

## Wiretapping as a Form of Coercion in Criminal Procedure Law in Indonesia

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### Abstract

The rapid development of the times is very likely to accompany the development of crimes committed through technology. In order to uncover crimes through technology, wiretapping is one tool that can be used. However, legal regulations regarding wiretapping as a form of coercion still vary. According to the *Undang-Undang Republik Indonesia Nomor 8 Tahun 1981 tentang Hukum Acara Pidana* (Law of the Republic of Indonesia Number 8 of 1981 concerning Criminal Procedure Law, hereinafter referred to as “*KUHAP*”), forms of coercive measures only include arrest, detention, search, confiscation and examination of documents. Now, wiretapping is carried out to uncover specific criminal acts, for example corruption crimes. For this reason, in the future, legal reform regarding wiretapping is a necessity. This seems to be supported by the *Mahkamah Konstitusi Republik Indonesia* (Constitutional Court of the Republic of Indonesia, hereinafter referred to as “*MKR*”) Decision Number 5/PUU-VIII/2010, dated February 2, 2011, which considers the need for a special law that regulates wiretapping in general as well as wiretapping procedures for each authorized institution.

### Keywords:

Tapping; Coercive Efforts; Criminal Procedure Law.

### Introduction

The increasingly rapid development of the times demands reform in all fields, including law. This development is also supported by rapid technological progress. Along with this, many crimes are also committed through technology. In this regard, wiretapping, for one thing, is used as a means to reveal crimes committed through technology.

Even though wiretapping is something that is prohibited according to law<sup>1</sup>, However, it is excluded if wiretapping is carried out to enforce the law and at the request of the police, prosecutor's office and/or other law enforcement institutions whose authority is determined by law.

Wiretapping is an effective technological means for uncovering systematic crimes, such as corruption, narcotics, or other inter-state crimes. In this case, wiretapping in English is referred to as “bugging”, which means a form of electronic surveillance in the form of conversations or the possibility of electronically capturing, listening or recording usually listening secretly via electronic devices.<sup>2</sup>

On the other hand, wiretapping is an act of violation of an individual's privacy which is categorized as a human right that not everyone can see.<sup>3</sup> This means that wiretapping can be carried out with limitations only to find out about the criminal act, not the privacy of the person being tapped. Wiretapping that violates human rights is when the person carrying out the wiretapping is not an authorized officer such as the police, prosecutor's office or other law enforcement institutions whose authority has been determined according to law.

In Indonesia, regulations regarding wiretapping efforts exist in various laws and regulations, both at the statutory level and up to ministerial regulations. Not only are the formal arrangements scattered, but the systems also vary. The diversity of legal regulations regarding wiretapping has dangerous effects, including that the target of wiretapping cannot dispute whether or not the wiretapping mechanism used on the target is legal, and the results of wiretapping which are used as evidence in court cannot be challenged, because they do not have a mechanism that regulates them in an appropriate manner. clear and explicit in one setting. The regulations governing wiretapping are still diverse and have not yet become unified, so that proving their

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<sup>1</sup> Look, Pasal 31 ayat (1) Undang-Undang Republik Indonesia Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik yang diubah dengan Undang-Undang Nomor 19 Tahun 2016.

<sup>2</sup> Andi Rachmad, “Legalitas Penyadapan Dalam Proses Peradilan Pidana Di Indonesia,” *Jurnal Hukum Samudra Keadilan* 11, no. 2 (2016): 239–340.

<sup>3</sup> Raissa Anita Fitria, “Penyadapan Sebagai Alat Bukti Dalam Tindak Pidana Umum Berdasarkan Hukum Acara Pidana,” *Mimbar Keadilan* (2017): 161.

procedural validity is difficult, and challenging the existence of wiretapping as evidence cannot be done, because the regulations are not explicit.

There are still quite a lot of authorities authorized to order wiretapping efforts in Indonesia. The tapping carried out in Indonesia varies depending on the target. Meanwhile, in other countries, permission to conduct wiretapping is only controlled by 1 (one) authority. The models of wiretapping permits given also vary, namely some have permits granted by the government (executive authorisatin), others have permits granted by the court (judicial authorisatin), and permits from commissioner judges (investigating magistrate). Implementation is still very diverse and there is no clear monitoring mechanism.<sup>4</sup>

Meanwhile, the Decision of the *MKR*'s Number 5/PUU-VIII/2010, dated 2 February 2011, considers that the court considers it necessary to have a special law that regulates wiretapping in general and the procedures for carrying out wiretapping for each authorized institution. This law is very necessary because until now there has been no appropriate regulation regarding wiretapping, so it has the potential to harm the constitutional rights of citizens in general.<sup>5</sup>

In connection with this, this conceptual study article focuses on 2 (two) things. First, the forms of coercive measures according to criminal procedural law in Indonesia. Second, wiretapping is a form of coercion in criminal procedural law in Indonesia. This article was prepared using the restatement writing method<sup>6</sup> which originates from statutory regulations, doctrine, and judge's decisions.

