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### **Design Of Interpreting Provisions In The Criminal Procedure Law Reform (Its Urgency In Eradication Of Criminal Actions Of Corruption)**

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#### **Abstrak**

The Constitutional Court's screening of talks between Anggodo Widjoyo and several individuals suspected of being Indonesian law enforcement personnel still raises many legal questions. In addition to the issue of voice veracity, there is also an open question regarding the legality and justification of wiretapping. This problem stems from the procedural legislation governing wiretapping's shortcomings. This paper aims to examine the difficulties and appropriate layout of rules pertaining to wiretapping provisions in the Draft Criminal Procedure Code (RKUHAP). This paper was written utilizing normative legal research methodologies such as statutory, conceptual, case, and comparative approaches. According to the study's findings, the most difficult aspect of wiretapping is drafting an acceptable procedural regulation that does not infringe on human rights. Because wiretapping deviates from natural principles, the implementation method must also rely on due process of law. Aside from these challenges, the ideal design required to regulate wiretapping provisions in the RKUHAP is to regulate criminal sanctions if wiretapping is carried out unlawfully by officials, distinguish law enforcement officials' arbitrariness from procedural errors, and formulate related wiretapping permit mechanisms, how to analyze the veracity of wiretapping results, up to the deadline for wiretapping that the Corruption Eradication Commission can carry out. In addition, Indonesia can also follow the example of the United

States, that in the United States, wiretapping permits are centralized in an institution called the United States Foreign Intelligence Surveillance Court, which was formed based on the United States Foreign Intelligence Surveillance Act.

### **Keywords**

Procedural Law; Legal Reform; Wiretapping Provisions; Corruption Crime

#### **A. Background**

The construction of an ideal rule-of-law state should be understood and developed as a cohesive system. Moreover, the state is to be viewed as a legal term, meaning as a "law state". (Fauzia et al., 2021: 13). As a result, Lawrence Friedman noted in his book entitled *The Legal System: A Social Science Perspective* that building a legal system must be founded on three fundamental factors. The three primary parts are legal substance, legal structure (procurement organization and enforcement), and legal culture, which also influences whether or not the law is important in national life from time to time. It is a mistake to focus solely on one component of optimizing the execution of the law or "upholding the law" without considering other factors.

It is not enough to rely just on the goal of structural strength or cultural interpretation in the process of law enforcement; it must be backed by a clear legal substance. Regarding legal content, one of the challenges in the law enforcement procedure in Indonesia is over the legal foundation of "wiretapping". The legitimacy and legal foundation of wiretapping is still being debated. This concern is triggered by the procedural legislation governing wiretapping's inadequacy. Because, up to now, there is only Law Number 11 of 2008 Concerning Electronic Transaction Information (UU ITE) which has prohibited wiretapping.

The need of regulating wiretapping stems from the desire to eliminate corruption. Because law enforcement has shown to face several challenges in eradicating traditional criminal acts of corruption (Hidayat, 2019: 33). As a result, an unusual law enforcement strategy is required, keeping in mind that corruption is an uncommon crime that must take precedence over other criminal activities.

Apart from having some characteristics that differ from ordinary criminal law, such as departures from procedural law, and when regarded from the material governed, the criminal offense of corruption is a part of the specific criminal law (Salim et al., 2018: 82). When the results of wiretapping are used as evidence or as a guide, as provided in Article 26A of Law Number 20 of 2001 concerning Amendments to Laws Number 31 of 1999 concerning the Eradication of Corruption Crimes, this is one of the special provisions in the Corruption Crime Procedural Code that violates the Criminal Procedure Code (KUHAP) (Tipikor Law). To reduce leakage and anomalies in governmental finances and the economy, illegal acts of corruption must be eliminated, whether directly or indirectly (Hamdani, 2021). By predicting these deviations as early and as ideally as possible, it is envisaged that the wheel of the economy and growth may be effectively executed, progressively

boosting development and people's welfare in general.

One method of anticipating is through a wiretapping device that is strictly regulated. This explicit organization is required to avoid abuse of authority and secure the validity of wiretapping findings because the wiretapping setting is truly full of rights conflicts. On the one hand, wiretapping can infringe on a person's human rights, particularly those concerning personal freedom. On the other side, wiretapping is used for law enforcement purposes, namely for human rights in general.

With the passage of Law Number 1 of 2023 about the Criminal Code (KUHP), the proper impetus has been created to incorporate provisions for wiretapping in the Draft Criminal Procedure Code (RKUHAP), which will replace the *Herziene Inlands Regulation* (Old KUHP), a product of the colonial authority.

