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Alternative Trial with Electronic Examination in Criminal Cases in Indonesia

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ABSTRACT
The law was formulated for humans, in this Covid-19 pandemic condition, electronic criminal trial is an alternative of conventional criminal trials in Law Number 8 of 1981 concerning the Indonesian Criminal Code Procedure. Based on the above background, the researcher is really interested in studying: 1) how are the arrangements for the trial of criminal cases regulated in Law Number 8 of 1981 concerning the Indonesian Criminal Code Procedure? and 2) what is the alternative policy for the electronic trial of criminal cases from the perspective of ius constituendum? The type of research used in this research is normative legal research. The alternative policy of electronic trial of criminal cases in court as an alternative to the process of examining criminal cases by still adhering to the Law Number 8 of 1981 concerning the Criminal Code Procedure is a modernization step and renewal of the current criminal procedure law.

KEYWORDS
alternative trial, electronic examination, criminal case

Introduction

Law enforcement as a process is essentially an application of discretion regarding the decision-making that are not strictly governed by the rule of law, but has an element of personal judgment (Santoso, 2015). Criminal Code Procedure or what is commonly known as formal criminal law is part of the overall rule of law in the State of Indonesia, which has the function to undertake material criminal law, in order to achieve justice in the litigation process for both victims and perpetrators (Andi Hamzah, 2008). The purpose of criminal code procedure is to seek, obtain or approach the material truth, namely the real truth of a

criminal case. To achieve the objectives of the Criminal Code Procedure, a criminal justice system is required. The law enforcement process, especially in the criminal law enforcement procedures in Law Number 8 of 1981 concerning the Criminal Code Procedure, upholds the principles of human rights.

The outbreak of the 2019 corona virus disease (hereinafter referred to as Covid-19) throughout the world, including Indonesia. In the legal field, breakthroughs were made in the use of supporting tools in the form of technology in assisting the trial process of criminal cases. As stated by Abdul Mukti and Supardi, as follows (Abdul Mukti, Supardi, 2021) :

> "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."

In order to anticipate the pandemic conditions, on September 25, 2020, the Chief Justice of the Supreme Court signed the Regulation of the Supreme Court of the Republic of Indonesia Number 4 of 2020 concerning the Administration and Trial of Criminal Cases in Courts Electronically (hereinafter referred to as the Regulation of the Supreme Court of the Republic of Indonesia Number 4 of 2020). The existence of the Regulation of the Supreme Court of the Republic of Indonesia Number 4 of 2020 is a big leap and reform of Criminal Code Procedure in a modern direction so that the examination process in the trial is carried out without being limited by space and other conventional administrations.

Electronic trial of criminal cases arises due to the needs of justice seekers in the conditions of the Covid-19 pandemic. According to Z.S. Lebedev, from Samara National Research University, emphasized that remote interaction in electronic courts is (Z.S. Lebedev, 2020):

> "There are 3 main forms of remote interaction with courts: submission of documents, which is more focused on professional participants in the process, familiarization with the materials of the case, which is implemented electronically."

According to Satjipto Rahardjo, law is made for humans, not humans for law. Progressive law understands the concept of justice as a law that really pays attention to new sources of law to achieve justice (Dicky Eko Prasetio, et.al, 2021). In accordance with the understanding of progressive legal thought, in which laws are made for humans, in this

Covid-19 pandemic condition, electronic criminal trials are an alternative to conventional criminal trials in Law Number 8 of 1981 concerning the Criminal Code Procedure in Indonesia. The application of alternative criminal case trials, assessed from the needs determined from the view of the panel of judges examining the case, it is necessary to pay attention to whether this alternative electronic criminal case trial has maintained the values of human rights and legal interests of the defendant.

Referring to the above background, the researcher is interested more in studying: 1) how are the arrangements for the trial of criminal cases regulated in Law Number 8 of 1981 concerning the Indonesian Criminal Code Procedure? and 2) what is the alternative policy for the trial of electronic criminal cases from the perspective of *ius constituendum*?