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<sup>4</sup> Institute for Criminal Justice Reform, "Menata Kembali Hukum Penyadapan Di Indonesia," last modified 2012, accessed May 31, 2020, <https://icjr.or.id/menata-kembali-hukum-penyadapan-di-indonesia/>.

<sup>5</sup> Mahkamah Konstitusi Republik Indonesia, "Putusan Nomor 5/PUU-VIII/2010, Tanggal 2 Februari 2011," n.d., 70.

<sup>6</sup> A legal explanation of a particular legal concept using the restatement writing method can be seen, for example, in Moch Choirul Rizal, "Restatement Terhadap Konsep Dalam Hukum Tentang Keluarga Sesuai Kewenangan Mengadili Peradilan Agama Di Indonesia," *Repository Publikasi Ilmiah*, last modified 2019, accessed August 18, 2020, <https://repositori.in/index.php/repo/article/view/5>.

### **Forms of Coercive Measures according to Criminal Procedure Law in Indonesia**

Coercive measures are an action of a coercive nature carried out by criminal law enforcement officials over a person's freedom or freedom to own and control an item or personal freedom so as not to receive interference from anyone.<sup>7</sup> These coercive measures include arrest, detention, search, confiscation and examination of letters. If these steps are taken without the provisions of the law regulating them, then this can be classified as a violation of human rights.

In Indonesia, coercive measures in relation to the process of enforcing criminal law are regulated in statutory regulations, one of which is *KUHAP*. The forms of coercive measures according to the *KUHAP* are arrest (which is regulated in Article 16 of the *KUHAP* to Article 19 of the *KUHAP*), detention (which is regulated in Article 20 of the *KUHAP* to Article 31 of the *KUHAP*), search (which is regulated in Article 32 of the *KUHAP* to Article 37 *KUHAP*), confiscation (which is regulated in Article 38 *KUHAP* to Article 46 *KUHAP*), and examination of letters (which is regulated in Article 47 *KUHAP* to 49 *KUHAP*).

In the investigation of special criminal acts, for example, criminal acts of corruption<sup>8</sup>, Investigators, during the investigation process, can ask for assistance in wiretapping the communications equipment of someone suspected of being connected to the case or another party as a form of case development. The wiretapping request must be supported by clear reasons<sup>9</sup>. Such actions can be categorized as a form of coercive effort that can be carried out by criminal law enforcement officers in the criminal justice system whose regulations are outside the *KUHAP*.

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<sup>7</sup> Andre Putra Utiahman, "Upaya Paksa Dalam Penyidikan Tindak Pidana Korupsi Di Indonesia," *Lex Crimen* 8, no. 10 (2019): 24.

<sup>8</sup> Read more in Moch Choirul Rizal, "Kebijakan Hukum Tentang Bantuan Hukum Untuk Pemberantasan Korupsi Di Indonesia," *Al-Jinayah: Jurnal Hukum Pidana Islam* 4, no. 1 (2018): 147–171.

<sup>9</sup> Utiahman, "Upaya Paksa Dalam Penyidikan Tindak Pidana Korupsi Di Indonesia," 29.

### **Penyadapan sebagai Bentuk Upaya Paksa dalam Hukum Acara Pidana di Indonesia**

Basically, wiretapping is a form of act of taking personal information from 2 (two) parties who are communicating at that time without the 2 (two) parties knowing.<sup>10</sup> According to the *Peraturan Menteri Komunikasi dan Informatika Republik Indonesia Nomor 11/PER/M.KOMINFO/02/2006 tentang Teknis Penyadapan terhadap Informasi* (Regulation of the Minister of Communication and Information of the Republic of Indonesia Number 11/PER/M.KOMINFO/02/2006 concerning Technical Interception of Information), it contains 2 (two) wiretapping terms, namely:<sup>11</sup>

*“Penyadapan informasi, yaitu mendengarkan, mencatat, atau merekam suatu pembicaraan yang dilakukan oleh aparat penegak hukum dengan memasang alat atau perangkat tambahan pada jaringan telekomunikasi tanpa sepengetahuan orang yang melakukan pembicaraan atau komunikasi tersebut (Interception of information, namely listening to, recording or recording a conversation carried out by law enforcement officers by installing additional equipment or devices on a telecommunications network without the knowledge of the person conducting the conversation or communication).”*

