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'Virtual Court' in the Perspective of Criminal Procedure Code

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Abstract:

The pandemic of COVID-19 has changed the pattern of how human think, behave, and act, not only in social interaction, but also in the law enforcement system. The development of Information Technology (IT) has brought up new system of video conferencing/teleconferences as a means of conducting 'Virtual Court' as a response to the 'social distancing' or 'physical distancing' which is actually one of the ways in preventing the spread of COVID-19. This research is a normative legal research applying legislation approach, case approach, comparative legal approach, and conceptual approach toward 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), America (New York), and Indonesia (although limited to the examination of witnesses) have applied the 'Virtual Court' in their Judicial System. The use of the 'Virtual Court' method through video conferencing/teleconference facilities in the Criminal Procedure Code is not the first or primary choice in criminal proceedings. In abnormal emergencies due to COVID-19 pandemic as it occurs now, examination through the 'Virtual Court' method can certainly be used as a solution. Actually, that is needed in the Criminal Procedure Code as the manifestation of the Criminal Justice System is the juridical substance of the judicial instruments while still accommodating the human rights of victims, witnesses, and defendants to create a 'fair trial' and not their 'physical' presence in the courtroom. The need for a quick legal breakthrough related to the implementation of 'Virtual Court' through the Supreme Court Regulation (PERMA) with active discretionary consideration (active beleid or vrijs ermerissen) is to make a Memorandum of Understanding through the forum of the Court, The Ministry of Law and Human Rights, Attorney General's Office and the Indonesian Police (DILKUMJAKPOL). It is done while waiting for the Act or Government Regulation in Lieu of Law (PERPU) that regulates expressly.

Keywords: Virtual court, criminal procedure code

1. Introduction

The domino effect of the increasingly widespread outbreak of *Corona Virus Disease 2019* (called COVID-19) which was established as a global pandemic by the World Health Organization (WHO) on March 11, 2020 has changed the pattern of how human think, behave, and act, not only in social interaction, but also in the law enforcement system. The criminal law enforcement sector is transformed to look for the right formulations and vaccines so that the principles of 'social distancing' and 'physical distancing,' which are expected to break the chain of the spread of COVID-19, can be implemented in criminal proceedings. To break the chain of the spread of COVID-19, the practice of criminal justice is forced to 'flex' its perspective on procedural law by allowing the 'virtual' presence of judicial instruments, namely Judges, Registrars, Prosecutors, Witnesses, Experts, Defendants, and Legal Counselors to replace the 'physical' presence. It is as stated in the Letter of the Director General of the General Court of the Supreme Court of the Republic of Indonesia Number:379/DJU/PS.00/3/2020 dated 27 March 2020 and the Circular of the Attorney General of the Republic of Indonesia Number: B-049/A/SEJA/03/2020 dated 27 March 2020. They allow the remote criminal trial through video conference/teleconference.

Responding to these legal instruments, several work units of the District Attorney and District Courts in Indonesia implement 'virtual' criminal trial using video conferencing/teleconferences. As a result, from 30 to 31 March 2020, there has been 1,509 (one thousand five hundred and nine) criminal cases were proceeded 'virtually' simultaneously in Indonesia.¹ The video conference/teleconference of criminal trial makes the judiciary, namely judges, clerks, prosecutors, witnesses, experts, defendants, and legal advisors, not involved in direct contact because they are in different place. Panel of Judges and Registrars in District Courts, Prosecutors in the District Attorney's Office, Defendants and Legal Advisors in

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

State Detention Centers, or in different composition in accordance with agreements previously coordinated among fellow law enforcement institutions. The aim is to implement the principles of 'social distancing' and 'physical distancing.'

The actions of law enforcers who respond to the COVID-19 pandemic seem to want to prove that *fiat justitia ruat caelum* is still imprinted on every law enforcement officer who could potentially be infected by Covid-19 at any time. Teleconference criminal trial is one of the means to synergize criminal law enforcement actions to prevent the spread of COVID-19. However, in its implementation, there are various problems both from juridical and technical aspects.

