

# Evaluation of The Fulfillment of The Defendant's Rights in Online Criminal Proceedings in Indonesia

**Gede Aditya Pratama**

Lecturer, Faculty of Law, Universitas Bhayangkara Jakarta Raya, Indonesia  
Email: [gede.aditya@dsn.ubharajaya.ac.id](mailto:gede.aditya@dsn.ubharajaya.ac.id)

DOI: [dx.doi/sasana.10.59999/v9i1.2268](https://doi.org/10.59999/v9i1.2268)

**Received:**  
14-02-2023

**Revised:**  
11-03-2023

**Accepted:**  
9-04-2023

**Abstract:** *In early 2020, Indonesia was hit by the Corona Virus that affect all aspects in public live including affect judicial institutions. Criminal proceedings that supposed to be held in a trial that open to the public according to the Indonesian Criminal Procedure Code, must be held online in which judges, prosecutor, lawyer, and the defendant are in separate places. Even though, the Indonesian Supreme Court have enacted Circular Letter No. 1 Year 2020 to regulate the proceedings during the Covid-19 pandemic, many criticisms for the course of online trials especially regarding the rights of the defendants, which were violated during the online trial. The rights of the defendant who were violated during the online criminal trial were the right to be heard equally, right to consult with a lawyer during the proceedings of the case, right to be tried without undue delay, and right to present witnesses and experts and ask questions to these witnesses and experts. These rights, that was feared violated because the defendant could not attend the trial in person. This research was conducted to explain the course of the online criminal proceeding to assess whether the defendant's rights had been fulfilled during the online trial.*

**Keywords:** *evaluation, online criminal proceedings*

**License:**  
Copyright (c)  
2023 Gede  
Aditya Pratama

This work is  
licensed under a  
Creative  
Commons  
Attribution-  
NonCommercial  
4.0 International  
License.



**Abstrak:** Di awal tahun 2020, Indonesia dilanda oleh Virus Corona yang berdampak pada segala aspek kehidupan masyarakat termasuk pada lembaga peradilan. Persidangan pidana yang seharusnya dilakukan dalam sidang terbuka untuk umum menurut KUHAP, harus dilakukan secara daring di mana hakim, jaksa, pengacara, dan terdakwa berada di tempat terpisah. Padahal Mahkamah Agung RI telah mengeluarkan Surat Edaran No. 1 Tahun 2020 untuk mengatur jalannya persidangan di masa pandemi Covid-19, banyak kritik terhadap jalannya persidangan daring terutama terkait hak-hak para terdakwa yang dilanggar selama persidangan daring. Hak-hak terdakwa yang dilanggar selama persidangan pidana online adalah hak untuk didengar secara adil, hak untuk berkonsultasi dengan pengacara selama persidangan, hak untuk diadili tanpa penundaan yang tidak semestinya, dan hak untuk menghadirkan saksi dan ahli serta mengajukan pertanyaan kepada para saksi dan ahli tersebut. Hak-hak tersebut dikhawatirkan dilanggar karena terdakwa tidak dapat menghadiri persidangan secara langsung. Penelitian ini dilakukan untuk menjelaskan jalannya persidangan pidana online untuk menilai apakah hak-hak terdakwa telah terpenuhi selama persidangan online.

**Kata kunci:** evaluasi, proses pidana online

## INTRODUCTION

The outbreak of Corona Virus in Indonesia since early 2020 has forced decision makers in Indonesia to limited public activities, including in judicial institutions. Contagious nature of the Corona Virus makes the court proceedings which normally has to be carried out in the courtroom and attended in person by the judges, prosecutors, defendants and their lawyers are no longer possible. In order to handle this situation, the Indonesian Supreme Court enacted Circular Letter No. 1 Year 2020 about Guidelines for Carrying out Duties during the Prevention of the Spread of the Corona Virus Disease 2019 (Covid-19) in the Supreme Court and Judicial Bodies under it (“SEMA No. 1/2020”).

