Virtual Court Policy For Criminal Justice On COVID-19 Pandemic

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ABSTRACT

The Corona Virus Disease (COVID-19) pandemic that has plagued the world has changed the mindset, how to behave and how to act, not only in social interaction but also has influenced the law enforcement system. Development in Information Technology (IT) has found a teleconference system as a means of conducting virtual courts as a reaction to social or physical distancing movements which is one way to prevent the spread of COVID-19. Although in practice the use of a virtual court in a trial is considered capable of preventing the spread of viruses, the use of a virtual court must keep be based on applicable laws and regulations. This paper is a normative legal research with legislation approach, case approach, comparative legal approach, and conceptual approach to legal material collected through literature study and then analyzed using grammatical, systematic, and extensive interpretation methods. Based on the results of the study, several countries such as the United Kingdom, China, Australia (New South Wales) and America (New York) and Indonesia (although limited to the examination of witnesses) have applied virtual courts in the justice system. Implementation of the trial using the virtual court method by teleconference did not violate the provisions of the trial set out in the Criminal Procedure Code (KUHP). According to the Draft Law KUHP has accommodated the trial using the virtual court method as an embodiment of legal principles in the judiciary that is carried out quickly, simply, and at a low cost. The use of virtual court is not the first or primary choice in examining criminal cases in Indonesia, in abnormal emergency conditions due to the COVID-19 pandemic as it is today, an examination by the virtual court method is a solution so that the criminal justice system continues to run without reducing the efforts to prevent the spread of the virus. Trials using virtual court facilities continue to accommodate the human rights of victims, witnesses and defendants through their virtual presence so that a fair trial continues in the courtroom.

Keywords: Virtual Court; Legal Perspective; Criminal; Procedure Code;

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INTRODUCTION

The domino effect of the increasingly widespread outbreak of Corona Virus Disease 2019 (COVID-19), which was established as a global pandemic by the World Health Organization (WHO) on March 11, 2020, has changed the way of thinking, how to behave and how to act in social interactions, even has also influenced the law enforcement system.¹ The criminal law enforcement sector was transformed to find the right formulations and vaccines so that the principles of social distancing and physical distancing are expected to break the chain of distribution of COVID-19 to be implemented in criminal proceedings. In an effort to break the chain of distribution of COVID-19, the practice of criminal justice is forced to flex its perspective on procedural law by allowing the presence of judicial instruments whether Judges, Registrars, Prosecutors, Witnesses, Experts, Defendants and Legal Counsels virtually replace physical presence in court.

Responding to the legal instrument, several work units of the District Attorney's Office and the District Court in Indonesia implemented a virtual criminal trial using video teleconference. As a result, from 30 to March 31, 2020, 1,509 criminal cases were tried virtually and simultaneously in Indonesia.² The composition of the trial of the teleconference criminal case made the judiciary, be it a Judge, Registrar, Prosecutor, Witness, Expert, Defendant and Legal Counsel, not involved in direct contact because each was in a different place. The panel of Judges and Registrars in District Courts, Prosecutors in the District Attorney's Office, Defendants and Legal Counsels in State Detention Centers, or with different compositions in accordance with agreements previously coordinated among fellow law enforcement institutions. The aim is nothing else so that the principles of social distancing and physical distancing can be implemented.

The actions of law enforcers who responded to the COVID-19 pandemic seemed to prove that the "*fiat justitia ruat caelum*" adage was still imprinted on every law enforcement officer who could potentially be infected with COVID-19 at any time. Teleconference criminal proceedings are one of the means to synergize criminal law enforcement efforts with the prevention of COVID-19. However, in implementation, there are various problems both from juridical,³ and technical aspects.

Regarding virtual court,⁴ criminal procedural law has not clearly and firmly established the situation.⁵ New legislation accommodates the examination of witnesses by not being present

¹ Fajriana, N. (2018). Teleconference Dalam Pemeriksaan Perkara Pidana Di Pengadilan. *Badamai Law Journal*, 3(1), 60-79. p.66

² <https://jatim.sindonews.com/read/28561/1/1509-perkara-disidangkan-online-didik-farkhan-rekor-dunia-1585731847>, (Accessed on March 31, 2020).

³ Thalib, H., Rahman, S., Mamulai, M., & Djanggih, H. (2016). Verification Through the Electronic Media (Teleconference) on the Court in Criminal Judicial System. *Jurnal Studi Islam dan Muamalah*, 4(1), 92-109.

⁴ Ticknor, B., & Tillinghast, S. (2011). Virtual reality and the criminal justice system: new possibilities for research, training, and rehabilitation. *Journal For Virtual Worlds Research*, 4(2). p.32

⁵ Faisal, F. (2019). Eksistensi Pengadilan Hak Asasi Manusia Terhadap Penegakan Hak Asasi Manusia Dalam Sistem Peradilan. *Gorontalo Law Review*, 2(1), 33-48. p. 35

directly in court but is examined using audio-visual facilities such as video conferencing or teleconferences that are regulated in several jurisprudence and several laws, namely terrorism law, witness protection law and victims, the law on the eradication of trafficking in persons and the law on the juvenile justice system. This can lead to legal problems in the form of a *leemten in het recht* if it is not addressed by finding solutions wisely.⁶ In addition to the law as mentioned above is only limited to cases of terrorism, trafficking in persons and the juvenile criminal justice system, and is only allowed against witnesses who are under the protection of witness and victim protection institutions. Law of the Republic of Indonesia Number 8 of 1981 concerning the Criminal Procedure Code (KUHP) only regulates trials conducted by judicial apparatus whether Judges, Registrars, Prosecutors, Witnesses, Experts, Defendants and Legal Counsels, with a physical presence in the courtroom and not virtually. Act No. 19 of 2016 concerning Information and Electronic Transactions, Act No. 35 of 2009 concerning Narcotics, Act Number 20 of 2001 concerning Eradication of Corruption and Act Number 25 of 2002 concerning Criminal Acts of Money Laundering and Laws other related laws only accommodate electronic evidence and do not regulate the virtual presence of judicial instruments in the courtroom.