Regarding the 'Virtual Court' that use video conferencing/teleconference, criminal procedural law has not clearly regulated the situation. New legislation accommodates the examination of witnesses without being present directly in the trial, but done using audio-visual facilities such as video conferencing/teleconferences. This regulation is stated in in several jurisprudences and several laws, namely the Terrorism Act, the Act of Protection of Witnesses and Victims, the Law on the Eradication of Human Trafficking, and the Law on the Criminal Justice System for Children (SPPA). This can lead to legal problems in the form of legal vacuum or 'loop holes' if it is not responded by finding the right solutions. Simply, the law is only limited to the case of Terrorism, Human Trafficking, and SPPA and only allowed to Witnesses who are under the protection of Witness and Victim Protection Agency (LPSK). Additionally, the Law of the Republic of Indonesia Number 8 of 1981 concerning the Indonesian Criminal Procedure Code (known as the Criminal Procedure Code) only regulates trials held by judicial instruments, namely Judges, Registrars, Prosecutors, Witnesses, Experts, Defendants and Legal Counsels, by a 'physical' presence in the courtroom and not 'virtually'. Meanwhile, the Electronic Information and Transaction Law (ITE), the Narcotics Act, the Corruption Eradication Act and the Prevention and Eradication Act of Money Laundering and other similar Acts only accommodate electronic evidence and do not regulate the virtual presence of judicial instruments in the courtroom.

This research is a normative legal research applying legislation approach, case-based approach, legal comparison approach, and conceptual approach to the legal materials collected through library research and analyzed using the grammatical interpretation, systematic, and extensive methods. This research is the initial observation of the author as a legal practitioner of the emergence of a virtual court as an emergency in the condition of the widespread spread of COVID-19 in Indonesia. This research focuses on discussing the legality of virtual court in the perspective of the Indonesian Criminal Procedure Code.

2. Analysis and Discussion

2.1. Several Forms of 'Virtual Court' in Some Countries

Based on the website <http://vcourts.gov.in/virtualcourt/>, it is explained that 'Virtual Court' is a concept that aims at eliminating the presence of litigants or lawyers in the court and adjudication of the case online.' In reality, several countries have applied this online trial system. The development of Information Technology (IT) is used to meet and to facilitate public access to the need of justice effectively, so it is not limited to the 'physical' presence only in the courtroom. The following countries apply the virtual court:

2.2. The United Kingdom

The 'Virtual Court' was first used in May 2009 in the United Kingdom. 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 allegation from the police station, without being present at the court, via video conference/teleconference with the judge at the court. This virtual court 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 that can be used by the police to protect and to serve the public better than just taking the suspect to the court. This 'virtual court' forms a close digital collaboration between law enforcement and 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 of the Police, the Prosecutors, and the Court to conduct a virtual court.² Furthermore, the first 'virtual court' case involving interstate court through video conference/teleconference facilities was hold in 2018 where the plaintiff was at his home in London, England, using a laptop camera, the Judge was in the London Court, England, and the Lawyers filed evidence from Belfast, Northern Ireland. Even though this is not a criminal case, the method works the same. The program launched by the Ministry of Justice is expected to expand the court examination operated remotely from tax disputes, civil law, and criminal law.³

2.3. China

'Virtual Court' is also held in China in the form of the Internet Courts. There were three (3) internet courts in Hangzhou, Beijing, and Guangzhou established in 2017-2018. It was the first court in China. The entire litigation process can be done online. This includes filing and document services, pre-trial mediation, collecting and presenting evidence, safeguarding assets, trial, sentencing, legal remedies, and other processes. Each part of the process can be done offline at the request of the parties involved or the needs of the trial. Moreover, the implementation of 'mobile court' can be downloaded on 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 and communicate directly with judges by sending

² 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 on March 31, 2020

³ 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 on March 31, 2020.

text and audio messages and submitting evidence on the application. Judicial devices can enter the application at the same time to conduct a trial and electronic signing, and then the judge can make decisions through the 'mobile court' application.⁴

2.4. New South Wales (Australia)

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, 'Virtual Courtroom' is defined as '*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.*' It is further stated '*Parties to proceedings can access the Virtual Courtroom using video conferencing applications.*' Additionally, '*Virtual courtrooms are still formal courtrooms. All usual court etiquette, protocols, procedures and restrictions apply.*'⁵

2.5. New York State Courts (America)

On March 25, 2020, criminal courts in New York, America (Suffolk County, Seventh and Fifth Judicial Districts), turned to 'virtual court operations' because of the COVID-19 pandemic. They held the trial through video conference. Furthermore, all parties participated in conducting the trial through video conferencing using Skype for Business. An extraordinary situation required extraordinary efforts. All trials were held virtually, in which Judges, Public Prosecutors, Lawyers, and Defendants were in different locations.⁶ The trial was held open to the public. Court officers monitored and could limit access to the courtroom to maintain social distance according to the guidelines of the public health authority. The purpose of this 'virtual court' is to minimize the spread of COVID-19 in New York City and, especially, in the court. According to Vito C. Caruso as *Deputy Chief Administrative Judge*, it is stated '*the virtual courthouse model enables us to serve the pressing justice needs of New Yorkers across the State while protecting the health and safety of our judges and staff, court users and the public.*'⁷

