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Jalan Srijaya Negara, Palembang, South Sumatra 30139, Indonesia.  
Phone: +62711-580063 Fax: +62711-581179  
E-mail: sriwijalayalawreview@unsri.ac.id| sriwijalayalawreview@gmail.com  
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## Finding the Truth in A Virtual Courtroom: Criminal Trials in Indonesia during the COVID-19

Febby Mutiara Nelson,<sup>a</sup> Intan Hendrawati,<sup>a</sup> and Rafiqqa Qurrata A'yun<sup>b</sup>

<sup>a</sup> Faculty of Law, Universitas Indonesia, Indonesia. Corresponding author Febby Mutiara Nelson, e-mail: febymutiara.n2@gmail.com

<sup>b</sup> Melbourne Law School, University of Melbourne, Australia. E-mail: rayun@unimelb.edu.au

Article	Abstract
<p><b>Keywords:</b> <b>Criminal Proceedings; Technology; The COVID-19; Virtual Courtroom.</b></p> <p><b>Article History</b> Received: Nov 30, 2022; Reviewed: Jan 13, 2023; Accepted: Jul 18, 2023; Published: Jul 31, 2023.</p> <p><b>DOI:</b> 10.28946/slrev.Vol7.Iss2.2 465.pp228-243</p>	<p>Video conferencing through video call platforms, such as Zoom and Google Meet, has become a useful option for judges holding criminal trials during the COVID-19 pandemic in many countries. This trend also occurred in Indonesia. Some judges believe that video conferencing technology will help them accomplish justice in an emergency, referring to the legal maxim '<i>salus populi suprema lex esto</i>' or 'let the welfare of the people be the supreme law'. Although virtual trials assist courts in preventing the spread of the deadly virus, they have also affected the work of judges to reach the substantive truth. This paper examines the challenges concerning the rights of the accused and technological matters that have emerged under the use of virtual courtrooms and, in some ways, led to unfair trial procedures. We argue that the absence of laws that regulate virtual courtrooms, along with an outdated the Code of Criminal Procedure in Indonesia (KUHAP), can lead to miscarriages of justice. The arguments presented in this article are based on survey data conducted from December 2020 to January 2021. The respondents are judges from Indonesia's western, middle, and eastern regions who used video conference facilities for criminal court hearings during the COVID-19 outbreak of 2020-2021.</p>

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### INTRODUCTION

The Coronavirus disease (COVID-19) pandemic has drastically changed how legal procedures are undertaken, including those in criminal trials. Around the world, this pandemic has challenged courts to tackle cases despite their limited abilities to operate face-to-face communication, resulting in the utilisation of virtual courtrooms through video conference applications such as Zoom and Google Meet. In some countries which experienced a severe spread of COVID-19, like Italy, civil and criminal proceedings were suspended for several

months during the peak of infections.<sup>1</sup> Similar situations occurred in the United States of America (USA), which closed its federal courts and diverted hearings to video proceedings in limited proceedings before the jury trial, such as detention hearings, initial appearances, preliminary hearings, waivers of an indictment, arraignments, probation and supervised release revocation proceedings, misdemeanour pleas and sentencing, plea, and verdict reading. Shortly after the first case of COVID-19, the United States immediately formed the CARES Act, which regulates teleconference hearings. Nonetheless, the United States maintains jurisprudence and a history of refusing trials via teleconference for viewing witnesses for violating the United States Constitution. Most countries have also issued emergency regulations to cope with such changes, particularly to justify the legality of the exceptional procedures during the pandemic, such as the use of video conference applications for hearings. Although video conferencing for courts was already in use in some countries before the COVID-19 pandemic, the way and the extent to which the technology has been used amid the outbreak has raised significant concerns in academic and public discourses.

The main issue facing virtual courts is the right to a fair trial. Gori and Pahladsingh, who studied video conferencing in European courts, underline how the pandemic has challenged the right to a fair trial by referring to Article 6 of the European Convention on Human Rights Year 1950 that includes elements of reasonable time and guarantees of independence and impartiality. In India, which experienced an extraordinarily high number of COVID-19 cases in mid-2021, a small number of virtual courts operated only in so-called ‘urgent’ cases. This situation made access to legal representation and fair investigation “virtually impossible”.<sup>2</sup> Concerns over the right to a fair trial in India indicate how the shifting of established procedures may affect the results of proceedings.<sup>3</sup>

Concerns over fair trials also emerged in Indonesia. During several months in 2021, Indonesia experienced some of the world's highest number of cases and positivity rates and the highest mortality rate of medical workers in Asia.<sup>4</sup> While the country’s handling of the pandemic has been poor even since the beginning, with Indonesia’s first case of COVID-19 detected in March 2020, the judicial system has also struggled with its impacts. The pandemic has negatively impacted the best efforts of trial procedures in an inquisitorial system where “the judges inquire into the truth,” including by directly questioning chosen witnesses.<sup>5</sup> But the impacts have been more significant than just on technical matters that disrupt physical hearings. The shift from offline to online courtrooms has made reaching a fair trial more challenging in a criminal justice

<sup>1</sup> Pierpaolo Gori and Aniel Pahladsingh, “Fundamental Rights under Covid-19: An European Perspective on Videoconferencing in Court,” *ERA Forum Journal of the Academy of European Law* 21, no. 4 (Jan 2, 2021): 561–62, <https://doi.org/10.1007/s12027-020-00643-5>.

