

Advocacy Problems in Virtual Criminal Trials

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Abstract: *The Coronavirus Disease (Covid-19) pandemic has caused criminal case trials to be held virtually. There are objections from advocates regarding the virtual trial of criminal cases. Advocates also question the guarantee of the fulfillment of the right to a fair trial. The purpose of this study was to determine and examine the implementation of advocacy for defendants by advocates in virtual criminal case trials and the obstacles faced about the implementation of advocacy for defendants by advocates in virtual criminal case trials. The approach used in this research is the legal approach. This research data collection technique was carried out through conventional and online literature searches. The data analysis technique used in this study is qualitative because the data is presented in a narrative-descriptive manner. The results showed that the advocate for the defendant was intended to provide legal assistance, confront and provide instructions to the defendant regarding the steps and efforts that must be taken while in front of the trial, and assist the defendant in acting. This of course will be difficult to obtain if the advocate cannot accompany the defendant directly during the virtual trial. In the end, the fulfillment of the defendant's rights in examining cases in court will be neglected. The obstacles faced by advocates in assisting defendants during online criminal case trials are the limited courtroom that has a teleconference device, unstable internet network that can even be disconnected, unclear timing of the trial, limited communication and coordination between the defendant and the advocate due to the defendant being in the office. correctional institutions or state detention centers, access to assistance by advocates for defendants also cannot be as flexible as a direct trial before a court, this will certainly affect the overall evidentiary process.*

Keywords: Advocate, Trial, Virtual, Criminal.

1. INTRODUCTION

During the current ¹ Covid-19 pandemic, criminal case trials cannot be carried out directly but using an electronic trial (virtual or online). At the beginning of the Covid-19 pandemic, the trial process for criminal cases was stopped altogether, following concerns over the spread of the coronavirus. This condition of uncertainty has an impact on the ongoing



detention time of the defendant and the absence of legal certainty regarding the settlement of the criminal case.

The development towards virtual in the trial of criminal cases, when viewed sociologically, is a necessity, either as a reaction to the Covid-19 pandemic or as a reaction to technological advances. Especially during the pandemic, law enforcers are faced with a very concrete situation in the form of the choice of resolving cases that are handled virtually or delaying the trial with the consequence that the number of cases will accumulate in the future. Triggered by this situation, the law shows its moment of flexibility following the issuance of several regulations which, although not in the form of law, are empirically implemented to ensure legal certainty [1].

The Supreme Court has issued Supreme Court Regulation Number 4 of 2020 concerning Administration and Trial of Criminal Cases in Courts Electronically to strengthen the legal umbrella for virtual criminal case trials [2]. This Supreme Court regulation regulates the procedures for conducting trials of criminal cases, both criminal cases within the scope of the general court, military, and online jinayat.

There are objections from advocates regarding the implementation of a virtual trial of criminal cases where the defendant attends a virtual trial without being accompanied by legal counsel. This can happen because the defendant's position is in a correctional institution or detention house where the place provides restrictions on visits for anyone on the grounds of preventing the spread of Covid-19 transmission. Advocates are also still questioning the guarantee of the fulfillment of the right to a fair trial that can be adopted in virtual criminal trials.

The defendant in the trial of a criminal case should have his right, namely to get facilities in the form of legal assistance [3]. Likewise, legal assistance is in line with legal assistance as a form of state effort to guarantee the constitutionality of its citizens, namely getting equal treatment before the law (equality before the law).

The e-court system can be a signal because legal aid can be provided in different forms and mechanisms in the future. So the model of legal aid that has developed over time has become a demand for redefining the current concept of legal aid. This is done so that the community, both individuals and groups, can have their voices heard, exercise their rights in opposition to arbitrariness, discrimination, or holding decision-makers accountable.

The right to obtain legal assistance is a fundamental or basic right for someone who is in legal trouble [4]. Obtaining legal assistance is a form of access to justice for those dealing with legal issues. General provisions for obtaining legal assistance are contained in the Law of the Republic of Indonesia Number 4 of 2009 concerning Judicial Power.

The defendant has been placed in the Criminal Procedure Code (KUHAP) in the position of his entity and dignity as a human being, which must be treated by noble human values. The law must be enforced, but in carrying out law enforcement against the accused, the defendant cannot release the main human rights inherent in him [5]. This situation shows how important it is to provide legal assistance for criminal defendants.

The impact of the spread of Covid-19 is not only on health issues, but also raises issues related to human rights broadly [6], including those related to legal protection. Providing legal assistance for defendants during the Covid-19 pandemic is a necessity in the context of fulfilling the constitutionality of citizens.