However, the Criminal Justice System in Indonesia is different from the United Kingdom, China, Australia (New South Wales), and especially America (New York) which uses court decisions as the main source of law. They can accommodate the 'Virtual Court' with more flexibility to conduct the trial. The differences in the Criminal Justice System will become obstacles and limitations in the implementation of 'Virtual Court' based on the Indonesian Criminal Procedure Code. However, despite these differences, there are similarities that need to be emphasized, namely the purpose of using virtual court in these countries is to support enforcement in seeking material truth for a criminal act during the COVID-19 pandemic. Virtual court is used as a winning solution in resolving criminal cases that still applies the principles of 'social distancing' or 'physical distancing' as a way to break the chain of the spread of COVID-19.

3. The History of Virtual Court Use in Indonesia

Regardless of the concept of e-court civil cases that have been launched by the Supreme Court of the Republic of Indonesia and trials of witnesses or expert examinations using video teleconference at the Constitutional Court of the Republic of Indonesia, virtual court in criminal court trial using video teleconference facilities is not something new in Indonesia. In 2002, the Supreme Court first gave permission to the former President B.J. Habibie to give a testimony using video teleconference in the case of Bulog's non-budgetary fund deviations of the Defendants, Akbar Tandjung and Rahardi Rammelan. In 2003 and 2011, witness examinations through video teleconference were again used in cases of the Defendants, Abu Bakar Ba'asyir and Ali Gufron. In addition, cases examinations of gross violation of human rights at the Ad Hoc Human Rights Court in Central Jakarta in 2002 and 2003, as well as the Jakarta International School case in 2010 also used video teleconferences during witness examination.

The explanation is provided below:

3.1. Witness Examination of the Former President B. J. Habibie

Witness examination using video teleconference in Indonesia was first conducted in 2002. At that time, for the first time, the Supreme Court through the District Court of South Jakarta made a legal breakthrough by accepting the application of the Law Advisor of the Defendant to conduct an examination of the former President B.J. Habibie used a video teleconference. The examination was on the case of the deviation in Bulog's non-budgetary funds that involved 2 (two) ministers in the era of President B.J. Habibie, namely the Defendants, Akbar Tandjung as former Minister of State Secretary and Rahardi Rammelan as former Minister of Industry and Trade.

Responding to the decision of the Panel of Judges, the Public Prosecutor expressed an objection. However, 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 due to his wife's illness. For this reason, the Central Jakarta Court then made a legal breakthrough by issuing a Decision Letter, Number: 354/Pid.B/2002/PN.JakartaSelatan. It was stated '*Examination of B.J. Habibie is considered by the Judges as very necessary to obtain material truth, but because there are problems regarding the presence of witnesses who are in Hamburg, Germany who has to accompany his wife who is seeking*

⁴Mimi 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 on March 31, 2020.

⁵District Court of New South Wales, 'Virtual Court Practitioner User Guide', <http://www.districtcourt.justice.nsw.gov.au/>, accessed on March 31, 2020.

⁶Unified 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 on March 31, 2020.

⁷New 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 on March 31, 2020.

medication, the solution is to use teleconference in providing information'. Based on the decision of the judge, then B.J. Habibie carried out the witness examination at the office of the Indonesian Consul General in Hamburg, Germany. The examination to B.J. Habibie is broadcast by a private TV station, SCTV. According to the Public Prosecutor, testimony from 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, 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 first sworn first by the headman at the Consulate. Before giving testimony, the Head of the Consulate General gave information about people who were in the room with witnesses and oath on duty, to the Judge, Prosecutor, and Legal Advisor of the defendants, so the statement given by witness, B.J. Habibie, is truly objective and not ruled by anyone.

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

- First, the use of teleconference technology is a solution for the trial, especially for witness examination which cannot be present at the trial, where such information is very necessary to obtain material truth, so that the existence does not conflict with the Criminal Procedure Code;
- Second, the use of electronic communication technology in giving information through teleconferences is intended to meet the requirements in the procedural law when obstacles occur as faced by witness B.J. Habibie. It is expected that the actions 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;
- Third, on the one hand, witness examination done using teleconference is in line with the role and duties of judges in exploring and discovering the law (*rechtsvinding*). On the other hand, it is as one of the breakthroughs on procedural law, which makes it easier to hear the testimony from B.J. Habibie who was on the Europe, so that it can be heard and followed directly and transparently by the public in Indonesia. Therefore, the use of teleconference technology is considered valid and has a proven value;
- Fourth, although during witness examination of BJ Habibie was done in Hamburg, precisely at the Office of the Consulate General of the Republic of Indonesia while the trial was held at the District Court building of South Jakarta, this is considered an integral part of the trial itself because the witness had taken an oath guided by Chairperson of the Assembly in this trial;
- Fifth, the facts of the trial show that the process of carrying out the witness examination via video teleconference has been going well. There has been question and answer process between the Panel of Judges and witnesses, among the Public Prosecutor, Legal Advisor, and Defendants as well as the witness as fully stated in the official report of the trial and the recording of the teleconference trial.⁸

