

Electronic Criminal Case Trial from the Perspective of Justice and Legal Certainty

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Abstract

The Covid-19 pandemic that hit Indonesia has caused major changes in the legal world. The enactment of social distancing/physical distancing rules and Large-Scale Social Restrictions (PSBB) ultimately forced the Supreme Court to make a legal breakthrough by issuing PERMA No. 4 of 2020 concerning the Administration and Trial of Criminal Cases in Courts Electronically, the purpose of which is to fill the legal vacuum in the Criminal Procedure Code and guarantee the right of the accused to immediately obtain legal certainty for the crime he is accused of through trial without undue delay, with fair treatment and impartiality (fair trial), which is a guarantee for the protection of the rights of everyone in the judicial process. PERMA No. 4 of 2020 concerning the Administration and Trial of Criminal Cases in Courts Electronically guarantees a fair and impartial electronic trial that meets the principles of justice and legal certainty, by clearly stipulating the rights of defendants in electronic criminal case trials, namely the right to obtain legal assistance, the right to defend, the right to be tried in a court session which is open to the public, and the right to immediately receive an examination in court for legal certainty. Then to fill the legal vacuum in the Criminal Procedure Code, and in the future, electronic criminal case trials must be strictly regulated to become the new norm in the revision of the Criminal Procedure Code.

Keywords

covid-19 pandemic; perma No. 4 of 2020 concerning administration; trial of criminal cases in courts electronically; legal justice; legal certainty



I. Introduction

COVID-19 is a global health problem including Indonesia. This was initiated from the information of the World Health Organization (WHO) on 31 December 2019 there was a case of a cluster of pneumonia with a new etiology in Wuhan City, Hubei Province, China and later expanded beyond China. On 30 January 2020, COVID-19 was set to become the public health Emergency of International Concern (PHEIC). On 11 March 2020, COVID-19 was designated as a pandemic. (Susilawati et al, 2020)

The Emergence of CoronaVirus Disease sudden(Covid-19) in the city of Wuhan, Hubei Province, China in December 2019, has now become a disease outbreak that has spread and infected millions of people in various countries including Indonesia. Various attempts have been made by the Government of Indonesia to break the chain of Covid-19, among other things, determine the status of a particular state of disaster emergency epidemic from coronavirus, implementing policies social distancing/physical distancing and the implementation of Large-Scale Social Restrictions (PSBB). The implementation of these rules and policies during the Covid-19 pandemic has not only had a major impact on social and economic life in the community, but has also hampered the law enforcement process in courts, which had to be postponed. The occurrence of a catastrophic disease outbreak due to Covid-19 and the rapid development of information and communication

technology in the era of the Industrial Revolution 4.0 at this time, of course, had never been realized and thought of by the compilers/makers of the Criminal Procedure Code (KUHAP) at that time. Thus, when law enforcement activities in court had to be delayed due to the enactment of social distancing/physical distancing/PSBB rules or, the Criminal Procedure Code was unable to provide an alternative solution for the smooth running of the trial in this situation because there was a legal vacuum in it.

As a solution to these problems, on March 23, 2020, the Supreme Court of the Republic of Indonesia issued a Circular Letter of the Supreme Court of the Republic of Indonesia Number 1 of 2020 concerning Guidelines for the Implementation of Duties During the Prevention of the Spread of CoronaVirus Disease 2019 (COVID-19) within the Supreme Court of the Republic of Indonesia. and the Judicial Body Under it as last modified by SEMA No. 6 of 2020 concerning the Working System of the Supreme Court and Judicial Bodies Under the New Normal Order, which was followed up by the Letter of the Director General of the General Court of Justice at the Supreme Court of the Republic Indonesia Number: 379/DJU/PS.00/3/2020 dated 27 March 2020 regarding Criminal Case Trials Teleconference addressed to the Heads of High Courts and Heads of District Courts throughout Indonesia, the contents of which are to say that during the emergency period of the disease outbreak due to the coronavirus, criminal case trials can be conducted remotely or by teleconference. What was done by the Supreme Court was then responded by the Attorney General of the Republic of Indonesia by issuing the Instruction of the Attorney General of the Republic of Indonesia Number 5 of 2020 concerning Policies for the Implementation of Duties and Handling of Cases During the Prevention of the Spread of Covid-19 in the Attorney General's Office of the Republic of Indonesia on March 23, 2020, who instructed the Head of the High Prosecutor's Office, the District Attorney's Office, and the Head of the District Attorney's Office throughout Indonesia to optimize the settlement of cases by developing the use of facilities teleconference during the trial, which was then followed up by the Attorney General's Letter Number: B-049/A/SUJA/03 /2020 dated March 27, 2020 regarding Optimizing the Implementation of Duties, Functions, and Authorities Amid Efforts to Prevent the Spread of Covid-19[10] addressed to the Heads of the High Prosecutor's Office throughout Indonesia, one of which conveys to all Prosecutors to seek criminal case trials through means of video conference / live streaming dal The implementation is coordinated together with the Head of the District Court and the Head of the Detention Center / Prison.

