

Human Right Protection in Online Court Proceedings

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ABSTRACT

The Covid-19 Pandemic has changed various aspects of human life, including criminal justice. The court of criminal justice that is usually done offline has been gradually shifting to online. The online courts have been implemented by Supreme Court Regulation (PERMA) No. 1 of 2019. However, it is only applicable for some aspects such as civil cases, civil religion, and administration. Supreme Court Regulation No. 4 of 2020 brought an innovation for the settlement of criminal cases. This regulation aims to prevent defendants from delaying the court so they can immediately obtain legal certainty for their cases. However, in practice, some problems arise regarding the online court, including the weak legal basis and the less optimal fulfillment of defendants' rights. This paper wishes to examine the legal basis of online criminal proceedings implementation and the fulfillment of defendants' rights protection. The research method was normative legal research by using a normative juridical approach. The data were collected through library research by analyzing various primary, secondary, and tertiary legal materials. The results showed that the legal basis for implementing online courts is legally weak, and an amendment of Law No. 8th Year of 1981 on the Criminal Procedure Code is needed. The implementation of online criminal proceedings is an effort to protect and fulfill defendants' rights; however, some improvements are still needed.

Keywords: *online court proceedings, human rights, legal basis.*

1. INTRODUCTION

The Covid-19 virus is a novel variety that spreads swiftly worldwide. In living species, this virus causes respiratory illness, intestinal, hepatic, and neurological problems. The virus is thought to be transmitted through respiratory droplets from coughing and sneezing. [1] Aerosol transmission is also conceivable when exposure is sustained in order to raise aerosol concentrations in a restricted location. According to data from the Committee on Covid-19 Handling and National Economic Recovery, Indonesia's population confirmed positive for the virus Covid-19 by April 25, 2021, totaled 1.636.792 people. The figure is expected to rise daily, given that the vaccine has not been given to the entire Indonesian population. [2]

Pandemic Covid-19, affecting Indonesia since the beginning of 2020, has had a significant influence, including the legal system. In order to reduce the spread of the virus covid-19, the Indonesian government implemented a policy of social distancing, which is preventing justice from being implemented as required by applicable regulations. As a result, the court's institution is unable to conduct a trial in compliance with the principles set out in the code of criminal procedure because it may attract a large crowd, increasing the likelihood of the virus Covid-19 spreading. As a result, the court is forced to rely on technology to ensure the long-term viability of legal services to justice seekers. However, Supreme Court Regulation No. 1 of 2019 has not yet accommodated the introduction of the electronic trial of criminal cases.

To stop the spread of the virus Covid-19, the judicial process, which was previously handled offline, must now be conducted online, based on Supreme Court Regulation No. 1 of 2019 about the Administration of the Case and the Trial in the Court Electronically, in the execution of the trial electronically (e-litigation).

The Supreme Court issued Supreme Court Regulation No. 4 of 2020 on the Administration and Prosecution of Criminal Cases in Court Electronically to fill the gap in the law on the introduction of the electronic trial of criminal cases. With the enactment of the electronic trial in a criminal case, the Defendant would obtain legal assurance on the case without worrying about the trial being delayed. [3] The suspects and the victims do not have to wait until the pandemic is over to receive a verdict on the case they are facing.

However, there is a clause in the application of The Supreme Court Regulation No. 4 of 2020 that is considered to be in violation of the rule of criminal procedure, which has become a source of legal in Indonesia. Furthermore, the public is concerned about the electronic trial, especially the Defendant and his family. The defendants are concerned that they will be harmed in the online trial due to technical difficulties in interacting with a prosecutor and the risk of sabotage, as in the Habib Rizieq case. [4] Conversely, the accused's family is unable to accompany and assist the accused during the execution of the electronic convention in court. Based on the issues, the author will discuss and assess the legal basis for implementing online court proceedings and the protection of human rights in the implementation of online court proceedings.

2. RESEARCH METHOD

This study is normative legal research by using a normative juridical method. Data for the study was gathered through a literature review, which included gathering and analyzing a wide range of primary, secondary, and tertiary legal resources.

This procedure is carried out by conducting a literature review of primary data in legal documents and related literature. A range of legislation, government regulations, and Supreme Court Regulations defining the trial court's duty were used in this study.

