

Legal Analysis of the Implementation of Electronic Criminal Case Trial During Covid – 19 Pandemic

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Abstract. The Criminal Procedure Code does not recognize the existence of an electronic criminal case trial. Thus, Supreme Court Regulation (*Peraturan Mahkamah Agung/Perma*) No. 4 of 2020 is insufficient as legal basis. Some policies are contrary to the CPC rules and lead to legal disharmony. This study aimed to determine electronic court implementation before issuance of Perma No. 4 of 2020, during the covid-19 pandemic, and urgency of its implementation in the future. This research method uses a normative juridical approach. The results of this study show that the electronic court implementation is currently in all stages, and all documents used at the time of the trial are carried out electronically. With the developments in technology, information, and communication, it will be possible for electronic courts to continue to be carried out while still applying the fair trial principle and the existence of legal reforms that regulate electronic courts so that the legal basis for its implementation becomes stronger.

Keywords: electronic courts, criminal procedure law, fair trial.

1 Introduction

The Unitary State of the Republic of Indonesia is a State of Law, as referred to in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The meaning of the contents of this constitution expressly indicates that all fields of law, starting from government, as well as social and state life, must be established. above the law. As a result, all community activities, behavior, and actions must be based on the law [1]. The procedure for conducting the trial of criminal cases in district courts is generally regulated in Law No. 8 of 1981 concerning the Criminal Procedure Code, also known as the Criminal Procedure Code (*Kitab Undang-Undang Hukum Acara Pidana /KUHP*).

Since 2020, the whole world, including Indonesia, has been hit by an outbreak of the corona virus 19 (Covid-19) which can endanger lives. This has an impact on various sectors, including the legal sector. The consequence of the current pandemic situation is the government's implementation of health protocol rules such as social distancing or physical distancing [2]. With this in mind, the trial process cannot take place as it should because the defendant, witnesses, and the parties, as well as the authorized officials, cannot conduct and attend the trial in person in the courtroom because of the risk of increasing the spread of the corona virus. To anticipate this, the courts must ultimately rely on technology to ensure the continuity of legal services to justice seekers. Namely, carrying out the online criminal case trial process via teleconference, which covers the entire trial agenda from beginning to end, including the agenda of witness statements and evidence, so that the enforcement of criminal

law enforcement is guaranteed because the Supreme Court adheres to the principle of *Solus Populi Suprema Lex Esto* which means that "People's Safety is the Supreme Law" [3–5].

To optimize the implementation of criminal case trials in judicial institutions during the covid-19 pandemic, a Cooperation Agreement No. 402/DJU/HM.01.1/4/2020, No. KEP-17/E/Ejp/04/2020, No. PAS-08.HH.05.05 concerning the Implementation of Trials by Teleconference by Law Enforcement officer. This cooperation agreement causes changes in the procedure for conducting criminal case trials originally conducted directly in the courtroom, to become electronic via teleconferencing. This new policy is considered insufficient to be the foundation for the criminal justice mechanism through teleconference. To strengthen these rules, The Supreme Court of the Republic of Indonesia issued Supreme Court Regulation (*Peraturan Mahkamah Agung/Perma*) No. 4 of 2020 concerning the Administration and Trial of Criminal Cases in Electronic Courts, which further regulates the examination process including examining, adjudicating, and deciding criminal cases in the scope of general courts, and the military through electronic means (audio and/or video).

Although the trial of criminal cases through teleconference has been carried out since 2002, The Criminal Procedure Code does not specifically regulate the conduct of criminal case trials through teleconference. As a result, the policies contained in the Cooperation Agreement and the Regulation of the Supreme Court can cause problems that are contrary to several articles in the Criminal Procedure Code, in Article 154, which implies the defendant to be present in person directly in the courtroom without being represented by anyone. Furthermore, it is emphasized in Article 230 of the Criminal Procedure Code that court hearings are held in the courthouse courtroom, with judges, public prosecutors, legal advisers, and clerks wearing their respective court clothes and attributes. Thus, these articles basically state that the criminal procedure law requires the physical presence of the parties involved in court [6].

The development of the criminal justice process, carried out virtually electronically, can be described as a double-edged sword. sociologically can be seen as a reasonable reaction because it can prevent the transmission of covid-19 virus and introduce criminal procedural law to technological advances. On the other hand, the existence of disharmony in the applicable procedural law can make it challenging to achieve the objectives of the criminal procedural law, namely seeking and obtaining (or at least approaching) the material truth [7]:

Based on the description of the background, the main problems that can be arranged include:

1. How to conduct the trial of criminal cases electronically before the issuance of Perma No. 4 of 2020?
2. How is the trial process for criminal cases electronically during the covid-19 pandemic?
3. What is the urgency of electronic criminal case trials in the future?