Furthermore, as a form of shared commitment in supporting law enforcement in courts during the Covid-19 pandemic, on April 13, 2020, the Indonesian Supreme Court, the Indonesian Attorney General's Office, and the Indonesian Ministry of Law and Human Rights signed a Cooperation Agreement Number: 402/ DJU/HM.01.1/04/2020; KEP-17/E/Ejp/04/2020; PAS-08.HH.05.05 of 2020 concerning the Implementation of Trials Through Teleconference. The purpose of the cooperation agreement is to achieve optimization, effectiveness, efficiency, and security in carrying out the duties and functions of the parties related to the implementation of trial activities via teleconference.

The trial of criminal cases by teleconference during the Covid-19 pandemic which was carried out only based on the Letter of the Director General of the General Court of Justice at the Supreme Court of the Republic of Indonesia Number: 379/DJU/PS.00/3/2020 and the Letter of the Attorney General of the Republic of Indonesia Number: B -049/A/SUJA/03/2020 turned out to be pro and contra, there are some parties who support and consider it a positive breakthrough to ensure legal certainty, which is done by prioritizing the safety of law enforcement officers and the people involved in it from the transmission of Covid-19 19, in accordance with the principle of *salus populi*

suprema lex esto (people's safety is the highest law for a country), but there are those who criticize it on the grounds that the Criminal Procedure Code does not regulate it. The Secretary General of the National Leadership Council of the Indonesian Advocates Association (Peradi), Advocate Sugeng Teguh Santoso condemned the trial of criminal cases conducted by teleconference. According to Sugeng, criminal cases are not allowed to be tried by teleconference, because in addition to violating the rules in the trial procedures regulated in the Criminal Procedure Code, the implementation of trials online is also very prone to being manipulated or cannot be legally accounted for. In line with Sugeng's opinion, Advocate Juniver Girsang also firmly said "As long as there are provisions in the Criminal Procedure Code, (trials online) is a violation".

In response to these problems, the Supreme Court as a high state institution holding judicial power, which has the authority to further regulate matters needed for the smooth running of the judiciary if there are matters that have not been sufficiently regulated by law, on the date of September 25, 2020 made a legal breakthrough by stipulating Supreme Court Regulation Number 4 of 2020 concerning the Administration and Trial of Criminal Cases in Courts Electronically.

Regulation of the Supreme Court or PERMA is basically a form of regulation that contains provisions of a procedural law. Perma is a written regulation as a complement to fill legal deficiencies or vacancies in procedural law for the smooth administration of justice, and based on the provisions of Article 8 paragraph (1) UU no. 12 of 2011 concerning the Establishment of Legislation, the Supreme Court Regulation is recognized for its existence and has binding legal force as long as it is ordered by a higher statutory regulation or is formed based on authority.

If you pay attention to the provisions of Article 2 paragraph (2) of Perma No. 4 of 2020 basically stipulates that in certain circumstances the trial can be conducted electronically. Then it is mentioned in the provisions of Article 11 paragraphs (1) and (2), although the trial is conducted electronically, the examination of witnesses and/or experts is carried out in the courtroom with the procedure of examination based on the provisions of the Procedural Law. Likewise, the provisions of Article 13 paragraph (1) stipulate that the examination of the Defendant is carried out in the courtroom in accordance with the provisions of the Procedural Law. Textually, the above provisions require "Electronic Trials" for criminal cases to only be carried out in "Certain Circumstances" based on the examination procedures regulated in the provisions of the "Procedural Law" namely the Criminal Procedure Code based on the provisions of Article 284 and Article 285 of the Criminal Procedure Code.

