



## Conducting Virtual Evidence Examinations in Criminal Proceedings During the Covid-19 Pandemic { Study Perma No.4 of 2020 }

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### **Abstract**

The aim of writing this research is to explain the examination of the evidence validity in criminal proceedings virtually conducted during the COVID-19 pandemic and weaknesses in the hearings process. The study findings that the Indonesian Supreme Court has a legal basis to enforce virtual criminal proceedings to address the legal vacuum. Then, the weaknesses in implementing virtual criminal trials are the inadequate quality of internet signals, lack of facilities, trial schedules, defendant attitudes, and other community factors. There is a need to improve, namely conducting evaluations, improving the quality of internet networks, and putting efforts into broadcast trials by broadcasting on television outside the room via live streaming. It is recommended to re-evaluate the course of the teleconference trial to improve the quality of the internet network so that the quality of the video and sound produced becomes clear and also so that online trials can be broadcast on court television and the public can play an active role to participate in overseeing the course of the trial process online. This research uses normative juridical research methods and interviews using literature, legislation and casuistic approaches at the State Court.

**Keywords:** *Validity; Criminal Proceedings; Virtual*

### **Introduction**

#### **Background**

Government policy through Supreme Court Regulation Number 4 of 2020, concerning the Administration and Trial of Criminal Cases in Courts Electronically, has opened an online criminal justice system; at the same time, this also makes it easier for justice seekers to be able to take part in online criminal justice trials, which during offline trials must queue, wait which can psychologically affect the defendant's mentality.

The electronic trial is a series of processes for examining, adjudicating, and deciding the defendant's case by the Court, which is carried out with the support of information and communication technology, audiovisual and electronic means. Meanwhile, the trial is a series of judge's actions to receive, examine, and decide criminal cases based on the principle of free, honest,

and impartial in CourtCourt, in this case, and in the manner provided for in the law and electronically [Supreme Court Regulation No. 1 of 2019, Article 1 paragraph 7].<sup>1</sup>

The Court does not physically attend Online Criminal Justice; each of them is in their place; the Public Prosecutor is at the Prosecutor's Office, the Defendant if detained, is in the detention room or Correctional Institution, as well as the Legal Attorney is in his office or how many in the detention room to accompany the Defendant, only the Panel of Judges is present in the Court courtroom to lead the trial. The legal basis for online criminal justice sessions during the Covid-19 pandemic has been regulated in the Circular Letter of the Supreme Court of the Republic of Indonesia Number 1 of 2020 concerning Guidelines for the Implementation of Tasks During the Covid 19 Prevention period. Then, the Cooperation Agreement between the Supreme Court of the Republic of Indonesia Number 402/DJU/HM.01.1/4/2020, the Attorney General's Office of the Republic of Indonesia Number: KEP - 17/Ejp/04/2020 and the Ministry of Law and Human Rights Number: PAS-08.HH.05.05 of 2020 concerning the Implementation of Trial Through Teleconference.

During the COVID-19 pandemic, all Judicial Bodies under the Supreme Court must comply with the trial by implementing health protocols and complying with Supreme Court Regulation No. 4 of 2020 concerning the Administration and Trial of Criminal Cases in Court Electronically and Supreme Court Circular Letter No. 1 of 2020 concerning Guidelines for the Implementation of Duties During Covid 19 Prevention within the Supreme Court and the Judicial Bodies under it.

The social phenomenon of case settlement during COVID-19 was implemented by reforming the court system from offline to online courts. It can be seen that in the context of law enforcement during the COVID-19 pandemic, there has been a change in dispute resolution, which can be carried out in two ways, including dispute resolution in court, ten called litigation and dispute resolution outside the court or commonly called non-litigation. In the Civil Procedure Law, there are two types of examination and case settlement processes in court, namely lawsuit cases, widely called *contentious*, in which there is a dispute between the parties, and petition cases, commonly called voluntary, in which there is no dispute and only one party for the benefit of the applicant.