This paper is the result of preliminary observations of the author as a legal practitioner on the emergence of a virtual court as an emergency effort in the condition of the widespread of COVID-19 in Indonesia so that this paper focuses on the practice of using virtual courts in the judicial system in several countries and policies on the use of virtual courts in criminal justice in the middle of the COVID-19 pandemic.

METHOD

This paper is normative legal research with legislation approach, case approach, comparative legal approach, and conceptual approach to legal material collected through literature study and then analyzed using grammatical, systematic, and extensive interpretation methods. The writing of this scientific paper uses a lot of secondary legal material due to the limitations of conducting empirical legal research as a counterpart to the constructed thesis, the impact of social distancing, but the study must continue to be used as a reference for improvement in law enforcement behavior.

ANALYSIS AND DISCUSSION

A. Various forms of virtual courts in several countries

Virtual Courts is a concept aimed at eliminating the presence of litigants or lawyers in the court and adjudication of the case online.⁷ In reality there are several countries that have applied this online trial system. By utilizing the development of Information

⁶ Yusipa, D. (2011) Tinjauan hukum Islam terhadap perkawinan teleconference. p.81

⁷ eCommittee Supreme Court of India, <http://vcourts.gov.in/virtualcourt/> (Accessed, March 31, 2020)

Technology that is able to fulfill and facilitate public access to the need for justice effectively so it is not limited to physical presence in the courtroom. The following countries have used the virtual court:

1) **United Kingdom**

Virtual court itself was first used in May 2009 in the UK. Virtual court is used between North Kent Police Station and Chester Court. At that time, a suspect who was arrested by the police could immediately hear the allegations from the police station without having to go to court through video conferencing facilities with the judge in court. This virtual trial is very useful in terms of time efficiency because it will save hundreds of hours wasted traveling the distance between the police station and the court which can be used by the police to better protect and serve the public rather than just taking the suspect to court. This virtual court initiation forms a close digital partnership between law enforcement with the aim of streamlining the criminal justice system.

Since 2012, the entire Criminal Justice System in North Kent is required to apply a digital system using a secure electronic network to transfer all case handling files between the Police, the Prosecutors' Office and the Court to then convene virtually.⁸ Furthermore, the first virtual court case involving intercountry trials through teleconference took place in 2018 where the plaintiff was at his home in London, England, using a laptop camera, the Judge was in the London, England Court and the lawyer submitted evidence from Belfast, Ireland North. Even though this is not a criminal case, the method or method works the same. The program launched by the Ministry of Justice or the Ministry of Justice is expected to be able to expand trial hearings that are operated remotely from tax disputes, civil law to criminal law.⁹

2) **China**

Virtual courts are also held in China in the form of The Internet Courts. There are 3 (three) internet courts in Hangzhou, Beijing and Guangzhou which were established in 2017-2018. This is the first court in China. The entire litigation process can be done online. This includes filing and document services, pre-trial mediation, collection and presentation of evidence, safeguarding assets, trials, sentencing, legal remedies and other processes. Each part of the process can be carried out offline at the request of the parties involved or the needs of the trial. Does not stop there, the mobile court application can be downloaded on the

⁸ Jonathan Djanogly, MP, and The Rt Hon Nick Herbert, "Virtual Courts Brings Swifter Justice", <http://www.gov.uk/government/news/virtual-courts-brings-swifter-justice>, (Accessed March 31, 2020)

⁹ Owen Bowcott, "First Virtual Court Case Held Using Claimant's Laptop Camera", <https://www.theguardian.com/law/2018/mar/26/first-virtual-court-case-held-using-claimant-laptop-camera>, (Accessed March 31, 2020)

WeChat application which is a social media application in China. Face recognition technology is used to authenticate the judiciary involved in the trial. They can submit cases directly and communicate directly with judges by sending text and audio messages and submitting evidence on the application. Judicial devices can enter the application at the same time to conduct a trial, electronic signing and the judge can give a decision through the mobile court application.¹⁰

3) New South Wales

The New South Wales district court in Australia has issued a Virtual Court Practitioners User Guide or Virtual Court Protocol for Legal Practitioners. In the protocol, explained the definition of Virtual Courtroom: "A Virtual Courtroom brings the physical courtroom to a virtual space. It is a digital method for court cases to be progressed without the need for participants to attend in person. Parties to proceedings can access the Virtual Courtroom using video conferencing applications. Virtual courtrooms are still formal courtrooms. All usual court etiquette, protocols, procedures and restrictions apply."¹¹

4) New York State Courts (America)

On March 25, 2020, criminal courts in New York, America, Suffolk County, Seventh and Fifth Judicial Districts, switched to virtual court operations due to the COVID-19 pandemic. They held the trial through video conferencing facilities. Furthermore, all parties will participate in conducting the trial through the means of video conferencing using Skype for Business, seen in facing extraordinary situations requires extraordinary efforts as well. All trials will be held virtually, with Judges, Public Prosecutors, Lawyers and Defendants in different locations. The trial will be held open to the public. Courts will monitor and can limit access to the courtroom to maintain social distance according to the guidelines of the public health authority.¹² The trial will be held open to the public. Courts will monitor and can limit access to the courtroom to maintain social distance according to the guidelines of the public health authority.¹³ The purpose of this virtual court is to minimize the spread of viruses in New York City and the courts in particular. According to Vito C. Caruso as Deputy Chief Administrative Judge stated "the virtual courthouse model enables

¹⁰ Mimi Zou, "Virtual Justice In The Time Of COVID-19", <https://www.law.ox.ac.uk/business-lawblog/blog/2010/03/virtual-justice-time-covid-19>, (Accessed March 31, 2020).