Research Method

The type of research used in this research is normative legal research. Moreover, this research uses a legal approach, a comparative approach, and a conceptual approach. The statutory approach is used to examine the contents of the legal provisions in Law Number 8 of 1981 concerning the Criminal Code Procedure and the Regulation of the Supreme Court of the Republic of Indonesia Number 4 of 2020 regarding the alternative process of examining criminal cases, then a comparative approach is used to compare conditions of criminal trials examination conducted electronically in different countries in this study comparing Indonesia with Australia, and a conceptual approach is used to describe the concept of conventional criminal court process in Law Number 8 of 1981 concerning the Criminal Code Procedure with the concept of an electronic criminal trial in the Regulation of the Supreme Court of the Republic of Indonesia Number 4 of 2020.

Result and Discussion

1.1 Regulation of Criminal Case Trials in Law Number 8 of 1981 concerning Criminal Code Procedure in Indonesia

The definition of Criminal Code Procedure is not clearly defined in Law Number 8 of 1981 concerning the Criminal Code Procedure. The definition of Criminal Code Procedure is essentially the rules regarding procedures for administering criminal justice where the subject of Criminal Code Procedure is the community in a broad sense and the law enforcers in it. The implementation of conventional criminal trials in Indonesia requires the defendant

to appear before the court with an examination as based on the legal principles contained in Law Number 8 of 1981 concerning the Criminal Procedure Code.

The principles of criminal trial are based on the provisions of Law Number 8 of 1981 concerning the Criminal Code Procedure, as follows:

1. The right of the defendant's presence before the court, in this principle demands the presence of the defendant in the judicial process until the court's decision is read and may not be represented by anyone. Except for corruption, money laundering and quick examination;
2. This free trial is carried out in a fast, simple and with low cost; (Merti Ardilla, Elis Rusmiati, Ijud Tajudin, 2020);

Based on the principles of criminal trial regulated in Law Number 8 of 1981 concerning the Criminal Code Procedure, it can be explained that the purpose of Criminal Code Procedure is essentially to seek the truth of a criminal case. Law enforcers must always be based on the truth that really happened, law enforcers are required to understand criminal Code Procedure in order to solve legal problems, especially criminal ones that are solely aimed at finding material truth.

The criminal trial as regulated in Law Number 8 of 1981 concerning the Criminal Code Procedure, regulates the presence of the defendant in the courtroom, as follows:

a. "The defendant's statement is what the defendant **stated in court** about the actions he had committed or which he himself knew or experienced". (Article 189 paragraph (1) of Law Number 8 of 1981 concerning the Criminal Code Procedure);
b. "The Defendant has the right to be tried in a court session which is open to the public." (Article 64 of Law Number 8 of 1981 concerning the Criminal Code Procedure);
c. "Witness testimony is evidence that **the witness stated in court**" jo. "**Witnesses are summoned into the courtroom** one by one according to the order deemed best by the presiding judge of the session after hearing the opinion of the public prosecutor, defendant or legal adviser" (Article 185 paragraph (1) of the Criminal Procedure Code in conjunction with Article 160 paragraph (1) letter a Law Number 8 of 1981 concerning the Criminal Code Procedure);
d. "Expert testimony is what **experts state in court**. (Article 186 of Law Number 8 of 1981 concerning the Criminal Code Procedure);

e. “The trial was held in the courthouse **in the courtroom**.” jo. "**In the courtroom**, judges, public prosecutors, legal advisers and clerks wear court clothes and their respective attributes." (Article 230 paragraph (1), (2) Law Number 8 of 1981 concerning the Criminal Code Procedure).

Based on the description of the provisions in Law Number 8 of 1981 concerning the Criminal Code Procedure above, it does not allow judicial trial *in absentia* in ordinary examination procedures and brief examinations. The principle of the presence of the accused has other names, namely *ius singular, ius speciale, or bizonder strafrecht*. In addition, the principle of the presence of the defendant is related to the principle of direct and oral examination of the judge. However, in its development, it is regulated in Supreme Court Regulation Number 4 of 2020, it is possible to have an alternative electronic criminal trial.

