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Study of Electronic Judgment Based on Digital Constitutionalism

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ABSTRACT: This study aims to see and describe the practice of electronic justice in Indonesia based on the Digital Constitutionalism approach, as a concept that tends to be new, Digital Constitutionalism in its development also accommodates the due process of online in scientific discourse. This research is a normative legal research using a statutory and conceptual approach. Based on the results of the study, it is known that the practice of electronic justice in Indonesia is currently still using procedural law guidelines which are basically conventional procedural law plus the internal regulations of the judiciary. Meanwhile, the development of electronic justice that utilizes technological advances is not enough to use the conventional procedural law base in its implementation because it is annulled yet oriented to the protection of Human Rights as conceptualized in the Digital Constitutionalism discourse, which includes the due process of online. So the regulation of electronic justice in the future must be based on Digital Constitutionalism, which includes knowing the due process of online by prioritizing the protection of human rights in a virtual scope from the provider of electronic judicial technology facilities.

KEYWORDS- Electronic Justice, Digital Constitutionalism, Due Process of Online, Human Rights, Indonesian Legal System

I. INTRODUCTION

The classic adage states *"ubi societas, ibi ius"*, where there is society, there must be law. From this adage, it is read that the law always goes hand in hand with the development of society. Paul Scholten stated that the legal system is an open system, namely a system which by its original nature is not finished and will not be finished, because the system is the basis of all decisions that add new things to the system (Scholten, 1993:103). "law is the same society", so "new social relations will form new regulations" (Apeldoorn, 1986:18). Thus, the opinion that the law always lags behind the pace of community development *(het recht hinkt achter de feiten aan)* must be interpreted as a written law (rules, statutory regulations), which indeed becomes a static document once the hammer is ratified. The law as principles and moral values will always move dynamically following the development of society.

The rate of development of information technology in the Uber Civilization certainly has an effect on the State Administrative Court. Previously, case administration was carried out manually which took a long time and had high costs, information technology has accelerated, simplified and reduced the cost of administering cases within the State Administrative Court. If in the beginning it was a change from a manual typewriter to a computer, now it has developed further towards digitization in the execution of judicial tasks. For case handling, there is a Case Investigation Information System (SIPP); for personnel administration, there is a Personnel Information System (SIKEP); for supervision, there is a Surveillance Information System (SIWAS); as well as various other information systems developed by the Work Units at the First Level and Appeals such as the Integrated Public Service (Excellent Court Services) developed by various judicial systems, especially in Indonesia.

The idea of using information technology for judicial tasks is currently growing rapidly towards Electronic Courts (e-Court), where information technology is utilized in case administration and the implementation of procedural law. In comparison, in Australia there is already an Online Dispute Resolution, where litigants can settle their disputes online (Sudarsono, 2018). In the United States, since 1999, Public Access to Electronic Records (PACER) has been initiated, there is also a Case Management and Electronic Case Files (CM/ECF) system, and various uses of information technology to support judicial tasks. In India, The Supreme Court of India on May 10, 2017 has launched the Integrated Case Management Information System (ICMIS), and will soon launch an information system for handling crimes that is integrated with the Indian Police in the form of Crime and Criminal Tracking Network and Systems (CCTNS) (Gupta et al., 2014; Yadav et al., 2020).

In the Indonesian context, this has indeed emerged and is practiced in various judicial practices, both at the regional court level and at the Supreme Court (MA) or the Constitutional Court (MK) and even in several institutions there are internal regulations that were formed to accommodate this. It's just that there are still some basic questions from these provisions, for example, what is the legal basis for the implementation of the digital justice practice? Is it enough just to be regulated at the level of internal regulations of the Supreme Court or the Constitutional Court? It is important to question this, because talking about the judicial system cannot be separated from the Due Process of Law which basically collides itself with human interests or the human rights of the community (Reksodiputro, 1994:27).

Thus the discourse on the technological approach in law is indeed quite fast in tandem with the development of technology itself. In the context of judicial institutions that use an electronic technology approach in carrying out judicial duties, it is said that this approach is very useful in preventing corruption and maladministration in the judiciary. For example, the Application Directory of Decisions, where the Decisions of Judges/High Judges/Supreme Judges are published and announced online have been proven to reduce corruption that is carried out by utilizing decision information. Likewise, the Information and Case Investigation System (SIPP) application is very helpful for judicial officials in completing case administration, so that there are no more maladministration complaints such as missing case files, unclear trial dates and events, to very long case minutes.