On 19 August 2019, the online court system (e-court) created by the Supreme Court of the Republic of Indonesia still had shortcomings and needed more to satisfy everyone. The new system implemented in this way is expected to help the judiciary look exceptional, fast, and low-cost, but the public has yet to see and feel the benefits that can be felt. PERMA No. 1 of 2019 is the completion of PERMA No. 3 of 2018, so now, not only can case registration use e-court services in court, but trials can also be conducted using electronic media, called e-litigation.

E-litigation can be interpreted as a trial conducted electronically that hopes to minimise the spread of COVID-19 by reducing the parties meeting directly and coming to the court office. Therefore, this principle is realised quickly and at a low cost. Generally, both parties can conduct trial events on their respective audio-visual communication devices.

Implementing E-Litigation hopes to boost the effectiveness and efficiency of case handling, especially for parties outside the jurisdiction of the court where the case is heard. This is because the parties concerned do not need to travel between regions, which has a high potential to carry the virus from one area to another.

Through electronic trial efforts, the Supreme Court is expected to be able to answer three critical problems faced by the parties when litigating in court, namely delay, access, and integrity.

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<sup>1</sup> Supreme Court Regulation Number 1 Year 2019, Article 1 Paragraph 7

## Data on cases that have been heard by video conference at the Central Jakarta District Court

No.	Name of convicted person	Case	Article	Case No.	Date of judgement
1.	Ferdy Ferdian	Embezzlement	372	956/Pid.B/2020/P N Jkt.Pst	11 January 2021
2.	M.Ali Tahir	Theft	362	28/Pid.B/2021/PN Jkt.Pst	12 January 2021
3.	Riki	Embezzlement in office	372	67/Pid.B/2021/PN Jkt.Pst	16 January 2021

From the data above, there are several cases where the evidence could be more precise, considering the trial is being held online. The court visitors cannot access the trial. Moreover, the prosecution is constrained by the signal; in other words, if the signal is good, then the trial goes well. Still, if, on the contrary, it is not hampered, it is likely that the decision is far from the value of justice and feels unfair to the seekers of justice at trial.

### ***Problem Formulation***

1. How is the validity of evidence in criminal justice during the pandemic Covid 19 { Study Perma No.4 Year 2020 }
2. What are the weaknesses of online criminal trials?

### ***Research Methods***

In this research, the author uses normative juridical research methods and interviews conducted by researching based on library materials or secondary materials. This research is conducted by examining events related to the applicable laws and regulations in the literature, books or references associated with the author's discussion, namely the form of implementation of the trial in the settlement of a case in the district court's scope.

### ***Discussion***

#### **1. The Validity of Evidence in Criminal Justice during the Pandemic Period**

##### **Covid 19 { Study Perma No.4 Year 2020 }**

During Covid 19, all law enforcement officers performed their duties according to the government's recommended health protocols for investigators, public prosecutors, attorneys, and judges.

Defendants whom investigators will examine must first undergo a health test and wear a mask during the investigation process, as well as in the prosecution process and trial in court.

Article 2 paragraph 2 Perma NO.4 of 2020, in certain circumstances, either at the beginning of the trial or while the trial is ongoing, the Judge / Panel of Judges, due to their position or legal counsel, can determine the trial conducted as referred to in paragraph 1 or electronically in the following manner:

- a. Judge/Judge Panel,
- b. The Registrar/Assistant Registrar and the Prosecutor convened in the courtroom. Meanwhile, the Defendant attended the hearing from the room where the Defendant was detained with/without the presence of a Legal Counsel.
- c. The Judge/Panel of Judges and Registrar/Substitute Registrar convene in the courtroom of the Court. At the same time, the Prosecutor attends the hearing from the office of the Prosecutor and the Defendant, accompanied/unaccompanied by Legal Counsel, attends the hearing from the Detention Centre/Prison where the Defendant is detained.
- d. If the place where the Defendant is detained does not have special facilities to attend the hearing electronically, the Defendant, accompanied/unaccompanied by a Legal Counsel, shall attend the hearing from the office of the Prosecutor or the Court.
- e. Defendants who are not detained may attend hearings in the courtroom or from the Prosecutor's office accompanied/unaccompanied by legal counsel or other places within or outside the trial court's jurisdiction and approved by the Judge/Panel of Judges by stipulation.<sup>2</sup>

