

Juridical Analysis of Implementation of a Virtual Trials for Criminal Case during the Covid-19 Pandemic



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ABSTRACT: The COVID-19 pandemic has led to changes in human order and patterns of life by implementing a new normal life. One of those affected is the law enforcement sector in Indonesia. Enforcement of Criminal Law ultimately applies an adjustment mechanism when conducting a case review in court. If during this time the examination of the case bases KUHP with face-to-face directly methods, then with COVID-19 turn it into a mechanism of remote trial electronically (virtual) using the Supreme Court Regulation (PERMA) as the basis. Further research is needed to ensure the legality of the use of PERMA in the application of such electronic hearings. This research method is a normative approach that combines conceptual approach in the form of prevailing views and doctrines, statute approach by attracting conformity between rules, sociological, philosophical, juridical and case approach as a form of implementation or application of norms. The results of the study stated that PERMA is a legal product that is legally binding and have binding legal force. It's just that the arrangement of this virtual trial needs to be raised to the level of law so that it has parallels with Criminal Procedure Code (KUHP), or at has the force of law least can be proposed to the President to be published into Government Regulations in Lieu of Laws or Peraturan Pemerintah Pengganti Undang-Undang (Perppu).

KEYWORDS- the COVID-19 pandemic, virtual trials, PERMA.

I. INTRODUCTION

The COVID-19 pandemic has led to changes in life patterns for mankind. The government issued various policies to cut the chain of transmission of the COVID-19 virus. With the policies created has led to changes in the pattern of interaction between people. The Minister of Health issued a Decree of the Minister of Health (Permenkes) of the Republic of Indonesia No. HK.01.07/MENKES/328 concerning Guidelines for Prevention and Control of Corona Virus Disease 2019 (COVID-19) in Office and Industrial Workplaces in Supporting Business Continuity in Pandemic Situations and Decree No. HK.01.07/MENKES/382 on Health Protocols for People in Public Places and Facilities in order to Prevent and Control Corona Virus Disease 2019 (COVID19).

Law enforcement is one of the areas affected by this policy. The judiciary is trying hard to find innovations so that the handling of cases, especially criminal cases, does not stop in the middle of the road because of COVID-19. In the end, an innovation was made to run the trial process remotely. The trial process is no longer only carried out in the courtroom, but can also be a virtual (not directly face to face). The term a virtual trial is also familiarly referred to as an online, it's by video teleconference, video conference.¹

Policies related to the implementation of criminal case trials electronically were stated in the 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 No. 402/DJU/HM.01.1/4/2020, No. KEP-17/E/EJP/04/2020, No. PAS08.HH.05.05 YEAR 2020 regarding the Implementation of Trials through Teleconference, which was made in response to the COVID-19 outbreak which is becoming increasingly worrying day by day. This is done so that the legal process can continue.²

Before to the above cooperation agreement, the Supreme Court through the Director General of the General Judiciary Agency had issued a letter No. 379/DJU/PS.00/3/2020 of 2020 concerning Teleconference Criminal Case Trials. Then at the same time, on March 27, 2020, the Attorney General has also issued the Attorney General's Letter of the Republic of Indonesia No.

¹Supardi, *Landasan Hukum Persidangan Perkara Pidana Secara Elektronik*, artikel, p. 1.

² Anggita Doramia Lumbanraja, *Perkembangan Regulasi dan Pelaksanaan Persidangan Online di Indonesia dan Amerika Serikat Selama Pandemi COVID19*, Jurnal Crepido Vol. 2 Nomor 01, Juli 2020, p. 52.

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B049/A/SUJA/03/2020 of 2020 concerning optimizing the Implementation of Duties, Functions and Authorities amid Efforts to Prevent the Spread of COVID-19. The letter addressed to the Heads of High Prosecutors throughout Indonesia emphasized several problems, including that the Prosecutor seeks to try criminal cases through video conference/live streaming facilities which in its implementation are coordinated with the Head of the District Court and the Head of Detention Center.

The policy regarding the trial by teleconference is a solution and innovation to solve the deadlock over the trial problems due to the COVID-19 pandemic. The Supreme Court has also issued several circular (SEMA) to serve as a reference for carrying out the duties of judges and other court employees during the pandemic. Starting from SEMA No. 1 of 2020 concerning Guidelines for the Implementation of Duties during the Prevention of the Spread of Corona Virus Disease 2019 (COVID-19) in the Supreme Court and Judicial Bodies Under it. Due to the condition not improving, the published SEMA has changes several times. Especially for the implementation of criminal case trials by virtual, the Supreme Court has issued Supreme Court Regulation (PERMA) No. 4 of 2020 about Administration and Trial of Criminal Cases in Courts Electronically. Previously in August 2019, the Supreme Court had issued PERMA No. 1 of 2019 about the Administration of Cases and Trials in Courts Electronically, but its application was more regulated in civil cases, state administration and military administration which were carried out based on the agreement of the parties.¹