The problem discussed in this study is the implementation of the defendant's assistance by an advocate in a virtual trial of criminal cases. The obstacles faced are related to the implementation of the defendant's assistance by advocates at the virtual trial of criminal cases.

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2. RESEARCH METHODS

This type of research is library research. Literature research is research that is carried out through library data collection or research carried out to solve a problem that relies on a critical and in-depth study of relevant library materials [7]. This research includes library research because data sources can be obtained from libraries or other documents in written form, both from journals, books, and other literature. The approach used in this research is the statute approach. A legal approach is an approach that uses legislation and regulation [8]. This study uses a legal approach because it is used to examine all laws and regulations related to the legal issue being studied. Sources of data used in this study in the form of secondary data. Secondary data are data obtained from official documents, books related to the object of research, research results in the form of reports, theses, dissertations, and laws and regulations [9]. This study uses secondary data as the main reference because it is already available in the form of writing in books, scientific journals, and other written sources.

This research data collection technique was carried out through conventional and online literature searches. Conventional literature searches are carried out by searching for library materials, purchasing books, journals and attending scientific activities (seminars). Searching online is done by searching on the internet [10]. This study uses conventional and online library search techniques because it is useful for obtaining theoretical foundations by reviewing and studying books, laws, regulations, documents, reports, archives, and other research results both printed and electronic related to the object of study.

The data analysis method used in this research is qualitative. Qualitative data analysis is the process of organizing and sorting data into patterns, categories, and basic units of description so that themes can be found that are presented in the narrative form [11]. This study uses qualitative data analysis because the data will be presented in a narrative-descriptive manner, not in numerical or numerical form.

3. DISCUSSION

1. Implementation of Assistance for Defendants by Advocates in Virtual Criminal Case Trials

The Covid-19 outbreak that has infected not only in Indonesia but even globally has had an impact on various aspects of life, including the legal services of the judiciary. This is because the Supreme Court was forced to implement a policy to carry out official duties from home (work from home) which was applied to judges and court officials. teleconference [12].

The current Covid-19 outbreak has brought innovations in a judicial system, namely implementation of virtual trials (online) as an innovation in a judicial process. The teleconference system and development of the sophistication of the internet used as a medium for holding a trial is a choice that can be used as a solution to the problem of the Covid-19 outbreak on the judicial system, namely the implementation of the trial so that the trial can still be carried out without delay even in the atmosphere of the Covid-19 outbreak.



The trial, which was held virtually via teleconference, was carried out to implement the social distancing policy that was set as an effort to suppress the spread of the Covid-19 break. Within the prosecutor's office, this virtual trial was carried out by referring to the Attorney General's Instruction Number 5 of 2020 concerning Policies for the Implementation of Duties and Case Handling During the Prevention of the Spread of Covid-19 in the Prosecutor's Office of the Republic of Indonesia on March 27, 2020. This instruction is accompanied by a letter Circular of the Attorney General of the Republic of Indonesia Number 2 of 2020 concerning Adjustment of the Employee Work System in Efforts to Prevent the Spread of Covid-19 in the Prosecutor's Office of the Republic of Indonesia.

By the provisions of the procedural law, namely Article 64 of the Criminal Code, it is stated that the defendant has the right to be tried in court trials in general. The Criminal Code itself does not define and does not specify the court mechanism in question. However, based on some basic decisions in the Criminal Code, it can be simply understood that a trial can be held in a court building, but in certain circumstances, the trial of a certain crime or as a result of certain circumstances can be carried out outside the court building.

The importance of the defendant's presence in the trial has been emphasized in Article 154 Paragraphs (4) and (6) of the Criminal Procedure Code. Article 154 Paragraph (4) of the Criminal Procedure Code provides that if the defendant has been legally summoned but does not appear at the trial without a valid reason, the examination of the case cannot be carried out, and the presiding judge at the trial orders the defendant to be summoned again.

Article 154 Paragraph (6) of the Criminal Procedure Code provides that the presiding judge at the trial orders a defendant who is absent without a valid reason after being legally summoned for the second time, to be presented by force at the next first trial. The provisions of the articles above show how important it is that the presence of the defendant in the trial of the criminal court examines him, to the extent that the legislators consider it necessary to reinforce this provision with threats to be presented by force.