Before the trial begins the Registrar/substitute Registrar checks the readiness of the participants and the trial and reports to the panel of judges. The court room is equipped with a recording device/camera/CCTV that can show the overall condition of the room. The court clerk records everything that happens in the trial process, where the prosecution or the defendant / legal counsel in the minutes of the trial. Indictments, objections, exceptions, examination of witnesses, charges, pledges and judgements are read out online.

Examination of evidence and witnesses in online trials can be carried out as stipulated in Article 4 of Supreme Court Regulation No. 4 of 2020. For evidence, it is sufficient to take photos or videos and broadcast them in the online trial.

While the procedure for examining witnesses is carried out based on the Criminal Procedure Law, namely witnesses or experts conducted in the courtroom even though the trial is conducted electronically. But in certain circumstances the Judge / Panel of Judges can determine the examination carried out on witnesses and / or experts who are in the courtroom:

- a. Prosecutor's office within its jurisdiction
- b. The court where the witness and/or expert is located if it is outside the jurisdiction of the court hearing the case.
- c. Any other place determined by the Judge/Judge Panel<sup>3</sup>

In the event that the evidence is not a printed document, the evidence can be photographed or videoed and sent to the postal address of the court in the trial before being submitted as evidence. However, if the defendant objects to the evidence submitted by the public prosecutor, he/she may request the panel of judges to conduct an offline hearing (interview with Dr Anwar, SH, MH, Former Corruption Judge of the Central Jakarta District Court).<sup>4</sup>

Different again with the opinion of Dr, Supardi, SH, MH [Deputy Kajati DKI Jakarta] who said it does not matter with photo or video evidence, the important thing is that it can be measured by showing confiscation documents [sprint confiscation, permission to confiscate, Berita Acara Sita]<sup>5</sup>.

Several practitioners and legal experts have also highlighted the validity of the examination of evidence in this criminal court, because it will be very detrimental to the defendant, so its validity is very doubtful, especially since the level of accuracy of evidence is still far from perfect. This must be

<sup>2</sup> Supreme Court Regulation Number 4 of 2020, Article 2, Paragraph 2

<sup>3</sup> Ibid

<sup>4</sup> Telephone interview on 20 January 2021

<sup>5</sup> Interview via telephone on 21 February 2021

immediately corrected by the government so that the current legal vacuum can be immediately resolved by making new regulations that can overcome the legal vacuum.

## 2. Weaknesses of Online Criminal Trials?

In the beginning, before the outbreak of the COVID-19 pandemic, the world of justice, especially Criminal Procedure in Indonesia, had introduced a teleconference examination model, namely in the examination of remote witnesses by utilising teleconference technology, namely the teleconference examination is no longer a new invention, which can be carried out by two or more people through communication media, telephone and television or computer screens, which have been connected to a network connection. The indirect meeting can use sound (audio conference) or video (video conference) which allows both parties to see each other as if they were face-to-face.