2 Research Methods

The method used in this study uses a normative juridical approach, which is an approach that refers to the applicable laws and regulations [8]. Specifications The research used in writing this law is descriptive-analytical, namely conducting a description and analysis of research results with data as complete and detailed as possible.

The type of data used in this study is secondary data, in the form of:

1. Primary Legal Materials, which are binding legal materials, including:
 - a. The 1945 Constitution of the Republic of Indonesia
 - b. Law No. 8 of 1981 concerning the Criminal Procedure Code
 - c. Law No. 21 of 2007 concerning Eradication of the Crime of Trafficking in Persons
 - d. Law No. 11 of 2012 concerning the Juvenile Criminal Justice System
 - e. Law No. 9 of 2013 concerning the Prevention and Eradication of the Crime of Financing Terrorism
 - f. Law No. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning the Protection of Witnesses and Victims Law No. 5 of 2018 concerning Amendments to Law No. 15 of 2003 concerning Stipulation of Government Regulation in Lieu of Law - Law no. 1 of 2002 concerning the Eradication of Criminal Acts of Terrorism Becomes a Law
 - g. Supreme Court Regulation (Perma) No. 4 of 2020 concerning Administration and Trial of Criminal Cases in Courts Electronically Cooperation Agreement No. 402/DJU/HM.01.1/4/2020, No. KEP-17/E/Ejp/04/2020, No. PAS-08.HH.05.05 concerning the Implementation of Trials Through Teleconferencing.
 - h. Regulation of the Supreme Court of the Republic of Indonesia (SEMA) No. 1 of 2020 concerning Guidelines for the Implementation the Tasks of Preventing the Spread of the Covid-19 within the Supreme Court and the Judicial Bodies Below.
2. Secondary Legal Materials are related to primary legal materials such as books, legal journals, legal thesis/dissertation/thesis, and papers.
3. Tertiary Legal Materials are complementary secondary and tertiary legal materials such as legal and general dictionaries.

This study's secondary data collection method was obtained through library research. Then, the data would be processed and analyzed qualitatively descriptively.

3 Results and Discussion

3.1 Implementation of Electronic Criminal Case Trials Before the issuance of Perma No. 4 of 2020

The existence of rapid developments in the fields of technology, information, and communication also influences all aspects of people's lives dynamically. One of the technological developments today is that people can easily communicate and meet face to face from a distance virtually with two or more people using teleconference technology, which includes audio and video conferences [8].

The utilization of technological developments in the field of law, especially procedural law, is seen in the scope of the judiciary. The process of examining a case, usually carried out directly in the courtroom, is currently carried out electronically via teleconference by the parties who are placed in a separate room outside the court, with no exception with criminal investigations. The implementation of an electronic trial at this time is not something that has just been carried out due to the Covid-19 pandemic. However, electronic criminal case

examinations have been carried out by certain criminal cases that occurred long before the covid-19 pandemic spread in Indonesia. This technology can be seen at the evidentiary stage, especially at the stage of providing information by witnesses who cannot attend the courtroom and have been approved by the judge through a letter of the determination made with various considerations.

a) Electronic Criminal Case Trials before the stipulation of Supreme Court Regulation (Perma) No. 4 of 2020 concerning Administration and Examination of Criminal Cases in Courts Electronically

Several criminal acts that apply electronic court practices, including:

1. Corruption Crime of the Logistics Affairs Agency (*Badan Usaha Logistik/BULOG*) on behalf of the defendant Rahardi Ramelan.
2. Serious Human Rights Violations in East Timor with the defendant Hulman Gulton.
3. The case of the act of treason against Megawati Soekarnoputri as vice president of Indonesia in 2003 and the migration violation on behalf of the defendant Abu Bakar Ba'asyir.
4. The examination of a number of 16 witnesses with the defendant Abu Bakar Ba'asyir was again held via teleconference based on the Decision Letter of the South Jakarta District Court No. 148/PEN.PID/2011/PN.Jkt.Sel.
5. The Bali Bombing Terrorism Crime with the defendant Ali Ghufron alias Muklas alias Sofyan.
6. The shooting case at the Cebongan Prison in Yogyakarta with the defendant Serda Ucoc, Cs.
7. Immoral Crimes against Minors committed in Surakarta.