3.2. Witness Examination in the Case of Abu Bakar Ba'asyir

In the case of Abu Bakar Ba'asyir in 2003, Public Prosecutor presented thirty-two (32) witnesses. The seven (7) of them provided information through video teleconferences, namely Faiz Abu Bakar Bafana, Hasyim bin Abbas or Osman or Rudi, Ja'far bin Mistoki or Saad or Badar, Ahmad Sajuli bin Abd Rahman alias Fadul Rahman or Fadlul or Uyong or Mat, Agung Biyadi or Husain, Muhammad Faiq bin Hafidh, and Ferial Muchlis bin Abdul Halim. Among those seven (7) witnesses who gave information through video teleconference, only Faiz Abu Bakar Bafana who had not previously been examined in the investigation. In this case, the one who requested that the seven witnesses provide information through a teleconference was the Public Prosecutor. The reason is these witnesses could not be present at the trial since they were being detained by the Malaysian Government and the Singapore Government, so it was not possible to attend the trial. The location of the seven witnesses giving testimony by teleconference was in the territory of Malaysia and Singapore. Thus, when the information was submitted via teleconference, the location was not within the jurisdiction area of Indonesia. Responding to the request of the Public Prosecutor, the Defendants' Legal Advisor stated an objection. As a result, the Panel of Judges in legal consideration of the Decision of the District Court of Central Jakarta, Number: 547/Pid.B/2003/PN.CentralJakarta considers as follows:

- First, talking about teleconference means talking about the development of Information Technology (IT), that can be used to meet the need of the court, by still considering the rights of the defendants and the interest of public prosecutor. The aim is to uncover the truth of the case;
- Second, the formal legal basis for the use of teleconferences has not yet been regulated in the Constitution, Number 8 of 1981 concerning the Criminal Procedure Code (KUHP). It is based on the reasons of the Assembly as written 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;
- Third, the panel of judges is fully aware that the use of teleconferences in this case is merely a means or instrument of examination to reveal, to seek, and to find material truth, and in no way intends to discredit the defendant, or merely to fulfill the desires or wishes of the Public Prosecutor;
- Fourth, in terms of formal law, the evidence obtained through teleconference by the Panel of Judges will be placed accordingly based on the procedural law and conscience. Therefore, the doubts of the defendants and their legal

⁸ *Vide* Determination of the District Court of South Jakarta Number: 354/2002/ PN. Jak.Sel jo. Decree of the District Court of South Jakarta Number: 354/Pid.B/2002/PN.Jak.Sel.

advisory team that the Panel of Judges would fully accept witness statements by teleconference should not need to exist.⁹

Furthermore, in the case of Abu Bakar Ba'asyir in 2011, the Public Prosecutor presented thirty-seven (37) witnesses, and sixteen (16) of them provided information through video teleconferences. The two (2) of the sixteen (16) witnesses are Mujahidul Haq and Joko Daryono, requested that both of them provide information directly in front of the court hearing. Responding to the request, the Panel of Judges rejected Mujahidul Haq's request since the witness had made and signed a statement that would provide information using video teleconference. Meanwhile, Joko Daryono's request was accepted by the Panel of Judges based on the Minutes of Trial. However, it is not clear why the judge accepted Joko Daryono's request to give information directly at the court. Based on the request of the Public Prosecutor, of course, the Defendant's Legal Advisor raised an objection. The objection of the Public Prosecutor is based on 3 (three) laws and regulations, namely:

- Article 33 *jo.* Article 34 section (1) point c of the Constitution of the Republic of Indonesia Number 15 of 2003 concerning Stipulation of Government Regulations in Lieu of the Law of the Republic of Indonesia Number 1 of 2002 concerning Eradication of Terrorism Criminal Act;
- Article 2 *jo.* Article 3-point c of 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;
- Article 9 section (1) and section (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 examination using video teleconference, but because the three laws and regulations govern witness examinations using video teleconference, the three statutory regulations override the Criminal Procedure Code regarding witness examination through video teleconference. Thus, the issuance of Letter of Determination Number: 148/Pen.Pid/2011/PN.Jkt.Sel is merely 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 any basis from the defendant's legal advisor. Furthermore, every witness examination that is completed which is not attended by the defendants, both witnesses examined using video teleconferences and witnesses examined directly at the court, the Panel of Judges always reads the resumes of all witnesses to the defendants, and then requests the defendant's response/opinion on the witnesses' statement. What the Panel of Judges do regarding the above statement is the embodiment of the 'fair trial' principle as regulated in the Judicial Power Act and the principle of balance as determined in the Criminal Procedure Code.¹⁰