Application of PERMA No. 4 of 2020 reaped responses from legal experts. Luhut MP Pangaribuan stated that there were several problems in electronic criminal case trials, such as the lack of fulfilment of the rights of the parties, the trial process, the implementation of COVID-19, the mechanism of procedural law has changed. In addition, there are still many parties who have not been able to use information technology and the availability of internet networks in certain areas when they want to conduct an electronic trial. Then the availability of the availability of electronic devices in each agency, the position, and the presence of related parties (witnesses). Therefore, according to Luhut, online criminal trials will continue to interfere with the principles of a fair trial.² In addition, there is also a view that the conduct of the trial electronically is regulated in the Criminal Procedure Code (KUHAP). As stated by the Attorney General of the Republic of Indonesia, ST Burhanuddin, who said that virtually it was a solution and innovation as well as a breakthrough in dealing with the COVID-19 pandemic. The Attorney General hopes that the virtual trial needs to be confirmed in the criminal procedure law.³

Electronic hearings have not been regulated in Law No. 8 of 1981 concerning the Criminal Procedure Code (KUHAP). This is understandable because at the time of drafting the Criminal Procedure Code, the technology can be use able as advanced as it is today. The Supreme Court's step in issuing PERMA to regulate the procedures and proceedings of the trial electronically is a progressive legal process.⁶ The legal rules issued by the Supreme Court and other law enforcement agencies have partially changed the pattern of examining criminal cases in courts which have been based on the Criminal Procedure Code. Among the problems that can be found as a form of deviation is that the conduct of the trial electronically changes the meaning of "courtroom" which has been described by the Criminal Procedure Code. Article 230 paragraph (1) of the Criminal Procedure Code states that "Trial hearings are held in the court building in the courtroom. Then the following verses describe the layout of the courtroom."

Article 230 of KUHAP above is understood that the trial is held in the courtroom court building. As for the implementation of criminal case trials which are conducted by virtual, the parties to the session can attend by virtual from other places. This can be seen in Article 2 paragraph (2) of the PERMA No. 4 of 2020 which basically explains that in certain circumstances the Judge / Panel of Judges because of their position or at the request of the Prosecutor and/or the Defendant or Legal Advisor may set a trial in the courtroom or courtroom virtually.

Furthermore, in the provisions of Article 160 paragraph (1) of KUHAP, it is required the physical presence of a witness in the trial room.⁴ In addition, there is also Article 185 paragraph (1) and Article 189 paragraph (1) of KUHAP which regulates the physical presence of the accused and witnesses in the courtroom. Article 185 paragraph (1) of KUHAP, "Witness testimony as evidence is what the witness stated in court." Meanwhile, Article 189 paragraph (1) of the Criminal Procedure Code states, "The defendant's statement is what the defendant stated at the trial about the actions he committed or which he himself knew or experienced himself."⁸

The application of the criminal trial as described above has given rise to critical views which contextually can be understood as an unavoidable necessity, especially in the COVID-19 pandemic situation where the interaction pattern is regulated by maintaining physical distance (physical distancing) and social distancing. Social (social distancing). However, objectively, a more in-depth academic study is needed to answer what is the ideal legal basis in the application of electronic criminal case trials, so as

³ Website: <https://www.hukumonline.com/>, accessed on July 7th, 2021.

⁴ Website: <https://www.hukumonline.com/>, accessed on July 7th, 2021.

⁵ Website: <https://independensi.com/>, accessed on July 7th, 2021.

⁶Supardi, *Op.cit*, p. 13.

⁷Putu Inten Andhita Dewi dan I Made Pujawan, *Teleconference Sebagai Bentuk Kemajuan Teknologi Dalam Hukum Acara Pidana Sebagai Salah Satu Cara Mendapatkan Kebenaran Materiil*, artikel di-download dari laman ojs.unud.ac.id, accessed on July 7th, 2021.

⁸Supardi, *Op.cit*, p. 2.

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not to cause disagreements regarding the validity of the trial process that has been carried out. Relevant to the foregoing, the author intends to conduct a study entitled "Juridical Analysis of Implementation of a Virtual Trials for Criminal Case during the COVID19 Pandemic."

II. PROBLEM FORMULATION

1. How is the implementation of a virtual trials for criminal case in the COVID-19 pandemic situation?
2. What is the juridical review of the implementation of a virtual trials for criminal case in the perspective of the laws and regulations in Indonesia?

III. RESEARCH METHOD

The type of research method chosen in this research is normative legal research. Although the emphasis is on normative legal research, to complete it, limited empirical research activities can be carried out which are intended to find out field practice on the problems that are the object of research. The approach taken in the use of this research method is a normative approach that combines a conceptual approach in the form of prevailing views and doctrines, a statutory approach by drawing conformity between regulations, sociological, philosophical, juridical and the case approach as a form of implementation or application of norms.

Sources of legal materials used in conducting this research include primary, secondary and tertiary legal materials. The primary legal material is in the form of statutory regulations. While secondary legal materials in the form of books, scientific works, journals, papers and writings from the internet related to research, and so on. Tertiary legal materials are complementary legal materials that provide instructions and explanations for primary and secondary legal materials,⁵ including the Kamus Besar Bahasa Indonesia (KBBI).

IV. THEORITICAL FRAMEWORK

In a legal research, of course, what is used as an analytical point of view are legal theories.⁶ In the context of this research, the theoretical basis are legal system theory, criminal justice system theory, and proportional justice theory.