The new breakthroughs allowed in online trials are the permissibility of presenting evidence online through a glass screen, whereas in a criminal event there is one of the evidence as a complete whether or not a person has been named as a suspect. Many observers doubt the validity of the evidence presented through the online criminal trials. This can be seen from the trial process online as follows:

- a. Online trials that present evidence are very prone to fraud, for example in exchange for other similar items, but do not match the actual evidence used when committing a criminal offence. The absence of evidence in court or in the courtroom that should be confronted with the defendant or the possibility of fraud can occur, because the factor of the absence of evidence that should be confronted with the defendant or witnesses who saw the incident can be one of the factors invalid or inaccurate in the examination of evidence. Because the evidence presented cannot be seen directly and cannot be held.
- b. In article 154 of the Criminal Procedure Code in conjunction with article 196 of the Criminal Procedure Code which requires the presence of the defendant in the courtroom, and in article 159 in conjunction with article 160 in conjunction with article 167 which requires witnesses to be present in the courtroom<sup>6</sup>. Then in article 181 of the Criminal Procedure Code which basically states that the panel of judges is obliged to show the defendant all evidence<sup>7</sup>.

If it turns out that the Public Prosecutor can only present evidence through photos or videos as stated in article 14 paragraph 4 of Perma number 4 of 2020, it can reduce the objectivity of judges in deciding cases<sup>8</sup> { opinion of Dr Juniver Girsang, SH, MH. Medcom.id} According to the Chairperson of the Indonesian Society of Criminal Law and Criminology [Yenty Garnasih], online trials in Kahar's time need to be regulated in the Draft Criminal Procedure Code, because currently some trials are conducted online to prevent the transmission of Covid 19. KUHAP aims to seek and approach the material truth, which is the complete truth of a criminal case by applying the provisions of the criminal procedure law honestly and in a timely manner with the aim of finding out who is the perpetrator of a criminal act that can be charged with violating the law. Starting from the investigation, prosecution, trial, it is mandatory to be able to present evidence in close proximity, even tends to be seen and held, so that those who need the evidence are sure that what is presented as evidence is true. Therefore, the evidence presented by the public prosecutor is presented in full physical form and from a close distance so as not to cause doubts. Now if only by presenting photos or videos only then it is feared that the item is invalid and doubtful of its truth.<sup>9</sup>

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<sup>6</sup> Kitab Undang-Undang - Hukum Acara Pidana, print, publisher "KESINDO UTAMA" Surabaya

<sup>7</sup> Ibid

<sup>8</sup> Dr Juniver Girsang, SH, MH. Medcom.id on 13 July 2020

<sup>9</sup> Yenty Garnasih, Chairperson of the Indonesian Society of Criminal Law and Criminology on 13 July 2020. Medcom.id 3

- c. According to Article 1 paragraph 26 of the Criminal Procedure Code, a witness is a person who can provide information for the purpose of investigation, prosecution and trial of a criminal case that he heard, saw and experienced himself. The victim can also be a witness in court as stated in Article 160 paragraph 1 of the Criminal Procedure Code that the victim who acts as a witness is usually a witness who incriminates the suspect/defendant, because the victim witness is a very important witness or the main witness who can explain the problem that actually occurred. In the context of online justice, the absence of witnesses in court hearings can be prone to manipulation, namely that witnesses can be directed by someone so that they cannot admit what they have seen, heard and experienced. We often hear that witnesses can be directed in the interests of a person in order to escape from the law.
- d. The presence of witnesses is needed in revealing facts in criminal trials, for honest and open witnesses. We often hear in his testimony a witness is not honest and not open due to pressure or influence from someone. There is a witness whose presence is forced because it is expected to alleviate or incriminate the defendant, such a thing clearly violates Article 242 paragraph 1 of the Criminal Code "Anyone who is in a situation where the law determines to give information on oath, either orally or in writing, personally or by a power of attorney specifically appointed for that purpose, shall be punished by a maximum imprisonment of seven years". As a result, if there are witnesses who are not honest and open, it will have a negative impact on justice seekers. In Article 174 of the Criminal Procedure Code, if the testimony of a witness in court is suspected of being false, the presiding judge shall solemnly warn him to give the true testimony and state the punishment that may be imposed on him if he continues to give false testimony.
- e. Article 242 paragraph 2 of the Criminal Code states that if false testimony on oath is given in a criminal case and is prejudicial to the accused or suspect, the offender shall be punished by a maximum imprisonment of seven years.
- R. Soesilo in his book KUHP and its commentary complete article by article [p. 183] explains that in order to be punished this element must be fulfilled:
- a. Testimony under oath
  - b. The statement must be required by law or regulation which determines the legal effect of the statement
  - c. The statement must be false [untrue] and this falsehood is known by the testifier. Based on the information above, every witness must be honest and open about his testimony, must not lie and must be open to what he knows he sees he feels about the criminal event. The witness must not be influenced by anyone, he must be independent, independent and free, must not be pressured.<sup>10</sup>