<sup>2</sup> Neha Dixit, “India’s Long Lockdown Led to Breakdown of Criminal Justice System,” <https://www.aljazeera.com/>, 2020, <https://www.aljazeera.com/features/2020/6/2/indias-long-lockdown-led-to-breakdown-of-criminal-justice-system>.

<sup>3</sup> Dharvi Vaid, “How Coronavirus Is Propelling the Rise of Online Courts in India,” <https://www.dw.com/en/top-stories/s-9097>, 2020, <https://www.dw.com/en/how-coronavirus-is-propelling-the-rise-of-online-courts-in-india/a-53774109>.

<sup>4</sup> Total cases of COVID-19 in Indonesia reached 6.11 million cases in July 2022. See John Hopkins Coronavirus Resource Center (2022)

<sup>5</sup> Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, KUHP: Law No 8 of 1981 on Criminal Procedure)

system where many difficulties exist, despite some reforms to change institutional aspects. Long before the pandemic, observers were already noting the need to amend the outdated primary source of criminal law procedure, *Kitab Undang-Undang Hukum Acara Pidana* (KUHAP, or Code of Criminal Procedure), to pursue due process of law. The pandemic has re-highlighted this key issue and brought new challenges to the fore.

Against this backdrop, the question addressed here is this: how has the virtual attendance of defendants in criminal trials led to unfair trial tendencies? Findings from our research conclude that the pre-conditions of criminal proceedings in Indonesia have worsened tendencies of miscarriage of justice during the pandemic. As new regulations are only useful in emergencies, achieving a fair trial remains challenging, if possible. These arguments are based on our analysis of survey data collected from 109 judges across Indonesia who used video conference facilities for criminal court hearings during the COVID-19 outbreak between March 2021 and January 2022. Primary data in the study were obtained using *questionnaires* and interviews and through trial observations (conducted virtually by the researchers) at several district courts in Indonesia's western, central, and eastern regions. The participants were selected by their capacity as criminal law judges sitting on district courts. This research also includes a desk-based analysis of legal documents and scholarly literature on Indonesian criminal procedure. It is supported by secondary data from credible media reports to provide insights on the COVID-19 situation in the country that urged legal arrangements for online trials. By using a qualitative approach with judges as respondents, the collected data allow us to reliably analyse and test the existing criminal procedure law and its enforcement, including how the law has coped with the impacts of COVID-19. This analysis allows the quantitative data collected by this study to explain further the arguments that were developed through qualitative analysis.<sup>6</sup>

In analysing the challenges of online trials in Indonesian courts during the COVID-19 pandemic, this paper provides comparative insights from Estonia and the United States that reflect the problems faced by law enforcement actors and potentially affect the standard of a fair trial. These insights, therefore, should not be treated as a thorough comparative examination since different trajectories of law enforcement in the countries assessed may define different challenges faced by each criminal justice system. This research includes a comparative dimension from Estonia and the United States (US), where legal frameworks were established to support the application of online trials during the pandemic. Online trials have been regulated since 2004 in Estonia, a civil law country, and since 2001 in the US, which uses a common law legal tradition. Estonia ranks highly for e-governance<sup>7</sup> and is globally known for its progressive use of high technology in its state administration, including courts, such as the utilisation of robot judges.<sup>8</sup> Three months after the first case of COVID-19, Estonia revised its Code of Criminal Procedure to ensure online criminal trials can be carried out in all stages of trials. Similarly, the US responded to the necessity of online trials within two months of the first US case of COVID-19,

<sup>6</sup> John W. Creswell and Vicki L. Plano Clark, *Designing and Conducting Mixed Methods Research* (Thousand Oaks: SAGE Publications, 2018).

<sup>7</sup> H.A. Shmagun, "From a Small State Towards a Matured Digital Society: The Case Study of Estonia," *Jurnal BSU* 3 (2015): 105–6.

<sup>8</sup> Oleg Stepanov et al., "Justice and Digitalization as Mutually Determining Factors of Criminal-Jurisdictional Activity Development," *Bratislava Law Review* 3, no. 2 (Dec 31, 2019): 64, <https://doi.org/10.46282/blr.2019.3.2.147>.

identified on Jan 20, 2020. The US Congress developed the Coronavirus, Aid, Relief, and Economic Security (CARES Act), one element which regulates online criminal trials, with the exception of the jury trial stage.<sup>9</sup>

In explaining our analysis, we organise this article into four sections. The first seeks to establish an understanding of technology and access to justice in the Indonesian context by elaborating on digital inclusion in criminal courts and providing insights from other countries. The second section examines Indonesia's ideals of fair trials, with particular attention given to rights and the truth-finding process in criminal procedure. This section also explores tendencies relating to miscarriage of justice under existing laws. The fourth contextualise the impact of the COVID-19 pandemic on criminal proceedings through analysing our research findings. The final section provides recommendations for future research in the local and global contexts. In a broader sense, the analysis in this paper is intended to contribute to scholarly conversation on legal issues in the context of pandemics and to evaluate possible legal frameworks regarding online trials, particularly to address concerns over the potential risk of unfair trials.

