

REVISITING THE INTERPRETATION OF THE INDONESIAN CRIMINAL PROCEDURE CODE: LEGAL BASIS FOR WITNESSTELECONFERENCING

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Abstract

Remote witness examination through teleconference media has been used for several criminal cases in Indonesia. However, it was assumed that its legal standing based on Criminal Procedure Code (KUHP) remains unclear and insufficient. Therefore, many legal scholars and practitioners look beyond the existing laws. This paper argues that the existing law can support the legal basis and implementation of witness teleconferencing in criminal cases without necessarily requiring new legislation. This normative juridical study collects and analyzes legal materials data from several laws and jurisprudences in Indonesia relating witness examination. The result shows that criminal witness examination through teleconference media is valid and enforceable under KUHP by employing broad interpretation of Article 160 KUHP. Nevertheless, for greater result on seeking the material truth, it is necessary to regulate the application of witness teleconferencing to ensure witness statements can be delivered smoothly and independently. This finding revitalizes the legal basis concept for remote examination in criminal proceedings. It may facilitate consideration by authorities and legislators in developing laws related to the Criminal Procedure Code.

Keywords: Witness, Teleconference, Criminal Case

Introduction

A courtroom is a natural location where the resolution of a legal problem is carried out. This premise stands as a field for judges to explore the truth of a case and a place of evidence to be tested for validity as a reinforcement of the judge's confidence in making

decisions. In that essence, a physical presence in court is vital to allow the dynamics of truth-seeking to be carried out in detail and as carefully as possible.¹ However, recent developments in technology make it possible for a court without the physical presence of judges, public prosecutors, lawyers, and witnesses.² As a means of evidence, witness testimony is also fundamental to be heard, confronted and believed to be solid evidence.³

Physical disability in the courtroom is possible due to a change in judicial process paradigm and technological advances. The concept of justice through teleconferences or paperless courts has also increasingly been echoed in recent times.⁴ In addition, remote examinations can also occur due to an emergency situation. An occurrence of the Covid-19 pandemic, for instance, affects our approach to social activities. It changes the previous requirement for physical presence in court

¹ Claire Shook, "Physical Presence Is in No Wayfair!: Addressing the Supreme Court's Removal of the Physical Presence Rule and the Need for Congressional Action," *Dickinson Law Review* 124, no. 1 (2019), <https://bit.ly/2L34AOB>.

² Alicia L Bannon et al., "REMOTE COURT: PRINCIPLES FOR VIRTUAL PROCEEDINGS DURING THE COVID-19 PANDEMIC AND BEYOND," *Northwestern University Law Review* 115, no. 6 (2021), <https://www.courthousenews.com/texas-judge-holds-first-virtual-jury-trial-in->; Shubhank Patel, Rishi Raj Mukherjee, and Soumya Snigdh, "VIDEO CONFERENCING: AN EMERGING CONCEPT ON COURTROOMS," *International Review of Law and Technology* 1, no. 1 (2020); Irma Cahyaningtyas, Adya Prabandari, and Kadek Wibawa, "The Utilization of Information Technology through Teleconference Examination for Child Victims of Crime in the Perspective Participation Rights," in *Proceedings of the 2nd International Conference on Law, Economic, Governance, ICOLEG 2021, 29-30 June 2021, Semarang, Indonesia* (EAI, 2021), <https://doi.org/10.4108/eai.29-6-2021.2312620>.

³ Criminal Procedure Code (KUHP) Article 184 paragraph (1) stipulates that valid evidences are witness statements, expert statements, letters, instructions and statements of the defendant.

⁴ Aju Putrijanti and Kadek Cahya Susila Wibawa, "The Implementation of E-Court in Administrative Court to Develop Access to Justice in Indonesia," *Journal of Environmental Treatment Techniques* 9, no. 1 (2020): 105–9, [https://doi.org/10.47277/jett/9\(1\)109](https://doi.org/10.47277/jett/9(1)109); Monika Singh et al., "Success Factors for E-Court Implementation at Allahabad High-Court," *PACIS 2018 Proceedings*, 2018, 137, <https://aisel.aisnet.org/pacis2018/137>; Tayil Al-Shiyab, Hakem Al-Serhan, and Faisal Al-Shawabkeh, "Using Modern Videoconference to Hear Witnesses at Criminal Cases: A Comparative Analytical Study," *International Journal of Innovation, Creativity and Change. Wnw.Ijicc.Net*, vol. 12, 2020, www.ijicc.net.

proceedings to avoid subsequent danger in public health.⁵ In many countries, most courts have been postponed leaving only important and urgent cases that continue to be carried out while still implementing standardized health protocols.⁶

In many other cases, the administration of justice in the courts has not yet found certainty. Thus, the continuing process of justice in the courtroom is vital, bearing in mind that even the person who is exposed to a legal case and will be punished also has the right to obtain legal certainty.⁷ In that sense, ignoring law enforcement by negating the judicial process must be avoided. Carrying out justice in the courtroom during a pandemic or any possible same scenario may pose a great amount of risks. Thus, the implementation of online courts surfaced.⁸ Online court may also become usual in the future because of its practical and efficient advantage.

Nowadays, in some cases, and certain justice systems, online court can be implemented. This practice has been developed and applied in International Arbitration.⁹ However, in some other legal systems especially those that have a high level of sensitivity, such as criminal justice, the remote justice system has its own level of risk and

⁵ Pandemic Covid-19 is a condition in which the Covid-19 virus originating from Wuhan, China has caused an epidemic globally resulting in many people being infected and dying worldwide. see <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic> (accessed 9 June 2020).

⁶ Galih Gumelar, "Indonesian courts to go virtual during COVID-19," The Jakarta Post, <https://www.thejakartapost.com/news/2020/04/20/indonesian-courts-to-go-virtual-during-covid-19.html> (accessed 9 June 2020). BTS Report, "Courts to resume functions on limited scale amid Covid-19 crisis, The Business Standard," <https://tbsnews.net/bangladesh/court/courts-resume-functions-limited-scale-amid-covid-19-crisis-72988>, (accessed 9 June 2020).

⁷ Rajeev Syal, "Coronavirus could cause 'unprecedented' backlog of court cases," The Guardian, <https://www.theguardian.com/law/2020/apr/29/coronavirus-could-cause-unprecedented-backlog-court-cases>, (accessed 9 June 2020).

⁸ Kate Puddister and Tamara A Small, "Trial by Zoom? The Response to Covid-19 by Canada's Courts," *Canadian Journal of Political Science* (Cambridge University Press, 2020), <https://doi.org/10.1017/S0008423920000505>.