¹¹ District Court of New South Wales, "Virtual Court Practitioner User Guide", <http://www.districtcourt.justice.nsw.gov.au/>, (Accessed March 31, 2020).

¹² Unified Court System New York State, "Virtual Arraignments Start in New York City Criminal Court New York County Criminal Court, 100 Centre Street, NY City" <http://www.nycourts.gov>, (Accessed March 31, 2020).

¹³ Brendan J. Lyons, "New York City Implements Virtual Courts Proceedings", <https://www.timesunion.com/news/article/New-York-City-implements-virtual-court-proceedings-15153010.php>, (Accessed March 31, 2020).

us to serve the pressing needs of New Yorkers across the State while protecting the health and safety of our judges and staff, court users and the public."¹⁴

Of the several practices of the use of virtual courts in some of these countries, essentially the same thing is that trials are conducted remotely using video conferencing facilities that present a variety of courtroom tools virtually. In contrast to Indonesia, the criminal justice system in the UK or China, Australia (New South Wales) especially America (New York) which uses court decisions as the main legal source can accommodate virtual courts with more flexibility in the conduct of trials. This difference in the criminal justice system will be an obstacle and limitation in the application of virtual courts based on the Indonesian Criminal Procedure Code. However, behind these differences, there are similarities that must be sharpened, namely the purpose of using virtual courts in some of these countries is to support enforcement in seeking material truth for a criminal act during the COVID-19 pandemic.¹⁵ Placing a virtual court as a winning solution in resolving criminal cases that still applies the principles of "social distancing" or "physical distancing" as a means of breaking the chain of virus spread.

B. The History of Virtual Courts in Indonesia

Apart from the existence of the concept of e-court civil cases that have been launched by the Supreme Court of the Republic of Indonesia as well as trials of witnesses or expert examinations using video teleconference at the Constitutional Court of the Republic of Indonesia, virtual courts in criminal court trials using video teleconference facilities are not new in Indonesia . In 2002, the Supreme Court first gave permission to former President B.J. Habibie gave testimony using video teleconference in the case of Bulog's non-budgetary fund deviations on behalf of Defendant Akbar Tandjung and Defendant Rahardi Rammelan. In 2003 and 2011, witness examinations through video teleconference facilities were again used in cases on behalf of Defendants Abu Bakar Ba'asyir and Defendant Ali Gufron. In addition, 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 also used video teleconferences during witness examination, and the following explanation:

1) Examination of Witness Former President B.J. Habibie

The examination of witnesses using video teleconferencing facilities in Indonesia, was first conducted in 2002. At that time, for the first time the Supreme Court through the South Jakarta District Court made a legal breakthrough by accepting the application of the Law Look at the Defendant to conduct an examination of the

¹⁴ New York State Unified Court System, "Press Release: Virtual Court Operations To Commence This Week In Suffolk County, Seventh and Fifth Judicial Districts" www.nycourts.gov/press, (Accessed March 31, 2020).

¹⁵ Soponyono, E. (2015). Kebijakan Hukum Pidana dalam Pemberian Keterangan Saksi melalui Media Teleconference di Indonesia. LAW REFORM, 11(1), 65-73. p. 70

former President B.J. Habibie used a video teleconference in the case of the irregularities in Bulog's non-budgetary funds which charged 2 (two) ministers in the era of President B.J. Habibie namely Defendant Akbar Tandjung as former Minister of State Secretary and Defendant Rahardi Rammelan as former Minister of Industry and Trade.¹⁶

Against the steps of the Panel of Judges, the Public Prosecutor expressed an objection, but the Panel of Judges postulated that the B.J. Habibie who was a witness in the case could not be brought to trial because he was in Hamburg, Germany and could not come to Indonesia on the grounds of waiting for his wife who was ill. For this reason, the Central Jakarta Court then made a legal breakthrough by issuing a Decision Letter Number: *354/Pid.B/2002/PN.JakartaSelatan* giving consideration that "Examination of B.J. Habibie was considered by the Judges as very necessary to obtain material truth but because there were problems with the presence of witnesses who were in Hamburg, Germany because they had to accompany their wives who were seeking treatment, the solution was to use teleconference in providing information ". Based on the determination of the judge, then B.J. Habibie underwent witness examination at the office of the Indonesian Consul General in Hamburg, Germany. B.J Check Habibie is broadcast by private TV station SCTV. According to the Public Prosecutor, the testimony of B.J. Habibie was considered important, because Habibie was a key witness for the misuse of Bulog funds during his reign. In providing information through video teleconference, witness B.J. Habibie gave a statement at the Consulate General of the Republic of Indonesia in Hamburg, Germany, attended by the Head of the Consulate General of the Republic of Indonesia along with his assistants. When giving a statement, witness B.J. Habibie was sworn in first by the head of office at the Consulate. Before giving testimony, the Head of the Consulate General explained to the Judge, Prosecutor and Legal Counsel of the defendant who was in the room with witnesses and oaths serving there, so that the information given by witness B.J. Habibie is truly objective and not ruled by anyone.