## RESEARCH METHODS

This research uses a mixed analysis method of qualitative-quantitative type exploratory sequential design. Qualitative data was analysed before quantitative data. The quantitative data is a complement. Data collection tools in this research survey from one hundred and nine judges from west, central, and east parts of Indonesia for primary data. For the secondary data used, an interview with a practitioner.

## ANALYSIS AND DISCUSSION

### Technology in court

Many conditions and processes in daily activities have drastically changed, and millions of people are struggling with health and other crises during the COVID-19 pandemic. In responding to such a dramatic situation, some scholars have noted how technology has become involved in enforcing the law, as it prescriptively offers several benefits,<sup>10</sup> for example, argues that technology in criminal justice may help facilitate the arrangement of complex information, improve efficiency, mark elements that can be taken into decisions, and improve the accuracy of information. Others have noted that technology in criminal justice can reduce corruption in the justice sector due to technology assisting improvements in transparency, case management facilitation, and dissemination of judicial information. The use of technology in criminal trials has also made trials more effective, as there are no compelling reasons to travel long distances to present witnesses to court.<sup>11</sup>

### Indonesia, COVID-19, and online trials

Indonesia's COVID-19 policies on public activity and social distancing have significantly affected how criminal law works. *Badan Pusat Statistik* (Indonesia's Central Bureau of Statistics), for example, recorded that of 90,967 respondents from a survey conducted on 7-14

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<sup>9</sup> United States Coronavirus, Aid, Relief, and Economic Security Act (CARES Act) Sec. 15002 (b).

<sup>10</sup> Dory Reiling, *Technology for Justice* (Amsterdam: Leiden University Press, 2009).

<sup>11</sup> Hecht McCornack Rosenthal Wood and Levi, "Coping with COVID: Continuity and Change in the Courts," *Judicature* 104, no. 2 (2020): 22.



on the power of the judge. Inasmuch as that, the judge did not allow Paul to provide testimony by teleconference.<sup>14</sup>

Despite this, there are, in fact, several laws and regulations outside KUHAP that have partially accommodated the use of teleconferencing for the cross-examination of witnesses. These laws regulate criminal law procedures for specific crimes that are not stipulated in the Criminal Code (*Kitab Undang-undang Hukum Pidana/KUHP*). For instance, under the Article 27 of Law No. 15 of 2003 on the Stipulation of Government Regulation in Lieu No. 1 of 2002 on the Eradication of the Crime of Terrorism into Law, a witness can give testimony without dealing directly with the defendant to ensure the witness' safety. Similarly, Law No. 31 of 2014 on Amendments to Law No. 13 of 2006 on Witness and Victim Protection also stipulates that witness testimony can be given without the witnesses present in court for the sake of witness security and safety.

During the COVID-19 pandemic, the need to hold online trials has been made difficult due to KUHAP's lack of recognition for online criminal trials and several Supreme Court decisions rejecting the implementation of online criminal trials. In March-September 2020, the Supreme Court and the Attorney General's Office issued at least ten policies in attempts to resolve challenges relating to online criminal trials. Most of those were in the form of circular letters (*surat edaran*) and instructions stating that during the COVID-19 pandemic, online criminal trials must be held for the safety of people (based on the principle of *salus populi suprema lex esto*).

**Table 1: Online Criminal Court Regulations in Indonesia after the COVID-19 Pandemic**

No	Regulations	Agency	Provisions related to the implementation of online criminal trials	Stipulated date
1.	Circular Letter of the Supreme Court No. 1 of 2020	Supreme Court	There is no specific online criminal trial regulation, but it introduces the use of the principle of <i>salus populi suprema lex esto</i> for online criminal trials	Mar 23 2020
2.	Extension of Circular Letter of the Supreme Court No. 1 of 2020 through the Amendment of Circular Letter of the Supreme Court No. 1 of 2020 determines the trial postponement period:	Supreme Court	Extension of Circular Letter of the Supreme Court No. 1 of 2020 (above), determining the postponement of criminal trials due to the COVID-19 pandemic but not regulating online criminal trials.	Apr 3 2020 Apr 20 2020 May 12 2020 May 29 2020
	1. Circular Letter of the Supreme Court No. 2 of 2020 (Apr 3 – Apr 21)			
	2. Circular Letter of the Supreme Court No. 3 of 2020 (Apr 19 – May 13)			
	3. Circular Letter of the Supreme Court No. 4 of 2020 (May 12 – May 29)			
	4. Circular Letter of the Supreme Court			

<sup>14</sup>. Supreme Court, Supreme Court Decision No. 112/PK/Pid.2006 p.35-36.