In general, the implementation of online criminal justice sessions in several District Courts still has several significant obstacles. Online criminal justice sessions are still far from the expected conditions, especially at the stage of evidence or examination of witnesses and defendants. This very important stage in the entire judicial process, if not carried out optimally, will directly affect the quality of judicial products or decisions, which of course will be directly related to the sense of justice received by the defendant or victim. The weaknesses faced by several District Courts are mainly internet network infrastructure that is not yet qualified and human resources who are not all proficient in information technology. This is very influential in the implementation of criminal justice trials from start to finish related to the effectiveness and effectiveness of the trial either directly or indirectly. Directly, of course, facilities and infrastructure that are not qualified will not support the smooth implementation of online trials. The facilities and infrastructure here are of course both the quality of the tools and the quality of the

<sup>10</sup> R. Soesilo in his book KUHP and its commentary complete article by article [p. 183].

internet network in each region where the offices are located. Then human resources or office staff who have not all mastered information technology will certainly hamper the effectiveness of the implementation of online judicial hearings. This has directly or indirectly affected the level of accuracy, flexibility and accuracy of the judge's examination of witnesses presented in court. We obtained a similar statement from one of the judges at the Boyolali District Court, Mrs Hj Nur Amalia Abbas, S.H., M.H., when we asked her about the significant difference between criminal court proceedings conducted online and regular criminal court proceedings, she answered as follows: "The difference is that it is not optimal, because we do not meet directly. Here we only see it from the screen. If the signal is lost, it is lost too. Maybe the judge asks a clear question, but the defendant doesn't really hear it. There are three places that implement online trials; the Public Prosecutor's Office, the correctional centre and the District Court. The one there is good, but the one here may not be good, so it can only be yes, yes, yes. This means that it is not optimal, it can slow down the trial, very slow! Especially if it is a child case, that is very difficult; we have to approach the child."<sup>11</sup>

These weaknesses must be addressed as soon as possible so that no one feels disadvantaged by criminal justice. Both in terms of infrastructure and facilities as well as laws and regulations.

### **Findings**

1. The validity of the examination of evidence in online Criminal Justice trials during the Covid 19 era is still a matter of debate among legal observers, due to the unavailability of Legislation governing this matter, but the rapid response that has been carried out by the Indonesian Supreme Court, can temporarily cover the legal vacuum.

Examination of evidence still has many weaknesses, namely where if the offline trial the evidence can be presented before the judge and examined together with the parties < Public Prosecutor, Judge, Attorney, Witness and Defendant. Meanwhile, if the trial is online, the examination of evidence is sufficiently photographed or videoed and displayed on a television screen, so that it often raises doubts and the accuracy of the evidence, because it cannot be held and seen by the eyes more closely.

2. The weakness of the online trial is that there are often interruptions by the internet network, so that when there is a question and answer between the judge and the witness or the defendant, it cannot be heard in full and is cut off, causing hearing problems and clarity in hearing the sentence being asked, this has a very negative impact on the defendant because the answer often does not match the question and causes misinterpretation.

The lack of communication is detrimental to the defendant, as the judge will make a decision based on what he or she hears during the online hearing. And will cause losses on the defendant's side. Likewise, the public cannot access the trial process directly, because during the Covid 19 pandemic, the Court did not broadcast the trial process directly for the public to see.

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