Furthermore, in consideration of the Decision of the South Jakarta District Court Number: *354/Pid.B/2002/PN.JakartaSelatan* considers that :

- a) The use of teleconference technology as a solution for the benefit of the trial, especially for witness examination which cannot be presented at the trial,

¹⁶ Wathan, H. (2004). Kajian Kritis Terhadap Kesaksian Dengan Menggunakan Video Teleconference Di Persidangan Dalam Perkara Pidana Suatu Tinjauan Terhadap Kesaksian Prof Dr Ir Bacharuddin Jusuf Habibie dalam Perkara Penyalahgunaan Dana Non Budgeter Bulog (Doctoral dissertation, University of Muhammadiyah Malang).

where such information is very necessary to obtain material truth, so that its existence does not conflict with the Criminal Procedure Code;

- b) The use of advances in electronic communication technology through the provision of information through teleconferences is intended to meet the demands of the requirements in procedural law when obstacles arise as faced by witness B.J. Habibie. It is expected that the steps taken by the panel of judges will get a positive response from the executive and legislative branches in the framework of perfecting criminal procedural law in the future;
- c) Witness examination by teleconference on the one hand in accordance with the role and duties of the judge in exploring and finding the law (*rechtsvinding*), and on the other hand as one of the breakthroughs on procedural law, namely making it easier to hear witnesses B.J. Habibie who is on the European continent so that it can be heard and followed directly and transparently by the public at large in Indonesia. Therefore, the use of teleconference technology is considered valid and has a proven value;
- d) Although during the hearing of the witness BJ Habibie was in Hamburg, precisely at the Office of the Consulate General of the Republic of Indonesia and the trial was held in the South Jakarta District Court building, such matter remained an integral part of the trial itself because the witness had taken an oath which was guided by the Chairperson of the Assembly in this trial;
- e) The facts of the trial show that the process of carrying out witnesses examinations via video teleconference has been going well, in the sense of question and answer between the Panel of Judges and witnesses, between the Public Prosecutor, Legal Counsel, and Defendant with the witness as stated in full in the minutes of the trial and the recording of the trial teleconference itself.¹⁷

2) Examination of witnesses in the case of Abu Bakar Ba'asyir

In the case of Abu Bakar Ba'asyir in 2003, the Public Prosecutor presented 32 (thirty two) witnesses, and 7 (seven) of whom provided information through video teleconferences, namely Faiz Abu Bakar Bafana, Hasyim bin Abbas alias Osman alias Rudi, Ja'far bin Mistoki aka Saad aka Badar, Ahmad Sajuli bin Abd Rahman alias Fadlul Rahman aka Fadlul aka Uyong aka Mat, Agung Biyadi alias Husain, Muhammad Faiq bin Hafidh, and Ferial Muchlis bin Abdul Halim. The seven witnesses who gave information through video teleconference, only witness Faiz Abu Bakar Bafana who had not previously been examined in the investigation.

¹⁷ *Vide* Surat Penetapan Pengadilan Negeri Jakarta Selatan Nomor : 354/2002/ PN.Jak.Sel jo. Putusan Pengadilan Negeri Jakarta Selatan Nomor : 354/Pid.B/2002/PN.Jak.Sel.

In this case, the party who requested that the seven witnesses provide information through a teleconference was the Public Prosecutor. The reason is because these witnesses could not be presented to the trial because they were being detained by the Malaysian Government and the Singapore Government so it was not possible to be brought to trial. The location of the testimony of the seven witnesses by teleconference was in the territory of the State of Malaysia and the State of Singapore. So, when the information is submitted via teleconference, its location is not within the jurisdiction of the State of Indonesia. Against the request of the Public Prosecutor, the Defendant's Legal Counsel stated an objection. As a result, the Panel of Judges in legal considerations of the Decision of the Central Jakarta District Court Number: *547/Pid.B/2003/PN.JakartaPusat* considers as follows:¹⁸

- a) Teleconference discussion means discussing information technology advancements that can be utilized for the benefit of a court of law by taking into account the rights of the accused on the one hand and the interests of public prosecutors on the other. The aim is to uncover the true truth of the case at hand;
- b) The formal legal basis for the use of teleconference is indeed not yet regulated in Act Number 8 of 1981 concerning the Criminal Procedure Code (KUHP). However, based on the reasons of the Assembly as set out in the Decision of the Panel of Judges on June 27, 2003 No. 547 / Pid.B / 2003 / PN. Central Jakarta, the Panel of Judges has allowed the Public Prosecutor to hear witnesses who are in the territory of Singapore and Malaysia via teleconference;
- c) The judges are fully aware that the use of teleconferences in this case is merely a means or instrument of examination to reveal, search for and find material truths, and in no way intend to discredit the accused, or merely fulfill the desire or the wishes of the Public Prosecutor;
- d) In terms of formal law, the evidence obtained through the teleconference by the Panel of Judges will be placed proportionally according to the provisions of the procedural law and according to conscience. Therefore, the doubts of the defendant and his legal advisory team that the Panel of Judges would fully accept witness statements by teleconference, should not need to exist.