⁹ Chiara Giorgetti, *Litigating International Investment Disputes: A Practitioner's Guide* (Leiden: Leiden: Brill Nijhoff, 2014), p 258; Hilmar Raeschke-Keller, "Witness Conferencing in the Leading Arbitrator's Guide to International Arbitration," *Lawrence W. Newman & Richard D. Hill Eds, Juris Publishing, Inc*, 2008., p. 416-417.

complexity.¹⁰ This is true especially when testing witness information. In a Civil Law-based legal system country such as Indonesia, witness statements are the crown of proof in court. Therefore, matters regarding how a person fulfills the conditions of being a witness, his presence and independence in providing information are important factors in the process of finding the truth in criminal case.

The modified court process by employing videoconferencing for witnesses raises several questions for legal scholars and public. The discussion of witness teleconferencing draws attention in several publications.¹¹ The majority of these publications point out that Criminal Procedure Code (KUHP) is lacking the substantial rule to establish robust ground for witness remote examination by teleconference media. However, in doing so, legal scholars tend to stick with the written rules in applying Article 160 KUHP with the word “physical presence”. That rigid application hinders, or at least provides doubts for judge to apply a remote examination by electronic devices. Therefore, for providing greater clarity, many legal scholars encourage for new and better regulation to accommodate this shortage. In spite of the mentioned argument true to some extent, the approach that has been used to determine that argument seems a narrow one.

This paper provides a different perspective. With an approach of a broader interpretation of Article 160 KUHP, it is possible for delivering witness teleconferencing without any nerve in breaking KUHP rules. This contemporary concept suggests that the word of “physical presence” can be interpreted broadly so it does not require the reform of KUHP for merely accommodating witness

¹⁰ Carolyn W Kenniston, “YOU MAY NOW ‘CALL’ YOUR NEXT WITNESS: ALLOWING ADULT RAPE VICTIMS TO TESTIFY VIA TWO-WAY VIDEO CONFERENCING SYSTEMS,” *J. High Tech. L.*, 2015, <http://perma.cc/J87V->, p. 98-100.

¹¹ Hambali Thalib et al., “Verification Through the Electronic Media (Teleconference) on the Court in Criminal Judicial System,” *ADRI International Journal Of Law and Social Science* 1 (2017): 1–9; (Sandhy Handika et al., “Virtual Court Policy For Criminal Justice on Corona Virus Disease Pandemic,” *Substantive Justice International Journal of Law* 3, no. 1 (2020): 74–93, <https://doi.org/10.33096/substantivejustice.v3i1.67>; Dewa Gede et al., “CHANGES IN CRIMINAL TRIAL PROCEEDINGS DURING COVID-19: CHALLENGES AND PROBLEMS,” *Indonesian Law Journal*, 2020, <https://ejournal.bphn.go.id/index.php/ILJ>.

teleconference. Article 160 KUHAP has already provided solid ground to serve a legal basis for witness teleconferencing henceforth. This alternative concept may be missed or disregarded by legal scholars and authority in Indonesia.

Before reaching a conclusion in the final section, this paper must be able to provide understanding and clarity on several issues. First, to what extent the development of witness teleconferencing has been implemented in the courts. Second, how far is this witness teleconferencing has been regulated by laws and applied in criminal court in so far. Third, how effective is teleconference statements to provide robust evidence without any doubt for solving criminal case. There should be a guarantee that material truth can be achieved by this remote witness examination so that the decision made by the judge is correct and accurate. These three questions are necessary to be answered in the first place to support the idea of witness testimony by teleconferencing during and post pandemic period can be legally and rightfully carried out in Indonesia that adopts the Civil Law system. The last and primary question of this research then to know how Article 160 KUHAP can be a solid ground for witness teleconferencing.

Research Method

This research is a normative juridical study which is a type of legal research conducted through the examination of secondary materials.¹² Data were collected by studying and analysing secondary library data. They were analysed by examining primary, secondary and tertiary legal materials in the form of documents and legislation in force regarding the legal system, especially the criminal justice system include the 1945 Constitution, the Criminal Code, Criminal Procedure Code, laws, and jurisprudence.

According to J. Vredenburg, based on its purpose, social research can be divided into three forms, namely exploratory research, descriptive research and explanatory research.¹³ In this research, the collected legal materials are analysed qualitatively and then delivered explanatively. It will explain the development of legal concepts

¹² Soerdjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Raja Grafindo Persada, 1994)., p.2.

¹³ Vradenberg, *Metode Dan Teknik Penelitian Masyarakat* (Jakarta: Gramedia, 1981).

regarding the utilization of teleconference media in the criminal justice system that is still not regulated thoroughly and firmly in the Indonesian legal system. The development of how law is made and practiced through jurisprudence is observed and then analysed in each phase. This is done through a deductive research method that commences from observing general arrangements and switch them to specific ones.¹⁴ For this reason, the analysis begins from the Criminal Procedure Code and continues with relevant laws relating to the development of remote witness examinations or the use of teleconference technology. Laws in this category include laws of specific criminal case which are Eradication of Terrorism Criminal Acts, Money Laundering, Protection of Witnesses and Victims, Eradication of the Criminal Act of Trafficking in Persons, Narcotics Information, Criminal Justice System for Children, Preventing and Eradicating Criminal Acts on Terrorism Funding. In addition, Law on Information and Electronic Transactions is also essential in this topic because it regulates the use of electronic means. All of these relevant laws are discussed in chronological order, so it can show the development of a regulatory framework for witness testimony.

Judges' decisions that are produced through the interpretation of the Law on related cases are also collected. All data obtained from the law and jurisprudence are analysed and then utilized as research material. Finally, legal analysis and legal logic are applied to find ultimate understanding in this research with the assist of research material, relevant theories and principles of criminal procedural law.¹⁵ Subsequently, the research explain how the existence and application of

¹⁴ Research by the deductive method is also related to the perspective of how the law is actually determined. In the legal system that adheres to the Continental European model (Civil Law), the judge's cerebration is deductive (from general to specific) because the judge is bound by general rules and makes his legal decisions with a tendency to use the characteristics of subsumption and syllogistic (objective cases can be subjective), see H F Abraham Amos, *Legal Opinion, Aktualisasi Teoritis Dan Empirisme* (Jakarta: PT Raja Grafindo Persada, 2004).

¹⁵ In *Legal Methods, Skills, and Reasoning*, Hanson states that the study of law is critically from the point of view of logic, legal reasoning, and legal argumentation because understanding of law from this perspective seeks to find, uncover, test accuracy, and justify assumptions or hidden meanings in existing rules or legal provisions based on the ability of human reason, see Urbanus Ura Weruin, "Logika, Penalaran, Dan Argumentasi Hukum Logic, Reasoning and Legal Argumentation," *Jurnal Konstitusi* 14, no. 2 (2017), p. 375.

law in Indonesia legal system toward criminal remote witness examination through teleconference media.