No. 5 of 2020 (May 29 – Jun 4)				
3.	Attorney General Instruction No. 5 of 2020	Attorney General's Office	States that there are already instructions for conducting online criminal trials, as the Attorney General's Office has the information technology needed to carry out online criminal trials, specifically the SIMKARI system.	Mar 23 2020
4.	Attorney General's Letter No. B-009/A/SUJA/03/2020	Attorney General's Office	Coordination instructions for district courts and correctional institutions for the implementation of online criminal trials.	Mar 27 2020
5.	Cooperation Agreement No. 402/DJU/HM.01.1/4/2020	Supreme Court, Attorney General's Office, Ministry of Law and Human Rights	Online criminal trial guidelines for three agencies. This agreement, however, did not involve criminal rights advocates. It also did not stipulate any provisions to ensure that defendants are accompanied in person by advocates.	Apr 13 2020
6.	Circular Letter of the Supreme Court No. 6 of 2020	Supreme Court	Instruction to implement online criminal trials during the 'New Normal' government policy period of the pandemic.	Jun 5 2020
7.	Supreme Court Regulation No. 4 of 2020	Supreme Court	Outlines comprehensive online criminal trial regulations for the criminal justice system. Online criminal trials are only for certain circumstances and must accommodate the defendant's right to be accompanied by an advocate in person.	Sep 25 2020

Table 1 shows several laws and regulations regulating online criminal trials were introduced in Indonesia in 2020. Supreme Court Regulation No. 4 of 2020 is the most important, as it comprehensively regulates online criminal trials. Nevertheless, the validity of online criminal trials has been continuously debated, primarily centring around two key aspects. First, online criminal trials are not regulated by KUHAP, and second, Supreme Court Regulations are hierarchically lower than KUHAP, which is an Act.

Beside the legality of online criminal trials, another source of concern centres around guaranteeing the due process of law. In criminal court proceedings, due process focuses on procedural requirements and individual protection. Each process looks at two important questions. Firstly, has the public prosecutor removed the defendant's rights by using a procedure that is not regulated by laws and regulations? Secondly, if this is in accordance with the procedure, is the application in accordance with the principles of due process?<sup>15</sup> These questions lead to an understanding that guarantees the due process of law. Practitioners must ensure that defendants' rights are retained by implementing criminal procedures based on laws and regulations.

Supreme Court regulations have legal force and are as equally valid as laws and regulations in Indonesia. This is based on Article 7 jo. Article 8 of Law no. 12 of 2011 concerning the Establishment of Laws and Regulations, which determines the hierarchy of laws and regulations. This means that Supreme Court Regulation No. 4 of 2020 has binding legal force established under the institution's authority as a statutory regulation under the law.

<sup>15</sup> Eddy O.S. Hiariej, *Teori Dan Hukum Pembuktian* (Jakarta: Erlangga, 2012).

However, there remains a contradiction. In order to guarantee the rights of the defendant, the regulation regarding the practice of online criminal trials in a comprehensive manner must be regulated in laws and regulations at the level of KUHAP. In Indonesia, regulation at the level of KUHAP is a law, Act, or Government Regulation in Lieu of Law (*Peraturan Pemerintah/Perppu*). Article 22, paragraph (1) of the 1945 Constitution stipulates that the President has the right to stipulate a *Perppu* in the case of a compelling urgency. Based on the hierarchy of laws and regulations in Indonesia, *Perppu* has a level parallel to a law (*undang-undang*). Despite long-running plans to amend KUHAP, this has not yet been achieved, meaning that if online criminal trials must be regulated by law, the process will be extremely lengthy. However, in the event of a compelling emergency, such as the COVID-19 pandemic, regulation through *Perppu* can be implemented to ensure equality and the rights of the accused.

Nevertheless, based on extensive interpretation, the practice of online criminal trials has already been regulated by several acts (Article 27 Law No. 15 of 2003, and Article 9 Law No. 31 of 2014 on Amendments to Law No. 13 of 2006), specifically in the context of the examination of witnesses at trial, implying that online criminal trials can be carried out in other situations.

Let us look at the United States to understand better the options for regulating online criminal trials during COVID-19. A common law country, the US has also developed regulations related to the criminal justice system in the face of the COVID-19 pandemic. The US enacted the Coronavirus, Aid, Relief, and Economic Security Act (CARES Act), which is a federal law-level arrangement, on Mar 27 2020. This Act regulates the implementation of several activities during the pandemic, including the online criminal justice process. The US also developed an Amendment to the Federal Rules of Criminal Procedure on Dec 1 2020. These regulations were formulated to respond to the rapid spread of COVID-19 in prisons due to the close confinement of the inmates and the inability to isolate the sick.<sup>16</sup> Under the CARES Act. However, courts only moved online for jury trials and verdict reading sessions. Other procedures, like examining witnesses, should still be held in person. This is closely related to plans for online criminal trials in the US that were launched between 1996 and 2001, based on the Prison Litigation Reform Act of 1995. Supreme Court rejected that plan because Supreme Court judges considered that virtual witness examination was feared to be contrary to the Sixth Amendment to the US Constitution.<sup>17</sup> It means that even the COVID-19 pandemic could not justify witness examination through teleconference or online methods.