Furthermore, in the case of Abu Bakar Ba'asyir in 2011, the Public Prosecutor presented 37 (thirty-seven) witnesses, 16 (sixteen) of whom provided information through video teleconferences, and 16 (sixteen) witnesses, 2 (two) witnesses,

¹⁸ Vide Surat Penetapan Pengadilan Negeri Jakarta Pusat Nomor : Nomor : 547/Pid.B/2003/PN.JakartaPusat jo. Putusan Pengadilan Negeri Jakarta Pusat Nomor : 547/Pid.B/2003/PN.JakartaPusat

namely witness Mujahidul Haq and Joko Daryono asked that both of them provide information directly in front of the court hearing. Upon the request, the Panel of Judges rejected Mujahidul Haq's request on the grounds that the witness had made and signed a statement that would provide information using video teleconference. While Joko Daryono's request was accepted by the Panel of Judges based on the Minutes of the Trial. However, it is not clear why the judge accepted witness Joko Daryono's request that information be given directly before the court hearing. At the request of the Public Prosecutor, of course the Defendant's Legal Advisor raised an objection. In the petition, the Public Prosecutor bases on 3 (three) laws and regulations:

- (1) Article 33 *junto* Article 34 paragraph (1) letter c of the Law of the Republic of Indonesia Number 15 of 2003 concerning the Stipulation of Government Regulations in lieu of the Republic of Law Number 1 of 2002 concerning Eradication of Terrorism Criminal Acts;
- (2) Article 2 *junto* Article 3 letter c Government Regulation of the Republic of Indonesia Number 24 of 2003 concerning Procedures for the Protection of Witnesses, Investigators, Public Prosecutors and Judges in Terrorism Criminal Cases;
- (3) Article 9 paragraph (1) and paragraph (3) of Republic Act Number 13 of 2006 concerning Protection of Witnesses and Victims;

The Panel of Judges agrees with the Public Prosecutor that the three laws are *lex specialis derogat legi generalis*. This means, because the Criminal Procedure Code, which regulates procedural law in general, does not regulate witness examinations using video teleconferencing facilities, but because the three laws and regulations govern witness examinations using video teleconferencing facilities, the three statutory regulations override the special Criminal Procedure Code regarding examination of witnesses through video teleconference facilities. Thus, the issuance of Letter of Determination Number: *148/Pen.Pid/2011/PN.Jkt.Sel* is solely based on the legal basis of legislation, and there is absolutely no basis for collusion between the Public Prosecutor and the Panel of Judges as a negative suspicion. without the basis of the defendant's legal counsel. Furthermore, every witness examination is completed which is not attended by the defendant, both witnesses who are examined using video teleconferences and witnesses examined directly at the hearing, the Panel of Judges always reads the resumes of all witnesses to the defendant, and then requests the defendant's response / opinion on the witness statements these witnesses. What the Panel of Judges do regarding the above is the embodiment of

the principle of fair trial as stipulated in the Judicial Power Act and the principle of balance as specified in the Criminal Procedure Code.¹⁹

3) Witness examination of Ali Gufron case

The Public Prosecutor presented 35 (thirty-five) witnesses. One of them gave information through video teleconference, namely witness Wan Min bin Wan Mat. Previously, witness Wan Min bin Wan Mat had given information before the investigators had been sworn in. The reason for using the video teleconference in this case is because Wan Min bin Wan Mat is being detained by the Malaysian Government so it is not possible to be brought to trial physically. Based on the judge's determination dated July 23, 2003, the Chief Judge ordered one of the member judges, a Public Prosecutor, and a Defendant's Legal Counsel to jointly watch the proceedings through a video teleconference in Kuala Lumpur, Malaysia. However, when the testimony through the video teleconference was carried out, the witness who accompanied Wan Min bin Wan Mat was only a member judge and a prosecutor, while the representative of the defendant's legal counsel was not present. The location for providing information via video teleconference was carried out in Kuala Lumpur, Malaysia, and not at the Embassy of the Republic of Indonesia in Malaysia. The panel of judges in their legal considerations stated their reasons for accepting the testimony of witness Wan Min bin Wan Mat given through video teleconference as follows:²⁰

- a) Indeed, teleconferences were not regulated in the Criminal Procedure Code because the legislators at that time were not aware of the rapid revolution in information and communication technology. When referring rigidly / formally legalistically, the teleconference is indeed not per Article 160 paragraph (1) letter a and Article 167 of the Criminal Procedure Code which requires the physical presence of witnesses in the courtroom. However, the Judge does not have to be confined in positive law. The judge must be able to open his eyes, mind, and heart in the face of changing times. Moreover, the provisions of Article 27 paragraph (1) of Law Number 14 of 1970 in conjunction with Law Number 35 of 1999 requires judges as law enforcers and justice to explore, follow, and understand the legal values that live in society;
- b) Criminal Procedure Code is made to find material truth that requires that formal legal aspects should be left selectively. A teleconference is only a suggestion to find the material truth. In a teleconference hearing, witnesses can also be present in the courtroom virtually, so that it is no different from

¹⁹ *Vide* Surat Penetapan Pengadilan Negeri Jakarta Pusat Nomor : 148/Pen.Pid/2011/PN.Jkt.Sel *junto* Putusan Pengadilan Negeri Jakarta Pusat Nomor : 148/Pen.Pid/2011/PN.Jkt.Sel.