The principle of the presence of the defendant in this criminal case is based on the defendant's human rights as a human being who has the right to defend himself and defend his rights to freedom, property, or honor. Hearing directly (before the trial) the testimony of a defendant is an essential aspect for the sake of objectivity and the principle of impartiality [13]. The main objective is so that the defendant can truly understand what is being charged, how the testimony of witnesses, experts, and other evidence, so that he is free to arrange his answer and defense. In the trial directly before the court, the defendant can face to face and dialogue with the judge, so that the judge can also pay attention to the characteristics, attitudes, and actual conditions of the accused.

Regarding the administration of criminal justice, the Supreme Court establishes a Supreme Court Regulation concerning the Administration and Electronic Trial of Criminal Cases in Courts. The Supreme Court has issued Supreme Court Regulation Number 4 of 2020 concerning Administration and Trial of Criminal Cases in Courts Electronically (Perma Online Criminal Sessions). This regulation is then better known in the community as electronic litigation (e-lit).

This online criminal trial regulation is a follow-up to the Memorandum of Understanding between the Supreme Court, the Attorney General's Office, the Police, the Directorate General of Corrections at the Ministry of Law and Human Rights regarding the conduct of the trial via teleconference in the context of preventing Covid-19 on April 13, 2020. In principle, the judge or panel of judges, substitute clerks, prosecutors convene in the



courtroom. While the defendant attends the trial from the state detention house where the defendant is detained accompanied or without the presence of an advocate or judge or panel of judges, the public prosecutor attends a trial from the public prosecutor's office.

Article 2 Paragraph (3) of the Perma explains that if an online trial is held, all trial participants must be seen on the screen and with a clear voice. The substitute clerk prepares the trial facilities, including the readiness of the trial participants, and reports to the panel of judges. In the trial judges, substitute clerks, prosecutors and advocates use their respective court attributes by the provisions of the applicable criminal procedural law.

One form of protection of human rights for defendants in the process of examination in court is the granting of several rights to the accused to defend his interests. This is in line with the principle of the presumption of innocence, i.e. a person who undergoes a case process (especially a criminal case) must be considered innocent until there is a court decision that has obtained permanent legal force stating his guilt. The consequence is that if a defendant based on the results of an examination at a court hearing cannot be proven guilty based on 2 (two) valid pieces of evidence and the judge has no conviction of the defendant's guilt, then the defendant is acquitted [14].

Article 7 Paragraph (2) and Paragraph (3) of Perma Number 4 of 2020 states that: (2) If the trial is conducted electronically, the defendant who is accompanied by legal counsel must be physically in the same room as the defendant. (3) If the legal adviser can't accompany the accused in the state detention house, the legal adviser will convene at the public prosecutor's office or court.

Based on these provisions, it is possible that in examining a criminal case in court, it is not possible for a legal adviser or advocate to accompany the accused in a state detention house, even though the advocate has the right to contact and talk to the suspect at every level of examination at any time to defend his case.

Efforts to realize the principles of the rule of law in the life of society and the state, the role and function of advocates as free, independent and responsible professions is important, in addition to judicial institutions and law enforcement agencies such as the Police and the Prosecutor's Office. Through the legal services provided, advocates carry out their professional duties for the sake of upholding justice based on the law for the benefit of the justice-seeking community, including efforts to empower the community to realize their fundamental rights before the law. Advocates as an element of the judicial system are one of the pillars in upholding the rule of law and human rights [15]. In addition to the judicial process, the role of advocates is also seen in the profession side the court.

Assistance to the defendant by an advocate is intended to provide legal assistance, confront and provide instructions to the defendant regarding the steps and efforts that must be taken while in front of the trial, and assist the defendant in acting. This of course will be difficult to obtain if the advocate cannot accompany the defendant directly during the trial. In the end, the fulfillment of the defendant's rights in examining cases in court will be neglected.

Advocates responded to their concerns about the condition of the defendants who could not be presented in person before the court in a virtual trial. This concern is related to the lack of guarantees that the condition of the defendant who is in the correctional institution or detention house or prosecutor's office is completely free without pressure from anyone, especially for defendants who are not accompanied by an advocate. In addition, in practice, there are difficulties for advocates to provide optimal assistance to defendants.



The shift in what is meant by the presence of the defendant from in-person to online media must be followed by an accountable and transparent trial mechanism. The defendant must be ensured that he is free from pressure from any party in giving testimony or during the trial.