3. FINDINGS AND DISCUSSION

3.1. Legal Basis

3.1.1. *Stufenbau Theory from Hans Kelsen*

Kelsen created a general legal philosophy. There are two main parts to this: Statis Aspect: This emphasizes seeing acts governed by legal and dynamic aspects: This emphasizes observing regulations guiding specific acts. [5] According to Hans Kelsen, the grund norm is the highest in the norm system, which is no longer formed by the highest norm system but predetermined by the public as the basic norms.

Hans Nawiasky, a student of Hans Kelen, developed a theory that legal norms in a state always run in several phases, those are: [5]

1. Fundamental Norms of the state
2. The Basic Rules of the state
3. The Law
4. Implementing regulations as well as autonomous regulations

Attamimi shows the hierarchical structure of the Indonesian legal order using Nawiasky's theory. Based on this theory, the structure of the Indonesian legal system is : [5]

1. Staatsfundamentalnorm: Pancasila (Preamble to the 1945 Constitution).
2. Staatsgrundgesetz: Body of the 1945 Constitution, MPR Decrees, and the State Administration Conventions.
3. Formell Gesetz: Law
4. Verordnung en Autonome Satzung: Hierarchically from Government Regulations to Regent or Mayor Decrees

3.1.2. *Legal Basis of Online Court Proceeding*

The Supreme Court released Circular Letter of Supreme Court (SEMA) No. 1 of 2020 on March 23, 2020, regarding the Guidelines For The Prevention of Corona Virus Disease 2019 (COVID-19) in Supreme Court and

Judicial Bodies Below it. The Minister of Law and Human Rights of the Republic of Indonesia released Letter of the Minister of Law and Human Rights of the Republic of Indonesia Number: M. HH.PK.01.01.01-04 on March 24, 2020, regarding Delays in Delivering Prisoners to House Arrest and Correctional Facilities in an Attempt to Stop the Spread of Covid 19. By Letter Number B-049/A/SUJA/03/2020 regarding the Optimization of the Implementation of the Tasks, Functions, and Authority during Efforts to Prevent the Spread of Covid-19, dated March 27, 2020, the attorney general's office did something similar. Third-party law enforcement authorities have taken steps to combat the spread of Covid-19, but the actions taken are still solitary and only apply to the institution's internal operations. This creates a challenge in the legal services process, a third of the agency's core market. Number:402/DJU/HM.01.1/4/2020, Number: KEP-17/E/Ejp/04/2020, Number: PAS-08.HH.05.05 2020 April 13, 2020, on the Implementation of the Hearing via Teleconference is an attempt to address the issue of the third law enforcement institutions.

With the publication of Supreme Court Regulation No. 1 of 2019 on Administrative Matters and the Trial in the Court Electronically, the Supreme Court has been using trial electronics since 2019. When the seekers for justice cannot attend the court in person, implementing the conventional electronic solution for the institution of court under the Supreme Court continues to provide legal services. The court uses an e-Litigation system to conduct the trial online. However, not all trials can be conducted using e-Litigation. Supreme Court Regulation No. 1 of 2019 only applies to civil cases, civil religion, administration, military, and state administration. The Supreme Court instructed the trial during the pandemic COVID-19, which is still being conducted as usual in the courts, the special considerations for which the Defendant is being held, and the duration of the detention cannot be prolonged for the prevention of COVID-19 spread. The trials are to be delayed until the end of the COVID-19 prevention period for suspects whose probation period could still be prolonged. [6] SEMA RI's No 1 of 2020 gave judges the power to postpone hearings of the inquiry despite the fact that it had passed the grace period set by constitutional provisions. The judge gave an order to the registrar of the surrogate, which was recorded in the minutes of the Hearing of the Pandemic COVID-19's extraordinary circumstances. [6]

The Supreme Court formed a working group on the Administration and Trial of Criminal Cases Electronically via SK KMA No. 108/KMA/SK/IV/2020 on April 29, 2020, to fill the gap in the law related to the implementation of the electronic trial of criminal cases. Finally, the Supreme Court issued The Supreme Court Regulation No. 4 of 2020 on the Administration and Trial of Criminal Cases in the court Electronically on September 25, 2020. The Supreme Court Regulation No. 4 of 2020 is one of them, intending to assist in the quest for justice by

resolving all barriers in order to realize a judicial process that is straightforward, fast, and low-cost, with the intention of reaching a resolution that is restricted to certain circumstances (such as the pandemic COVID-19) and in need of completion concerning human rights.