The 2006 Supreme Court rejection of the examination of witnesses via teleconference is inseparable from the Supreme Court's interpretation of the Confrontation Clause in the 2003 case of *Crawford v Washington*. In this case, Michael Crawford was charged with the murder of a

<sup>16</sup> J. M. Miller and A Blumstein, "Crime, Justice & the COVID-19 Pandemic: Toward a National Research Agenda," *American Journal of Criminal Justice* 45, no. 4 (2020): 515–24, <https://doi.org/doi:10.1007/s12103-020-09555z>; Laura Hawks, Steffie Woolhandler, and Danny McCormick, "COVID-19 in Prisons and Jails in the United States," *JAMA Internal Medicine*, 2020.

<sup>17</sup> Johnson Molly Treadway and Elizabeth C. Wiggins, "Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research," *Journal LAW & POLICY* 28 (2006): 213. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence



man, Kenneth Lee, who, according to his wife, Sylvia, had raped him (Crawford v. Washington, 2003). In the case, Crawford argued that he acted in self-defence when he stabbed Lee because Lee already had a knife. However, during the investigation, Sylvia said the opposite, stating that there was no knife in the room. This burdened the defendant – since Sylvia was his wife of the defendant, she had the right not to testify against her husband. Nevertheless, prosecutors used a tape recording as proof of Sylvia's testimony in the investigation into evidence because Sylvia could not be heard as a witness in the trial due to her status as the defendant's wife. On the evidence, the defendant was sentenced to 14 years imprisonment. When this case was appealed to the Supreme Court, the Supreme Court granted cassation and decided that the defendant's wife's testimony, recorded on tape, contradicted the Confrontation Clause of the Sixth Amendment to the Constitution. Witness testimony, if recorded by tape recording, could not be used in cross-examination,<sup>18</sup> Based on this case, the Supreme Court determined that teleconference jury trials contradict the Confrontation Clause, as the defendant cannot directly confront the witnesses testifying against him.

Several other countries have also changed laws and regulations or formed new laws and regulations governing online court practices. Estonia, which is a civil law country (like Indonesia), amended its Criminal Procedure Code on May 7 2020. Estonia has a project called e-Estonia, which is a technology development project for the State, including the courts. The Estonian Ministry of Justice has even asked the development team to create a robot judge to adjudicate simple lawsuits worth less than US\$8,000.<sup>19</sup> In criminal cases, Estonia has conducted telehearing or online trials since 2004 for defendants, witnesses, and experts who are situated outside Estonian territory. The digital transmission of files has also been implemented through a system called E-Files since 2008. As a result, Estonia's criminal system has had no significant difficulty dealing with the COVID-19 pandemic.

Although at the beginning of the COVID-19 pandemic, Estonia did not have a specific policy regulating online criminal trials, the Council for Administration of Courts recommended to the Supreme Court and Ministry of Justice that courts remain functional during the COVID-19 pandemic, including through seeking to conduct trials with technical solutions. The Estonian Ministry of Justice immediately submitted a draft of an Amendment to the Estonian Criminal Procedure Code.<sup>20</sup> Following the amendments to Article 269 Point 4 of the Estonian Criminal Procedure Code 2020, all criminal proceedings can be conducted online. Criminal trials can be conducted by teleconference, except for sessions for defendants to give testimony, which can only be carried out via video conference.

### **The fair trial principle in Indonesia**

The principle of a fair trial must be upheld in the criminal justice process in connection with due process guarantees. However, the definition and the standardisation of this principle differs from

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<sup>18</sup> Anthony Garofano, "Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials," *Catholic University Law Review* Vol. 56, Issue 2 (2007), p. 686

<sup>19</sup> Oleg A. Stepanov et al., "Justice and Digitalization as Mutually Determining Factors of Criminal - Jurisdictional Activity Development," *Bratislava Law Review* Vol.3, (2019).

<sup>20</sup> Estonian Human Rights Centre, "Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications," European Union Agency for Fundamental Rights (23 Maret 2020), p. 2.

country to country, as their different histories, legal systems, and other aspects, such as the role of religion, influence the judicial process and the various norms accepted by society.<sup>21</sup> Based on the 2018 Principles Assessment Report: Fair Trial of Indonesia by the Institute for Criminal Justice Reform (ICJR), four indicators of applying the fair trial principle in Indonesia exist. These indicators are the fulfilment of the rights of suspects during the judicial process; the fulfilment of the principle of equality before the law; the fulfilment of principles of competency, independence, and impartiality; and the fulfilment of the principles of assistance by legal counsel. These indicators must be met in online criminal trials to ensure a fair trial.

A defendant has clear rights during the criminal trial process. These rights are regulated in KUHAP and include the right to be presented in a free state, the right to be tried publicly by an impartial and fair court, the right to present a defence, and the right to remain silent on questions that incriminate the defendant (non-self incrimination).<sup>22</sup> During an online criminal trial, the defendant's rights must still be fulfilled and not reduced. However, the defendant's right to refuse online criminal proceedings has not been accommodated in Indonesia. This juxtaposes the US and Estonia, where online criminal trials require the accused's consent.