But that's not enough, today's world has also changed along with technological advances. One of them is the emergence of the Digital Constitutionalism discourse in the development of world constitutional law, which is often referred to as new constitutionalism (Celeste, 2022). Where the most substantive thing in the discussion about Digital Constitutionalism is the Due Process Online, which is conceptually different from the principle of Due Process of Law in general. The question then is whether the practice of electronic justice regulated in the current internal regulations of the judiciary has prioritized and guaranteed the Due Process Online as stated in the Digital Constitutionalism discourse?

II. RESEARCH METHODS

This research is a normative legal research using a statutory approach and a conceptual approach (Saputra et al., 2021). Conceptually what is meant in writing this law is the concept of Digital Constitutionalism which is developing in the global constitutional law community (Efendi & Ibrahim, 2018), then the concept is dissected in such a way in order to see whether the current practice of electronic justice in Indonesia is based on the concept of Digital Constitutionalism. Normative Legal Research is a legal research conducted by examining library materials or secondary data (Widodo, 2022). Normative legal research is also known as doctrinal legal research. Normative legal research is a process to find a rule of law, legal principles, and legal doctrines in order to answer the legal issues faced. In this type of legal research, law is often conceptualized as what is written in legislation or the law is conceptualized as a rule or norm which is a benchmark for human behavior that is considered appropriate.

III. RESULTS AND DISCUSSION

A. Due Process of Online

Article 28D paragraph (1) of the 1945 Constitution states that everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law. This article shows two important principles, namely due process of law and the principle of equal treatment before the law. Mardjono Reksodiputro stated that the term due process of law is simply translated with the term fair legal process. The opposite of the due process of law is an arbitrary process, for example, only based on the power of law enforcement officials. Due process of law is often misinterpreted in its meaning, this is because the meaning and nature of a fair legal process is not only in the form of the application of law or legislation which is assumed to be formally fair, but also contains guarantees of the right to independence of a citizen (Reksodiputro, 1994).

To create a due process of law, judicial freedom is very important. The judiciary must be completely free from all interests including from the influence of certain castes, classes, or groups. The absence of judicial freedom causes the due process of law to be meaningless. Judicial freedom requires an honest and impartial trial, judges in carrying out their profession do not discriminate between people (Hamzah, 1988:120). In the context of the Criminal Procedure Code, the implementation of the concept of due process of law, according to Reksodiputro, is reflected in the principles of the Criminal Procedure Code, namely general legal principles and specific legal principles.

General legal principles include; a) equal treatment in public without any discrimination; b) presumption of innocence; c) the right to obtain compensation (compensation) and rehabilitation; d) the right to obtain legal assistance; e) the right of the defendant's presence in court; f) free trial and carried out quickly and simply; g) courts that are open to the public. Meanwhile, specific legal principles include: (1) violations of individual rights (arrest, detention, search, and confiscation) must be based on

law and carried out with a (written) warrant; (2) the right of a suspect to be informed of his suspicions and charges against him; and (3) the obligation of the court to control the implementation of its decisions.

The due process of law contains two important principles, namely the principle of equal treatment before the law (equality before the law) and the principle of presumption of innocence (Tahir, 2010:50). The principle of equal treatment before the law means that every citizen, including the suspect/defendant, must be given the same opportunity to exercise the rights that have been determined by law, such as the right to obtain legal assistance, the right to provide information legally. Freedom and the right to be tried by an honest and impartial tribunal (Phillipson et al., 2014). While the principle of presumption of innocence means that every suspect and defendant must be considered innocent before his guilt is proven in court and stated in a decision that has permanent legal force (Supardjaja, 2002:284).

Simply put, the purpose of the due process of law is to minimize the arbitrariness of the state against the community in the judicial process because in the conventional judicial process, especially in the scope of law with a public dimension, the state vis a vis the community.

This is different from the due process of online, the principle that was born in conjunction with the Digital Constitutionalism discourse states that in a digital society, the state is not the only dominant actor whose power can directly affect individual rights. Private companies creating, managing and selling digital technology products and services are the new Leviathan of the digital age. Laidlaw, speaking specifically about Internet Service Providers, and specifically about search engines, aptly defines these actors as 'online gatekeepers' (Laidlaw, 2008). In the case of search engines, their power to control access to information becomes clear. Removing, or simply downgrading search results is tantamount to being condemned to digital non-existence, consequently limiting an individual's right to access publicly available information.