The Supreme Court should be commended for its swift response in formulating the regulation, which allows criminal cases to be tried electronically in order to avoid the spread of Covid-19. The Supreme Court wants to offer the assurance of a fair trial and impartiality (fair trial) through The Supreme Court Regulation No. 4 of 2020, which guarantees the security of rights for all in the judicial process. The Supreme Court Regulation, in particular, serves to protect the Defendants' rights to seek legal certainty for the criminal charges against them as soon as possible in the trial process. As codified in the International Covenant on Civil and Political Rights (ICCPR), which was ratified by Law No. 12 2005 along with General Comment No. 32, the Supreme Court Regulation also confirms a guarantee that the Defendant whom Legal Counsel assists will interact directly and be provided time and sufficient facilities to prepare a defense. [6] The electronic prosecution of criminal cases is not covered by Law No. 8 of 1981 on the Law of Criminal Procedure (criminal procedure code). This is understandable given that the technology available at the time was not as advanced as it is today.

When it comes to systematic legalistic thought, some of the clauses of the electronic trial implementation appear to be in violation of some provisions of the criminal procedure code. Even if it is not expressly stated in Article 154 of the criminal procedure code, Defendants are required to attend the trial. According to the seventh paragraph of Article 154 of the criminal procedure code, Defendants are to attend the court properly. Similarly, the criminal procedure code's Article 152, paragraph (2) specifically stated that "the Judge shall order the public prosecutor to call the defendant and witnesses to appear before the court on the day of the hearing referred to in paragraph (1)." Article 154, paragraph (4) of the criminal procedure code prohibits judicial proceedings in the absence of regular checks, and a brief examination of this can be found in the criminal procedure code. [7] Defendants' involvement is referred to as *ius singular*, *ius speciale*, or *bizonder strafrecht*. [8] Furthermore, the Defendants' Presence Principle is linked to the Principles of the Judge's Direct and Oral Examination. [9] In addition, the information given by Defendants outside of the trial cannot be used as evidence but can only be used to help find evidence in the trial court, as specified in Article 189, paragraphs (1) and (2) of the code of criminal procedure. The criminal procedure code requires the participation of a witness present in the courtroom, in addition to the presence in person of the accused at the trial, as stated in Article 160, paragraph (1) letter a and Article 167 of the criminal procedure code. While Article 162, paragraph (1) of the criminal procedure code allows for the submission

of witness statements without appearing before the court. The letter of the law says, "If a witness after giving testimony during an investigation dies or due to a legal obstacle cannot attend the hearing or is not summoned because of the distance from their residence or place of residence or for other reasons related to the interests of the state, the information that has been given shall be read out." Furthermore, according to Article 9, paragraph (1) of Law No. 13 of 2006 on the Protection of Witnesses and Victims, "Witnesses and/or Victims who feel that they are under a great threat, with the approval of the judge, can give testimony without being present in person at the court where the case is being examined." Later in Article 9, paragraph (3), it is stated that the judge has the authority to agree to the hearing of witness statements by electronic means, supported by the competent authorities. The use of electronic means is intended to ensure the witness's safety from a variety of risks and enable the provision of evidence without the need for the witness to be physically present in the courtroom. All parties, such as the Judges, the Public Prosecutor, the Defendants, and their counsel, are also expected to be present in the courtroom by statute. [10]

Another issue with the electronic prosecution in criminal proceedings is the issue of evidence. The term "proof" refers to the process of determining whether or not a piece of evidence is true in order to convict a defendant. The prosecution showed the evidence to the Judge/panel of Judges electronically, according to Article 14, paragraph (1) and (2) of Supreme Court Regulation No. 4 of 2020. However, as Attorney General Sanitiar Burhanuddin said, the evidence submitted is often inaccessible clearly, [11] despite the fact that Article 183 of the criminal procedure code states that judges cannot decide on a criminal case until at least two credible pieces of evidence lead them to believe that a crime occurred and that the Defendant is guilty of committing it.