3.3. Witness Examination in the Case of Ali Gufron

In the case of Ali Gufron, the Public Prosecutor presented 35 (thirty-five) witnesses. One of them gave information through video teleconference, namely Wan Min bin Wan Mat. Previously, Wan Min bin Wan Mat had given information in front of the investigators that had been sworn. The reason for using video teleconference is Wan Min bin Wan Mat is being detained by the Malaysian Government, so it is not possible to attend the trial physically. Based on the judge's determination dated 23 July 2003, the Chairman of the Panel of Judges ordered one of the member judges, a Public Prosecutor, along with a Defendant's Legal Advisor to watch the examination through a video teleconference in Kuala Lumpur, Malaysia. However, when the testimony through video teleconference was carried out, Wan Min bin Wan Mat was only accompanied by a member Judge and a Prosecutor, while the Defendant's Legal Advisor was not present. The location for providing information via video teleconference was carried out in Kuala Lumpur, Malaysia, and not at the Indonesian Embassy in Malaysia. The panel of judges, in making a decision, stated the reasons for accepting the witness testimony of Wan Min bin Wan Mat given through video teleconference, namely:

- First, it is true that teleconferences are 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. If looking at the legalistic literally, teleconference is indeed not in accordance with Article 160 section (1) point (a) and Article 167 of the Criminal Procedure Code that 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 to face the development era. Moreover, Article 27 section (1) of the Law Number 14 of 1970 and the Law Number 35 of 1999 require judges as law and justice enforcers to explore, to follow, and to understand the legal values that live in society;
- Second, the Criminal Procedure Code aims to look for the truth aiming that formal legal aspects should be left selectively. Teleconference is only a suggestion to find the material truth. In a teleconference hearing, witnesses can also be present in the courtroom virtually. Thus, it is not different from witnesses who are physically present in the courtroom. All parties may also test that the witness statements are heard by everyone;
- Third, it is true that the Criminal Procedure Code has a regulation on the absence of witnesses at the court due to legal impediments or other reasons relating to the state. The testimony of witnesses who were sworn in the investigation, because of a legal obstacle cannot be present at the hearing, is only read out and considered to have

⁹Vide Letter of Determination of the District Court of Central Jakarta Number: 547/Pid.B/2003/PN.JakartaPusat *jo.* Decree of the District Court of Central Jakarta Number: 547/Pid.B/2003/PN.JakartaPusat

¹⁰Vide Letter of Determination of the District Court of Central Jakarta Number: 148/Pen.Pid/2011/PN.Jkt.Sel *jo.* Decree of the District Court of Central Jakarta Number: 148/Pen.Pid/2011/PN.Jkt.Sel.

the same value as testimony under oath in accordance with Article 162 section (1) and section (2) of the Criminal Procedure Code. However, even though Wan Min bin Wan Mat has given information to the investigator and has been sworn, it needs to be welcomed by all parties if the Public Prosecutor wishes to hear the witness' statement through teleconference. The reason is the defendant will be benefited from this condition and able to do a cross examination to balance witness testimonies. Moreover, the facts of the trial show that the Public Prosecutor, Legal Advisor, and Defendant also actively asked questions to Wan Min bin Wan Mat;

- Fourth, giving testimony through teleconference does not conflict with the principle of judicial competence. If it is not followed, the Indonesian judiciary will be out of date in facing the development of information technology and communication revolution. The witness examination using teleconference media is one form of judiciary of information that is global in scope and crosses borders.
- Fifth, when Wan Min bin Wan Mat gave a statement via teleconference in Malaysia, he was in a state of freedom and not under the stress. This is because the Panel of Judges has ordered one of the member Judges, a Prosecutor, and a Defendant's Legal Advisor to jointly witness the proceedings of witness examination. It turns out that 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 was not free in providing information. He was not pressured, was not led by the text in front of him, and there were no police officers around him.¹¹