The principle of equality before the law is a principle that is realised by the presumption of innocence. If this principle is arbitrarily implemented, the defendant will receive compensation and/or rehabilitation.<sup>23</sup> In the inquisitorial system, the State has the large burden to prove the guilt of the accused, meaning the individual in question is considered innocent until the State proves his guilt.<sup>24</sup> This principle is known as the presumption of innocence for everyone, including the defendant, until a judge's decision declares otherwise.<sup>25</sup> Therefore, the implementation of online criminal trials still accommodates the principle of equality before the law because the defendant still has the right to defend himself.

Competency, independence, and impartiality are also key to fair trials. A competent judiciary refers to the accuracy of the judiciary in handling a case and the speed of trial execution. Independence is the freedom of the judicial process from interference, pressure, coercion, influence, or control from the legislative, executive, or other legal bodies. Impartiality is the neutral and impartial attitude towards personal prejudice or bias and maintaining the judiciary's integrity.<sup>26</sup> The fulfilment of competent, independent, and impartial judicial principles in online criminal trials is carried out by examining the trial's readiness and the trial participants' connection to the judge. In addition, the judge cannot be bound to anyone in the trial and the trial is held open to the public to maintain trust in the court.<sup>27</sup>

<sup>21</sup> Parveen Gul dan Bahadar Ali, "The Concept of a Fair Trial," *Journal of Law and Society*, Vol. XLVII, p. 180.

<sup>22</sup> Bagir Manan, "Ex Post Facto Law, Double Jeopardy, Self Incrimination dan Presumption of Innocent sebagai Hak Asasi Tersangka," *Majalah Hukum Ikatan Hakim Indonesia* No. 325., p.6

<sup>23</sup> Soeharto, *Perlindungan Hak Tersangka, Tersangka, dan Korban Tindak Pidana Terorisme* (Bandung: Refika Aditama, 2007), p. 75.

<sup>24</sup> Febby Mutiara Nelson, "Due Process Model Dan Restorative Justice Di Indonesia: Suatu Telaah Konseptual," *Jurnal Hukum Pidana Dan Kriminologi* 1, no. 1 (2020): 108.

<sup>25</sup> Badan Pembinaan Hukum Nasional Departemen Kehakiman dan Hak Asasi Manusia RI, *Analisis Dan Evaluasi Hukum Tentang Hak-Hak Tersangka/Tersangka Dalam KUHAP*, ed. Syaiful Watni et al. (Jakarta: Badan Pembinaan Hukum Nasional Departemen Kehakiman dan HAM RI, 2004).

<sup>26</sup> Yustina Trihoni Nalesti Dewi, "Hak Konstitusionalitas Korban Atas Pengadilan HAM Yang Kompeten, Independen, Dan Imparsial," *Jurnal Konstitusi* 11, no. 2 (2014): 263.

<sup>27</sup> Gori and Pahladsingh, "Fundamental Rights under Covid-19: An European Perspective on Videoconferencing in Court."

Before the enactment of Supreme Court Regulation No. 4 of 2020, problems were encountered regarding excluding defendants' advocates in the cooperation agreement between the Supreme Court, the Attorney General's Office, and the Ministry of Law and Human Rights. This meant that legal counsel often had difficulty meeting the defendant in court and defending him. This caused the defendant cannot giving testimony freely at trial because the testimony was given directly in police detention, without any advocate besides. Based on our research, even though there was a case, the defendant was still handcuffed during the examination.

However, with the enactment of Supreme Court Regulation No. 4 of 2020, Article 7 paragraph (2) stipulates that legal counsel must be physically in the same room as the defendant so that the right of the accused to be accompanied by legal counsel is directly accommodated in online criminal trials. Therefore, the defendant can give their testimony freely, and rights are more guaranteed.

### Problems for future research

Based on our research, four principles of fair trial have been accommodated and not reduced in online criminal trials. However, in practice, the fair trial situation before the COVID-19 pandemic was not in good condition, even after it became worse. This argument regarding implementing a fair trial in practice refers to the results of ICJR's research on 16 experts consisting of law enforcers, government, and journalists that the application of the principle of fair trial in Indonesia score is 55,31 on a scale of 0-100.<sup>28</sup> In implementing a fair trial, obstacles could result in unfair trials, such as the defendant's right to refuse an online criminal trial and technical standards not yet regulated in Indonesia.

In support of the research results, a survey was conducted from December 2020 to January 2021 using a questionnaire containing 19 questions. A total of 109 judges participated as respondents, consisting of 23 female judges and 39 male judges from 44 district courts in western Indonesia; 4 female judges and 27 male judges from 22 district courts in central Indonesia; and one female judge and fifteen male judges from 9 district courts in eastern Indonesia. Respondents were selected purposely and are not intended to generalise.

The survey was held to gain an additional explanation of data from normative research. The district court judges who participated as respondents held online criminal trials.