Furthermore, Indonesian Attorney General has also enacted Attorney General Instruction No. 5 Year 2020 about Policy on the Implementation of Duties and Handling of Cases during the Prevention of the Spread of Covid-19 in the Indonesia Public Prosecutor’s Office (“**AG Instruction No. 5/2020**”). Finally, the Supreme Court, Attorney General, and Ministry of Law and Human Rights have made Cooperation Agreement No. 402/DJU/HM.01.1/4/2020, No. KEP-17/E/EJP/04/2020, No. PAS-08.HH.05.05 Year 2020 dated 13 April 2020 about Conduct of the Trial by Teleconference (“**Cooperation Agreement**”).

Even though SEMA No. 1/2020, AG Instruction No. 5/2020, and Cooperation Agreement have been enacted to ensure the course of the online trial, especially criminal proceedings by teleconference during the COVID-19 pandemic, is these regulations and cooperation are enough as a basis for the online criminal proceedings? Then, what is more important is whether the rights of the defendants are still protected according to the criminal procedural law during the implementation of the online criminal proceedings? This article is made to answer these questions in order to evaluate the fulfilment of the defendant’s rights in online criminal proceedings during the COVID-19 pandemic in Indonesia.

The article consists of five parts. After this first introductory part, Part II explains about the defendant’s rights in trial according to the Indonesian Criminal Procedure Code, SEMA No. 1/2020, AG Instruction No. 5/2020, and Cooperation Agreement between Indonesian Supreme Court, Attorney General, and Ministry of Law and Human Rights. Part III discuss about the course of online criminal proceeding during the COVID-19 pandemic. Part IV points out about evaluation of the course of online criminal proceeding. The fifth part concludes and give recommendation about the course of online criminal proceeding in regards with the fulfilment of the defendant’s rights.

## DISCUSSION

### Defendant’s Rights in Trial according to Criminal Procedural Law

#### A. Criminal Procedure Code

Criminal procedural law in Indonesia is regulated in Law No. 8 Year 1981 about Criminal Procedure Code (“**Criminal Procedure Code**”), there are several articles in the Criminal Procedure Code that states the proceedings must be conducted in court room

that open to the public and the defendants must be attending in person to the court room. The articles said as follows:

Article 153 paragraph (3) states that:

*“For the purpose of the examination, the Chairman of Judges opens the trial and declares that it is open to the public, except in cases concerning decency or the defendant is underage.”*

Article 153 paragraph (4) states that:

*“Non-fulfilment of the provisions in paragraphs (2) and (3) results in the cancellation of the decision by law.”*

Article 154 paragraph (1) states that:

*“The Chairman of Judges ordered that the defendant be summoned in and if he was in detention, he be confronted in a free state.”*

Article 154 paragraph (4) states that:

*“If the defendant has been legally summoned but does not appear in court without a valid reason, the examination of the case cannot be carried out and the Chairman of Judges order that the defendant to be summoned again.”*

Article 196 paragraph (1) states that:

*“The court decides the case in the presence of the defendant unless this law provides otherwise.”*

Article 230 paragraph (1) states that:

*“The court hearings are held in the Court building in the courtroom.”*

From the articles in Indonesian Criminal Procedure Code as mentioned above, we can understand that according to the Criminal Procedure Code, defendant has to be presented and examined in person at court. M. Yahya Harahap in his book explains, that without the presence of the defendant in the trial, the examination of the case cannot be carried out. Violation of this principle results in the cancellation of the decision by law.<sup>1</sup> Criminal Procedure Code basically does not allow the course of criminal proceedings without the presence of the defendant. The principle of the presence of the defendant is related to the principle of direct and oral examination of the judges.<sup>2</sup>

However, since the Corona Virus outbreak until now many criminal proceedings are conducted by teleconference and not presenting the defendant in person to the court. In the next part of this article, we will discuss whether the regulations and cooperation that has been made are sufficient as a legal basis to conducting criminal proceedings without the presence of the defendant in person to the court.