²⁰ *Vide* Putusan Pengadilan Negeri Denpasar Nomor : 224/Pid.B/2003/PN.DPS.

witnesses who are physically present in the courtroom. All parties may also test witness statements and their statements can be heard by everyone;

- c) The Criminal Procedure Code has indeed regulated the absence of witnesses at court due to legal impediments or due to other reasons relating to the state. The testimony of witnesses who were sworn in the investigation but due to a legal obstacle could not be present at the hearing, and then the statement was read out then the same value as testimony under oath following Article 162 paragraph (1) and paragraph (2) of the Criminal Procedure Code. However, even though Wan Min bin Wan Mat had given information to the investigator and had been sworn in, it would need to be welcomed by all parties if the Public Prosecutor wanted to hear the witness' statement through a teleconference. The reason was that the defendant benefited from this condition and was able to do a cross-examination to balance witness testimonies. Moreover, the facts of the trial show that the Public Prosecutor, Legal Counsel, and Defendant also actively asked questions to witness Wan Min bin Wan Mat;
- d) Testimony by teleconference does not conflict with the principle of judicial competence. The reason is that if it is followed by the Indonesian judiciary it will be out of date in the face of the information technology and communication revolution. The examination of witnesses by using teleconference media is one form of the birth of judicial information that has a global reach and is cross-border. Fifth, when witness Wan Min bin Wan Mat stated teleconference in Malaysia, he was not in a state of freedom or stress. This is because the Panel of Judges has ordered one of the member Judges, a Prosecutor and a Defendant's Legal Counsel to jointly witness the proceedings of the witness examination. It turns out, during the trial in Malaysia that can be watched on television in Indonesia, the Panel of Judges did not find any indication that Wan Min bin Wan Mat in providing information was not free. He was not pressured, was not led by the text in front of him, and there were no police officers around him.

4) Examination of witnesses in Serious Human Rights Violations in the Timor Timur

In cases of gross human rights violations that occurred in Timor Timur with Defendant Major General Adam Damiri, Defendant Brigadier General Noer Muis, Lieutenant Colonel Soedjarwo, and Defendant Lieutenant Colonel Hulman Gultom

held at the Central Jakarta Ad Hoc Human Rights Court.²¹ The request for a witness examination using a video teleconference in Dili Timor Leste for reasons of safety and efficiency was submitted by the Attorney General's Office of Timor-Leste which was initially obstructed by the Attorney General's Office of the Republic of Indonesia on the grounds of the cost and the mismatch of witnessing in this manner by the Criminal Procedure Code.²² The petition was submitted shortly after an Indonesian court agreed to use a teleconference facility to hear the testimony of former President Habibie in the corruption case of the DPR Speaker, Akbar Tanjung, in July 2002. Finally, the Ad Hoc Human Rights Court agreed to conduct a testimony examination using video teleconferences in December 2002 and January 2003. Witnesses provided information via video teleconference from Dili, while the Defendant was at the Central Jakarta Ad Hoc Human Rights Court.²³

5) Examination of the Jakarta International School Case

The Jakarta International School case in 2010 on behalf of Defendant Neil Bantleman and Defendant Ferdinand Tjong, the Public Prosecutor submitted an application to conduct an examination of witnesses for a 6-year-old child with initial AK, using a video teleconference facility with witnesses located at the Witness and Victim Protection Agency. The trial began at approximately 10:00 AM GMT+7, AK victims got the first turn to give information in the trial with the agenda of witnesses examinations via video teleconference. In the courtroom at that time, 3 (three) 50 (fifty) inch television units were seen facing the Panel of Judges, Defendant's Legal Counsels and Public Prosecutors. The examination of the child as a separate witness from the Defendant at least makes the child as a witness in providing information freely and the safety of the child as a witness is also guaranteed by the Witness and Victim Protection Agency.²⁴

From some virtual court practices in criminal proceedings that use video teleconference during the witness examination, at least provide the following description:

- (1) The criminal court in Indonesia has practiced witnesses examination using video teleconference facilities;
- (2) The examination of witnesses using video teleconference means is applied if the witness is abroad, as well as for the security of the witness so that the witness is free to provide information;

²¹ Hermansyah, *Laporan Penelitian Perlindungan Saksi Dan Korban Dalam Integrated Criminal Justice System (Analisis Terhadap Undang-Undang Nomor 13 Tahun 2006)*, (Fakultas Hukum Universitas Tanjungpura, 2008), hlm. 16.

²² Siregar, R. M. D. (2017). Legalitas Keterangan Saksi melalui Teleconference Sebagai Alat bukti dalam Perkara Pidana. *Jurnal Jurisprudence*, 5(1), 25-33. p.29

²³ <https://www.amnesty.org/download/Documents/96000/asa210062004in.pdf> (Accessed, March, 31, 2020).

²⁴ <https://www.medcom.id/nasional/metro/wkBz9Yqk-sidang-kasus-di-jis-korban-beri-keterangan-via-teleconference> (Accessed, March, 31, 2020).

- (3) When examining witnesses using video teleconferencing facilities, the Panel of Judges asks witnesses about who is around the witnesses to ensure that witnesses provide information freely;
- (4) Examination of children as witnesses is more free to use video teleconference facilities;
- (5) Examination of witnesses outside Indonesian jurisdiction must be examined at the Indonesian Embassy as a manifestation and expansion of the territory of the Indonesian state, so that if criminal acts occur, Indonesian criminal law can be applied;
- (6) Law enforcers do not have the same perspective on giving testimony through a teleconference in a criminal case trial, namely if the prosecutor uses the video teleconference facility as a Public Prosecutor, the Defendant's Legal Counsel refuses it and vice versa.

Although the practice of using virtual court by means of video teleconference in Indonesia is still limited to witness examinations, it is a precedent that sets up jurisprudence as a source of law to propose the concept of a virtual court in criminal trials in Indonesia.