*“Penyadapan informasi secara sah (lawful interception) adalah kegiatan penyadapan informasi yang dilakukan oleh aparat penegak hukum untuk kepentingan penegakan hukum yang dikendalikan dan hasilnya dikirimkan ke Pusat Pemantauan (Monitoring Center) milik aparat penegak hukum (Lawful interception is an activity of intercepting information carried out by law enforcement officials for the purposes of law enforcement which is controlled and the results are sent to the Monitoring Center belonging to law enforcement officials).”*

Wiretapping is one of the best ways to carry out investigations in the enforcement of extraordinary crimes. Included in extraordinary crimes are corruption

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<sup>10</sup> Hwian Christianto, “Tindakan Penyadapan Ditinjau Dari Prespektif Hukum Pidana,” *Jurnal Hukum PRIORIS* 5, no. 2 (2016): 91.

<sup>11</sup> Peraturan Menteri Komunikasi dan Informatika Nomor: 11/PER/M.KOMINFO/02/2006 tentang Teknis Penyadapan Terhadap Informasi.

crimes, human trafficking, money laundering, illegal drug trafficking, weapons smuggling, and so forth.<sup>12</sup>

In the context of criminal law, wiretapping must be carried out by lawful interception, that is, lawful wiretapping and monitoring of communication activities must be carried out according to law and carried out by government institutions that have the authority determined by certain regulations for individuals and groups.<sup>13</sup> The authority to conduct wiretapping is limited to efforts to prevent and detect very serious crimes with the condition that it must be used when other criminal investigation methods have failed or there are no other methods that can be used other than wiretapping to obtain the necessary information and there must be a strong enough reason. that by wiretapping new evidence will be obtained and at the same time used to punish perpetrators of criminal acts.<sup>14</sup>

Wiretapping may only be carried out by authorized institutions. Wiretapping is prohibited by civilians. If someone wiretaps by installing a device or other device on someone's communication device to obtain information in an illegal way, then this has violated that person's right to privacy. Indonesia highly upholds the constitutional right to privacy of its citizens as evidenced by the existence of a law that prohibits wiretapping in an unauthorized manner or carried out intentionally and against the law.

Wiretapping is not actually listed as a form of coercion according to the criminal procedure law in the Criminal Procedure Code. The reason is that wiretapping is an act of violation of a person's right to privacy. However, there are several criminal acts that require wiretapping, for example, special criminal acts, which according to procedural law are a form of forced effort to obtain information which will later be used as evidence in the examination process at trial. Regulations regarding the procedures for carrying out wiretapping are also still diverse and vary within each institution

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<sup>12</sup> Hardy Salim, Monica Kurnia, and Nada Dwi Azhari, "Analisis Keabsahan Penyadapan Yang Dilakukan Oleh Komisi Pemberantasan Korupsi Tanpa Izin Pengadilan," *Adil* 9, no. 2 (2018): 90. See also, Moch Choirul Rizal, *Kajian-Kajian Tentang Pembaruan Hukum Pidana Di Indonesia* (Cirebon: LovRinz Publishing, 2015), 55–68.

<sup>13</sup> Salim, Kurnia, and Azhari, "Analisis Keabsahan Penyadapan Yang Dilakukan Oleh Komisi Pemberantasan Korupsi Tanpa Izin Pengadilan," 90.

<sup>14</sup> *Ibid.*, 91.

authorized to carry out wiretapping. For this reason, there needs to be separate regulations regarding wiretapping.

The results of the wiretapping carried out must be in accordance with the standard operational procedure (SOP) as proven by the audit results of the *Direktorat Jendral Pos dan Komunikasi Kementerian Informasi dan Komunikasi Republik Indonesia* (Directorate General of Posts and Communications, Ministry of Information and Communications of the Republic of Indonesia). If it is not appropriate, then the results of the wiretapping cannot be used as evidence in court. Meanwhile, if a procedural violation occurs during the wiretapping process, the results of the wiretapping are invalid, even though the wiretapping results were carried out by an authorized institution.<sup>15</sup> So, the results of the wiretapping process which can be used as evidence in the examination process at trial must comply with the procedures established by the *Direktorat Jendral Pos dan Komunikasi Kementerian Informasi dan Komunikasi Republik Indonesia*.

