rev.*, vol. 63, p. 124, 1988.
- [9] S. Handika, M. I. F. Rahim, and R. P. Sudirdja, "Virtual Court Policy For Criminal Justice on Corona Virus Disease Pandemic," *Subst. Justice Int. J. Law*, vol. 3, no. 1, pp. 74–93, 2020.

- [10] UNODC, “the Guidance Note Ensuring Access to Justice in the Context of COVID-19,” 2020.
- [11] International Commission of Jurists, *Videoconferencing, Courts and COVID-19 Recommendations Based on International Standards*. Geneva, 2020.
- [12] Kompas.com, “Jaksa Akhirnya Bacakan Dakwaan, meski Rizieq Sempat Ancam Walkout,” 2021. .
- [13] CNN Indonesia, “Rizieq Pulang: Jerat Kerumunan hingga Misteri Bentrok KM 50,” 2020. .
- [14] CNN Indonesia, “Sidang Rizieq Ditunda, Massa di PN Jaktim Bubar,” 2021. .
- [15] Kompas.com, “Setelah Marah-marah, Rizieq Shihab Akhirnya Diizinkan Hakim untuk Sidang Tatap Muka,” 2021. <https://megapolitan.kompas.com/read/2021/03/24/05494231/setelah-marah-marah-rizieq-shihab-akhirnya-diizinkan-hakim-untuk-sidang?page=all>. (accessed Mar. 24, 2021).
- [16] Z. D. Rogers, “To What End: Machiavelli, Natural Law, and Politics,” *URJ-UCCS Undergrad. Res. J. UCCS*, vol. 9, no. 2, pp. 41–46, 2016.