C. Virtual Court in the Perspective of Indonesian Criminal Procedure Code

The Criminal Procedure Code is a manifestation of the Criminal Justice System in Indonesia which contains provisions on the procedure of a criminal proceeding along with all the rights and obligations of those who are in a criminal process, in which case regarding the procedure and location of a court session are firmly regulated in Article 230 of the Criminal Procedure Code,²⁵ and this provision implies that a court hearing takes place in a court building in a courtroom with the location of the judiciary, be it Judges, Registrars, Prosecutors, Witnesses, Experts, Defendants and Legal Counsels, which have been firmly and clearly determined. However, there are exceptions to being able to hold a court hearing outside the

²⁵ Article 230 Paragraph (1) of the Criminal Procedure Code states "A court hearing takes place in a court building in a courtroom". Furthermore, Article 230 paragraph (2) of the Criminal Procedure Code states "In a courtroom, judges, public prosecutors, legal counsel and clerks wear court clothes and their respective attributes". In Article 230 paragraph (3) of the Criminal Procedure Code states "The courtroom referred to in paragraph (1) is arranged according to the following conditions: a. The table and seat of the judge are higher than the place of the public prosecutor, defendant, legal advisor and visitors. b. The place of the court clerk is behind the right side of the presiding judge's court. c. The public prosecutor's place is located on the right front of the judge's place. d. The place of the defendant and legal counsel is located on the left side in front of the place of the judge and the place of the defendant to the right of the place of legal counsel. e. The examination seat for the defendant and the witness is located in front of the judge's place. f. The witness or expert place that has been heard is located behind the examination chair. g. The visitor's place is located behind the witness location that has been heard. h. The National Flag is placed to the right of the judges' table and the Penamanoman banner is placed to the left of the judges' table while the state symbol is placed on the upper wall behind the judges' table. i. The cleric's place is to the left of the clerk's place. j. The places referred to in letters a through letter i shall be given identification. k. Place a security officer on the inside of the main entrance to the courtroom and elsewhere as deemed necessary. Furthermore, Article 230 paragraph (4) of the Criminal Procedure Code states "If a court session is held outside a court building, the layout of the place as far as possible is adjusted to the provisions of paragraph (3) above". Finally, Article 230 paragraph (5) of the Criminal Procedure Code states "In the event that the provisions of paragraph (3) cannot be fulfilled, at least there must be a national flag".

court building as far as possible to arrange the courtroom as stipulated in Article 230 paragraph (3) of the Criminal Procedure Code, and if that provision is not possible, then there must be at least a National flag. From this description, it is implied that a court hearing must be held directly with the physical presence of the judiciary be it Judges, Registrars, Prosecutors, Witnesses, Experts, Defendants and Legal Counsels, in the same room even if it does not have to be in the court building.

This situation creates a dilemma because in an emergency situation the pandemic COVID-19 as it is today. The application of the principle of social distancing and physical distancing is an absolute thing to do. If we continue to hold traditionally and rigidly interpret the Criminal Procedure Code to meet directly and gather in court or be physically present, then this will even give greater problems to the safety of the people with the risk of the widespread of virus that is contrary to *the postulate solus populi suprema lex* which means people's safety is the highest law.

Therefore, a virtual court should be used as a solution before the existence of legislation that regulates explicitly. The virtual legitimacy of trials using teleconferencing facilities is *quasi court* which is an abnormal emergency,²⁶ because in the sense of criminal procedure law, this matter is not strictly tied to formal and material rules.²⁷ Other doctrines and jurisprudence have also given legitimacy to the use of video conferencing / teleconferences in the context of examining witnesses from outside the court even though the Criminal Procedure Code does not regulate them.²⁸

Futuristically in the Draft Indonesian Criminal Procedure Code since 2012 has also included teleconference examinations as a form of examination of witnesses that applies also to experts, in Article 180 paragraph (2) of the Criminal Procedure Code Bill states that if witnesses cannot be presented in the examination at a court hearing, witness statements can be given remotely through an audio visual communication tool in the presence of a Legal Counsel and a Public Prosecutor. And in paragraph (10) the provisions concerning the procedures and conditions for giving testimony remotely as referred to in paragraph (2) are regulated by Government Regulation.

Even though it is not on a large scale like a virtual court, the use of video conferencing / teleconferences in witnessing from outside the court has the same essence as the implementation of a virtual court that involves all judicial instruments be it Judges, Registrars,

²⁶ Billis, E. (2016). The European Court of Justice: A "Quasi-Constitutional Court" in Criminal Matters? The Taricco Judgment and Its Shortcomings. *New Journal of European Criminal Law*, 7(1), 20-38. p.23

²⁷ Indriyanto Seno Adji, "Sidang Pidana Secara Online. Prof Dr Indriyanto Seno Adji : *Persidangan Online Adalah Quasi Court*", http://m.beritahukum.com/detail_berita.php?judul=Sidang+Pidana+Secara+Online.+Prof+Dr.Indriyanto+Seno+Adji%3A+Persidangan+Online+Adalah+Quasi&subjudul=Jaksa , (Accessed, March, 31, 2020)

²⁸ Terdapat beberapa yurisprudensi sehubungan dengan video conference/teleconference dalam pemeriksaan saksi, yakni : Putusan Pengadilan Negeri Jakarta Selatan Nomor : 354/Pid.B/2002/PN.Jak.Sel, Putusan Pengadilan Negeri Jakarta Pusat Nomor : 547/Pid.B/2003/PN.JakartaPusat, Putusan Pengadilan Negeri Jakarta Pusat Nomor : 148/Pid.B/2011/PN.JakartaPusat, dan Putusan Pengadilan Negeri Denpasar Nomor : No. 224/Pid.B/2003/PN.DPS.