There is no explanation for further arrangements that can provide reasons in what cases the advocate is not able to accompany the defendant in a detention house or correctional institution. This is very important because in practice advocates are not justified in accompanying the defendant directly in the detention house just because of concerns about the spread of Covid-19. Likewise, if the defendant is brought to court to attend the trial and is accompanied by an advocate, that is also not justified. The reason put forward is to prevent the spread of Covid-19, namely so that hundreds of people in the state detention center are not exposed to Covid-19 [16].

In principle, advocates must accompany the defendant directly if the trial is conducted online, but because of the fear of the spread of Covid-19 into the detention house, this is not allowed. So, if the defendant goes in and out of the detention house, it will become a space or gap for the spread of Covid-19 in the detention house. The interests of many people (residents of the state prison, employees of the state prison, guards, and workers at the state detention center) are more important than the interests of one or more accused persons.

Advocates who should always be close to and accompany the defendant in court will greatly affect the fulfillment of the defendant's rights in court. Although the advocate accompanies the defendant in court, due to the position or existence of the accused and the advocate being far apart, the assistance provided by the advocate is not optimal. If an advocate can accompany the defendant directly in one place (either in court or in a state detention house), then the defense of the defendant will run optimally. The defendant will be open and free to express anything to his advocate, this is different if his advocate is not nearby.

2. Obstacles Faced Related to Implementation of Accompaniment of Defendants by Advocates in Virtual Criminal Court Trials

The assistance of defendants by advocates in the implementation of criminal trials virtually encountered several obstacles and problems. Various problems related to technical and human resources are still coloring the course of virtual criminal trials.

The results of the mapping conducted by the Ombudsman of the Republic of Indonesia who conducted monitoring in 16 (sixteen) District Courts and 61 Legal Aid Organizations (OBH) in 20 Provinces in Indonesia found technical problems in virtual criminal trials, namely: limited courtrooms have a teleconference device, both in court and out of court, especially a state detention center or correctional institution. Infrastructure such as monitors, large screens, microphones, projectors, cameras, and loudspeakers are not available in all courtrooms. Even at the extreme, advocates and prosecutors have to sit side by side with witnesses so they can take turns using the microphone and be caught on camera.

Regarding facilities and infrastructure, a problem that often occurs in virtual criminal courts is an unstable internet network that can even be disconnected. This has happened when a virtual trial was conducted and the cause was the damage to the tower at one of the national providers it was not possible to continue this virtual trial and it was postponed until a predetermined time. The trial was also interrupted due to using zoom which was not paid for. The quality of equipment or audio zoom that is not good is also very difficult for the parties, especially during the verification process [17].



The unavailability of a generator when a power failure occurs is one of the most crucial things when using electronic devices. Some areas where the availability of electricity is still limited and the generator is not available will certainly increase the risk of disruption of the trial.

The unclear timing of the trial led to complaints about the limited trial time by several district courts and complaints by lawyers who had to wait for the start of the trial with an uncertain waiting time. The lack of IT personnel who are familiar with and understand the mechanism of the electronic trial also has an impact on the preparation and implementation of the trial as well as being unprepared to anticipate technical problems.

Not all District Courts, District Prosecutors, as well as Penitentiary and State Detention Centers, have human resources in the form of IT staff so that if you encounter technical problems in the middle of the trial, there is not much that can be done while the time is running. In addition to the limited IT staff, judges also complained that they were not familiar with electronic court tools (especially senior judges). In turn, this will be very disturbing because the judge (especially the chairman of the panel) is the leader of the trial whose job is to regulate the proceedings [18].

The lack of optimal coordination between agencies or institutions can be seen in the complaints of the slow delegation of cases between district courts and the lack of preparation from other parties outside the court, such as legal advisors or advocates. Thus the other party does not get information related to the process or schedule of the trial to be carried out.

The lack of communication and coordination between the defendant and the lawyer was because the defendant was in a correctional institution or state detention center so he had very limited time to discuss the case being faced by the defendant. This is different from a direct trial, where the advocate can maximally discuss and coordinate with the defendant during the trial period. In addition, restrictions on visits to prisons or state detention centers also hinder communication and coordination between advocates and defendants. Due to the limitation of visits, it is very possible that the lawyer cannot visit the defendant at all [19].

Apart from the technical problems, human resources, and coordination, what is also important is the uncertainty regarding the conditions of the witnesses and the accused who is not under pressure. In a virtual trial, the parties are not in the same forum at the same time, so the witness testimony may lie or are under pressure because at that time it is not possible to know who was around them.