1. Legal System Theory

The legal system is usually described in a set of rules that apply to a country. The rules are formed or made in the form of normative prescriptions, with the hope that they will function properly as a reference for human behavior in society, which if they can meet their expectations will enable the realization of an orderly and highly integrated society.⁷ This normative meaning is the objective meaning of an action, so that it has the character of law enforcement action, norm creation, or norm enforcement.⁸

In the legal system, it is possible for contradictions to occur, so provisions or principles are needed to determine which regulations are valid.⁹ Regarding this, there are several principles that can be used, such as the principle of *lex superior derogat legi inferiori*, *lex posteriori derogat legi priori*, or *lex specialis derogat legi generali*.¹⁰ This is in line with what was stated by Sudikno Mertokusumo regarding the principles in the statutory order, namely the *lex specialis derogat legi generali* principle, the *lex posteriori derogat legi priori* principle, and the *lex superiori derogat legi inferiori* principle.¹¹

The Implementation of virtual criminal case trials is essentially a policy caused by the influence of certain elements, including the COVID-19 pandemic. This encourages the issuance of policies or legal norms related to the implementation of the trial with a new mechanism. In this case, legal products that have been published by judicial institutions or other law enforcement institutions in the context of implementing virtual criminal case trials need to be observed whether they cause contradictions that cause conflicts of laws and regulations as described previously.

2. Criminal Justice System Theory

According to Remington and Ohlin, the criminal justice system is defined as the use of a systems approach to the mechanism of criminal justice administration and criminal justice as a system is the result of the interaction between legislation, administrative

⁹Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, (Jakarta: Raja Grafindo Perkasa, 2003), p. 23.

¹⁰Supandriyo, *Asas Kebebasan Hakim Dalam Penjatuhan Pidana: Kajian Komprehensif Terhadap Tindak Pidana Dengan Ancaman Minimum Khusus*, (Yogyakarta: Arti Bumi Intaran, 2019), p. 20.

¹¹Soetandyo Wignjosubroto, *Hukum yang Tak Kunjung Tegak: Apa Yang Salah dengan Kerja Penegakan Hukum di Negeri Ini*, tulisan tertuang di dalam buku "*Dialektika Pembaruan Sistem Hukum di Indonesia* (Jakarta: Sekretariat Jenderal Komisi Yudisial Republik Indonesia, 2012) p. 5.

¹²Hans Kelsen, *Teori Hukum Murni, Dasar-Dasar Ilmu Hukum Normatif*, (Bandung: Penerbit Nusa Media, 2015), p. 50.

¹³A. Mukthie Fajjar, *Negara Hukum dan Perkembangan Teori Hukum, Sejarah dan Pergeseran Paradigma*, (Malang: Intrans Publishing, 2018), p. 6.

¹⁴*Ibid*, p. 6-7.

¹⁵Sudikno Mertokusumo, *Mengenal Hukum, Sebuah Pengantar*, (Yogyakarta: Cahaya Atma Pustaka, 2019), p. 147.

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practices, and social attitudes or behavior.¹² Mardjono Reksodipoetro, as quoted by Romli Atmasasmita, provides limitations on the criminal justice system, namely the crime control system consisting of police, prosecutors, courts and correctional institutions.¹³ The criminal justice system will run effectively if law enforcement agencies (police, prosecutors, courts and correctional institutions) can work in an integrated.

In the context of conducting virtual trials, which are carried out in the current situation of the COVID-19 pandemic, integration between law enforcement officers is the key to success in resolving criminal cases. The legal rules that form the basis for conducting virtual trials are indispensable for the four law enforcement institutions, so that all four can work with a normative approach that is in harmony and rhythm.

3. Proportional Justice Theory

Another theory that is used as the basis for this research is the theory of proportional justice. Justice is the ultimate goal of law enforcement, otherwise Immanuel Kant's expression deserves to be stated, namely: "If justice is gone, there is no reason for a man to live longer on earth," therefore justice should be the true spirit of law enforcement. The parties who have legal cases or disputes over legal problems, both to fellow individuals and those related to the relationship between citizens and the state, the legal process through the courts is the most rational choice whose legality is recognized by the state. Through the legal process in court, it is hoped that the existence of justice can really be realized.¹⁴ The most basic demand of justice is to give equal treatment to all people. Therefore, the judge who carries out his duties or professions in the field of justice has the responsibility to uphold the law that is fair and true and always acts fairly and does not discriminate between people.¹⁵

In conducting research on the implementation of virtual criminal court proceedings, the theory of proportional justice can be used as an approach in reviewing the problems of this electronic trial. The basis for consideration is that the virtual trial has become an effective and efficient option in the context of accelerating the settlement of cases, especially in the COVID-19 pandemic situation, where courts are required to conduct trials in a simple, fast and low cost manner, but in practice it is still necessary to pay attention to human rights and obligations for each party involved in the trial proportionally based on the provisions of the applicable legislation.