**Table 2. Online Criminal Trials in the Western, Central, and Eastern Regions of Indonesia**

No.	Question	West		Middle		East		Total		%	
		Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
1	Courts conducting online criminal trials	62	0	31	0	14	2	107	2	98%	2%
2	Trials open to the public	50	12	24	7	13	1	87	20	81%	19%
3	Broadcasting of the trial	11	51	2	29	3	11	16	91	15%	85%
4	Access of court visitors to the trial application	20	42	7	24	2	12	29	78	27%	73%
5	Denial of the defendant and/or his legal counsel	10	52	7	24	0	14	17	90	16%	84%
	Accepted	7	3	4	3	0	0	11	6	65%	35%
6	Facility available	61	1	31	0	14	0	106	1	99%	1%

<sup>28</sup> Institute for Criminal Justice Reform, *Laporan Penilaian Penerapan Prinsip Fair Trial di Indonesia Pada Masa Pandemi COVID-19* (Jakarta: ICJR, 2021)

	Facilities adequate	40	22	23	8	5	9	68	39	64%	36%
7	Technical obstacles	57	5	30	1	13	1	100	7	93%	7%
9	Clarity of voice during the examination	37	25	18	13	9	5	64	43	60%	40%
10	Effect of obstacles on judges' emotions	22	40	18	13	9	5	49	58	46%	54%
11	Effect of constraints on judges' beliefs and decisions	21	41	18	13	7	7	46	61	34%	66%
12	Effects of constraints on judges' adherence to Investigation Report (BAP)	17	45	8	23	4	10	29	78	27%	73%
13	The defendant was handcuffed during the examination	5	27	2	29	0	14	7	100	7%	93%
14	Judge ensured that the defendant had sufficient time to prepare his defence	60	2	29	2	14	0	103	4	96%	4%
15	Judge ensured that the defendant gave testimony freely	53	9	30	1	13	1	96	11	90%	10%
16	Witnesses took oaths themselves	21	41	8	23	0	14	29	78	27%	73%
17	Judges appoint legal counsel at trial	62	1	31	0	14	0	106	1	99%	1%
18	Defendants always receive case files before trial	36	26	20	11	9	5	65	42	61%	39%

Based on table 2, the survey results conducted from December 2020 to January 2021, 93% of respondents said they had experienced technical obstacles in online criminal trials. These included power outages, visualisations that appear too small on the computer or mobile phone screen, audio barriers from the sound system, and internet problems. In addition to technical obstacles, respondents noted juridical obstacles for online criminal trials, such as several regulations that do not accommodate the implementation of online criminal trials. These obstacles included difficulties for the public prosecutor to bring detained defendants directly into the courtroom due to prison or remand centre policies that do not allow detainees to prison or detention centres; legal counsel who cannot directly accompany the defendant, resulting in concerns about the reduced freedom of the defendant in giving information during the trial process and a decline in the quality of the defence; a lack of consent from the defendant to proceed with an online criminal trial; a lack of specific regulations related to online criminal trials for brief examinations and quick examinations; and a lack of standardisation of public services in online criminal trials.

Based on the data above, we can identify obstacles that may affect the achievement of a fair trial in online criminal trials. An online criminal trial, for example, may affect the judges' emotions and/or their confidence in making decisions because when the judge examines the defendant, they must repeat questions more than once to obtain clear answers and because online criminal trials require more time than offline criminal trials. Judges also reported that they found it difficult to ensure that the defendant was free to give their statement during online trials, which is indicated by the fact that there were cases of the defendant being handcuffed even though the trial was held online. The survey found that as many as 46% of respondents agreed that these obstacles affect judges' emotions, and 34% agreed that these obstacles affect the judges' beliefs.

Although police investigation reports (*Berita Acara Pemeriksaan/BAP*) is only used as a guide in criminal trials, in online trials, due to the obstacles that occurred, 27% of respondents said that these obstacles made the judges rely solely on the BAP.

Regarding defendant rights issues, 90% of respondents confirmed that the defendant gave his testimony freely to fulfil the defendant's rights. However, 7% of respondents had examined cases where the defendant was still handcuffed during the examination. Concerning preparation, 39% of respondents stated that the defendant did not always receive the case file before the online criminal trial took place. However, 96% of respondents stated that they ensured the defendant had sufficient time to prepare their defence for the online criminal trial.

Regarding equality before the law, there is still one key defendant right that Indonesian laws and regulations have not accommodated. This is the right of the defendant to refuse online criminal proceedings. Other countries, such as the US and Estonia, require consent from the accused before conducting online criminal trials.<sup>29</sup> Based on our survey results, as many as 16% of judges have tried cases where defendants refused to participate in online trials. Of this 16% of judges, 65% agreed not to hold an online trial, while 35% did not grant the request.