3.4. Witness Examination in Gross Human Rights Violation in Timor-Timur

In cases of gross human rights violation in Timor-Leste, involving Defendants, Major General Adam Damiri, Brigadier General Noer Muis, Lieutenant Colonel Soedjarwo, and Lieutenant Colonel Hulman Gultom, the witness examination was held at the Ad Hoc Human Rights Court of Central Jakarta.¹² The request for witness examination using video teleconference in Dili Timor Leste in the purpose of security and efficiency, which was initially blocked by the Attorney General's Office of the Republic of Indonesia, and due to the cost and incompatibility of giving testimony by the Criminal Procedure Code, was proposed by the Attorney General's Office of Timor-Leste. The request 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 DPR Speaker, Akbar Tanjung, in July 2002. Finally, the Ad Hoc Human Rights Court agreed to conduct a witness examination using video teleconferences in December 2002 and January 2003. The witnesses gave testimony via video teleconference from Dili, while the Defendant was at the Ad Hoc Human Rights Court of Central Jakarta.¹³

3.5. Examination in the Case of Jakarta International School (JIS)

In the case of the Jakarta International School in 2010 involving the Defendants, Neil Bantleman and Defendant Ferdinant Tjiong, the Public Prosecutor submitted an application to conduct witness examination with the witness, whose age is 6 (six) years, using a video teleconference. The witness is located at the Witness and Victim Protection Agency. The trial began at approximately 10:00 WIB. The victim, AK, got the first turn to give testimony in the trial with the agenda of witness examination via video teleconference. In the courtroom, at that time, there are 3 50-inch television units were seen facing the Panel of Judges, Defendant's Legal Advisor and Public Prosecutors. The examination of the child as a witness separated from the Defendant at least makes the child provide information freely, and the safety of the child as a victim witness is guaranteed by the Witness and Victim Protection Agency.¹⁴

Based on some 'virtual court' practices in criminal proceedings using video teleconference during the witness examination at least provide the following description:

- The criminal court in Indonesia has practiced witness examination using video teleconference facilities;
- Witness examination using video teleconference is applied when the witness is abroad, as well as for the security of the witness so that the witness is free to provide information;
- When examining witness using video teleconference, the Panel of Judges asks witness about who is around the witness to ensure that witnesses provide information freely;
- Examination of children as a witness is freer to use video teleconference facilities;
- Witness examination outside Indonesian jurisdiction must be examined at the Indonesian Embassy as a manifestation and expansion of the territory of the Indonesian state, so that the Indonesian criminal law can be applied in the event of a criminal happens there;
- 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 Advisor refuses it and vice versa.

It cannot be denied, despite the practice of using virtual court through video teleconference in Indonesia still limited to witness examination, that it is a precedent that sets up jurisprudence as one of the legal sources for proposing the concept of virtual court in criminal trials in Indonesia.

¹¹VideDecree of the District Court of Denpasar Number 224/Pid.B/2003/PN.DPS.

¹²Hermansyah, 2008, Laporan Penelitian Perlindungan Saksi Dan Korban Dalam Integrated Criminal Justice System (Analisis Terhadap Undang-Undang Nomor 13 Tahun 2006), Faculty of Law, Universitas Tanjungpura, pg. 16.

¹³<https://www.amnesty.org/download/Documents/96000/asa210062004in.pdf> accessed on March 31, 2020.

¹⁴<https://www.medcom.id/nasional/metro/wkBz9Yqk-sidang-kasus-di-jis-korban-beri-keterangan-via-teleconference> accessed on March 31, 2020.

4. 'Virtual Court' and Criminal Procedure Code

Criminal Procedure Code is a manifestation of the Criminal Justice System in Indonesia containing 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.

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Based on these provisions, a court hearing is held in a court building in a courtroom with a judicial location, consisting of Judges, Clerks, Prosecutors, Witnesses, Experts, Defendants, and Legal Advisor, which have been firmly and clearly determined. However, there is exception to being able to conduct a court hearing outside the court building as far as possible to arrange the courtroom as stipulated in Article 230 paragraph (3) of the Criminal Procedure Code. If that provision is not possible, there must be at least a National flag. Based on the description, it is implied that a court hearing must be held directly with the 'physical' presence of the judiciary, namely Judges, Clerks, Prosecutors, Witnesses, Experts, Defendants, and Legal Advisor, in the same room, even if it does not have to be in the courthouse.

This situation creates a dilemma because in this emergency due to COVID-19 pandemic. The implementation of 'social distancing' and 'physical distancing' is an absolute thing to do. If we continue literally interpreting the Criminal Procedure Code in terms of the need of meeting directly and gathering in court or being present 'physically', this will even give greater problems to the safety of people with the risk of being infected by COVID-19. That is contrary to the postulate *solus populi suprema lex*, which means people's safety is the highest law.