II. Research Methods

This research is a legal research using a statutory approach. The legal materials used are primary, secondary, and tertiary legal materials which are analyzed using analytical descriptive.

III. Results and Discussion

3.1 Principles of Justice and Legal Certainty in Electronic Criminal Case Trials as regulated in Perma No. 4 of 2020

Talking about justice and legal certainty is of course very closely related to the protection of Human Rights (HAM). It is explained in the Legal Dictionary that Human Rights are rights that humans have because of their birth, not because they are given by society or the state. Therefore, in the rule of law concept proposed by Fredrich Julius Stahl, it is stated that one of the main elements that must be possessed by a rule of law is the recognition and protection of human rights.

Related to "justice" John Rawls argues that justice enforcement programs with a populist dimension must pay attention to the principle of justice, namely giving equal rights and opportunities to the broadest basic freedoms, as wide as the same freedoms for everyone [19]. Meanwhile, according to Gustav Radbruch law is the bearer of the value of justice. Justice is normative because it is to justice that positive law originates, and is constitutive because justice must be an absolute element of law, so without justice, a rule does not deserve to be law.

Referring to Aristotle's view that justice distributive focuses on the distribution, honorarium, wealth, and other goods that are equally obtainable in society, then leaving aside the mathematical "proof" it is clear that what is in Aristotle's mind is the distribution of wealth and valuables. Others based on the prevailing values in society. If it is related to the trial of criminal cases electronically, then what is meant by "other valuables" in this context are rights, namely rights that have been given to defendants in conventional trials as regulated in the Criminal Procedure Code, which should also be distributed in Perma No. 4 of 2020 so that it fulfills the principle of justice. Based on the results of the analysis, the authors argue that Perma No. 4 of 2020 has accommodated the rights of defendants in electronic criminal case trials as the Criminal Procedure Code has regulated them in conventional trials, namely the right to obtain legal assistance [Article 2 paragraph (1)], the right to immediately receive an examination in court for legal certainty [Article 2 paragraph (1)] 2 paragraph (2), Article 4 paragraph (1) and paragraph (2), Article 9 paragraph (2), Article 11 paragraph (3), and Article 16 paragraph (2)], the right to defend [Article 3 paragraph (2)], and the right of the defendant to be tried in a court session which is open to the public [Article 9 paragraph (1), Article 16 paragraph (1), and Article 18]. So it can be concluded that the electronic trial of criminal cases provides a guarantee of a fair and impartial trial, which is a guarantee for the protection of the rights of everyone in the judicial process, thus fulfilling the principle of justice.

Based on the opinions of the legal experts above, if it is related to the trial of criminal cases electronically, then Perma No. 4 of 2020 as a regulation that fills legal voids in the Criminal Procedure Code must be able to contain clear and non-deviating legal rules, which are able to realize legal certainty and guarantee that everyone who is entitled according to law can obtain their rights, because with legal certainty there will be legal certainty create legal justice that is of value to the community and is the desire of justice seekers.

The provisions of Article 2 paragraph (2) of Perma No. 4 of 2020 basically states that in certain circumstances, both from the beginning of the case trial and when the case trial is in progress, the Judge/Judge Council because of their position or at the request of the Prosecutor and/or the Defendant or Legal Advisor may determine the trial to be conducted electronically. This provision implies that the electronic trial is a solution to the settlement

of criminal cases in the Covid-19 pandemic situation to provide legal certainty to the defendant without experiencing an undue trial delay.