The implementation of the electronic trial in the period before the Covid-19 pandemic was the same as the normal examination hearing in general. The distinguishes between trial implementation in the examination of ordinary events and the electronic trial before the Covid-19 pandemic in the evidentiary stage. The provision of witness statements in the electronic trial conducted via teleconference must obtain the approval of the Panel of Judges or the Supreme Court in the form of a letter of determination.

b) Expansion of a Witness Examination by Teleconference

The stages of witness examination delivered via teleconference include the following:

1. Submission of a letter of application by the Attorney General, the Legal Advisor, or an authorized third party to the Panel of Judges or the Supreme Court to examine witnesses via teleconference.
2. The request for examination of witnesses through teleconference will be examined and/or further reviewed by the Panel of Judges or the Supreme Court with various considerations.
3. After further review, the Panel of Judges or the Supreme Court may approve or disapprove the application letter.
4. If the Panel of Judges or the Supreme Court has considered the things that make the process of examining witnesses electronically possible, then the Panel of Judges will make a letter of determination addressed to the Public Prosecutor.

5. After receiving the letter of determination, the Public Prosecutor shall properly summon witnesses so that they can attend the trial electronically via teleconference.
6. During the teleconference trial, the witness must be accompanied by the Public Prosecutor, Legal Counsel, and/or an authorized Third Party. This is done so that it can be ensured that the witnesses present at the trial conducted electronically via teleconference are witnesses who are actually appointed by the Public Prosecutor, and to avoid various risks that threaten the witness.

The basic problem is that the Criminal Procedure Code as a *lex generalis* does not accommodate examination process based on electronic. Therefore there is a condition that the trial implementation of criminal cases electronically can be legally accepted and understood by the public. The implementation is based on the awareness of the judges as contained in Article 5 paragraph (1) and Article 10 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power. Based on the two articles, it can be known about the active role of the judge if in a case the legal rules are incomplete or unclear then to give a fair decision and avoid a legal vacuum (*rechtsvacuum*) and achieve material truth. The judge must seek and find the law [9]. In addition, the implementation of electronic criminal case trials at this time is also regulated in other laws and regulations outside the Criminal Procedure Code [10].

3.2 Electronic Criminal Case Trial Process During the Covid-19 Pandemic

At the beginning of 2020, the covid-19 pandemic, commonly referred to as covid-19, spread worldwide, including in Indonesia. This also affects judicial practice, both at the pre-trial stage and at the time of trial, especially in criminal cases, where the practice of criminal case trials cannot be carried out as in general, so that trial practice becomes hampered, because if the criminal case trial process is carried out according to inspection of ordinary events, it is feared that there will be a risk of increasing the spread of the covid-19 disease outbreak. In early 2020, The covid-19 pandemic, commonly referred to as covid-19, has spread worldwide, including in Indonesia. This also affects judicial practice, both at the pre-trial stage and at the time of trial, especially in criminal cases, where the practice of criminal case trials cannot be carried out as in general, so that trial practice becomes hampered, because if the criminal case trial process is carried out according to examination of ordinary events, it is feared that there will be a risk of increasing the spread of the covid-19 disease outbreak. At the beginning of 2020, the covid-19 pandemic, commonly known as covid-19, spread worldwide, including in Indonesia. This also affects judicial practice, both at the pre-trial stage and at the time of trial, especially in criminal cases, where the practice of criminal case trials cannot be carried out as in general, so that trial practice becomes hampered, because if the criminal case trial process is carried out according to examination of ordinary events, it is feared that there will be a risk of increasing the spread of the covid-19 disease outbreak. At the beginning of 2020, the covid-19 pandemic, commonly known as covid-19, spread worldwide, including in Indonesia. This also affects judicial practice, both at the pre-trial stage and at trial, especially in criminal cases, where, the practice of trial of criminal cases cannot be carried out as usual, so that the practice of the trial is hampered, because if the trial process for criminal cases is carried out according to the normal examination procedure, it is feared that there will be a risk of increasing the spread of the covid-19 disease outbreak. Therefore, the court is trying to adjust the course of the judicial process with the current conditions to reduce the number of expansion of the disease outbreak, namely by conducting the practice of courts electronically or known as e-

courts (electronic courts) where the trial is still carried out through teleconference, which means that the parties are not present in person at the court. Courtroom but is only present virtually [9].