Several previous studies that examined wiretapping included the research by Hardy Salim et al, in 2018 with the title "Analisis Keabsahan Penyadapan yang Dilakukan oleh Komisi Pemberantasan Korupsi Tanpa Izin Pengadilan", research by Muhammad Arif Hidayat in 2019 with the title "Penyadapan oleh Penyidik Komisi Pemberantasan Tindak Pidana Korupsi dalam Perspektif Sistem Peradilan Pidana", and research by Puteri Hikmawati in 2022 with the title "Pengaturan Izin Penyadapan oleh KPK Pasca Putusan Mahkamah Konstitusi No. 70/PUU-XVII/2019". None of the three studies discussed the design of wiretapping arrangements in terms of procedural law and its renewal through the RKUHAP. Thus, it is necessary to conduct a more in-depth study related to this issue.

## **B. Method**

This paper was written utilizing a normative legal research process that employs statutory, contextual, case, and comparative methods. Several aspects connected to wiretapping are controlled under Law Number 11 of 2008 concerning Electronic Transaction Information, Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, and Law Number 1 of 2023 concerning the Criminal Code. In terms of the contextual approach, the author explores the topic utilizing the Law of Pancasila and Human Rights Law Principles. The author then provides various examples of corruption cases that were effectively exposed by employing wiretapping tools in the case approach. While using a comparative method, the author uses the United States of America as an example to illustrate how the model or system for implementing wiretapping allows. The methodologies described above are designed to support the author's assertions in this article to provide complete research.

## **C. Discussion**

### **1. Regulatory Challenges Concerning Wiretapping Provisions in the Draft of Criminal Procedure Code**

In practice, wiretapping is certainly effective in revealing criminality,

particularly corruption. Wiretapping is an effective alternative option in the investigation of corruption crimes, such as those connected to the growth of the method of crime, including money laundering. As a result, wiretapping might be viewed as a technique for preventing and detecting corruption and money laundering. Wiretapping has been used to unearth several high-profile corruption cases in Indonesia, including the Musi Banyuasin regional budget bribery case, the PDIP politician Adriansyah case, the Fuad Amin case, the Luthfi Hasan Ishaq case, the Akil Mochtar case, and the Sutan Bhatoegana case (Andwika, 2015). However, the use of wiretapping results, like as recordings, as evidence in court frequently runs into difficulties. For example, the legitimacy of the playback of conversations between Anggodo Widjoyo and several people suspected of being law enforcement officials in Indonesia at the Constitutional Court is still being questioned in the bribery case of two deputy chairmen of the Corruption Eradication Commission, Bibit Samad Rianto and Chandra M Hamzah (Takariawan, 2019: 155).

Wiretapping without protocols and carried out by law enforcement agencies or official state organizations, on the other hand, remains problematic since it is regarded as a breach of its residents' private rights, which include privacy for personal life, family life, and communication. Wiretapping as a method of preventing and detecting crime is also risky for human rights and is prone to abuse if the legislation is not suitable (due to lax rules) and falls into the wrong hands (due to a lack of control), especially if the rule of law is implemented. It is not in compliance with human rights ideals.

The urge to regulate wiretapping began on January 6, 2009, when the government issued a Draft Government Regulation on Interception Procedures (RPP TCI), Article 31 paragraph (4) of the ITE Law requires this RPP, which calls for derivative regulations concerning wiretapping. (Napitupulu, 2016). However, on February 24, 2011, the Constitutional Court invalidated Article 31, Paragraph 4, of the ITE Law in Decision No. 5/PUU-VIII/2010. The Constitutional Court also mandated that all laws governing wiretapping materials be combined in its ruling. Therefore, by the Constitutional Court's directive, it is ideal for the laws relating to wiretapping processes to be governed at the level of legislation, namely through the Draft of Criminal Code Procedure.

The problem in regulating wiretapping rules is ensuring that the wiretapping method does not violate human rights. Because it has been declared in human rights legislation that human rights are vital for everyone not to be exposed to arbitrary measures or unlawful attacks against their private life or personal property, including their communication interactions.

This affirmation is also stated in the 1948 Universal Declaration of Human Rights, as referred to Article 12 has emphasized that:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks”.

Even specifically, Article 17 of the 1976 International Covenant on Civil and

Political Rights, as ratified by Indonesia through Law Number 12 of 2005 states:

"No one may be arbitrarily or illegally interfered with regarding their personality, family, household or correspondence, nor shall his honor and good name be illegally scrutinized".