On the other hand, if a defendant rejects the offer of an online criminal trial, this may create a more difficult situation for law enforcement. One example is the 2021 trial of Rizieq Shihab, a leader of the hard-line Islamic Defenders Front (*Front Pembela Islam/FPI*) in a case of a health quarantine violation during the COVID-19 pandemic (Decision No. 225/Pid.Sus/2021/PN.Jkt.Tim). Shihab insisted that he did not want to be present at the online trial because he had refused to conduct the online trial for five reasons: technical barriers, claims he could obey COVID-19 protocols in person; discrimination, as other cases were being held physically in court; being provided a room at the National Police Criminal Investigation Agency (Bareskrim Polri) is not a court (as defined by KUHAP); and his case is of interest to the public. However, the judges decided to continue the trial online, with the proceedings broadcasted on the YouTube channel of the East Jakarta District Court. Shihab and his attorney walked out of the trial held on Mar 16 2021, because the public prosecutor did not present the defendant directly in court. From the room provided for him at Bareskrim Polri, Shihab asked the judges to present him in person at the East Jakarta District Court. Shihab stated that he had sent letters to the Supreme Court, the Judicial Commission, and the East Jakarta District Court to propose in-person trials. Despite this, Shihab was only presented virtually. The absence of regulations regarding the defendant's right to refuse online criminal trials, or in other words, the defendant's consent to carry out online criminal trials, as regulated by the US and Estonia, should be a great concern for Indonesia. This is because in the absence of arrangements regarding the defendant's approval for online criminal trials, if the defendant does, in fact, reject the proposal for an online trial, the panel of judges can settle on a different decision. This could cause the fair trial principle to be violated.

In fulfilling the court's impartiality, based on the General Explanation of KUHAP in number 3 letter I, the court must conduct trials open to the public, except in cases that are excluded. According to 19% of respondents in this research, online criminal trials did not meet this

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<sup>29</sup> According to Rule 43 Federal Rules of Criminal Procedure, the consent given by the defendant in a criminal court in the US should be in written form.

requirement due to the following reasons: unclear regulations regarding court visitors, limited trial visitors, no online broadcast, lack of accessibility due to not possessing the broadcast link, the use of headsets/earphones during the trial, and the absence of a monitor screen. In addition, before the online criminal trial begins, the readiness of the participant's connection must first be checked.<sup>30</sup>

Respondents gave two main reasons for online criminal trials not always being open to the public: first, only the relevant parties have access to the broadcast link, and second, there is no broadcast. However, several district courts in Indonesia have accommodated this, providing monitor screens for trials that are open to the public, and 27% of respondents said the court gave access to applications for trial visitors.

In the US, on the other hand, criminal trials are routinely broadcast online. In addition, several states, such as Texas, also strongly support the use of virtual courtrooms by providing support such as training on conducting trials using Zoom.<sup>31</sup> The US Federal Court has provided a website for the public to access recordings of the proceedings at <https://ww2.ca2.uscourts.gov/court.html>. In addition, the US Supreme Court also provides a website for the public to listen to the proceedings through C-SPAN, at <https://www.c-span.org/video/>.

Interestingly, broadcasting criminal trials was originally prohibited by Rule 53 of the US Federal Rules of Criminal Procedure. This is because the Supreme Court previously criticised the press's behaviour in *Sheppard v. Maxwell*, Warden, 384 US 333 No. 490 (1966) for prejudicing the public and lacking the power to control publicity. However, there were exceptions where photographing or broadcasting was allowed. Since enacting the Courtroom Act (S.822) in 2019, broadcasting in court has been permitted, except in certain cases where it may violate due process. When a trial is broadcast, there are limitations that the judge must ensure that it is done while protecting the parties, not unduly interfering with the rights of the parties, and not interfering with the administration of the court. Regarding the assistance of the defendant's legal counsel, the judge can still appoint a legal advisor to accompany the defendant in online criminal trials, and the defendant's legal advisor must be in the same room as the defendant.

This last element is similar to Indonesia, where Article 7 of Indonesian Supreme Court Regulation No. 4 of 2020 stipulates that legal counsel must be physically in the same room as the defendant. If this is not possible, the legal counsel can convene from the prosecutor's office or court. In addition, the panel of judges can appoint legal counsel for the defendant during the trial, using legal advisors who are present at the trial. Based on the questionnaire data, 99% of judges have appointed legal counsel to accompany defendants in online criminal trials.

## CONCLUSION

Implementing online criminal trials is a court reform in using technology in court. Online criminal trials must fulfil the requirements for a fair trial, so due process is implemented and a miscarriage of justice does not occur. In Indonesia, Estonia, and the United States, online

<sup>30</sup> Article 7 point 1 Supreme Court Regulation No. 4 Year 2020 (Perma No. 4 Tahun 2020)

<sup>31</sup> Kate Puddister and Tamara A. Small, "Trial by Zoom? The Response to COVID-19 by Canada's Courts," *Canadian Journal of Political Science* 53, no. 2 (Jun 19, 2020): 373–77, <https://doi.org/10.1017/S0008423920000505>.

criminal trials are implemented as the fair trial standard. Even though in Indonesia, the practically has been not good before the pandemic and getting worse after the pandemic. There remain several technical and juridical obstacles that must be resolved. These technical obstacles include power outages, too small visualisation, audio barriers, and internet problems. The juridical obstacles include a lack of consent from the defendant to hold an online criminal trial, a lack of regulation for short and quick online examinations, and a lack of standardisation of public services in online criminal trials. In Estonia and the United States, defendant consent is mandatory before online criminal trials heading, and the regulation already regulated in the Criminal Procedure Code and Federal Rules of Criminal Procedure. Problems in Indonesia can be overcome by the existence of regulations that regulate standardisation in the implementation of online criminal trials in Indonesia and regulated in the amendment of the Criminal Procedure Code.

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