Discussion

The Development and Implementation

The implementation of teleconference method in obtaining witness statements is not entirely new, at least globally.¹⁶ However, its application was more dominated and more suitable for international arbitration where practicality and less-cost are among the benefits obtained when using media teleconference.¹⁷ Initially, teleconferences did not exist in any country's legal system, either those that adopted civil law, common law or other legal systems. This is understandable because the traditional concept of the court is to listen directly to witness statements in front of the court in front of the judge. In all legal systems in the world, traditional legal concept continues to be practiced even though alternative teleconference methods have begun to emerge. In the United States, for example, the utility of teleconference technology has begun since 1970 and continues to grow in various types of justice system although initially was used in civil cases than criminal cases.¹⁸ In Canada, it has explicitly stated that the use of video conferences allowed in hearings whenever possible.¹⁹ Meanwhile, in the UK, The

¹⁶ Raeschke-Keller, "Witness Conferencing in the Leading Arbitrator's Guide to International Arbitration" Lawrence W. Newman & Richard D. Hill eds, Juris Publishing, Inc. 2008), p. 416-417; CHITRANJALI NEGI, "CONCEPT OF VIDEO-CONFERENCING IN ADR: AN OVERVIEW ACCESS TO JUSTICE," n.d., <http://ssrn.com/abstract=2662344>; S Ekwenze, "VIDEO CONFERENCING IN ARBITRATION: AN OVERVIEW," n.d., <http://ssrn.com/abstract=2173971>; Carolyn W. Kenniston, op.cit, p. 96.

¹⁷ Ekwenze, "VIDEO CONFERENCING IN ARBITRATION: AN OVERVIEW", p. 6. See also; Selina Domhan, "Online Hearings in Proceedings before International Commercial Courts," *Juridica International* 30 (2021): 49–58, <https://doi.org/10.12697/ji.2021.30.07>.

¹⁸ Kenniston, "YOU MAY NOW 'CALL' YOUR NEXT WITNESS: ALLOWING ADULT RAPE VICTIMS TO TESTIFY VIA TWO-WAY VIDEO CONFERENCING SYSTEMS." p. 98-100. The difficulty in holding video conferences in criminal cases is given the complexity and sensitivity, especially the defendant's right to be able to confront witnesses.

¹⁹ Rule 1.08 (1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. in RULING ON PARTICIPATION OF WITNESSES AT TRIAL BY VIDEO

Access to Justice Ct, 1999 allows civil hearings to use video conferencing.²⁰ In another country like the Netherlands, the use of videoconferencing has been restricted to only specific criminal cases such as the extension of punishment and immigration law cases.²¹

Despite a revolutionary breakthrough and alternative, the implementation of witness video conferencing still has various technical and legal obstacles. Technical constraints can arise such as the unavailability of device infrastructure, networks and internet access. It is also possible for communication interruptions in the form of disconnection, and delay in data transmission. These hurdles can interfere information that should be accepted clearly by judges and parties. Eventually, technical problems can have implications for the emergence of legal problems due to the inability of exploration towards witness testimony as robust evidence in the judicial process.

In Indonesia, the application of teleconference was held in listening to witness statements from the 3rd Indonesian President, BJ Habibie, in the alleged corruption of Bulog's non-budgeted funds case by Akbar Tandjung in 2002.²² Consideration for the application of teleconference at that time was because the location of witness, namely BJ Habibie, was in Germany which is far from the location of the court

CONFERRING Ontario, Superior Court of Justice, Chandra v. CBC, 2015 ONSC 5385, Between Ranjit Kumar Chandra and Canadian Broadcasting Corporation, Chris O'neill-Yates, Catherine MCISAACS, LYNN BURGESS, JACK STRAWBRIDGE, and MEMORIAL UNIVERSITY OF NEWFOUNDLAND, COURT FILE NO.: 06-CV-310261PD2 DATE: 20150831, In this case, the presence of witnesses by video conference was discussed. 4 out of 5 witnesses are in the UK, while 1 witness is in the USA. In the discussion of the decision, the judge stated that naturally witness testimony was conveyed orally in court, but the paradigm shift in the Supreme Court of Canada wanted to be able to anticipate technological progress. Judges at the Supreme Court considered that the use of video conference technology and the like did not have a significant impact, because the judge and lawyers were still able to listen to witness statements and see the physical presence of witnesses.

²⁰ NEGI, "CONCEPT OF VIDEO-CONFERRING IN ADR: AN OVERVIEW ACCESS TO JUSTICE."

²¹ European Commission for the Efficiency of Justice, *European Judicial Systems: Efficiency and Equality of Justice* (Paris: Council of Europe, 2014), p. 131.

²² Supreme Court Decree Number 572 K/Pid/2003 can be retrieved at https://karakterisasi.komisiyudisial.go.id/file/572_K_PID_2003.pdf, (accessed 8 June 2020).

that was held in Indonesia. Furthermore, the Bali Bombing witness examination and the Abu Bakar Baasyir Court also used several witness statements by teleconference.²³

Meanwhile, since the covid-19 outbreak, online trial examinations are no longer an option and on a case-by-case basis, but have become a new procedure to anticipate the spread of covid-19 through the Supreme Court Circular Letter Number 1 of 2020 concerning Guidelines for Carrying Out Tasks During Prevention of the Spread of Corona Virus Disease 2019 (COVID-19) Period within the Supreme Court of the Republic of Indonesia and the Judicial Bodies under it and the Cooperation Agreement between the Supreme Court, the Attorney General's Office and the Ministry of Law and Human Rights of the Republic of Indonesia regarding the Implementation of Trials via Teleconference which then lately institutionalized by Supreme Court Regulation Number 8 of 2022 concerning the Administration and Trial of Criminal Cases in Court Electronically.

Regulation and Application in Court Proceedings

1. Interpretation on Article 162 KUHAP

The Criminal Procedure Code (KUHP) explicitly requires the presence of a witness in the court²⁴ to convey information from what he/she saw, heard and experienced him/herself in a criminal case.²⁵ However, this attendance obligation can be excluded because, based on

²³ Supreme Court Decree Number 2452 K/PID.SUS/2011 can be retrieved at <https://putusan3.mahkamahagung.go.id/direktori/putusan/847d781ef739b94db3d34ad609291ef3>, (accessed 8 June 2020), Supreme Court Decree Number 93 PK/Pid.Sus/2016 can be retrieved at <https://putusan3.mahkamahagung.go.id/direktori/putusan/7944c61a8c551c3137b1d6f2351761cb.html>, (accessed 8 June 2020).

²⁴ Criminal Procedure Code (KUHP) Article 160 paragraph (1) determines that the witness is summoned into the courtroom one by one in the order deemed to be the best by the presiding judge after hearing the opinion of the public prosecutor, defendant or lawyer. Furthermore, Article 167 paragraph (1) states that after the witness gives his/her statement, he/she will still be present at the hearing unless the presiding judge gives permission to leave. On the paragraph (2), the permit is not granted if the public prosecutor or defendant or lawyer submits a request that the witness still attend the hearing.