Likewise in General Comment No. 16 regarding Article 17 of the ICCPR which was agreed upon by the United Nations (UN) Human Rights Committee at its twenty-third session, 1988, which provided comments on the material content of Article 17 of the International Covenant on Civil and Political Rights, at point 8 stated that:

"...that the integrity and confidentiality of correspondence must be guaranteed de jure and de facto. Correspondence must be delivered to the intended address without hindrance and without being opened or read first. Observation (surveillance), both electronic and otherwise, tapping telephones, telegrams, and other forms of communication, as well as recording conversations must be prohibited".

Based on the preceding explanation, it is possible to draw a common thread that wiretapping genuinely deviates from a prohibitive norm. As a result, wiretapping requires prior authorization from the appropriate authorities. Although wiretapping is forbidden conduct under human rights legislation because it breaches a person's right to privacy, it might be justified within the context of law enforcement, notably in the public interest. Furthermore, while interpreting the idea of defending human rights in international law, it must be understood and interpreted not just textually, but also in light of the history of law and its teleological features (Hadjon & Djatmiati, 2020: 26).

Modern law seems more liberal in spirit and respects individual freedom. It is widely employed in practically all nations throughout the world. However, not all peoples and cultures share the same worldview as that held and practiced in the countries where modern law originated and developed, which is based on an individualistic Western cosmology (Hamilton & Sanders, 1992), as shown in the aforementioned international human rights texts. In Eastern cosmology, people are not put in an independent position but rather as an integrated part of their community, such as in Indonesia, which is as a Pancasila state. As a result, when a policy is being developed, consideration of human rights includes both individual rights and the rights of the community as a whole.

The formulation of human rights based on Pancasila law is reflected in the formulation of Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia) which states that:

"Dalam menjalankan hak dan kebebasannya, setiap orang wajib tunduk kepada pembatasan yang ditetapkan dengan undang-undang dengan maksud untuk menjamin pengakuan serta penghormatan atas hak kebebasan orang lain dan untuk memenuhi tuntutan yang adil sesuai dengan pertimbangan moral, nilai-nilai agama, keamanan, dan ketertiban umum dalam suatu masyarakat demokratis".

The words "restrictions (pembatasan)" set by "law (undang-undang)" and

"public order (ketertiban umum)" in the phrasing of Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia need to be highlighted. This implies that the Republic of Indonesia's 1945 Constitution has also made it clear that limits on human rights are permissible as long as they are enacted by the law and serve to maintain public order or interest.

Apart from being in the context of corruption crimes, the authority to carry out wiretapping granted by laws and regulations can also be found in several institutions in Indonesia with different purposes, including:

- a. Based on Article 20 paragraph (3) of Law no. 18 of 2011 concerning Amendments to Law no. 22 of 2004 concerning the Judicial Commission, namely to maintain and uphold the honor, dignity, and behavior of judges;
  - b. Based on Article 31 of Law no. 17 of 2011 concerning State Intelligence, namely for the benefit of state intelligence;
  - c. Based on Article 31 paragraph (1) letter b Perpu No. 1 of 2002 (Government Regulation instead of Law on the Eradication of Criminal Acts of Terrorism);
  - d. Based on Article 31 paragraph (1) of Law no. 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons;
  - e. Based on Article 44 paragraph (1) letter f of Law no. 8 of 2010 concerning Prevention and Eradication of Money Laundering Crimes;
  - f. Based on Article 75 letter i Law no. 35 of 2009 concerning Narcotics;
- and
- g. Regulation of the Minister of Communication and Information of Indonesia Number 11/PER/M.KOMINFO/02/2006 concerning Technical Wiretapping of Information, namely for the benefit of criminal justice.

The foregoing instances of wiretapping legislation in various institutions demonstrate that wiretapping in the public interest and law enforcement activities is justified. However, preparations connected to procedural legislation are required, which might serve as a guide for every institution in exercising its authority over wiretapping, particularly in the context of law enforcement on corruption offenses.

## **2. Design of Ideal Arrangements Concerning Wiretapping Provisions in the Draft of Criminal Code Procedure**

Wiretapping arrangements are governed by a particular paragraph in the Criminal Code, namely Articles 258 and 259, as follows:

### **Article 258**

(1) Setiap Orang yang secara melawan hukum mendengarkan, merekam, memblokir, mengubah, menghambat, dan/ atau mencatat transmisi Informasi Elektronik dan/atau Dokumen Elektronik yang tidak bersifat publik, baik menggunakan jaringan kabel komunikasi maupun jaringan nirkabel, dipidana dengan pidana penjara paling lama 10 (sepuluh) tahun atau pidana denda paling

banyak kategori VI.