Regarding the rights of defendant to be accompanied by lawyer, article 54 Criminal Procedure Code regulates that in the interest of defence, a defendant is entitled

---

<sup>1</sup> M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP: Pemeriksaan Sidang Pengadilan, Banding, Kasasi, dan Peninjauan Kembali* (2<sup>nd</sup> edn, Sinar Grafika 2009), 110-111

<sup>2</sup> Anggita Doramia Lumbanraja, ‘Perkembangan Regulasi dan Pelaksanaan Persidangan Online di Indonesia dan Amerika Serikat selama Pandemi COVID-19’ (2020) *Jurnal CREPIDO* Volume 2 Number 1 46, 53

to legal assistance from one or more lawyers during the time and at every level of examination, according to the procedure specified in the Criminal Procedure Code. Moreover, article 56 paragraph (1) Criminal Procedure Code also states that in the event that a defendant is charged with committing a criminal act which is punishable by the death penalty or a sentence of fifteen years or more or for those who are incapacitated (financially) who are threatened with a sentence of five years or more who do not have their own lawyer, the official concerned at all level of examination in the judicial process is obliged to appoint lawyer for them.

### **B. SEMA No. 1/2020, AG Instruction No. 5/2020, and Cooperation Agreement**

In regards with the criminal proceeding, SEMA No. 1/2020 only regulates that criminal proceeding, military criminal proceeding, and Islamic criminal proceeding will continue to be carried out specifically for cases where the defendant is being detained and the detention cannot be extended during the period of preventing the spread of COVID-19 within the Supreme Court and its judicial bodies. On the other hand, criminal proceeding, military criminal proceeding, and Islamic criminal proceeding against defendants whose detention can be legally extended, are adjourned until the end of the preventing period of the spread of COVID-19 within the Supreme Court and its judicial body. The adjournment of the proceeding can be conducted by a single judge.

Moreover, in AG Instruction No. 5/2020 which give instruction to the prosecutor's office across the nation to: reschedule criminal proceeding for cases where the defendant is currently in custody and its detention cannot be extended during the period of preventing the spread of COVID-19; postponing the process of criminal proceeding for suspects/defendants whose detention is reasonably can be extended or suspended; and develop the use of teleconference at the time of the proceeding. Since according to the SEMA No. 1/2020 and AG Instruction No. 5/2020, criminal proceeding for the defendant which is being detained and its detention cannot be extend must continue, then the only way to do it during the COVID-19 pandemic is that the trial must be conducted online through teleconference. In order to do that, the Cooperation Agreement between Indonesian Supreme Court, Attorney General, and Ministry of Law and Human Rights regulate their respective role in the criminal proceeding in the conduct of the online trial. With the enactment of SEMA No. 1/2020, AG Instruction No. 5/2020, and Cooperation Agreement it became clear that the criminal proceeding during the COVID-19 pandemic will be held online through teleconference. In the next part of this article, we will observe how the online criminal proceeding are conducted, including from the author own perspective who also has experience in assisting a client as defendant during the online criminal proceeding.

### **The Course of Online Criminal Proceeding during the COVID-19 Pandemic**

During the implementation of Online Criminal Proceeding since the outbreak of Corona Virus in early 2020, there has been many criticisms especially for the fulfilment of the

defendant rights during the trial. Ombudsman an institution who were established to oversee the enforcement of public service in Indonesia said that there are several potential of maladministration in regards with the implementation of Online Criminal Proceeding such as protracted delay of the trial; lack of the IT staff that can causes online proceeding become slowly, especially if technical problems occur in the middle of the trial; limited mastery of technology by the judges; limited courtrooms that have teleconferencing facilities; unstable internet network; and lawyers which are not beside the defendant and cannot ensure whether the defendant or witnesses are under pressure or not.<sup>3</sup>