V. DISCUSSION

1. Implementation of a Virtual Trials for Criminal Case in the COVID-19 Pandemic Situation

In principle, the trial of criminal cases is based on the provisions contained in the Criminal Procedure Code (KUHAP) as the basic rules in the conduct of the trial. This provision has been in effect since 1981 with the enactment of Law No. 8 of 1981 concerning the Criminal Procedure Code. The implementation of KUHAP in resolving criminal cases is a form of formal law enforcement that becomes a guide for law enforcement officers in efforts to enforce material criminal law. The definition of law enforcement itself in terms of its object includes both broad and narrow meanings. In a broad sense, law enforcement includes the values of justice contained in the sound of formal rules as well as the values of justice that live in society. In a narrow sense, law enforcement only concerns the enforcement of formal and written regulations. Therefore, law enforcement is translated into "law enforcement" in a broad sense and "rule enforcement" in a narrow sense.¹⁶

In relation to the conduct of the trial, the KUHAP regulates the stages of the trial in detail, including regulating the rights and obligations of the parties in the trial. The trial implementation is part of a law enforcement process through the courts. The stages in the trial of criminal cases in general are as follows:¹⁷

- a. Reading the indictment
- b. Exception by defendant or legal counsel (if any)
- c. Replik or response of the Public Prosecutor on the exception (if any)
- d. Interim decision on the exception filed by the defendant (if any). If the exception is accepted, the trial is declared complete, but if the exception is rejected, the trial continues with an examination of the main case (proof).
- e. The examination of witnesses began with witnesses from the public prosecutor as incriminating witnesses, followed by witnesses from the accused who became mitigating witnesses. Experts from both parties may also submit.
- f. Examination of the accused.

¹⁶Komisi Pemberantasan Korupsi, *Hukum dan Sistem Peradilan Pidana*, Buku Informasi Modul 02, p. 28

¹⁷Romli Atmasasmita, *sistem Peradilan Pidana Kontemporer*, (Jakarta: Kencana Prenada Media Grup, 2011), p. 2.

¹⁸M. Ali Zaidan, *Kontribusi Lembaga Kejaksaan Dalam Mempercepat Reformasi Peradilan*, (Jakarta: Sekretariat Jenderal Komisi Yudisial, 2007), p. 127.

¹⁹Keputusan Bersama Ketua Mahkamah Agung RI dan Ketua Komisi Yudisial RI Nomor 047/KMA/SKB/IV/2009, 02/SKB/P.KY/IV/2009 tentang Kode Etik dan Pedoman Perilaku Hakim, Komisi Yudisial RI, Jakarta, p. 11.

²⁰Bambang Waluyo, *Penegakan Hukum di Indonesia*, (Jakarta: Sinar Grafika, 2017), p.. 99.

²¹Website: <https://pn-karanganyar.go.id/>, accessed on July 9th, 2021.

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- g. Demand (requisitoir) by the public prosecutor
- h. Defense (pledooi) by the defendant or legal counsel.
- i. Replik or response to pledooi by the public prosecutor.
- j. Duplicate or response to the replica by the defendant or legal counsel.
- k. The reading of the verdict by the panel of judges

If the trial is carried out conventionally, then in every stage of the trial the parties are generally always presented to follow the course of the trial. Even if one of them is unable to attend the trial in court, the panel of judges can postpone the trial agenda to be continued on the agenda of the next trial. This is in accordance with the application of one of the principles contained in the Criminal Procedure Code, namely the presentation principle which states that courts examine criminal cases in the presence of the defendant, unless it is possible to examine without the presence of the defendant (in absentia).¹⁸ Examination of cases in court or also called the adjudication phase is carried out in the presence of the public prosecutor and the accused with or without being accompanied by a lawyer (advocate).²³

The provisions regarding the presence of the defendant in the trial according to the KUHAP can be seen in Article 154 especially in paragraph (3), paragraph (4) and paragraph (5) as follows:

- (3) If the defendant is summoned illegally, the presiding judge at trial postpones the trial and orders the defendant to be summoned again to appear on the next day of trial;
- (4) If the accused is found to have been legally summoned but does not appear at the trial without valid reasons, the examination of the case cannot be carried out and the presiding judge at the trial orders the defendant to be summoned again.
- (5) If in a case there are more than one defendant and not all of the defendants are present on the day of trial, an examination of the accused who is present may be carried out.

Even if the defendant is not present without a valid reason, the defendant can be presented forcibly as stipulated in Article 154 paragraph (6) that states the presiding judge at trial orders that the defendant who is absent without a valid reason after being legally summoned for the second time, is presented with forced at the next first trial. The presence of the defendant in question is the presence of the defendant in examining the case in the courtroom. The provisions of the court room itself have actually also been described in the provisions in the KUHAP, which are contained in Article 230.

Since the COVID-19 pandemic, the examination of criminal cases in courts has undergone significant developments and changes, at which time a virtual trial mechanism was introduced. The implementation of the trial of criminal cases electronically using the PERMA No. 4 of 2020 concerning Administration and Trial of Criminal Cases in Courts virtually. This PERMA, in principle, emphasizes that case examination as regulated in the Criminal Procedure Code is carried out according to the same stages. This PERMA also confirms that in principle the trial is carried out in the court room as stated in Article 2 paragraph (1) that "The trial is carried out in the court trial room in the presence of the public prosecutor and the defendant accompanied/unaccompanied by legal counsel, unless otherwise determined based on the provisions of the legislation." It's just that there are exceptions, that internal trials are conducted electronically when faced with certain circumstances.