(2) Setiap Orang yang menyiarkan atau menyebarluaskan hasil pembicaraan atau perekaman sebagaimana dimaksud pada ayat (1), dipidana dengan pidana penjara paling lama 10 (sepuluh) tahun atau pidana denda paling banyak kategori VI.

(3) Ketentuan sebagaimana dimaksud pada ayat (1) **tidak berlaku** bagi Setiap Orang yang melaksanakan ketentuan peraturan perundang-undangan atau **melaksanakan perintah jabatan** sebagaimana dimaksud dalam Pasal 31 dan Pasal 32.

### Article 259

Dipidana dengan pidana penjara paling lama 7 (tujuh) tahun atau pidana denda paling banyak kategori VI, Setiap Orang yang:

a. mempergunakan kesempatan yang diperoleh dengan tipu muslihat atau secara melawan hukum merekam gambar seseorang atau lebih yang berada di dalam suatu rumah atau ruangan yang tidak terbuka untuk umum dengan menggunakan alat bantu teknis sehingga merugikan kepentingan hukum orang tersebut;

b. memiliki gambar yang diketahui atau patut diduga diperoleh melalui perbuatan sebagaimana dimaksud dalam huruf a; atau c. menyiarkan atau menyebarluaskan gambar sebagaimana dimaksud dalam huruf b dengan menggunakan sarana teknologi informasi.

The aforementioned formulation states that the provisions relating to wiretapping already have a clear basis, but one issue with the regulation on wiretapping in the new Criminal Code is that it currently lacks any criminal penalties should wiretapping by officials be done in violation of the law. Law enforcement may one day misuse their ability to wiretap people without a warrant and hide behind procedural mechanisms, thus it needs to be monitored.

The arbitrariness of law enforcement officials must be separated from blunders or illegal eavesdropping. Illegal wiretapping by law enforcement officials is not related to law enforcement; in other words, wiretapping is used for reasons other than law enforcement, or with their authority to wiretap for the needs of other parties that are not related to law enforcement, or with other purposes to profit from wiretapping recordings or results. Meanwhile, if law enforcement officials conduct wiretapping for law enforcement objectives, particularly in corruption cases, but procedural breaches arise throughout the process, the complaint mechanism, as well as procedural or procedural testing of wiretapping, are utilized. As a result, this is what needs to be controlled further in the Criminal Code Procedural Law.

Furthermore, wiretapping requirements in Article 12 paragraph (2) of Law Number 30 of 2002 establishing the Corruption Eradication Commission, as modified for the second time by Law Number 19 of 2019 (UU KPK), stipulate that:

"Dalam melaksanakan tugas penyelidikan, penyidikan, penuntutan sebagaimana dimaksud dalam Pasal 6 huruf c, Komisi Pemberantasan Korupsi

berwenang melakukan penyadapan dan merekam pembicaraan.”

Looking at the KPK's ability to conduct wiretapping in Article 12 paragraph (2) above, the Law of Corruption Eradication Commission limits the technique and time limit for implementing this wiretapping authority. However, the release of Constitutional Court Decision Number 70/PUU-XVII/2019 about the material review of the Corruption Eradication Commission Law invalidated Article 12B, the wiretapping technique, timeline, and other things are still facing a legal vacuum.

Regarding the aforementioned Constitutional Court ruling, the author agrees that Article 12B of the Law of Corruption Eradication Commission, which abolished the supervisory board's power to grant the Corruption Eradication Commission's wiretapping permits, should be repealed. However, the author also believes that the permit is still necessary to ensure that the Corruption Eradication Commission's authority is still exercised by due process of law. This is what the Draft Criminal Code Procedure also needs to further regulate, for instance in terms of what crimes wiretapping is authorized to be used for, how the permit procedure works, how long it lasts, what situations new wiretapping may be used for, what makes wiretapping lawful and invalid, and so on. Only if it is judged essential to give more precise arrangements may it be controlled further in each statutory regulation in line with the criminal act.