Prosecutors, Witnesses, Experts, Defendants and Legal Counsels , because with the progress of Information Technology as if it has cut space and time. Today, Information Technology greatly facilitates interaction between humans so that physical presence can be replaced by virtual presence even if not absolutely.^{29,30} Examination, direct, and complete, specifically, Judges, Prosecutors, or Legal Determination can help, aim and detail the evidence, the goods provided in court. Sometimes until the gesture, the experts were accused. However, discussing we see more of the essence of this direct or physical trial and speak with the emergency conditions as it is today, actually what is needed is the juridical substance of the judicial tools be it Judges, Registrars, Prosecutors, Witnesses, Experts, Defendants and the Legal Counselor itself continue to accommodate the court's right of victims, representatives and defendants to create fair trials or fair trials, and not involve them physically in the courtroom. Virtual Courts through video conferencing / teleconference use media that can bridge a person to be in the courtroom and philosophical means that can not be used at all to improve the purpose of any legal procedure meant by finding suitable material or at least requires material questions.

The author argues that in general physical presence is no longer an absolute matter where the juridical substance tested in court can already be accommodated through virtual presence itself. This is in line with the view of Arnold M. Rose who put forward a general theory of social change in relation to changes in law based on 3 (three) factors, namely: first, the existence of progressive communication from discoveries in the field of technology; second, there is contact or conflict between people's lives; and third, the existence of social movements. This reasoning is based on the stipulation of health emergency status based on the Law of the Republic of Indonesia Number 6 of 2018 concerning Health Quarantine and the issuance of Government Regulation of the Republic of Indonesia Number 21 of 2020 concerning Large-Scale Social Restrictions (PSBB) by the President of the Republic of Indonesia to address the COVID-19 pandemic which the more widespread, the state has firmly set a goal, namely to limit the space for people through social distancing and physical distancing. Thus, it would be impossible for all judicial instruments whether Judges, Registrars, Prosecutors, Witnesses, Experts, Defendants and Legal Counsels to be able to be physically present and gather in the same courtroom. For this reason, the law must be able to move to protect the country's goals by responding and adapting quickly to social changes that occur in society as per the views of Subekti which states that legal objectives must serve the objectives of the state.³¹

It is also necessary to understand that the development of law and the development of human civilization are like 2 (two) sides of a coin which cannot be separated and it is a

²⁹ Nasution, M. K. (2017). Metodologi riset. Desain Riset, 4, p, 17

³⁰ Sølling, I. K., Carøe, P., Mathiesen, K. S., & Lindgren, K. (2020) When the physical presence in the citizen's home is replaced by online video consultations; a citizen perspective. Nordisk sygeplejeforskning, 10(01), 70-85. p, 77

³¹ C.S.T.Kansil dan Christine S.T.Kansil, *Pengantar Hukum Indonesia*, (Jakarta : Rineka Cipta, 2010), hlm.36.

necessity where legal changes occur because of changing times, locality, and social situation, which on this occasion is a pandemic COVID-19 which is plaguing the world.

After all, the criminal procedure code is not a sacred word of God and cannot be changed. However, he is not an opinion that can be distorted, even just ignored. The procedural law must be placed precisely in its proper place as a device that must be upheld for the maintenance of material law. Because he is devoted to material law, then if there are aspects of changing the law that requires changes to it, then these changes must also be oriented to the establishment of material law, and of course, it must be done with methods that can be accounted.

As the closing paragraphs of this article, it is hoped that there will be no legal problems in the future which question the legitimacy of the virtual court and because the formation of a Law or Government Regulation in lieu of a Law (PERPU) will require a relatively long period, the judicial institution has made a Cooperation Agreement between Republic of Indonesia Supreme Court Number: 402/DJUH/HM.01.1/4/2020, Attorney General's Office Republic of Indonesia Number: KEP-17/E/Ejp/04/2020, and Ministry of Law and Human Rights Republic of Indonesia Number: PAS-08.HH.05.05 Year 2020 dated 13 April 2020 which in essence allows the trial of criminal cases remotely through video conferencing / teleconferences. The cooperation agreement is an active discretionary (*activist beleid* or *vrijs ermerssen*) of each judicial institution that responds to abnormal conditions (*abnormal recht voor abnormaal*) due to the COVID-19 epidemic. Although the cooperation agreement has allowed the trial to use virtual court facilities, it has yet to regulate matters relating to the technical implementation of the trial. This technical matter must then be immediately regulated through Government Regulations in lieu of laws or Supreme Court Regulations as part of legislation that perfectly legalizes the conduct of trials using virtual court facilities.

CONCLUSION

The reality is that countries such as the United Kingdom, China, New South Wales and America and Indonesia have applied virtual courts in their justice systems even in different forms, but substantively continue to use teleconferences in the implementation of law enforcement to meet and facilitate public access to the need for justice in a manner effective wherever they are so that it is not limited to the mere physical presence in the courtroom. The use of virtual courts in several countries supports enforcement in seeking material truth for a criminal act during the COVID-19 pandemic. The process of law enforcement must continue even in the case of abnormal emergencies due to the COVID-19 pandemic, an examination through the virtual court method can certainly be a solution, so that the behaviour of everyone remains in accordance with the law, even though the way of thinking and acting drastically changes. Implementation of the trial using the virtual court method or through teleconference

does not violate the provisions of the trial set out in the Criminal Procedure Code. Cooperation Agreement between the Supreme Court of the Republic of Indonesia, the Attorney General's Office of the Republic of Indonesia, and the Ministry of Law and Human Rights of the Republic of Indonesia which in essence allows long-distance criminal trials through teleconferencing facilities have been established, but a rapid legal breakthrough is still needed in relation to the implementation of virtual courts through the Supreme Court Regulations that govern the procedures for conducting trials using virtual court facilities that can resolve both legal and technical issues while waiting for new regulations that regulate strictly.

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