Regarding the implementation of the trial virtually in certain circumstances, it is stated in Article 2 paragraph (2) PERMA No. 4 of 2020 which affirms that "In certain circumstances, both from the beginning of the case trial and when the case trial is in progress, the Judge / Panel of Judges because of their position or at the request of the Prosecutor and/or the Defendant or Legal Counsel may determine the trial to be conducted as referred to in paragraph (1). Paragraph (1) or electronically in the following manner:

- a. The Judge/Judge Council, Registrar/Substitute Registrar, and Prosecutor convened in the Court's courtroom, while the Defendant attended the trial from the prison where the Defendant was detained accompanied/without being accompanied by a Legal Counsel;
- b. The Judge/Judge Council, Registrar/Substitute Registrar meet in the Court's courtroom, while the Prosecutor attends the hearing from the Prosecutor's office, and the Defendant accompanied/without being accompanied by a lawyer attends the trial from the remand center/prison where the Defendant is detained;
- c. In the event that the place where the Defendant is detained does not have special facilities to attend the trial virtually, the Defendant accompanied/not accompanied by a lawyer attends the trial from the Prosecutor's office; or
- d. Defendants who are not detained may attend a hearing in the courtroom or from the Prosecutor's office accompanied/unaccompanied by a Legal Counsel or other places within or outside the jurisdiction of the Court adjudicating and approved by the Judge/Judge Council with a stipulation.

²²Komisi Pemberantasan Korupsi, *Buku Informasi – Modul Hukum dan Sistem Peradilan Pidana*, Modul 02, p. 30.

²³*Ibid*, p. 33.

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The conduct of an electronic hearing can only be carried out if it faces certain conditions as required in these provisions. Then what is meant by certain circumstances itself is stated in Article 1 No. 16 with the explanation that "Certain Circumstances are conditions that do not allow the process of delegating cases, case administration and trials to be carried out in accordance with the procedures and procedures regulated in the Procedural Law due to distance, natural disasters, disease outbreaks, other conditions determined by the government as an emergency, or other conditions that according to the Panel of Judges by stipulation it is necessary to conduct an electronic trial." By looking at this formulation, the current COVID-19 pandemic is included in the category of certain circumstances which is a strong reason for conducting a virtual trial.

The Supreme Court has full awareness of the COVID-19 situation that this nation is currently experiencing. In commemoration of the 75th anniversary of the Supreme Court of the Republic of Indonesia, On August 19, 2020, the Chief Justice of the Supreme Court gave a mandate by stating that "The COVID-19 pandemic is a matter of health and safety of the human soul that has an impact on all aspects of life, including aspects of law enforcement and justice. At the same time all countries are struggling to prevent the wider spread of COVID-19, curing sick patients and reduce the death rate from COVID-19. We also have to fight so that fair law enforcement continues while providing protection for human rights. For this reason, the Supreme Court has responded to this pandemic based on the principle that people's safety is the highest law (*salus populi suprema lex asto*)."¹⁹ The statement by the Chief Justice of the Supreme Court is also an affirmation that COVID-19 is a condition that makes the reason for implementing a virtual court system to maintain human safety as well as the principle of *salus populi suprema lex asto*. Although COVID-19 poses a threat to human safety, it is not a reason to stop the ongoing legal process. In fact, cases that are constrained by certain circumstances require a quick resolution while respecting human rights. In addition, there is a judicial principle that must be upheld that the trial is carried out simply, quickly and at low cost as stated in Article 2 paragraph (4) of Law No. 48 of 2009 concerning Judicial Power.

The implementation of a virtual trial does not always run smoothly, because there are still parties who object to the implementation of the online trial. One example is the examination of a criminal case No. 221/Pid.B/2021/PN.Jkt.Tim with the Defendant Mohammad Rizieq Shihab (MRS) in which the Defendant refused to undergo a virtual (online) trial. Although initially the trial was conducted electronically, in the middle of the trial process the Defendant raised an objection to the online trial. The defendant gave several reasons for refusing to conduct an online trial.²⁰ First, online courts are prone to disturbances, ranging from unclear voices to dotted images that are considered prone to sabotage. This is considered detrimental to the Defendant. Second, if the reason is obeying health protocols, the Defendant is ready to apply strict protocols starting from keeping a distance, wearing masks, and others. Third, the Defendant compared the trial of the bribery case with the Defendant Inspector General Napoleon Bonaparte which was conducted directly in the courtroom, thus assessing the discrimination in treatment against him. Fourth, the Defendant stated that the Criminal Investigation Office Police (Bareskrim) was not a courtroom according to the KUHAP. Fifth, the trial of Defendant HRS was highlighted nationally and internationally and the Defendant did not want Indonesian law to be tarnished because of the debate over the presence of the Defendant at the trial. The Defendant's refusal was finally granted by the Panel of Judges, so that the next trial was carried out offline.²¹ Through a press release with No. PR-254/89/K/3/03/2021 the Attorney General's Office stated that the virtual trial of the health quarantine case against the Defendant Mohammad Rizieq Shihab alias Muhammad Rizieq and his friends was declared revoked and the Public Prosecutor would carry out a judge's decision regarding offline trial.²⁷

The case of the defendant HRS, there are still several other criminal cases that are carried out offline, including the trial with Defendant I Gede Aryastina alias Jerinx for issuing the statement "IDI Kacung WHO." There was also a trial in the case of Djoko Tjandra and his friends, one of the defendants was Inspector General Napoleon Bonaparte. Then the trial with the Defendant Syahganda Nainggolan in the case of spreading false news related to the Job Creation Act (Omnibus Law) which was tried at the Depok District Court.²²

Although in practice there are rejections of virtual trials, most of them continue to run according to PERMA. In a written statement submitted by the Attorney General, ST Burhanuddin, stated that within one year of the COVID-19 pandemic, the prosecutor's office had conducted 573,953 online trials.²³ This No. illustrates that the electronic trial process is an effective option for resolving criminal cases during the COVID-19 pandemic.