The practice of electronic trial was initially based on the Regulation of the Supreme Court (hereinafter referred to as Perma) No. 1 of 2019 concerning Electronic Case Administration and Trial in Courts. However, the Perma is not sufficient if it is used as a legal umbrella for the implementation of the electronic trial because the policies in the Perma only apply to civil, religious, administrative, and military court cases. With these problems, the trial of criminal cases electronically is supported by several policies contained in the notification letter, including within the scope of the Ministry of Law and Human Rights carried out based on the policies written in Letter No. M.HH.PK.01.01.04 related to the practice carried out at the State Detention Center in order to temporarily suspend the delivery of detainees to detention centers and Correctional Institutions. Then, based on the Attorney General's regulation (*Surat Edaran Jaksa Agung/SEJA*) No. B-049/A/SUJA/03/2020 the Attorney General of the Republic of Indonesia issued a policy about Optimizing the Implementation of Duties, Functions, and Authorities in Efforts to Prevent the Spread of Covid-19. Furthermore, the Supreme Court also issued a policy related to Teleconference Case Trials based on Letter No. 379/DJU/PS.00/3/2020. As a result, the three institutions worked together by making a Memorandum of Understanding (MoU) recorded in the cooperation agreement letter No. 402/DJU/H.01.1/4/2020, No. KEP-17/E/Ejp/04/2020, No. PAS-08.HH.05.05 in 2020 regarding the Trials Examination Through Teleconference. In addition to the issuance of the notification letter, the implementation of the trial of criminal cases electronically is also based on the Circular Letter of the Supreme Court (SEMA) No. 5 of 2020 concerning the Fourth Amendment to SEMA No. 1 of 2020 concerning Guidelines for the Implementation of Duties During the Prevention of the Spread of Covid- 19. Furthermore, Perma No. 4 of 2020 concerning Administration and Trial of Criminal Cases in Electronic Courts also supports the implementation of the electronic criminal trial.

Mechanism for the Implementation of Electronic Criminal Case Trials During the Covid-19 Pandemic

Perma No. 4 of 2020 concerning Administration and Trial of Criminal Cases in Electronic Courts was made by the working group based on SK KMA No. 108/KMA/IV/2020 concerning the Administrative Working Group and the Trial of Criminal Cases in Electronic Courts. The Perma outlines several policies related to the administration of the trial and the implementation of case trials through teleconference, including the following:

- a. The stage of determining the trial method is to determine the location of the defendant, legal advisor, and the public prosecutor to conduct the trial electronically. Among other things, detention houses, correctional institutions, public prosecutor's offices, or other places with the approval of the Panel of Judges.
- b. Electronic case administration stage, all administrative stages starting from the delegation process to sending a copy of the decision to the public prosecutor and investigator is carried out electronically sent via the e-mail address of the court handling the case in PDF format.
- c. The trial preparation stage is carried out by the Registrar/Substitute Registrar to ensure that all trial participants, all litigants, as well as the facilities and infrastructure that support the trial are ready to be used. Then this will be recorded in the minutes of the trial. The trial stage starts from the reading of indictments and exceptions, the

evidentiary process starting from the examination of witnesses and/or experts, examination of the accused, up to the examination of evidence, as well as the reading of decisions and notification of decisions. All of these stages apply in accordance with the provisions in the procedural law, but the implementation is carried out electronically. In the case of examining evidence, the judge only sees the evidence in the form of a scan or in the form of photos, while the original goods have been stored in the public prosecutor's office.

- d. Based on the description of the mechanism for the implementation of the electronic criminal case trial above, it can be seen that there are things that must be considered when conducting an electronic trial, including:
 1. All trial participants during the trial must turn on the camera so that it can be seen on the monitor screen with adequate lighting and a clear sound.
 2. After the trial is confirmed to be ready to be carried out and can be properly connected, the Registrar/Substitute Registrar will report the matter to the Judge/Judge Council.
 3. During the trial process, the Judge/Judge Council, Registrar/Substitute Registrar, Public Prosecutor, and Legal Counsel are required to use their respective attributes.
 4. All documents to be used in the trial must be submitted electronically in the form of a portable document format (PDF).

On the implementation, the electronic criminal case trial process does not escape from various kinds of various kinds of problems. One of them is loss of internet connection (technical problems), problems in the facilities/infrastructure that have been prepared, and security problems that cause all electronic data and information to be sent and used in the trial process change/lost. So, it can interfere with applying the principle of a fair trial principle in trial, especially in protecting the rights of the defendant or victim and can mislead the facts of the trial.