Therefore, 'virtual court' should be used as a solution before the existence of legislation that regulates explicitly. According to Prof. Indriyanto Seno Adji, the legitimacy of the trial using virtual video conference/teleconference means 'quasi court', an abnormal emergency. In the sense of criminal procedural law, this is not strictly tied to formal and material rules.¹⁶ Furthermore, Prof. Indriyanto Seno Adji explains that the doctrine and jurisprudence have given legitimacy to the use of video conference/teleconference in the context of examining witnesses from outside the court even though the Criminal Procedure Code does not regulate it.¹⁷ Although it is not on a large scale like the 'virtual court', the use of video conference/teleconference in examining witnesses from outside the court has the same essence as the implementation of a 'virtual court' involving all judicial instruments, namely Judges, Clerks, Prosecutors, Witnesses, Experts, Defendant, and Legal Advisor. This is due to the development of Information Technology (IT) that seems to be more efficient, in terms of the space and time.

Today, Information Technology (IT) greatly facilitates human interaction so that the 'physical' presence can actually be replaced by a 'virtual' presence even though it is not absolutely necessary. However, direct examination certainly has its own advantages where Judges, Prosecutors, or Legal Advisor can assess more fully, objectively, and in detail on the evidence presented in court, even on the gesture of witnesses, experts, and defendants. However, if we look deeper into the essence of this direct or 'physical' trial, and relate it to the abnormal emergency condition happening now, what is really needed is the juridical substance of the judicial instruments, consisting of Judges, Clerks, Prosecutors, Witnesses, Experts, Defendant, and the Legal Advisors. It is done while still accommodating the human rights of victims, witnesses, and defendants to create 'fair trial' rather than their 'physical' presence in the courtroom. 'Virtual Court' done through video conference/teleconference is only a media to bridge the existence of a person in the courtroom. This media is philosophically does not limit or hinder the objective of the criminal procedure itself, that is, looking for material truth or at least approaching material truth.

Based on this argument, 'physical' presence is no longer an absolute thing where the juridical substance tested in court can be accommodated through 'virtual' presence. This is in line with the view of Arnold M. Rose who states a general theory of social change in relation to changes in law based on 3 (three) factors. Those factors are the existence of progressive communication from discoveries in technology, contact or conflict between people's lives, and the existence of social movements.¹⁸ Furthermore, the health emergency status based on the Law of the Republic of Indonesia Number 6 of 2018 concerning Health Quarantine and the Government Regulation of the Republic of Indonesia Number 21 of 2020 concerning Large-Scale Social Restrictions (PSBB) issued by the President of the Republic of Indonesia is to overcome the

¹⁵ In Article 230 section (1) Criminal Procedure Code, it is stated 'A court session shall be held in a court building in a session room'. It is further stated in Article 230 section (2) Criminal Procedure Code that 'in the session room, the judge, the public prosecutor, legal adviser, and the clerk shall don session robes and carry their attributes'. In Article 230 section (3), it is stated 'Session room as intended in section (1) shall be laid-out according to the following stipulation: a. the place for the judge's table and chair shall be located higher than that for the public prosecutor, the defendant, the legal adviser, and the audience; b. the place of clerk shall be positioned on the right hand back of the place of the judge/chairman of the session; c. the place of public prosecutor shall be on the right hand back of the place of the judge; d. the place of the defendant and his/her legal adviser shall be on the left hand front of the place of the judge and the place of the defendant on the right of that of his/her legal adviser; e. the examination chair for the defendant and witness shall be positioned in front of the place of the judge; f. the place of the witness or expert already heard shall be behind the examination chair; g. the place of the audience shall be behind that of the witness(es) already heard; h. the National flag shall be positioned on the right of the judge's table and the banner of Protection on the left of the judge's table, while the symbol of the State shall be hung on the upper part of the wall behind the judge's table; i. the place of spiritual leaders shall be on the left of that of the clerk; j. the places as intended under letter a up to and including letter l shall be provided with identification marks; k. the place of the security officer shall be inside the man door of entry into the session room and at other places if considered necessary'. After then, in Article 230 section (4), it is stated 'If a court session is held outside the court building, the layout of the place shall as far as possible be adjusted to the provisions of section (3) mentioned above. In Article 230 section (5), it is stated 'If the provisions of section (3) cannot possibly be observed then at least a National flag must be present.'

¹⁶ Law news, 'Online Court. 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&subjjudul=Jaksa, accessed on Maret 31, 2020.

¹⁷ There are several jurisprudence related to video conference/teleconference in witness examination, namely: Decision of the South Jakarta District Court Number: 354/Pid.B/2002/PN.Jak.Sel, Central Jakarta District Court Decision Number: 547/Pid.B/2003/PN.JakartaPusat, Central Jakarta District Court Decision Number: 148/Pid.B/2011/PN.JakartaPusat, and Denpasar District Court Decision Number: No. 224/Pid.B/2003/PN.DPS.