²⁴Mahkamah Agung, *Optimalisasi Peradilan Modern Berkelanjutan Merespon Pandemi COVID-19*, Amanat Ketua Mahkamah Agung Republik Indonesia Pada Hari Jadi Mahkamah Agung RI Ke-75 19 Agustus 2020, p. 2.

²⁵ Website: <https://kumparan.com/kumparannews/>, accessed on July 10th, 2021.

²⁶ Website: <https://nasional.kompas.com/>, accessed on July 10th, 2021.

²⁷ Website: <https://www.kejaksaan.go.id/>, accessed on July 10th, 2021.

²⁸ Website: <https://kumparan.com/kumparannews/>, accessed on July 10th, 2021.

²⁹ Website: <https://nasional.kompas.com/>, accessed on July 10th, 2021.

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2. Juridical Analysis of the Implementation of Virtual Trials for Criminal Case in the Perspective of Indonesian Laws and Regulations

So far, the virtual trial of criminal cases is a breakthrough that is quite innovative to ensure that the criminal justice process continues. The COVID-19 condition had become a dilemmatic problem faced by law enforcers, because the special rules that underlie the conduct of the trial virtually (online) had not been prepared beforehand. The provisions regarding this electronic trial have not yet been regulated in the Criminal Procedure Code. Law enforcement institutions have tried to make a mutual agreement that the implementation of criminal case investigations will continue, because it involves human rights that must be prioritized. On April 13, 2020, a Cooperation Agreement was made between the Supreme Court, the Supreme Attorney's Office and the Ministry of Law and Human Rights No. 402/DJU/HM.01.1/4/2020, No. KEP-17/E/Ejp/04/2020, No. PAS-08.HH.05.05 of 2020 concerning the Implementation of Trials through Teleconference. Prior to this cooperation agreement, the Supreme Court through the Director

General of the General Judiciary Agency had issued a letter No. 379/DJU/PS.00/3/2020 of 2020 concerning Teleconference Criminal Case Trials. Then at the same time the Attorney General has also issued the Attorney General's Letter of the Republic of Indonesia No. B-049/A/SUJA/03/2020 of 2020 concerning Optimizing the Implementation of Duties, Functions and Authorities Amid Efforts to Prevent the Spread of COVID-19.

In its development, the Supreme Court subsequently issued PERMA No. 4 of 2020 concerning Administration and Trial of Criminal Cases in Courts Electronically which is the basis for conducting electronic hearings. The effort taken by the Supreme Court by issuing PERMA is a way out in the midst of a legal vacuum regarding remote trials. The Institute for the Study and Advocacy of Judicial Independence (LeIP) mentioned several considerations that made the reason for the need for the PERMA. First, the criminal trial must still be carried out. If the trial is postponed until the pandemic period is over, it will be feared that the prison term will run out and the defendant must be legally released from detention before the trial starts again. Second, criminal trials in courthouses are very risky as a means of spreading the COVID-19 virus. Third, the Supreme Court, the Attorney General's Office and the Ministry of Law and Human Rights have agreed to start conducting criminal trials by teleconference. Fourth, an electronic criminal trial guide is needed so that the implementation is uniform and fulfills the rights of a fair trial. Fifth, there are natural disasters and other emergencies.²⁴

The regulation regarding the electronic trial actually existed before the COVID-19 outbreak, namely with the issuance of PERMA No. 1 of 2019 concerning Electronic Case Administration and Trial in Courts. This PERMA replaces and enhances PERMA No. 3 of 2018 concerning Electronic Case Administration and Trial in Courts. But PERMA No. 1 of 2019 only applies to types of civil cases, religious civil cases, military state administration, and state administration.²⁵ The PERMA which specifically regulates the trial of criminal cases electronically is PERMA No. 4 of 2020.

The issuance of PERMA No. 4 of 2020 had raised questions about its legality. At least this was a problem during the examination of case Number 221/Pid.B/2021/PN.Jkt.Tim with the Defendant Mohammad Rizieq Shihab (MRS) who expressed his objection to being examined online where one of the reasons was that it was against the KUHAP because of his position. at the time the trial was in the Bareskrim and according to him it was not a courtroom as regulated in the KUHAP. The defendant's objection may refer to the provisions of Article 230 of the KUHAP which in detail describes the courtroom in the court itself. While in Article 1 point 4 PERMA No. 4 of 2020 defines an electronic courtroom as a courtroom in a court which includes the prosecutor's office, the detention center/prison, or other places determined by the judge/judge panel. From here, it seems as if there is a conflict, or at least, there is a shift in the scope of the existing regulations in the KUHAP with the existence of the PERMA.