3.3 The Urgency of Electronic Criminal Case Trials in the Future

In efforts to meet the needs of the revolution in the trial of criminal cases, the use of information technology does not apply only outside the legal sector but also in the legal sector must accommodate the expansion of technology and information in the form of electronic trials in criminal cases. The implementation of the electronic trial of criminal cases raises various polemics because the legal basis for conducting the electronic trial is not specifically and firmly regulated. However, the electronic trial must still be carried out as a substitute for the trial of cases in the normal examination procedure [11]. The emergence of contra related to the implementation of the trial by teleconference with various rules in the Criminal Procedure Code, it creates confusion regarding the regulations for conducting electronic hearings which lead to legal disharmony against law enforcement in Indonesia, such as Article 160 paragraph (1) letter a, Article 167 paragraph (1), Article 154 paragraph (4), Article 230, and Article 185 paragraph (1) where the articles require the presence of the parties directly in the courtroom. Therefore, the Supreme Court has taken steps to overcome the problem with the legal substance with the issuance of Perma No. 4 of 2020 as an umbrella act for the implementation of electronic criminal case trials [12, 13]. Several considerations that can be used as a legal reform in the trial of electronic criminal cases, include:

- a. The main objective of the Criminal Procedure Code is to seek material truth and obtain legal certainty. Thus, the application of teleconference can be used to seek material truth because basically the implementation of an electronic trial is still in line with the applicable rules in procedural law [14].
- b. The Fast, Simple, and Low-Cost Criminal Justice Principles. The affirmation of the application of this principle is contained in Article 2 paragraph (4) of Law No. 48 of 2009 concerning Judicial Power, where it is stated that "the judiciary must comply with the principles of simple, fast, and low cost". It can be seen that the application of the principles of criminal justice which is fast, simple, and low cost looks more appropriate if the trial is conducted electronically. The application of the principle of "Salus Populi Suprema Lex Esto" which means that the safety of the people is the highest law. With the implementation of this principle, the scope of the judiciary implements the implementation of the trial electronically via teleconference if there is an incident that occurs, such as the covid-19 pandemic.
- c. The application of the principle of "Salus Populi Suprema Lex Esto" which means that the safety of the people is the highest law. With the implementation of this principle, the scope of the judiciary implements the implementation of the trial electronically via teleconference if there is an incident that occurs, such as the covid-19 pandemic [15]. In addition, reinforced by Article 8 of Law no. 12 of 2011 which explains that the Supreme Court is included in other types of legislation whose existence is recognized and has binding legal force if the urgency of the formation of the regulation is instructed based on the authority or legislation that has a higher position. So, based on this, Perma No. 4 of 2020 can be used as a legal umbrella for the implementation of criminal case trials electronically and already has permanent legal force because it is a legal product produced by the Supreme Court.
- d. The revolution in the fields of technology, information and communication as well as the development and renewal of the law has led to the expansion of evidence which has been regulated in Article 175 paragraph (1) and Article 180 paragraph (2) of the Draft Criminal Procedure Code, as follows:
 - a. Article 175 paragraph (1) of the Draft Criminal Procedure Code about evidences tool includes:
 - Evidence;
 - Letters;
 - Electronic evidence;
 - Testimony of a expert;
 - Testimony of a witness;
 - Testimony of a defendant;
 - Judge's observations.
 - b. Article 180 paragraph (2) of the Draft Criminal Procedure Code
In the event that a witness cannot be presented during an examination at a court session, the witness's information can be provided remotely through audio-visual communication devices in the presence of legal counsel and the public prosecutor.

4 Conclusion

Based on the results of the research and discussion above, it can be concluded that prior to the issuance of Perma No. 4 of 2020, the implementation of electronic criminal case trials has been carried out with the support of various rules that are outside the KUHAP in a lex specialist manner, namely at the proof stage, especially the expansion of a witness examination. This process can be carried out if the Panel of Judges has approved the implementation of the electronic witness examination by issuing a letter of determination containing various considerations.

The emergence of the covid-19 pandemic has also brought changes in the implementation of criminal case trials which are currently conducted electronically. The trial of the case is based on Perma No. 4 of 2020 where all stages, be it the administrative stage or the implementation stage of the case trial, are carried out electronically with the Judge and Registrar/Substitute Registrar in the trial room, while the other parties in the litigation conduct trials in a different room that has been determined by the Panel of Judges. The documents used in this trial were sent by e-mail to the court in charge of the case and the judge could only see the evidence in the form of scans or photos.

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