¹⁸ Soerjono Soekanto, 1994, *Pokok-Pokok Sosiologi Hukum*, Raja Grafindo Persada, Jakarta, pg. 96.

spread of COVID-19 pandemic. Thus, the state has firmly set its goal, namely to limit the space for people through 'social distancing' or 'physical distancing'. Thus, it would be impossible for all judicial instruments, namely Judges, Clerks, Prosecutors, Witnesses, Experts, Defendant, and Legal Advisor to attend 'physically' and gather in the same courtroom. Therefore, the law must be able to protect the country's goals by responding and adapting quickly to social changes as the view of Subekti that state *'the purpose of law must serve the goals of the state'*.¹⁹

Moreover, we must also understand that the development of law and human civilization are like 2 (two) sides of a coin that cannot be separated and are a necessity where legal changes occur due to changes in times, locality, and social situations. In this case COVID-19 pandemic that is spreading around the world.

Besides, the Criminal Procedure Code is not a sacred word of God that cannot be changed. However, it is not an opinion that can be distorted or even ignored. The procedural law must be placed precisely in its proper place as a device that must be upheld for the implementation of material law. Thus, it is dedicated to material law. If there are aspects that require changes to the law, then these changes must also be oriented to the establishment of material law, and of course, it must be done through the methods that can be accounted for.

In order to avoid legal problems in the future questioning the legitimacy of the 'virtual court,' and since the formation of a Law or Government Regulation in lieu of a Law (PERPU) will require a relatively long time, the judicial institution, particularly the Supreme Court of the Republic of Indonesia, must as soon as possible provide legal breakthroughs on regulations. It should rely on the provisions in Article 5 section (1) of the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power. It is stated *'judges and constitutional justices are obliged to explore, follow, and understand the legal values that live in public'* through the Republic of Indonesia Supreme Court Regulation (PERMA) with active discretionary considerations (*active beleid or vrijs ermerssen*), regarding abnormal condition (*abnormal recht voor abnormal*) due to the COVID-19 pandemic. Thus, it is necessary to make Memorandum of Understanding through the Forum of the Law, Ministry of Law and Human Rights, the Attorney General's Office of the Republic of Indonesia, and the Indonesian National Police (DILKUMJAKPOL). It should also not merely rely on the Director General's Letter of the General Court of the Supreme Court of the Republic of Indonesia Number: 379/DJU/PS.00/3/2020 dated 27 March 2020 and the Circular of the Attorney General's Office of the Republic of Indonesia Number: B-049/A/SEJA/03/2020 dated 27 March 2020 which cannot be categorized as a statutory regulation.

5. Conclusion

The pandemic of COVID-19 has changed the pattern of how human think, behave, and act, not only in social interaction, but also in the law enforcement system. Changes in era and social situation, as well as the progressive compilation of discoveries in the field of technology have changed how humans implement the law. The development of Information Technology (IT) has brought up new system of video conferencing/teleconferences as a means of conducting 'Virtual Court' as a response to the 'social distancing' or 'physical distancing' which is actually one of the ways in preventing the spread of COVID-19. In reality, several countries such as the United Kingdom, China, Australia (New South Wales), America (New York), and Indonesia have implemented the 'Virtual Court' in their Judicial System. Although they have different forms, the substances remain using video conference/teleconference to meet and to facilitate public access to the need for justice effectively wherever they. Thus, it is not limited to 'physical' presence in the courtroom. The use of the 'Virtual Court' method through video conference/teleconference in the Criminal Procedure Code is not the first or primary choice in criminal proceedings. However, a direct examination or a 'physical' presence certainly has its own advantages where Judges, Prosecutors or Legal Advisor can assess more fully, objectively, and in detail on the instruments or evidence presented in court, even to the gesture of witnesses, experts or defendants. However, in abnormal emergency due to the COVID-19 pandemic as happening now, examination through the 'Virtual Court' method can certainly be used as a solution. What is actually needed in the Criminal Procedure Code as a manifestation of the Criminal Justice System is the juridical substance of the judicial instruments while still accommodating the human rights of victims, witnesses, and defendants for the creation of a 'fair trial' and not their 'physical' presence in the courtroom.

The need for a quick legal breakthrough related to the implementation of 'Virtual Court' through the Supreme Court Regulation (PERMA) with active discretionary consideration (*active beleid or vrijs ermerssen*) is to make a Memorandum of Understanding through the forum of the Court, The Ministry of Law and Human Rights, Attorney General's Office and the Indonesian Police (DILKUMJAKPOL). It is done while waiting for the Act or Government Regulation in Lieu of Law (PERPU) that regulates expressly.

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