The next discussion concerns the legality of PERMA itself in the legal structure in Indonesia. Law No. 12 of 2011 concerning the Establishment of Legislations states the types and hierarchies of laws and regulations in Indonesia. Article 7 paragraph (1) of this law states that the types and hierarchies of statutory regulations consist of:

- a. The 1945 Constitution of the Republic of Indonesia (UUD 1945);
- b. Decree of the People's Consultative Assembly (Ketetapan MPR);
- c. Laws/Government Regulations in Lieu of Laws (UU/Perppu);
- d. Government regulations (Peraturan Pemerintah);
- e. Presidential decree (Peraturan Presiden);
- f. Provincial Regulations (Peraturan Daerah Provinsi); and
- g. Regency/City Regional Regulation (Peraturan Daerah Kabupaten/Kota)

³⁰Website: <https://leip.or.id/infografis-perma-nomor-4-tahun-2020-tentang-administrasi-dan-persidangan-pidana-secara-elektronik/>, accessed on July 11th, 2021.

³¹Dian Cahyaningrum, *Persidangan Secara Elektronik Pada Masa Pandemi COVID-19*, Jurnal Info Singkat diterbitkan oleh Pusat Penelitian Badan Keahlian DPR RI Vol. XII, No. 14/II/Puslit/Jul/2020, p. 2-3.

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The provisions above do not mention the position of PERMA as part of the hierarchy of laws and regulations. However, in the provisions of Article 8 paragraph (1) it is stated that "Types of laws and regulations other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, the People's Representative Council, the Regional Representatives Council, the Supreme Court, the Constitution, the Supreme Audit Agency, the Judicial Commission, Bank Indonesia, the Minister, agency, institution, or a commission of the same level established by law or by the government by order of law, the Provincial House of Representatives, the Governor, the District/Regency Regional House of Representative City, Regent/Mayor, Village Head or equivalent." Furthermore, in paragraph (2) it is stated that "The statutory regulations as referred to in paragraph (1) are recognized for their existence and have binding legal force as long as they are ordered by higher laws and regulations or are formed based on authority."

Based on the above provisions, it can be said that PERMA is part of the type of legislation recognized in Indonesia. Regarding the authority of the Supreme Court itself in Article 24A paragraph (1) of the 1945 Constitution it is stated that "The Supreme Court has the authority to judge at the level of cassation, examine statutory regulations under the law against the law, and have other powers granted by law. Other powers that are intended include carrying out the regulatory function (*regelende functie*) as stated in Article 79 of Law Number 14 of 1985 concerning the Supreme Court which states that "the Supreme Court may further regulate matters needed for the smooth administration of justice if there are -things that have not been sufficiently regulated in this law."

The authority in the formation of this regulation is the attribution of power possessed by the Supreme Court based on the law. Rosjidi Ranggawidjadja explained that the attribution of power (*attributie van rechtsmacht*), especially the attribution of power to form laws and regulations (*attributie van wetgevendemacht*) is often defined as the granting of authority to certain agencies or institutions or state officials, either by the constitution or by law. In this case, it is in the form of the creation of new authority for and on behalf of the given authority. With the granting of such authority, it gives birth or gives rise to a new authority and independent responsibility.²⁶ In the context of PERMA, the regulation of the Implementation of virtual trial of criminal cases through PERMA is the authority of the Supreme Court whose authority has been given by the highest legal rule, namely the Constitution, so that PERMA which regulates electronic trials is recognized and has binding legal force. This is in line with Indriyanto Seno Adji who said that PERMA has binding legal force, is legitimate and does not deviate from the principle of *lex superior derogat legi inferiori*.²⁷ PERMA is a written regulation made by the Supreme Court to fill legal gaps or gaps in the judiciary, which is generally binding and has binding legal force.²⁸

This virtual trial of criminal cases is very appropriate if it is linked as a basis for taking a policy in the midst of the COVID19 outbreak, because the law that will be applied really protects the interests of the people. Exactly as the adage conveyed by Cicero, namely *salus populi suprema lex esto*, which means that the safety of the people is the highest law.²⁹³⁰ The implementation of an electronic trial (e-court) in Indonesia itself was first carried out in 2002. The Supreme Court has given permission for former President BJ Habibie to testify by teleconference in the case of irregularities in non-budgetary funds from the Logistics Affairs Agency (Bulog) on behalf of the defendants Akbar Tanjung and Rahadi Ramelan.³¹

The mechanism for the trial of criminal cases virtually initiated by the Supreme Court is also carried out by other countries, including the United States. The United States Courts in a release dated April 3, 2020 stated "media organizations and the public will be to access certain criminal proceedings by videoconference or teleconference for the duration of the coronavirus (COVID19) crisis, according to new guidance provided to the federal court."³⁷ Virtual trials in the United States have actually been conducted since 1998. The Administrative Office of the United States Courts reports that dozens of courts in various states have used information technology in the form of video conferencing or electronic trials (teleconference).³² However, since the COVID-19 pandemic, the United States has made adjustments to the practice of criminal case trials. The United States government has set the trial to be conducted virtually amid the spread of the virus. This is in accordance with the results of the One Hundred Sixteenth Congress of The United States of America on January 3, 2020 in Washington DC. During the congress, the United States government enacted "The Coronavirus Aid, Relief and Economic Security Act (CARES Act), which among other things regulates

³²Radita Aji, *Batasan Kebijakan Pembentuk Undang-Undang (Open Legal Policy) Dalam Pembentukan Peraturan Perundang-Undangan Berdasarkan Tafsir Putusan Mahkamah Konstitusi (Limit to Open Legal Policy in Legislation Making Based on Constitutional Court Decision)*, Jurnal Legislasi Indonesia Vol. 13 No. 02 – Juni 2016, p. 112.