From the author own experience when assisting a client in criminal proceeding as defendant in South Jakarta District Court, the author cannot accompany the defendant side by side in courtroom. Lawyers, prosecutors, and judges were present in courtroom during the proceeding while the defendants were stay in the detention house and join the proceeding via ZOOM application. As a lawyer, the author experienced the difficulties by himself from unable to communicate freely and confidentially with the clients during the trial, since the proceeding conducted in ZOOM application, then if the lawyer wants to communicate with their client, the prosecutor and judges will hear the conversation too. Furthermore, when conducting cross examination, the defendant cannot hear clearly what the witnesses or experts said during the proceeding due to unstable internet network, this resulted in the defendants were not being able to respond properly to what was stated by witnesses and experts during the trial. Moreover, even the defendant did not have the opportunity to firstly consult with his lawyer before stating that whether he would accept the court decision or file an appeal.



Figure 1. The author as a lawyer assisting a defendant for criminal proceeding in South Jakarta District Court on June 2<sup>nd</sup>, 2020

<sup>3</sup> Ombudsman Republik Indonesia, 'Ombudsman RI Temukan Potensi Maladministrasi terkait Penyelenggaraan Persidangan Online di tengah Pandemi COVID-19' <<https://ombudsman.go.id/news/r/-ombudsman-ri-temukan-potensi-maladministrasi-terkait-penyelenggaraan-persidangan-online-di-tengah-pandemi-covid-19>> accessed June 30<sup>th</sup>, 2021

## Evaluation of the Course of Online Criminal Proceeding

Indonesian Supreme Court on September 29<sup>th</sup>, 2020, after evaluating the course of online criminal proceeding since the outbreak of Coronavirus in early 2020 enacted Supreme Court Regulation No. 4 Year 2020 about Administration and Trial of Criminal Cases in Court Electronically (“**PERMA No. 4/2020**”). In article 7 PERMA No. 4/2020 it is regulated that in the event that the trial is conducted electronically, the defendant who is accompanied by lawyer must be physically in the same room as the defendant. However, in the event that the lawyer is not able to accompany the defendant in the detention house, lawyer convenes at the prosecutor’s office or at court. Furthermore, in the same article it is also regulated that the room where the defendant attends the trial must be equipped with a recording device/camera/CCTV that can show the overall condition of the room. Moreover, Article 13 PERMA No. 4/2020 also regulated that the defendant who is in detention is heard from the place where the defendant is being held accompanied/not accompanied by a lawyer.

From PERMA No. 4/2020, we can see that basically the Supreme Court try to standardize the practice that have occurred during the implementation of online trials. However, PERMA No. 4/2020 basically allow that the defendant not to be appeared in court with or without the presence of their lawyer. This is principally violating the defendant’s rights as regulated in Criminal Procedure Code, which requires the defendant to be presented in person at the court during the criminal proceeding. Supreme Court Regulation according to Article 7 and 8 Law No. 12 Year 2011 about Establishment of Legislation are not higher than Criminal Procedure Code or even in the same level, so it cannot waive the rights of defendant that is granted by the Criminal Procedure Code.

The presence of the defendant in person at court is important to reveal the material truth in the trial and this right is guaranteed by Criminal Procedure Code. The truth that seeks by the civil judges is different from that of criminal judges. Civil judges seek formal truths based on formal evidence submitted in court, thus placing letter evidence as the main evidence. On the other hand, the criminal judges seek material truth, which is not only based on formal truth, but lies on the role of the judges based on his belief in examining the case. The problem is with the limitations of the online criminal proceeding whether the judges can still find the material truth, considering that the stakes are very large, which is the fate of the defendant itself.<sup>4</sup>