Examination of cases in court through electronic media is certainly not new, especially for civil cases. This is based on Perma No. 1 of 2019 which allows civil cases to be heard even though not directly before the court. However, this is not the case with criminal cases. The problem of proof is the reason why criminal trials are not conducted virtually, at least before the Covid-19 pandemic.

Various kinds of problems related to the implementation of online criminal trials can result in a decrease in the quality of the trial. The decline in the quality of the trial is closely related to the transparency and accountability of the trial because the parties who should be able to cross-check with each other at the time of proof are hampered by technical obstacles. This of course also carries the risk of lowering the quality of evidence [20].

The quality of evidence is of course very important to maintain so that what is produced from the evidentiary process becomes valid and fulfills the nature of material truth as is the goal of criminal law enforcement. If the quality of the evidence cannot be ascertained, it will



be very dangerous, because the judge may be wrong in making decisions that are detrimental to the defendant and the justice of society in general.

During the examination of the defendant, where the defendant is not directly in front of the judge because he is at the place of the public prosecutor and is very likely not accompanied by an advocate, it cannot be confirmed that the defendant is completely free to give information. Free here of course not only physically, but also free from pressures. Access to assistance by advocates for defendants is also not as flexible as a direct trial before a court.

During the examination of evidence, for example, when the trial is conducted electronically, the defendant, advocate, and judge will have limitations in checking the evidence. This will be more difficult if the case is complex with a lot of evidence. Not to mention if there are technical problems during the trial.

The electronic trial process in turn will also change the way judges look for clues during the trial process. The evidence is obtained by the judge by observing the evidence presented and observing the process during the trial. If in a direct trial before a trial the judge will see before his own eyes every evidence and explanation presented, during a virtual examination this cannot be done [21].

There is a possibility of misinformation because the information and visualization of the evidence are disturbed because they cannot see it directly. This in addition of course makes it difficult for judges to obtain objective instructions about a criminal case.

In practice, both the public prosecutor and the defendant through an advocate provide evidence in front of the trial. The public prosecutor will try as much as possible to convince the judge that the defendant in the trial is guilty, and vice versa for advocates, who will try to prove that the defendant is legally and convincingly innocent. This process is known as the principle of balanced reversal of the burden of proof.

The existence of a back and forth "flow" in criminal evidence requires a transparent and accountable trial capacity so that each party, both the public prosecutor and the defendant, can provide evidence and the judge can evaluate it objectively. A virtual trial where the defendant is in place and under the supervision of the public prosecutor results in the emergence of limitations for advocates to provide maximum assistance like a trial in person before a trial. The imposition of restrictions on visits to prisons or state detention centers on the grounds of reducing the spread of Covid-19, the lack of rooms and electronic facilities for the examination of defendants and witnesses have the potential to interfere with the fair, open and fair trial. This of course will affect the overall evidentiary process.

The legal basis that guides the implementation of this virtual trial is not detailed enough, because the information obtained is that the Supreme Court will soon issue a new rule as a guide in the virtual trial. So, the parties also hope that in the future all parties must be ready before a policy will be decided and the infrastructure must also be prepared so that everything can ensure that there is no pressure from any party. In this virtual trial, this is something sacred and will determine how a person's future will be in the future. because the trial of criminal cases electronically is open, but it doesn't seem like it is open even though in some large district courts there are already large screens so that all visitors can watch.

Between the defendant and the lawyer, it is not possible to consult directly, because this right is not fulfilled in a virtual trial. Legally, in terms of evidence in criminal cases what is sought is material truth. Fulfillment of the rights of victims and the public in court information. In a virtual trial of criminal cases, only the location of the defendant and law enforcers is



regulated during the virtual trial. Access to the public and also victims to witness the trial of criminal cases electronically is not strictly regulated.

19 4. CONCLUSION

Based on the results of the research and discussion, it can be concluded that the advocate for the defendant is intended to provide legal assistance, confront and provide instructions to the defendant regarding the steps and efforts that must be taken while in front of the trial and assist the defendant in acting. This of course will be difficult to obtain if the advocate cannot accompany the defendant directly during the virtual trial. In the end, the fulfillment of the defendant's rights in examining cases in court will be neglected. Some of the obstacles faced by advocates in assisting defendants during the virtual trial of criminal cases are the limited courtroom that has a teleconference device, unstable internet network that can even be disconnected, unclear timing of the trial, limited communication and coordination between the defendant and the advocate due to the defendant's presence. In prisons or state detention centers, access to assistance by advocates for defendants also cannot be as flexible as a direct trial before a court, this will certainly affect the overall evidentiary process.

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