3.2. Arrangement of Electronic Criminal Case Trials in the Future

The ups and downs of changes in the hierarchy of laws and regulations in Indonesia can be seen from the history of the development of the existing hierarchy, improvements for improvements continue to be made to realize good regulations. Starting with the birth of Law no. 1 of 1950 concerning the Composition, Power and Way of the Courts of the Supreme Court of Indonesia, and after it was declared that was not applicable the hierarchical rule of laws and regulations, it was contained in MPRS Decree No. XX/MPRS/1996 concerning the DPR-GR Memorandum Regarding the Orderly Sources of Law of the Republic of Indonesia and the Order of the Legislation of the Republic of Indonesia, then republished in MPR Decree No. III/MPR/2000 concerning Sources of Law and Order of Legislation, then replaced by Law Number 10 of 2004 concerning the Establishment of Legislations, and after that it was replaced again with Law Number 12 of 2011 concerning the Establishment of Legislations -Invitation as last amended by Law Number 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning the Establishment of Legislation. This shows that the hierarchy of laws and regulations is very important for Indonesia as a State of Law in accordance with the mandate of the 1945 Constitution.

Referring to the provisions of Article 7 of Law no. 12 of 2011, as follows:

Paragraph (1) reads:

“Types and hierarchy of laws and regulations consist of:

- a. the 1945 Constitution of the Republic of Indonesia;
- b. Decree of the People's Consultative Assembly;
- c. Laws/Government Regulations in Lieu of Laws;
- d. Government regulations;
- e. Presidential decree;
- f. Provincial Regulations; and
- g. Regency/City Regional Regulations.

Paragraph (2):

“The legal force of the Legislation is in accordance with the hierarchy as referred to in paragraph (1).”

Based on the provisions of Article 7 above, it can be said that the Regulation of the Supreme Court does not have a position in the hierarchy of laws and regulations, but this is then determined otherwise in the formulation of Article 8 which reads:

Paragraph (1), reads:

"Types of Legislation invitations 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 Constitutional Court, the Supreme Audit Agency, the Judicial Commission, Bank Indonesia, the Minister, agencies, institutions, or a commission of the same level established by law or by the Government on the orders of the Act, the Provincial People's Representative Council, the Governor, the Regency/City Regional People's Representative Council, the Regent/Mayor, the Village Head or the equivalent.”

Paragraph (2):

“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 a higher statutory regulation or are formed based on authority.”

Based on the provisions of Article 8 above, Perma No. 4 of 2020 becomes a statutory regulation that is recognized for its existence and has binding legal force. Article 1 paragraph (2) of Law no. 12 of 2011 defines statutory regulations as written regulations that contain legally binding norms in general and are established or determined by state institutions or authorized officials through the procedures stipulated in the Legislation.

One of the powers of the Supreme Court as stated in the formulation of Article 24 A Paragraph (1) of the 1945 Constitution is to have other powers granted by law, in this case including making laws and regulations (Perma). The authority of the Supreme Court is also described in the provisions of Article 79 of Law no. 14 of 1985 concerning the Supreme Court in conjunction with Law no. 5 of 2004 in conjunction with Law no. 3 of 2009 which reads:

"The Supreme Court can further regulate matters needed for the smooth administration of justice if there are matters that have not been sufficiently regulated in this law."

Elucidation of Article 79 of Law no. 14 of 1985 concerning the Supreme Court, reads as follows:

"If in the course of the judiciary there is a legal deficiency or vacuum in a matter, the Supreme Court has the authority to make regulations as a complement to fill the gap or vacancy earlier. With this Law, the Supreme Court has the authority to determine the arrangement on how to resolve a problem that has not been or is not regulated in this Law. In this case, the regulations issued by the Supreme Court are distinguished from the regulations drawn up by the legislators. The administration of justice as intended by this Law is only part of the overall procedural law. Thus, the Supreme Court will not interfere with and exceed the regulation of the rights and obligations of citizens in general and will not regulate the nature, strength, means of evidence and assessment or distribution of the burden of proof."

Based on the explanation above, the Supreme Court has the authority to establish laws and regulations called the Supreme Court Regulation (Perma), which is a written regulation as a complement to fill legal deficiencies or vacancies in the procedural law (KUHAP) for the smooth administration of justice, which it admits. Existence and has binding legal force.

Then to see the position of Perma No. 4 of 2020 and the Criminal Procedure Code in the Indonesian legal system, can also be done using the theory of level norms (Stufen Theory) proposed by Hans Kelsen and Hans Nawiasky which requires legal norms to be tiered and multi-level/layered layers in a hierarchy (organization) of laws and regulations. Based on the theory of level norms, the position of Supreme Court Regulation Number 4 of 2020 concerning Administration and Trial of Criminal Cases in Electronic Courts is below or lower than Law Number 8 of 1981 concerning Criminal Procedure Code (KUHAP).