## CONCLUSION

The outbreak of COVID-19 pandemic has caught society by surprise, the judiciary is no exception. To ensure the course of criminal proceeding, many regulations has been enacted by the Supreme Court, Attorney General, and related Ministry. However, none of its regulation are in the same level or higher than the Criminal Procedure Code which obliged that the defendants must be tried in person at court. Moreover, the

---

<sup>4</sup> Dewi Rahmaningsih and S. Suteki, ‘Membangun Budaya Hukum Persidangan Virtual (Studi Perkembangan Sidang Tindak Pidana via Telekonferensi)’ (2020) *Jurnal Pembangunan Hukum Indonesia* Volume 2 Number 3 291, 299

implementation of online criminal proceeding also still has several weaknesses and can result in the violation of the defendant's rights, from the defendant's unable to hear and respond clearly when witnesses or experts are testifying at trial, especially if internet interference occur. With the defendant who are not side by side with their lawyer at court, they are also unable to communicate freely and confidentially during the online trial with their lawyer. Online criminal proceedings also contain limitations compared to in-person proceedings in court, for judges to find material truths that will determine the fate of the defendant.

Since the rights for defendants to be presented in person at court is granted by the Criminal Procedure Code, accordingly until the enactment of higher level of legislation (i.e. law or government regulation in lieu of law) that regulates online criminal proceeding, the author suggest that if the court is unable to present the defendant in person at court, then all criminal trial must be suspended. For defendants that are currently in detention, they must be released when their detention term is ended until the enactment of higher legislation that regulate online criminal proceeding or until the COVID-19 pandemic is over so all the defendants can be tried in person at court.

## BIBLIOGRAPHY

### Primary Sources

- Law No. 8 Year 1981 about Criminal Procedure Code (Indonesia)
- Law No. 12 Year 2011 about Establishment of Legislation (Indonesia)
- Supreme Court Regulation No. 4 Year 2020 about Administration and Trial of Criminal Cases in Court Electronically (Indonesia)
- Supreme Court Circular Letter No. 1 Year 2020 about Guidelines for Carrying out Duties during the Prevention of the Spread of the Corona Virus Disease 2019 (Covid-19) in the Supreme Court and Judicial Bodies under it (Indonesia)
- Attorney General Instruction No. 5 Year 2020 about Policy on the Implementation of Duties and Handling of Cases during the Prevention of the Spread of Covid-19 in the Indonesia Public Prosecutor's Office (Indonesia)
- Cooperation Agreement No. 402/DJU/HM.01.1/4/2020, No. KEP-17/E/EJP/04/2020, No. PAS-08.HH.05.05 Year 2020 dated 13 April 2020 about Conduct of the Trial by Teleconference between Supreme Court, Attorney General, and Ministry of Law and Human Rights (Indonesia)

### Secondary Sources

- Harahap MY, *Pembahasan Permasalahan dan Penerapan KUHAP: Pemeriksaan Sidang Pengadilan, Banding, Kasasi, dan Peninjauan Kembali* (2<sup>nd</sup> edn, Sinar Grafika 2009)
- Lumbanraja AD, 'Perkembangan Regulasi dan Pelaksanaan Persidangan Online di Indonesia dan Amerika Serikat selama Pandemi COVID-19' (2020) *Jurnal CREPIDO* Volume 2 Number 1
- Rahmaningsih D and Suteki S, 'Membangun Budaya Hukum Persidangan Virtual (Studi Perkembangan Sidang Tindak Pidana via Telekonferensi)' (2020) *Jurnal Pembangunan Hukum Indonesia* Volume 2 Number 3
- Ombudsman Republik Indonesia, 'Ombudsman RI Temukan Potensi Maladminsitrasi terkait Penyelenggaraan Persidangan Online di tengah Pandemi COVID-19' <<https://ombudsman.go.id/news/r/-ombudsman-ri-temukan-potensi-maladministrasi-terkait-penyelenggaraan-persidangan-online-di-tengah-pandemi-covid-19>> accessed June 30<sup>th</sup>, 2021