1.2 Alternative Policies for Electronic Criminal Case Trials in the Perspective of the *Ius Constituendum* in Indonesia

Technology and interconnection-networking play an important role in civilization in the world today. Technology never lags behind fashion and trends. It always develops following the development of the society’s needs, too rapidly even, that sometimes it creates an imbalance between developed countries (I Gusti Agung Ayu Gita Pritayanti Dinar, et.al. 2021). Menurut Satjipto Rahardjo, one of the most well-known Professor of Law in Indonesia, revealed that law science is not a human intellectual idea only, however, this instrument was developed and guided based on society dynamics (I Dewa Made Suartha, et.al, 2021).

One of the guidelines for a judge is of course the laws and regulations in carrying out their duties to hear, examine and sentence (Sebastian Sindarto, 2021). Likewise, Law Number 8 of 1981 concerning the Criminal Code Procedure as a guide in formal criminal procedure law. The role of progressive legal understanding which can be seen as a concept, in the form of dissatisfaction and concern with the performance and quality of law enforcement in Indonesia (Ferdy Rizky Adilya, 2018) in the conditions of the Covid-19 pandemic.

Supreme Court Regulation No. 4 of 2020, is a consequence of the principle of legality. The principle of formal legality is applied to prevent arbitrariness of the authorities against innocent people (Ateng Sudibyo, et.al, 2021). That matter encourages law enforcers to make legal breakthroughs and need other alternatives so that they can continue to carry

out a fair law enforcement process, especially in the criminal trial process in court. Supreme Court Regulation Number 4 of 2020 in the consideration, outlines the principle matters in the provisions of the Supreme Court regulation, namely:

a. that the Court is obliged to assist justice seekers and try to overcome all obstacles and obstacles to realize a simple, fast and less cost trial;
b. that the 2010-2035 Judicial Reform Blueprint aims to realize a modern justice based on information technology;
c. that in the presence of a case that is constrained by certain circumstances, it requires a quick resolution while respecting human rights.

Viewing the consideration of letter a in Supreme court Regulation Number 4 of 2020, it has been regulated in Article 4 paragraph (2) of Law Number 48 of 2009 concerning Judicial Power which replaces Law Number 35 of 1999 concerning Amendments to Law Number 14 of 1970, the contents of which are exactly the same as the preamble to letter a of the Supreme Court Regulation Number 4 of 2020. Electronic hearings are regulated in Article 1 number 12 of the Supreme Court Regulation Number 4 of 2020, which regulates:

> "An electronic trial is a series of processes for examining, adjudicating, and deciding the case of the Defendant by the Court which is carried out with the support of technology and communication, audio-visual and other electronic devices."

Supreme court Regulation Number 4 of 2020 stipulates that the examination of the defendant is not present in the courtroom at the Court, in the case of a criminal act of corruption, the examination without the presence of the defendant is known as the principle of in absentia, by fulfilling several conditions, including: the defendant has been legally summoned, and the defendant is not present at the trial court without a valid reason (P. Iskandar Welang, 2020). There are many obstacles in the electronic trial of criminal cases, as also revealed by Meredith Rossner and David Tait from the Australian National University and the University of Sydney Australia, who said (Meredith Rossner and David Tait, 2020):

> "Witnesses and defendants routinely appear in court via video link, as do judicial officers in Northern Territory and South Australia courts. Our research, however, suggests that attempts to translate courtroom interactions to a video mediated process do not always work. Introducing monitors into the courtroom requires a reimagining of courtroom spaces, social cues, symbols and performances."

Based on the results of the above research regarding the use of technology with video conferences (teleconference), the Northern Territory Court and South Australia have used

for a long time the form of video conferencing by presenting the panel of judges in a different room from the defendant in other places..