To address legal inconsistency, the electronic prosecution of criminal proceedings must be well controlled by statute. Changes to Criminal Law No. 8 of 1981 (criminal procedure code) are needed. [10]

Regardless of the issue of legal inconsistency in the electronic application of the convention, some argue that a judicial body should be given the authority to create laws and regulations. [12] According to Alexander Hamilton in Federalist Paper 78, the judicial power is the most "independent" in the sense that, because of the structure and role of the judicial power, it differs from the executive power, which holds the power of state executor, and the legislative branch, which holds power to use state finance, and determination of applicable law, the judicial power does not possess any of these powers. [13]

Since it complied with the provisions of Article 10, paragraph (1) of Law No. 12 of 2011 on the Establishment of Laws and Regulations, material content setting the trial of criminal cases electronically needed to be set in legislation (through the revision of the code of criminal

procedure). Article 10, paragraph (1) states that the content material should be structured with the legislation if it contains: a. further regulation regarding the provisions of the 1945 Constitution of the Republic of Indonesia; b. that a Law must be established by order of another Law; c. ratification of certain international agreements; d. follow-up on the decision of the Constitutional Court; and/or e. fulfillment of legal needs in society. According to the preamble of the criminal procedure code letter c., "Such development of national law in the field of criminal procedural law is for the public to live up to their rights and obligations and to improve the development of the attitude of law enforcement officers in accordance with their respective functions and authorities towards upholding the law, justice and protection of human dignity and order. as well as legal certainty for the implementation of the rule of law in accordance with the 1945 Constitution." This demonstrates that the criminal procedure code is an arrangement based on the provisions of the Republic of Indonesia's Constitution of 1945, implying that electronic trial of criminal cases should be accommodated in the code of criminal procedure for the application of state law in compliance with the Constitution of 1945. "... therefore it is necessary to enact a law on criminal procedural law to administer justice to courts within the general court and the Supreme Court by regulating the rights and obligations of those in criminal proceedings, so that the main basis of the rule of law can be enforced," says the letter e later in the preamble. This means that the code of criminal procedure organizes the fulfillment of legal needs in society and that the setting for the electronic prosecution of criminal cases must be accommodated in the code of criminal procedure to satisfy the community's legal needs in certain situations and at certain times.

3.2. Human Rights Protection

3.2.1. Due Process of Law

Human rights are rights that a person has just because he is a human being. A man possesses a right founded simply on his dignity as a human being, not on society or positive law. As a result, despite the fact that each person is born with different skin color, gender, language, culture, and citizenship, they absolutely possess rights that should not be taken away (inalienable) or infringed (inviolable). [14]

Civil rights, political rights, and social rights are the three components of human rights. According to T.H. Marshall, civil rights are the rights to protect and assert all of one's rights in a fair and lawful manner with others. [15] A civil right is a person's right to protect and demand their rights, as well as the recognition of their mutual standing in the law (equality before the law) and through a fair legal process. As a result, the civil right is the most important when compared to political and social rights, since if the court upholds and protects citizens' rights, then political and social rights can have value.

According to Mardjono Reksodiputro, a fair trial (due process of law) includes the formal application of laws and regulations and the expression of the award, which is the citizen's right to freedom. Even if a person commits a crime, their rights as a citizen are not automatically taken away. [15] The Elements of due process of law are hearing, counsel, defense, evidence, fair and impartial court

The protection against the nobility of human dignity is governed by ten principles in the code of the criminal process. The principles are as follows: [16]

1. Equality before the law;
2. Presumption of innocence;
3. The right to obtain Compensation and rehabilitation;
4. The right to obtain Legal aid;
5. The right of the presence of the Defendant in the court;
6. Judicial Independence, fast and simple;
7. Judicial that is open to the public;
8. Violations of individual rights (arrest, detention, shakedown, and seizure) must be based on law and done by warrant;
9. The right of the Defendant to be informed of the suspicions and prosecution against him;
10. The obligation of the court to control the implementation of its decisions.