KUHAP adheres to the principle of equality before the law, namely the principle of presumption of innocence, where human rights are respected and upheld. Therefore, the should be accusatoir system applied from the examination to the trial, so that the suspect/defendant is considered a subject who has full rights to defend himself. Thus, it is not allowed to have other rules relating to the implementation of criminal procedural law in

Indonesia that can reduce the rights of the suspect/defendant already in the Criminal Procedure Code.

It is undeniable that the Covid-19 pandemic that has hit Indonesia has had a very large impact on the continuity of the trial of criminal cases in Indonesia. The implementation of social distancing /physical distancing and even Large-Scale Social Restrictions (PSBB) resulted in the trial having to be postponed. This happens because the Criminal Procedure Code is not able to anticipate it, because there is a legal vacuum in it.

As a solution to this problem, the Supreme Court of the Republic of Indonesia made a legal breakthrough by issuing Supreme Court Regulation Number 04 of 2020 concerning Administration and Trial of Criminal Cases in Courts Electronically. On the one hand, it can be said that Perma No. 4 of 2020 is a positive and innovative legal breakthrough for the smooth and continuous trial of criminal cases in Indonesia, but on the other hand, if this regulation is implemented, there will be deviations from the principles of criminal law that apply in Indonesia, namely the principle of *lex superior derogat legi inferiori*.

Then, to determine whether a norm has a higher position than other norms is certainly not a difficult thing because Indonesia as a state of law has a written legal order that is structured hierarchically. In the Indonesian legal system, the types and hierarchy of laws and regulations are regulated in the provisions of Article 7 and Article 8 of Law Number 12 of 2011 concerning the Establishment of Legislation.

If we examine the position of the Supreme Court Regulations in the hierarchy of laws and regulations, with reference to Article 8 paragraphs (1) and (2) of Law no. 12 of 2011 which states that the Supreme Court Regulation is also a type of statutory regulation that is in force and its existence is recognized and has binding legal force as long as it is ordered by a higher statutory regulation or is formed based on its authority.

Based on the description above, it can be concluded that the Perma is a form of statutory regulation that has several characteristics, namely: (1) formed based on the legislative authority of the delegation (2) formed within the scope of the "the "process.rule making rule making" process and not the scope of "law making" (3) is complementary, (4) is formed to fill the "void law or legislation," (5) does not regulate the rights and obligations of citizens, (6) regulates the procedural law of judicial administration.

In the perspective of the hierarchical principle, every statutory regulation has a position in the hierarchy of regulations so that the order of regulations is orderly and if there is a conflict, a material review can be carried out in court. The position of the Perma is not regulated in Law Number 12 of 2011 so that if it conflicts with higher regulations, it will cause problems if it is tested materially. However, before discussing Perma in terms of the principle of hierarchy, there is something that needs to be said first. First, according to the doctrine, there are 2 (two) sources of legislative authority, namely (1) original legislative authority; and (2) derivative legislative powers (delegation powers).[26] The Supreme Court's authority to form the Perma is a derivative authority (delegation authority) because it comes from the legislative body as the owner of the attribution authority (original legislative power). Different sources of authority affect the content and hierarchy of legal products of each organ. Second, the delegation of legislative authority to the Supreme Court is carried out with the intent and purpose of filling a legal vacuum that cannot always be filled by law. To fill the legal vacuum, the DPR needs to delegate its authority to other state organs in order to form laws and regulations of a technical nature such as the Perma.