²⁵ Article 185 paragraph (1) of the Criminal Procedure Code in conjunction with Article 1 number 27 of the Criminal Procedure Code.

Article 162 KUHAP, witness statements can be read in the court room if it has been given during the investigation process. If the statement is carried out under oath, the strength of the value of the statement is equated with the statement submitted at the hearing. This can be done when the witness is in a condition that meets the following criteria if the witness: (1) dead, (2) could not attend due to valid obstacles, (3) was not called because it was far from his residence or (4) other reasons related to the interests of the state.

The aforementioned requirements are conditions that must exist in order to be able to read out testimony without being present at the hearing. However, in practice, the provisions in this article often become a point of debate between parties. This can occur because Article 162 KUHAP is one of the key factors that will also determine the final outcome of the judicial process in which witness testimony is conveyed and can be confronted in a case. On the other hand, the conditions themselves still leave space to be debated because they can be interpreted differently. For example, to agree what is the absolute condition of absence with a valid reason. Then, how far can a location be said to be far from the court because this is relative. Furthermore, what categories are meant by matters relating to state interests. The conditions above cannot be measured with certainty, so parties must wait for the judge's consideration to decide if it is acceptable to use witness testimony without being directly present in the courtroom.

The provision in Article 162 KUHAP also does not explain the possibility of remotely carrying out witness statements using technology such as video conferencing. This is undeniable because the KUHAP was indeed made in the past which could not predict the development of human life with recent technology. Thus, the use of video conferencing technology to listen and confront witness statements has not been regulated in the KUHAP which is the main basis for the implementation of formal criminal law. However, regulations for conducting a video conference for witness statements can be found in a number of rules alongside the jurisprudence of Akbar Tandjung, and Abu Baakar Basyir case.

2. Relevant laws concern on witness testimony

The first regulation to observe witness testimony without being present directly in a court is Law Number 15 of 2003 concerning

Establishment of Government Regulations in lieu of Law Number 1 of 2002 concerning Eradication of Terrorism Criminal Acts, Becoming a Law. In Article 27 of the Law it is stated that the evidence of the examination of criminal acts of terrorism includes: (a). evidence as referred to in the Criminal Procedure Code; (b). other evidence in the form of information that is spoken, sent, received, or stored electronically with optical devices or similar; and c. data, records or information that can be seen, read and / or heard that can be issued with or without the aid of a means, whether stated on paper, any physical object other than paper, or electronically recorded, including but not limited to on: 1) writing, sound, or picture; 2) maps, designs, photographs or the like; 3) letters, signs, numbers, symbols, or perforations that have meaning or can be understood by people who are able to read or understand them.

In this provision, the evidence has been expanded to include the data, information and records stored. However, the disadvantage of this provision is that it does not accommodate the witness statement given directly through electronic media, but only by looking at data, information or records that already exist or are stored. In the absence of a witness videoconferencing basis, this provision basically does not provide sufficient legal basis for the witness's statement compared to that in the Criminal Procedure Code which has also allowed the written statement of information without being directly confronted for further information. Furthermore, the provisions in Article 34 paragraph (1) of this Law states that protection as referred to in Article 33 is carried out by law enforcement and security forces in the form of: (a). protection of personal security from physical and mental threats; (b). confidentiality of witnesses' identities; and (c). providing information at the time of the hearing in court without face to face with the suspect. Paragraph (1) c of this article stipulates that the witness's testimony can be carried out without directly involve with the crime suspect. However, this norm is not an appropriate legal basis for witness videoconferencing. The reason for that is, if only to distance the witness from being intimidated from the suspect, it is sufficient for the judge to ask the suspect to come out when the witness examination is held in accordance with Article 173 of the Criminal Procedure Code.

Another noteworthy regulation is Law Number 15 of 2002 concerning Money Laundering. This Law also contains similar norms

as previously stated by the Law Number 15 of 2003 concerning the Establishment of Government Regulations in lieu of Law Number 1 of 2002. The Law likewise provides and emphasizes that in addition to evidence as stipulated in the Criminal Procedure Code, evidences in the form of documents and information, written or electronically, can be used as valid evidence.²⁶ Furthermore, Law Number 13 of 2006 concerning Protection of Witnesses and Victims as amended by Law Number 31 of 2014 on its Article 9 (1) and (2) explicitly confirm that with the consent of the judge, witness statements can be provided without being present directly at the hearing. This can be done either through written statements that are in accordance with the Minutes or through electronic means. Furthermore, although it does not explicitly mention video conferencing media, Article 9 paragraph (3) provides a broad dimension to the use of electronic means to hear witness testimonies directly because video conference media is included in electronic means as stated above. This becomes the basis that witness video conferencing can be implemented. The prominent ground for the provision of alternative media for witness testimony, as stated in the considerations of this Law, is that witnesses in criminal cases are often difficult to present directly in court due to physical and psychological threats from certain parties. Therefore, in addition to provide comfort and protection for witnesses, the consideration of this electronic witness statements provision is also intended to provide greater opportunities for law enforcement to be able to seek material truth by utilizing witness testimony to the fullest without any obstacles.

Another regulation regarding the application of witnesses' video conferencing can also be analyzed from Supreme Court Decree No. 112

²⁶ Article 38 of Law Number 15 of 2002 explains that in the examination of criminal acts of money laundering the evidence is in the form of (1) as referred to in the Criminal Procedure Code; (2) other evidence in the form of information that is spoken, sent, received, or stored electronically with optical devices or similar; and (3) documents as referred to in Article 1 number 7, namely data, records, or information that can be seen, read, and / or heard, which can be issued with or without the help of a means, whether stated on paper, any physical object other than paper, or electronically recorded, which includes but is not limited to: (a) writing, sound, or drawing; (b) maps, designs, photographs or the like; and (c) letters, signs, numbers, symbols, or perforations that have meaning or can be understood by people who are able to read or understand them. Law Number 15 of 2002 available at http://hukum.unsrat.ac.id/uu/uu_15_02.htm. (accessed 22 June 2020).

PK / Pid / 2006.²⁷ In consideration of their decision to refuse the Reconsideration of the defendant Corby (Schapelle Leigh Corby), the judge stated:²⁸

"... In decision *in casu judex facti* and *judex juris*, there is no oversight of the judge or a evident fault, because the examination of witnesses through is not a requirement under the Criminal Procedure Code applicable in Indonesia, *in casu* is not regulated by the Law of evidence, especially in Article 184 of the Criminal Procedure Code; Indeed, based on the jurisprudence of examining witnesses through it has been practiced in several cases, but it is different from the common law system, in the civil law system adopted by Indonesia jurisprudence is only persuasive in nature, so there is no obligation for judges in Indonesia to use the teleconference,²⁹ because other than Evidence through does not include valid evidence according to Article 184 of the Criminal Procedure Code, and the strength of proof from the is highly dependent on the judge's judgment. Besides the implementation of the in *a quo* case is not in accordance with the principle of justice which must be quick, simple and low cost."