3.2.2. Human rights protection in the electronic trial of criminal cases in the present pandemic situation

Even after being declared a suspect or accused, a person retains their rights as a citizen of the country. Therefore, the adjudication stage of the criminal justice system is the most important part of the entire procedure. Only at this point can the Defendant and the lawyers stand erect as the parties engaging with the prosecutor as equals. As a result, in order to ensure a fair trial, the court must properly protect both parties' rights, including the public prosecutor's right to indict and the accused's right to defend himself against the allegations.

In the middle of the covid-19 pandemic, the Supreme Court ordered The Supreme Court Regulation No. 4 of 2020 on the Administration and Trial of Criminal Cases in the court Electronically, which serves as the legal foundation for the implementation of the convention electronic criminal cases, which includes both criminal cases within the scope of the online general, military, and jinayat courts. The electronic trial is not a new concept in the Supreme Court, but it is a breakthrough in a pandemic condition for a criminal case. Therefore, the trial should continue so that the litigants can obtain legal clarity as soon as possible.

However, not all of the concepts of human dignity protection in the criminal procedural legislation can be accommodated well in the application of Supreme Court Regulation No. 4 of 2020. The principles of the criminal procedure code that are not followed during the trial online, for example:

1. Equality before the law without prejudice of any kind

Supreme Court Regulation No. 4 of 2020 does not require the trial to be conducted online and does not specify when it should be conducted offline. Therefore, because some defendants were investigated in online trials while others were examined offline, the disparity in treatment sparked jealousy among some defendants.

2. The right to legal representation

The Defendants' and their lawyers' roles in an online trial are at a disadvantage because the legal advisors could not be there with the Defendants during the trial. Therefore, the defense's chances will be greatly lowered, and the Defendants' position will be put in jeopardy, if the Defendant's and legal advisors' communication in online trial practices is not going well.

3. The right of Defendants to appear before the judge

The court will refuse to hear the case if the lawyer is unable to present the Defendant. Defendants' presence is meant to allow them to present a defense consistent with their role and integrity as human beings. There is also a defendant who refuses to stand trial online because he is concerned that the signal strength or sabotage by outside parties would compromise the plea submitted online.

4. The judiciary that is free and done in a clear and fast manner

Because the trial is not held in a single place, internet intervention against witness or defendant testimony is quite likely. When criminal proceedings are held online, the standard of evidence review is likewise decreased. Furthermore, if the courtroom is under lockdown, the trial must be postponed. This is in direct conflict with the principle of justice, which argues that a defendant is entitled to a fair trial in a reasonable amount of time, without delays that law enforcement cannot explain.

5. The judiciary is open to the general public

The existence of a public hearing and the avoidance of a secret hearing are the definitions of being open to the public. [15] With the implementation of online trials, there are restrictions on who can attend court, and not everyone can access the zoom link, making it impossible for the public to check whether the court has carefully preserved the Defendant's rights.

6. The right of a defendant to know about charges and allegations leveled against him

To conclude that Defendants have a right to know what is charged in a language he understands, the court must apply Article 51 of the criminal procedure code, letters a and b. If the Defendants' Internet connection is poor, they may find it difficult to understand the accusations presented against them.

4. CONCLUSION

Based on the discussion, Supreme Court Regulation Number 4 of 2020 is in conflict with The Criminal Procedure Code. Therefore, the regulatory framework for online criminal trials, as published in Supreme Court Regulation Number 4 of 2020, is less successful, assuming that the regulation is enforced. The Supreme Court Regulation No. 4 of 2020 serves as the legal foundation for the online criminal session. However, the Supreme Court's Rules are not always in line with the letter, and at least six of Defendants' rights are abused or ignored during online trials.

Furthermore, it is necessary to revise Indonesia's criminal procedure law in order to address the legal needs of the population in light of current events and circumstances. Defendants' rights should be respected under criminal law.

This research recommends undertaking research into the law's purpose; it is necessary to improve the competency of human resources and complete the infrastructure necessary to facilitate the online application of the Convention on Criminal Justice.

The use of a normative legal approach is one of the research's flaws. Empirical research was required to determine the application of the convention online in its actuality.

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