In the Indonesian constitutional system, there are 2 (two) state organs that are delegated legislative authority to fill the "legal vacuum." The two state organs in question are the President and the Supreme Court. These two state organs are delegated the

authority to form laws and regulations in order to fill legal voids with different functions. The delegation of authority to the President aims to form a Government Regulation (PP) to fill a legal vacuum in the sense of “carrying out the law as it should.” The delegation of authority to the Supreme Court aims to form a Supreme Court Regulation (Perma) in order to fill a legal vacuum in the sense of "regulating matters that have not been regulated by law." The difference in the function of these two laws and regulations affects their content. The phrases "implementing the law's orders as they should" and "regulating things that have not been regulated by law" have different perspectives, contexts and objectives. In addition, the phrase “regulating matters that have not been regulated by law” can be understood in a different meaning frame from the context of the existence of the PP. The phrase "regulating matters that have not been regulated by law" implies forming new legal norms so that the purposes and objectives of the law can be implemented. The meaning of the phrase should be linked with the aim of “preventing a legal vacuum.” Legislation that functions to “regulate matters that have not been regulated by law” to “prevent a legal vacuum” and “stalemate in the context of judicial practice” is Perma.

In the Criminal Procedure Code, the process of handling criminal cases starting from the stage of investigation, investigation, prosecution, trial to court decisions, must be carried out face-to-face directly in the courtroom. KUHAP does not recognize that the due process of law is conducted electronically. The philosophy of the Criminal Procedure Code in applying legal action for justice (*Pro Justicia Basis*) directly to witnesses, experts, suspects or defendants, because the essence of handling criminal cases from a legal process is to seek the material truth of an event that is suspected of violating criminal provisions. .

Based on the description above, referring to the principle of *lex superior derogat legi inferiori*, it is not permissible for the Perma to reduce or contradict the Criminal Procedure Code in terms of regulating the mechanism for attendance, examination of expert witnesses, and defendants at trial, as well as the pronouncement of judge's decisions. So to create an electronic trial rule that is fair and with legal certainty, it is appropriate for electronic criminal case trials to be regulated in a law, because if referring to Article 10 paragraph (1) of Law Number 12 of 2011 concerning Legislation, content material that must be regulated by law contains: a. further regulation regarding the provisions of the 1945 Constitution of the Republic of Indonesia; b. an order for a Law to be regulated by Law; c. ratification of certain international agreements; d. follow-up on the decision of the Constitutional Court; and/or e. fulfillment of legal needs in society. So based on these provisions, it is not appropriate if the trial of criminal cases electronically is regulated in Perma No. 4 of 2020, because the content material is the fulfillment of legal needs in society which is the content material of the law.

Therefore, in the future, electronic trial of criminal cases must be strictly regulated to become the new norm in the revision of the Criminal Procedure Code (KUHAP), and also to prepare a clear standardization of the implementation of electronic trials as well as protection devices for the parties involved in electronic trial, and easy access for people who want to follow and witness the trial.

IV. Conclusion

The application of rules social distancing/physical distancing and Large-Scale Social Restrictions (PSBB) poses a dilemma in the legal world because it causes delays in the law enforcement process in court, while the trial of criminal cases demands a quick settlement and it is impossible to delay due to the tight time limit for the defendant's detention. relation to the rights of the accused. As a solution to these problems, on September 25, 2020, the Supreme Court of the Republic of Indonesia issued Supreme Court Regulation Number 4 of 2020 concerning the Administration and Trial of Criminal Cases in Courts Electronically, with the hope of being able to provide guarantees of a fair and impartial trial in trial of criminal cases electronically as the Criminal Procedure Code has regulated it in conventional trials. Thus, the electronic trial of criminal cases provides a guarantee of a fair and impartial trial, which is a guarantee for the protection of the rights of everyone in the judicial process, thus fulfilling the principles of justice and legal certainty. That the electronic trial is also not optimal in realizing the principle of an open trial to the public which is reflected in the provisions of Article 153 paragraph (3) and Article 195 of the Criminal Procedure Code. Although Perma No. 4 of 2020 has regulated the trial that is open to the public as formulated in Article 9 paragraph (1), Article 16 paragraph (1), and Article 18, but in its application it will be difficult for people who want to attend and witness the trial, because they must have IT devices that support and must first get access from the court to be able to enter the broadcast of the electronic trial. So that referring to the principle of *lex superior derogat legi inferiori*, then Perma No. 4 of 2020 has reduced or contradicted the Criminal Procedure Code in terms of regulating the mechanism for the presence, examination of witnesses and defendants at trial, and the pronouncement of judge decisions and in the future the arrangement of these electronic criminal court trials can be regulated in the R-KUHAP.

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