Through this decision, the Judge emphasized that in accordance with the Criminal Procedure Code, the media for witness testimony is not explicitly regulated in the Criminal Procedure Code. Although in practice it can be implemented, everything depends on the judge himself whether or not to approve witness videoconferencing. In

²⁷ Indonesia Supreme Court Decree Number 112 PK/Pid/2006 can be retrieved at <https://putusan.mahkamahagung.go.id/putusan/downloadpdf/d5277dc0e0de7226271ab0ba373b1ecd/pdf> (accessed 8 June 2020).

²⁸ Indonesia Supreme Court Decree Number 112 PK/Pid/2006, p.35

²⁹ In Indonesia, the jurisprudence is "persuasive precedent" or only as a source of law in the formal sense. Indonesia also does not recognize the precedent principle (not as the binding force of the precedent) specifically it does not recognize *stare decisis* or the principle of *stare decisis et quita non movere* (ie a legal principle stating that lower courts must follow higher court decisions), see Dian Erdianto and Eko Soponyono, "KEBIJAKAN HUKUM PIDANA DALAM PEMBERIAN KETERANGAN SAKSI MELALUI MEDIA TELECONFERENCE DI INDONESIA," *Jurnal Law Reform Program Studi Magister Ilmu Hukum* 11, no. 1 (2015): 65, <http://melitanotodoneily.multiply.com/journal/item/>, pp. 65-73., p. 67.

contrast, at the Abu Bakar Ba'asyir hearing at the Cassation level,³⁰ the judge dismissed the defendant's attorney's request regarding the opinion that it was contrary to the law giving witness testimony through media. At the review stage, the Judge on this occasion again denied that the use of the media as implemented by the District Court was legal and not contrary to the law or the Criminal Procedure Code.³¹

Meanwhile, in line with Law Number 13 of 2006 and Supreme Court Decree No. 112 PK / Pid / 2006, Law Number 21 of 2007 concerning the Eradication of Criminal Acts of Trafficking in Persons has also begun to show the *lex specialis* regulation trend in the evidence which recognizes and becomes the basis for witness videoconferencing. This can be seen in Article 34 of the Law which states that in the event that witnesses and / or victims cannot be presented at an examination at a court hearing, witness statements can be given remotely through audio-visual communication tools. If it is agreed that this audio-visual communication tool is a term we can equate with videoconferencing, then this provision adequately provides legal certainty on the application of witness conferencing.

3. Inconsistent Development

In the development of other special criminal laws, it does not necessarily mean that further regulations also provide a robust legal basis for conducting videoconferences. Law Number 11 of 2008 concerning Information and Electronic Transactions and Law Number 35 of 2009 concerning Narcotics as example. Both laws do not follow the previous law which has extended the mechanism of proof to the videoconference method. In Law Number 11 of 2008 concerning Information and Electronic Transactions, Article 44 states that the evidence of investigation, prosecution and examination at a court hearing according to the provisions of this Law is the evidence referred to in the provisions of the Law; and other evidence in the form of Electronic Information and / or Electronic Documents. Meanwhile,

³⁰ Indonesia Supreme Court Decree Number 2452 K/PID.SUS/2011 <https://putusan3.mahkamahagung.go.id/direktori/putusan/847d781ef739b94db3d34ad609291ef3>, (accessed 8 June 2020).

³¹ Indonesia Supreme Court Decree Number 93 PK/Pid.Sus/2016 <https://putusan3.mahkamahagung.go.id/direktori/putusan/7944c61a8c551c3137b1d6f2351761cb.html>, (accessed 8 June 2020).

Law Number 35 of 2009 concerning Narcotics in Article 86 states that investigators can obtain evidence other than those referred to in the Law on Criminal Procedure in the form of information that is spoken, sent, received, or stored electronically by optical devices or similar; and recorded data or information that can be seen, read, and / or heard, which can be issued with or without the assist of a means that is stated on paper, any physical object other than paper or recorded electronically.

Several other specific criminal laws namely Law Number 11 of 2012 concerning the Criminal Justice System for Children and Law Number 9 of 2013 concerning Prevention and Eradication of Criminal Acts on Terrorism Funding again provide legal basis for the implementation of witness videoconferencing. In Law Number 11 of 2012, Article 58 paragraph (3) states that in the event of the children victim and / or children witness cannot be present to provide information before a court hearing, the Judge may order the children victim and / or children witness to hear the statement: (a). outside the court hearing through electronic recording conducted by the Community Guidance in the local legal area attended by Investigators or Public Prosecutors and Advocates or other legal aid providers; or (b). through a direct remote inspection with an audiovisual communication tool accompanied by a parent / guardian, social adviser or other companion. It is evident that this Law has re-adapted the norms that existed in Law Number 21 of 2007 by using the phrase "... audiovisual communication tool." This law is also mandated to conduct video conferencing by requiring that children victim and / or children witness be accompanied by parents / guardians, community counselors or other assistance. The consideration of the legislators to require this condition is to ensure the examination process will not cause children to feel depressed, confused, or intimidated.

Furthermore, Law Number 9 of 2013 through its Articles 39-40 also continued the norm of videoconferencing arrangements for witnesses like some previous laws, but the arrangements were made more complete. Article 39 of this Law has determined that the examination of witnesses and experts in a court of law against a criminal act of financing terrorism can be carried out through remote communication with audiovisual media tailored to the needs and conditions encountered. Then, Article 40 also states that the

examination at the court hearing referred to in Article 39 shall be carried out with due regard to the fulfillment of the legal requirements for granting information that is not under coercion or pressure, is not guided and accompanied by the public prosecutor and if necessary is accompanied by an advocate. Furthermore, it is also regulated that in the case if information is carried out outside the territory of Republic of Indonesia, the providing of information by witnesses and / or experts must also be accompanied by officials of the Republic of Indonesia Representative Office. Finally, the technical examination with audiovisual media requires that the witness must face the judge with a voice that can be heard clearly.

Applying Examination

By deciding that a witness examination can be executed through teleconference, the crucial issue to discuss then how this will lead to achieve truth material. This point is extremely crucial for criminal case. Material truth must be found by the judge even with this tricky method. Therefore, technical issues in the implementation of teleconference such as infrastructure and audio-visual communication equipment, internet networks, and other things that support the process must be anticipated. Nonetheless, non-technical issues must also be considered.