The lack of clarity on the processes for wiretapping carried out by the Corruption Eradication Commission, particularly without court approval, might lead to the use of recordings and wiretapping by the Corruption Eradication Commission as evidence in trials that violate due process of law and a person's right to privacy. Clear standards are important not just for protecting one's privacy, but also for upholding the rule of law. According to Marc Webber Tobias and Roy Davis Petersen in "Pre-Trial Criminal Procedure: a Survey of Constitutional Rights," due process of law is a constitutional assurance that every individual has the right to protection from arbitrary government actions (Tobias & Petersen, 1972).

Without approval or notification, the results of recordings or other forms of wiretapping must be considered illegal (illegal) because their position is the same as wiretapping carried out illegally. Further referring to Chairul Huda's opinion to provide information as an expert in the Constitutional Court Decision No 012-016-019/PUU-IV/2006 which states that wiretapping also follows various other provisions in the Criminal Procedure Code, for example in carrying out confiscations and investigations obtain permission from the Head of the District Court. As with wiretapping, something is "taken," specifically "information". According to the societal notion of "information is power," intercepted information is also highly essential for the individual concerned, and may have a larger value when compared to money or other things.

Dengan demikian, kewenangan penyadapan yang dimiliki oleh KPK harus di desain sedemikian rupa sehingga tidak melanggar hak asasi manusia seseorang, sehingga diperlukan suatu pengaturan yang khusus dan bersifat sui generis mengenai batasan dan mekanisme penyadapan. Penyadapan harus dilakukan



dengan alasan yang jelas dan sudah memiliki bukti permulaan yang cukup, agar tidak serta merta dilakukan penyadapan terhadap seseorang, hingga akhirnya mencederai rasa keadilan dan hak asasi manusia. Kemudian terkait dengan izin penyadapan tersebut, maka Penulis memberikan saran agar izin penyadapan semestinya diberikan kepada pengadilan, atau dapat pula dibentuk lembaga khusus yang berwenang mengurus terkait izin penyadapan. Sehingga tidak hanya untuk kasus tindak pidana korupsi saja, namun izin penyadapan tindak pidana seperti terorisme, narkoba, pencucian uang, dan tindak pidana lainnya terorganisir di satu kelembagaan.

In the United States, for instance, wiretapping permissions are centralized in a single organization. The United States Foreign Intelligence Surveillance Court is the authority in charge of wiretapping permissions in the United States. It was founded under the United States Foreign Intelligence Surveillance Act (FISA), which was passed in 1978 and has been revised three times (Cohen & Wells, 2004: 34). In the United States, the Electronic Communication Privacy Act was adopted in 1986, and it controls the protection of not just spoken communications, but also electronic communications such as signals, text, pictures, and sound by imposing severe criteria such as a warrant (Wilber, 2009). Because wiretapping is a forced endeavor by investigators to uncover the evidence, it has intervened in human rights, particularly the right to privacy connected to the secrecy of personal communication connections.

Thus, it is time for Indonesia to fix the current wiretapping regulations. Through a clear legal basis (formal law), there is no doubt about the legitimacy of the legal structure in wiretapping. The regulatory reform model can adopt best practices in other countries. However, what is certain is that the principles that must be accommodated in reforming the legal regulations for wiretapping procedures are how efforts to enforce the law are not hampered but still respect human rights.

#### **D. Conclusion**

1. The use of wiretapping in law enforcement activities, particularly in the investigation of corruption offenses, continues to have advantages and disadvantages because wiretapping can violate a person's privacy rights. However, in the context of Indonesia, as a country with the Pancasila Law idea, individual rights are not prioritized but must be in harmony with the human rights of many people (public interest). It is reflected in Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia which stipulates that a person's rights can be limited by law and in the public interest. Therefore, wiretapping aimed at law enforcement can be justified, this also underlies the existence of a legal basis for wiretapping in several institutions in Indonesia, namely not only in the context of eradicating corruption.

2. The provisions related to the wiretapping procedure law must be regulated more clearly in the Draft Criminal Code Procedure and thus can become

a guideline for each institution in exercising its authority, especially in the context of enforcing the law on corruption. Several things that need to be regulated are related to aggravation of penalties in the case of wiretapping carried out by officials against the law, differentiating the arbitrariness of law enforcement officials from procedural errors, formulating regarding how to assess the legality or invalidity of wiretapping results, formulating a wiretapping permit mechanism, as well as related to deadlines wiretapping time that can be carried out by the Corruption Eradication Commission. Even about institutions that can grant wiretapping permits, the author suggests that wiretapping permits be granted to the court, or a special institution with the authority to administer wiretapping permits can be set up as is the case in the United States.

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