The provisions in Article 1 point 16 of the Supreme Court Regulation Number 4 of 2020 provide two conditions for conducting the trial electronically, namely with provisions from the government which considers the situation to be an emergency and the condition according to the panel of judges who issued its determination relating to the criminal case in question cannot be carried out manually. conventional manner with the procedures regulated by Law Number 8 of 1981 concerning the Criminal Code Procedure. According to Kate Puddister and Tamara A. Small from the University of Guelph Ontario-Canada, said (Kate Puddister, 2020):

> "However, the COVID challenge presents an opportunity for the court system to innovate and, where appropriate, embrace the capabilities of digital technology."

The statement from Kate Puddister and Tamara A. Small above, emphasizes that in the conditions of the covid-19 pandemic, this is a good opportunity for courts as law enforcement institutions to be able to innovate and be efficient in resolving and deciding criminal cases electronically.

Regarding the facilities and infrastructure in the implementation of criminal case trials electronically, which must be recognized until now in Indonesia, there are still obstacles, especially regarding the internet network as a liaison between electronic modules used in electronic trials. This is also emphasized by Emma Rowden and Anne Wallace, who emphasize the use of electronics, as follows (Emma Rowden and Anne Wallace, 2019):

> "That video link appearances disrupt or alter experts' performances should trouble experts and those who call them. Experts and lawyers could advocate for courts to ameliorate some of the challenges we identify through technical fixes and adjustments to the architecture of remote court facilities. No doubt such measures will happen in time. However, focusing solely on design or technological solutions misses the broader implications for law and society."

Another factor regarding the trial of criminal cases electronically is related to the psychology of the defendant. This was also expressed by Meredith Rossner and David Tait, who are researchers from the Australian National University and the University of Sydney Australia, who said (Meredith Rossner and david Tait, 2020):

> "In criminal matters, defendants who appear remotely from police custody or jail are more likely to have a higher bail set, plead guilty and receive longer sentences than those who appear in person."

Based on the research undertaken by Meredith Rossner and David Tait above, they highlight the psychological attitude of the defendants who in electronic trial examinations using video conferencing are less active than in live criminal trials (conventional) in the courtroom..

According to Vladyslav Yamkovyi, et al from Tate University of Economics and Technology, Ukraine, providing a view of the advantages in the trial process conducted electronically, as follows (Vladyslav Yamkovyi, et.al, 2021):

> "The advantages of remote court proceedings are the acceleration of the trial, saving time and money for both participants in the process and the state in the face of the judiciary, ensuring social isolation in a global pandemic, ensuring the safety of litigants."

Electronic trial of criminal cases in the perspective of *ius constituendum*, in accordance with the Blueprint for Judicial Reform 2010-2035, among others, aims to realize modern justice based on information technology. Considering the advantages of conducting an electronic criminal trial, it must be followed by the validity of the examination process in the trial of a criminal case which must be carried out by taking into account the rights of the accused and endeavored to be kept away from elements that are technical in nature. In order to continue to enforce the process of examining criminal cases and provide legal certainty in criminal procedural law, it is appropriate that Supreme Court Regulation Number 4 of 2020 which regulates criminal proceedings electronically as an alternative to the provisions in Law Number 8 of 1981 concerning the Criminal Code Procedure.

Conclusion

The alternative policy of electronic trial of criminal cases in court as an alternative to the process of examining criminal cases while still being guided by Law Number 8 of 1981 concerning the Criminal Code Procedure, is a modernization step and renewal of the current criminal procedure law. Not only in the current state of the COVID-19 pandemic, but also the demands of the times with the continued development of information technology as stated in the Blueprint for Judicial Reform 2010-2035 Indonesia. Regarding the validity of the electronic criminal trial examination process, it can be carried out as long as the examination

continues to pay attention to the *due process* model for trial participants and the provisions of Law Number 8 of 1981 concerning the Criminal Code Procedure in general.

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