The legal issue emerges because witness' location and the court are not in the same premise. The witness must be independent from all intimidation, coercion or pressure from any party because it can cause anxiety. In many cases, anxiety may lead to misleading statements. This anxiety is understandable considering that the mood and testimony of witnesses for criminal cases, especially serious criminal cases such as murder, rape, violence, are very easily influenced. Without a guarantee that the witness can fully independent and is protected from all threats, intimidation and provocation, the validity of the witness's answer will always be debated.

In a traditional court process, the judge can immediately observe physical and mental conditions of witness that sit/ stand directly in front of him. Court officials and parties also participate in this trial, for example the security forces who approve witness representation in court without any intervention from other parties. Monitoring of witnesses' conditions is also carried out by all parties at the court hearing so that they can provide a valid statement. Meanwhile, during the

teleconference process, the judge will only depend on limited visual impressions received from the image and sound from connected device.

The judge cannot ascertain how the environment of the witness is apart from seeing the witness himself. In fact, the judge's conviction is very important in deciding the case as specified in the Criminal Procedure Article 185 that entails (a) correspondence between one statement with another; (b). correspondence between information and other evidence; (c). reasons that need to be used by participants to provide specific information; (d). how to live and morality with all the convenience that is obtained when checking with his presence, there is also something that can be requested in accordance with the truth. Therefore, there is a necessity to have standardized procedures to support the examination of witnesses through teleconference. This can be achieved while maintaining court protocols in traditional examination like the involvement of security officers, legal advisors and oversight of all parties in the courtroom.

Employing Broad Interpretation

In so far from the jurisprudence and rules that have been previously discussed, it can be concluded that the KUHAP does not explicitly determine the use of media conferences. The rules which explicitly state the implementation of the media conference begin with Law Number 13 of 2006 concerning the Protection of Witnesses and Victims through the phrase "... directly by electronic means". Several other laws follow that specifically mention "... direct remote examination with audiovisual communication tools" as in Law Number 21 of 2007 concerning Eradication of the Criminal Act of Trafficking in Persons, Law Number 11 of 2012 concerning the Criminal Justice System for Children and Law Number 9 of 2013 concerning Preventing and Eradicating Criminal Acts on Terrorism Funding. Table 1 shows a summary of how related specific criminal laws adjust to the development of the witness evidence examination.

Table 1. The development of criminal laws on the examination of witness evidence.

No	Regulation	New form of evidence	Legal Basis for Teleconference
1.	Law Number 15 of 2003 concerning Establishment of Government Regulations in lieu of Law Number 1 of 2002 concerning Eradication of Terrorism Criminal Acts, Becoming a Law.	Yes	Not Available
2.	Law Number 15 of 2002 concerning Money Laundering	Yes	Not Available
3.	Law Number 13 of 2006 concerning Protection of Witnesses and Victims.	Yes	Yes, "... directly by electronic means"
4.	Law Number 21 of 2007 concerning Eradication of the Criminal Act of Trafficking in Persons	Yes	Yes, "... direct remote examination with audiovisual communication tools"
5.	Law Number 11 of 2008 concerning Information and Electronic Transactions	Yes	Not Available
6.	Law Number 35 of 2009 concerning Narcotics	Yes	Not Available
7.	Law Number 11 of 2012 concerning the Criminal Justice System for Children	Yes	Yes, "... direct remote examination with audiovisual communication tools"

No	Regulation	New form of evidence	Legal Basis for Teleconference
8.	Law Number 9 of 2013 concerning Preventing and Eradicating Criminal Acts on Terrorism Funding	Yes	Yes, "... direct remote examination with audiovisual communication tools"

Furthermore, in several cases, Judges have employed video conferencing media to obtain witness statements, such as in the Akbar Tandjung Case, the Bali Bombing case, and Abu Bakar Baasyir case. Meanwhile, in another case, the Corby Case, the Judge refused the use of video conference media. Although several laws have explicitly stated the basic legal norms for implementing video conferencing, they must not be considered as general provisions that can be followed by other regulations, but rather as a special form of regulation in special criminal law. For example, in the case of the crime of trafficking in persons it has been regulated that a remote examination can be carried out through Law No. 21 of 2007. This does not apply, for example, to criminal acts of theft as stipulated in the Criminal Code.

The validity between the KUHAP and the Law discussed above is bound to the legal principle of the *lex specialis derogate legi generali*, which is the rule that determine specific law overrides the general legal rules. If we pay attention to the above specific criminal laws, namely Law Number 13 of 2006 concerning witness and victim protection, Number 21 of 2007 concerning Eradication of Trafficking in Persons, Act Number 11 of 2012 concerning the Criminal Justice System for Children and the Act of 9 of 2013 concerning Acts Prevention and Eradication of Criminal Acts on Terrorism Funding, a common thread can be drawn that the emergence of new norms for conducting remote examinations is in order to protect witnesses or victims who are deemed to have a tendency to fear, and can be intimidated in the process of

providing their statements in court.³² Witnesses or victims in the Law above are given the privilege to give their testimony without being physically present in court to avoid the reluctance in presenting testimony in front of many people including judges, prosecutors, lawyers, defendants or even visitors.³³ Thus, it is reasonable that in jurisprudence it is very rare to find a decree concerning remote examination of witnesses through audio-visual media if it has nothing to do with the protection of witnesses or child victims. So that, at this stage of the discussion, the rule of law and the application of witness examinations through video conferencing are still narrow and limited to a trial involving witnesses or child victims who need to be protected.

Furthermore, in 2017, the Constitutional Court Judge has decided a lawsuit against Article 162 KUHP in the context of the use of media conference.³⁴ This decision becomes one of the important references in understanding how to apply video conferencing media in witness examination. Although in its decision the Constitutional Court Judge stated that it did not consider the principal of the petition because the petitioner did not have legal standing in the petition which resulted in the refusal of the petition, in this court there was extensive discussion of the validity of the use of media as part of witness testimony. In this case, there is a view from the Government of Indonesia which states

³² In reality in the criminal justice process, witnesses often get pressure from the parties concerned in criminal events, see Anggun Malinda, *Perempuan Dalam Sistem Peradilan Pidana* (Yogyakarta: Garudhawaca, 2016), p. 2.; Due to security reasons, it is often difficult to obtain witness statements, see Antonius P S Wibowo, *Penanggulangan Tindak Pidana Perdagangan Orang: Kajian Hukum Dalam Perspektif Nasional Dan Internasional* (Jakarta: Penerbit Universitas Katolik Indonesia Atma Jaya, 2020)., p. 137.

³³ Protection of witness testimonies is very much needed so that the legal process runs properly and justice can be upheld, see Abdul Salam Siku, *Perlindungan Hak Asasi Saksi Dan Korban Dalam Proses Peradilan Pidana* (Makassar: Indonesia Prime, 2016)., p. 94.