³³Panji Purnama, *Penerapan e-Court Perkara Pidana Sebagai Salah Satu Upaya Terwujudnya Integrated Judiciary Dalam Sistem Peradilan Pidana di Indonesia*, Jurnal Rechts Vinding Volume 10 Nomor 1, April 2021, p. 102.

³⁴Budianto Eldist Daud Tamim, *Tinjauan Yuridis Terhadap Kedudukan Peraturan Mahkamah Agung (PERMA) Dalam Hierarki Peraturan Perundang-Undangan di Indonesia*, Jurnal Lex Administratum, Vol. VI No. 3/Jul-Ags/2018, p. 115.

³⁵Wahyu Iswanto, *Persidangan Pidana Secara Online, Respon cepat MA Hadapi Pandemi COVID-19*, Jurnal Selisik Volume 6 Nomor 1, Juni 2020, p. 60

³⁶Panji Purnama, *Op.Cit.*, p. 108.

³⁷Wahyu Iswanto, *Loc.Cit.*

³⁸Panji Purnama, *Op.Cit.*, p. 109.

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teleconference trials.³³ The same thing was done to the Dutch government, where for the implementation of the legal process an Explanation Memorandum on Temporary COVID-19 Justice and Security was issued (Memorandum of Explanation of the Temporary Law on Security Justice for COVID-19). Point 8 explains that the application of video conferencing is aimed at the process of examining, interrogating or questioning suspects or witnesses.³⁴

If we compare between the two countries above, then Indonesia has a different basis for setting up an electronic trial, because the legal basis is limited to PERMA No. 4 of 2020, while the United States uses The Coronavirus Aid, Relief and Economic Security Act (CARES Act) and the Netherlands uses the Temporary COVID-19 Justice and Security. By looking at the implementation of the legal basis in other countries carried out by law, the author is of the opinion that the PERMA that has been issued by the Supreme Court should be upgraded to a law by going through the legislative process as regulated by law. This means that PERMA is a transitional policy made to cover regulatory deficiencies or legal vacuums that occur in Indonesia, especially those caused by the COVID-19 pandemic. Even though PERMA is a legal product that has strong legality, its position cannot be equated with the law. PERMA is not specifically mentioned in the hierarchy of laws and regulations as Article 7 of Law no. 12 of 2011, but only referred to as an internal legal product of the institution.³⁵ To provide a stronger legal basis regarding electronic trial arrangements, in the future it must be formulated into the criminal procedure law, either in the form of revisions or replacements of the current KUHAP.³⁶ In this case, the existing regulations in PERMA can be adopted to be included in the revised KUHAP material which in recent years has become an effort by the government and parliament to restructure the regulations regarding criminal procedural law in Indonesia.

During the process of revising the Criminal Procedure Code has problems because the selection and discussion of a proposed law must go through a political process in parliament, then the Supreme Court can actually submit the PERMA material to the President to be proposed as a Perppu even though in the end it remains a law. It is entirely up to the President to approve or reject it. This choice is a rational solution to strengthen the juridical position of the electronic trial arrangement, so as not to cause legal disputes with the Criminal Procedure Code as the basis for conducting trials that have been running so far.

CONCLUSIONS

In principle, the trial of criminal cases is based on the provisions contained in the Criminal Procedure Code (KUHAP) as the basic rules in the conduct of the trial which regulates the implementation of conventional trials (directly face to face). However, since the COVID-19 pandemic, the examination of criminal cases in court has changed, namely by implementing a virtual or electronic trial mechanism. The implementation of the trial of criminal cases electronically using the basis of PERMA No. 4 of 2020 concerning Administration and Trial of Criminal Cases in Courts Electronically.

PERMA No. 4 of 2020 is a legal breakthrough made by the Supreme Court to address the legal vacuum due to the COVID19 pandemic. It's just that the position of PERMA in the hierarchical structure of laws and regulations is not specifically mentioned in Article 7 paragraph (1) of Law No. 12 of 2011. PERMA is only limited to institutional legal products as referred to in Article 8 paragraph (1) of Law No. 12 of 2011 whose position is under the law. In other countries, such as the United States and the Netherlands, which apply these electronic criminal court arrangements on a legal basis, namely The Coronavirus Aid, the Relief and Economic Security Act (CARES Act) for the United States and the Temporary COVID-19 Justice and Security Act for the Netherlands. Learning from there, higher legal arrangements are needed related to virtual trials in Indonesia. PERMA is a transitional legal product whose material can be proposed to become law through a process of law revision (revision of the KUHAP) or through a Perppu.

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³⁹*Ibid*, p. 110.

⁴⁰*Ibid*, p. 111.

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