More generally, however, Laidlaw's description fits well across categories of tech companies. By controlling access to digital technology, they can shape the way individuals use these instruments. In this way, they have the potential to influence the exercise of our basic rights, not much different from how nation-states do (Jørgensen & Pedersen, 2017; Suzor, 2019; MARONI, 2021).

In this context, there is a debate about whether, to what extent, and how to apply the existing constitutional standards governing the exercise of state power to these private actors (technology companies) (Olsen et al., 2021). As seen in the previous chapter, the constitutional system emerged to limit the power of the dominant actor and to protect the basic rights of individuals. Their historical mission, however, aims to overcome the power of the state. Existing constitutional norms do not articulate principles to limit the power of private entities. However, given the similarities between the ways in which the state and private companies can affect individual rights, one is intellectually tempted to apply these principles to the private sector as well, especially the private sector whose performance orientation is towards the basic principles of society.

From a legal point of view, private actors are not formally bound by international human rights (Celeste, 2022). It is the duty of the state to ensure that these rights are also protected by private entities. In 2008, UN Special Representative John Ruggie issued a document setting out guiding principles on business and human rights, called the 'Ruggie principles'. This text not only reaffirms the obligation of the state to prevent human rights violations committed by private actors but also vigorously affirms the responsibility of private entities to protect human rights. Although this document is not legally binding and therefore imposes only a moral obligation on private actors, it witnessed the start of a legal reaction against the power of private entities.

Such is the difference between the principle of due process of law and due process of online, where in the due process of online the view is that the private sector is also considered as a party that can commit acts of human rights violations through their performance orientation orientation. One of the electronic service providers from the judicial practice is a private party, for example will the privacy of justice seekers be protected by these service providers? This is important to discuss because it concerns the human rights of justice seekers.

B. Electronic Judicial Arrangements Based on Digital Constitutionalism

The current practice of electronic justice in Indonesia is basically still using the conventional procedural law base, and usually additional arrangements are formed at the level of the internal rules of each institution that still lack attention to the concept of due process of online which in fact threatens the basic rights of justice seekers. In more general judicial practice, for example, since the issuance of Supreme Court Regulation Number 1 of 2019 concerning the Administration of Cases and Trials in Electronic Courts (Supreme Court Regulation Number 1 of 2019), through the Supreme Court Regulation not only case registration can be carried out electronically. Online or known as e-court, but trials can also be conducted electronically, namely e-litigation (Putra, 2020).

Therefore, it is time for the practice of electronic justice in Indonesia to be regulated in rules at the level of separate legislation with content that pays attention to the provisions in the due process of online. This can be taken by imitating the

electronic judicial arrangement in the United States, which has contained provisions regarding electronic justice through rules at the level of statutory regulations. In the United States, the implementation of electronic trials in the United States has been carried out since 1998. The Administrative Office of the United Stated Courts reports that there are dozens of courts in various states of the country that have used information technology in the form of video teleconferences or electronic trials. The teleconference trial was carried out for various trial agendas, for example: giving testimony, trial examination by judges, and counseling. The terms used regarding electronic justice in the USA are Virtual Courts, Virtual Courtrooms, and Virtual Courthouses (Veselovska et al., 2021).

The development of justice in the United States is influenced by the dissatisfaction of justice seekers with the existing legal system, because seeking justice takes a long time and is expensive. Therefore, the Federal Civil Justice Reform Act 1990 carried out judicial reform with the concept of digitization after the creation of computer chips. The use of information technology makes the judiciary continue to grow rapidly (Adisti et al., 2021).

The first state to conduct a cyber court trial, was the state of Michigan. Based on House Bill 4140 which was approved in November 2001 and passed as Public Act 262 of 2001 on January 9, 2002, cyber court is intended for cases relating to the use of technology and high-tech business, in which cases are more effectively tested. And tried through computer media rather than the method of examination in the courtroom. Parties such as jurors, defendants, lawyers and judges do not have to be in the courtroom but can use video conference as a medium of communication in the trial examination process.

IV. CONCLUSIONS

The practice of electronic justice in Indonesia currently still uses procedural law guidelines which are basically conventional procedural law coupled with internal judicial regulations, while the development of electronic justice that utilizes technological advances is not sufficient to use conventional procedural law bases in its implementation because it is annulled and has not been oriented to the protection of rights. Human Rights as conceptualized in the Digital Constitutionalism discourse, which includes the due process of online. So the regulation of electronic justice in the future must be based on Digital Constitutionalism, which includes knowing the due process of online by prioritizing the protection of human rights in a virtual scope from the provider of electronic judicial technology facilities.

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