³⁴ Constitution Court Decree Number 74/PUU-XV/2017 can be retrieved at https://mkri.id/public/content/persidangan/putusan/74_PUU-XV_2017.pdf, (accessed 8 June 2020). The Petitioner, Emir Moeis, requested the material review of Article 162 paragraph (1) and (2) of the Criminal Procedure Code (KUHP) against Article 1 paragraph (3) and Article 28D paragraph (1) of the 1945 Constitution. There was a request that with advancing technology, Article 162 should be amended so that due process of law and legal certainty can be upheld. On the other hand, if Article 162 is retained, the petitioner requests that witness testimonies can only be used as solid evidence if followed by reinforcement and / or compliance with other witness statements taken under oath before the court.

that the application of remote examination has not been regulated by the Criminal Procedure Code, but only disguised as stated in the Law governing the development of evidence by *Lex Specialis* principle.

In the Government's view, the clearest rule is the Jurisprudence of the Republic of Indonesia's Supreme Court Decree No. 112 PK / Pid / 2006 that examination of witnesses through media is not a necessity and depends on judges' consideration in seeking material truth.³⁵ Meanwhile, the House of Representatives (DPR)'s statement in this case is viewed as more revolutionary. In the DPR's argument, even though the KUHAP, which was made in 1981, did not mention the media, this did not mean that the KUHAP was not implementative in following society development.³⁶ In addition to that, DPR did not consider that Article 160 of the KUHAP contradicted with the 1945 Constitution. The reason is, the use of technology in the witness examination is part of the trial process. Such witness statements are considered to have fulfilled Article 185 paragraph (1) KUHAP because the witness states what he saw, heard and felt before the court. Witnesses can still be sworn, and their lineaments, gestures and attitudes can be seen in the examination process so that they can be judged by judges and related parties.³⁷ If this view can be recognized as an appropriate legal argument, this concept must fulfill 2 (two) conditions. First, whether the presence in the form of a remote examination through videoconference can be considered to be the same as physical presence in the context of court proceedings. Second, whether material truth can be obtained through observation with electronic media.

For the first condition, the thing that needs to be observed first is how to interpret the norms that exist in the KUHAP. By considering the European continental (civil law) legal system, the text of a regulation is the law that lawmakers originally want to follow. In interpreting the regulation, the judge is bound to what is written and may not add new texts and norms. In other words, the judge is bound by an interpretation

³⁵ Constitution Court Decree Number 74/PUU-XV/2017, p.52-53.

³⁶ It follows the same concept of technology neutrality principle which provides the sue of technology does not change the nature of activity. See also Deborah Tussey, "Technology Matters: The Courts, Media Neutrality, and New Technologies," *J. Intell. Prop. L.* 12, no. 427 (2004).

³⁷ Constitution Court Decree Number 74/PUU-XV/2017, p. 65-66.

that is flat (*plain meaning*).³⁸ Specifically, regarding the KUHAP itself, it must be underlined that the nature of the regulation in the KUHAP is a norm of authority (*bevoegdheidsnormen*).³⁹ If there is no regulation, it means that there is no authority for it. In this case, if the KUHAP is observed in its Article 160 in conjunction with Article 162, there are only two major norms that are regulated: (1) the presence of witnesses in court (2) witnesses cannot be present in court. As remote technology was unavailable at the time the KUHAP was designed, lawmakers only regulated the presence as a physical presence. Therefore, it is erroneous to assume that Article 160 itself clearly stipulates a condition to be able to present remotely. When that concept applies, it violates the principle of the judge not to add or create new norms to norms that have been written in the text. Therefore, a plain interpretation will lead to a narrow interpretation. Figure 1 below describes the narrow interpretation on the meaning of “present in the court” in Article 160 KUHAP.

³⁸ Jimly Asshiddiqie, *Perihal Undang-Undang* (Jakarta: Raja Grafindo Persada, 2010), p. 177.

³⁹ As a norm of authority, matters regulated in the Criminal Procedure Code are authority and the use of that authority. In comparison, the norms regulated in the Criminal Code are norms of command and prohibition, see Didik Endro Purwoleksono, *Hukum Acara Pidana* (Surabaya: Airlangga University Press, 2015), p. 16.

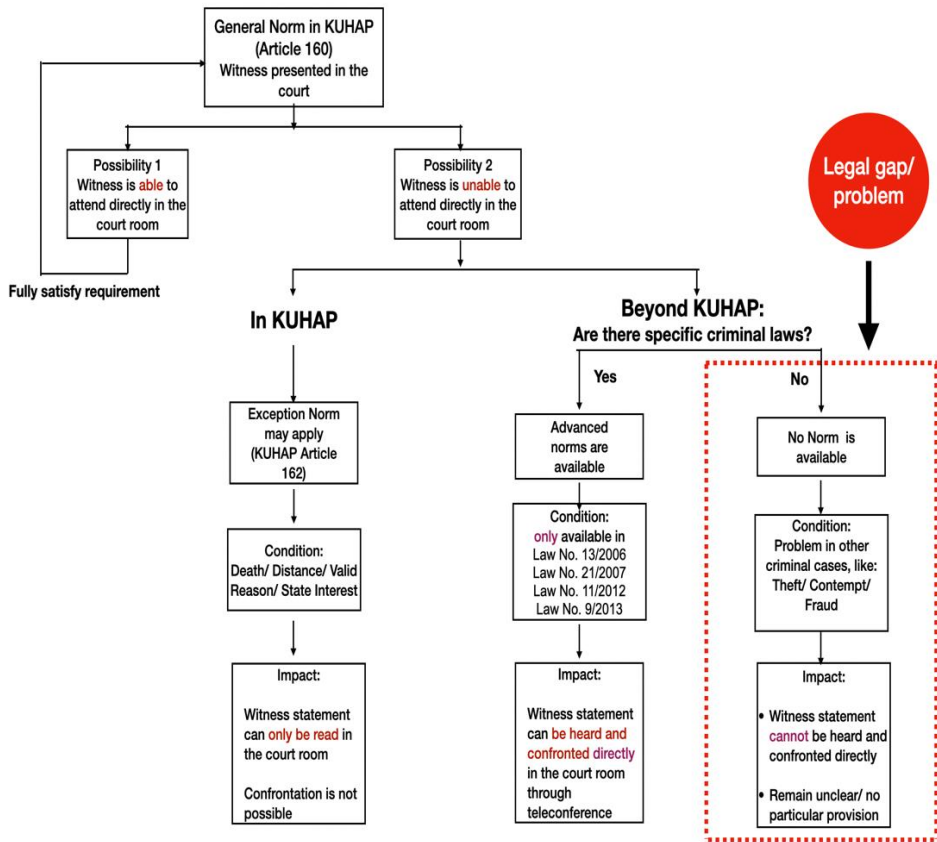


Figure 1. A description of narrow Interpretation on Article 160 of KUHP (Criminal Procedure Code) in criminal cases and its impacts.

When the interpretation becomes narrow, it also creates narrow application on the examination of witness statement as illustrated in figure 1. Eventually it requires further laws to accommodate the necessity to provide solid ground for witness statement by teleconference. When such laws are unavailable, two legal consequences may emerge. First, the lack of a clear legal basis for conducting witness testimony may render the proceedings questionable, potentially leading to unjustified court decisions. Second, it could be deemed a direct violation of KUHP provisions. As a result, beyond the legal impact, authorities or court personnel may also be accused of procedural misconduct.

However, the interpretation of the language of the text can also be interpreted in a broader meaning. The term of ‘be present’, as stated by Article 160, does not come with any specific method to be present. The Indonesia Dictionary (KBBI) provides the meaning of “presence” as "be there". In another words, it is possible to ‘be present’ in different ways, that is remotely, with the assistance of technology. This concept is best described in the illustration below.

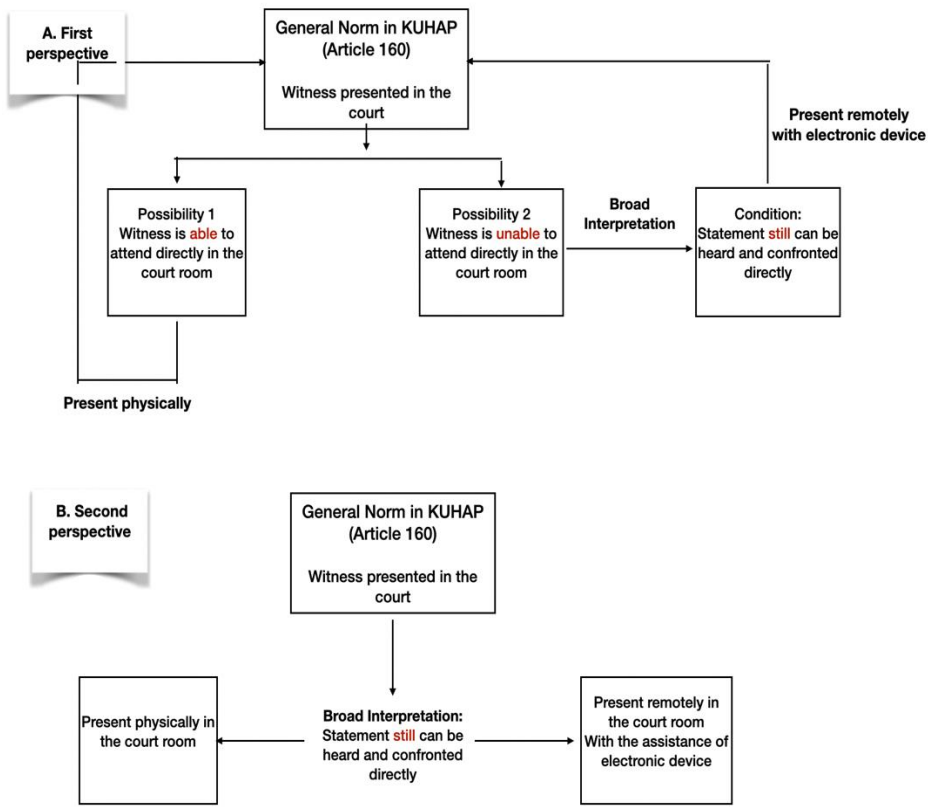


Figure 2. A description of broad Interpretation of Article 160 KUHAP (Criminal Procedure Code).

The provided illustration is based on the context in which a witness, when presented in court, must be able to give testimony before a panel consisting of judges, prosecutors, and lawyers. Since there is no limitation to attend in the court room with physical presence only,

another meaning of presence in the court is possible as long as witness testimony can be heard directly at the same time and can be confronted by parties in the court. The main requirement for a remote examination is witness testimony must be satisfactory for legal evidence, that is, clearly conveyed with visible gestures and facial expressions so that the judge can obtain the correct information about the truth and confidence on the statement (*negatief wettelijke stelsel*).⁴⁰

Figure 1 and 2 above has described the difference on the interpretation on the meaning of “present in the court” in Article 160 KUHAP. A narrow interpretation as depicted in figure 1 generates tension when conducting witness examination through electronic media as KUHAP is not designed in the current era. Meanwhile, if the meaning of ‘be present’ on Article 160 can be widely interpreted, it provides simple yet robust legal base to establish flexible mechanism on the examination of witness statement. In that sense, authority and court personnel will have sufficient legal basis for conducting witness examination through teleconferences. This argument is not genuine in nature. Instead, it echoes and supports previous reasoning provided by the DPR in the constitution court decision number 74/PUU-XV/2017. It also emphasizes the application of technology neutrality principle, which allows ‘old norms’ to remain applicable in the new digital context without the need for ‘new norms,’ as long as the nature of the act itself does not change significantly, apart from the method of its execution.

Conclusion

Instead of applying a rigid concept, this paper argues that a broader interpretation of article 160 KUHAP is sufficient as legal ground for witness remote examination. The meaning of ‘present’ is not limited to a physical term but the condition to provide witness testimony directly to the court panel as required by Article 185. An application of the technology neutrality principle supports the

⁴⁰ In addition to the adequacy of two pieces of legal evidence according to the law, it is also necessary to have a judge's conviction. These two rules form as a system of proving criminal law adopted by Indonesia, see Monang Siahaan, *Perjalanan Komisi Pemberantasan Korupsi Penuh Onak Duri* (Jakarta: PT Elex Media Komputindo, 2014), p. 259; Monang Siahaan, *Falsafah Dan Filosofi Hukum Acara Pidana* (Jakarta: PT Grasindo, 2017), p. 38; Irene Svinarky, *Bagian Penting Yang Perlu Diketahui Dalam Hukum Acara Perdata Di Indonesia* (Batam: CV Batam Publisher, 2019), p. 49.

implementation of this concept. Thus, teleconference witnesses can be carried out remotely and applied in the condition of the Covid-19 pandemic, other emergency conditions and whenever it is needed. Any limitation of social interaction in the court room because of the emergency situation should not impair the right of every human being, be it the victim, defendant or community.

The state also needs to continue to guarantee the implementation of peace and order in society through law enforcement. With the legal basis for examination of witnesses remotely and supported by other online inspection mechanisms, the judicial process should still proceed with regard to the necessary conditions such as the availability of supporting infrastructure and equipment, as well as the internet network in order to ensure there are no obstacles from the technical factors. Furthermore, it is also necessary to ensure that witnesses are in the conditions that allow them to be able to provide the correct information without coercion, intervention, intimidation, and fear.

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