Currently, there are at least 20 (twenty) laws and regulations in Indonesia that mention and/or regulate wiretapping, namely:

1. *Undang-Undang Republik Indonesia Nomor 5 Tahun 1997 tentang Psicotropika* (Law of the Republic of Indonesia Number 5 of 1997 concerning Psychotropics);
2. *Undang-Undang Republik Indonesia Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi sebagaimana telah diubah dengan Undang-Undang Republik Indonesia Nomor 20 Tahun 2001 tentang Perubahan atas Undang-Undang Nomor 31 Tahun 1999* (Law of the Republic of Indonesia Number 31 of 1999 concerning the Eradication of Corruption Crimes as amended by Law of the Republic of Indonesia Number 20 of 2001 concerning Amendments to Law Number 31 of 1999);
3. *Undang-Undang Republik Indonesia Nomor 36 Tahun 1999 tentang Telekomunikasi* (Law of the Republic of Indonesia Number 36 of 1999 concerning Telecommunications);

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<sup>15</sup> Muhammad Arif Hidayat, "Penyadapan Oleh Penyidik Komisi Pemberantasan Tindak Pidana Korupsi Dalam Prespektif Sistem Peradilan Pidana," *Badamai Law Journal* 4, no. 1 (2019): 41.

4. *Undang-Undang Republik Indonesia Nomor 18 Tahun 2003 tentang Advokat* (Law of the Republic of Indonesia Number 18 of 2003 concerning Advocates);
5. *Undang-Undang Republik Indonesia Nomor 21 Tahun 2007 tentang Pemberantasan Tindak Pidana Perdagangan Orang* (Law of the Republic of Indonesia Number 21 of 2007 concerning Eradication of the Criminal Act of Human Trafficking);
6. *Undang-Undang Republik Indonesia Nomor 35 Tahun 2009 tentang Narkotika* (Law of the Republic of Indonesia Number 35 of 2009 concerning Narcotics);
7. *Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman* (Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power);
8. *Undang-Undang Republik Indonesia Nomor 8 Tahun 2010 tentang Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang* (Law of the Republic of Indonesia Number 8 of 2010 concerning Prevention and Eradication of the Crime of Money Laundering);
9. *Undang-Undang Republik Indonesia Nomor 17 Tahun 2011 tentang Intelijen Negara* (Law of the Republic of Indonesia Number 17 of 2011 concerning State Intelligence);
10. *Undang-Undang Republik Indonesia Nomor 18 Tahun 2011 tentang Perubahan atas Undang-Undang Nomor 18 Tahun 2004 tentang Komisi Yudisial* (Law of the Republic of Indonesia Number 18 of 2011 concerning Amendments to Law Number 18 of 2004 concerning the Judicial Commission);
11. *Undang-Undang Republik Indonesia Nomor 13 Tahun 2016 tentang Paten* (Law of the Republic of Indonesia Number 13 of 2016 concerning Patents);
12. *Undang-Undang Republik Indonesia Nomor 19 Tahun 2016 tentang Perubahan atas Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik* (Law of the Republic of Indonesia Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions);
13. *Undang-Undang Republik Indonesia Nomor 5 Tahun 2018 tentang Perubahan Undang-Undang Nomor 15 Tahun 2003 tentang Penetapan Peraturan Pemerintah*

- Pengganti Undang-Undang Nomor 1 Tahun 2002 tentang Pemberantasan Tindak Pidana Terorisme menjadi Undang-Undang (Law of the Republic of Indonesia Number 5 of 2018 concerning Amendments to Law Number 15 of 2003 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2002 concerning the Eradication of Criminal Acts of Terrorism into Law);*
14. *Undang-Undang Republik Indonesia Nomor 19 Tahun 2019 tentang Perubahan Kedua atas Undang-Undang Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi (Law of the Republic of Indonesia Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission);*
  15. *Peraturan Pemerintah Republik Indonesia Nomor 52 Tahun 2000 tentang Penyelenggaraan Jasa Telekomunikasi (Republic of Indonesia Government Regulation Number 52 of 2000 concerning the Implementation of Telecommunications Services);*
  16. *Peraturan Presiden Republik Indonesia Nomor 50 Tahun 2011 tentang Tata Cara Pelaksanaan Kewenangan Pusat Pelaporan dan Analisis Transaksi Keuangan (Presidential Regulation of the Republic of Indonesia Number 50 of 2011 concerning Procedures for Implementing the Authority of the Center for Financial Transaction Reporting and Analysis);*
  17. *Peraturan Menteri Informasi dan Komunikasi Nomor 11/Per/M.Kominfo/02/2006 tentang Teknis Penyadapan terhadap Informasi (Regulation of the Minister of Information and Communication of the Republic of Indonesia Number 11/Per/M.Kominfo/02/2006 concerning Technical Interception of Information);*
  18. *Peraturan Menteri Informasi dan Komunikasi Nomor 1 Tahun 2008 tentang Perekaman Informasi untuk Pertahanan dan Keamanan Negara (Regulation of the Minister of Information and Communication of the Republic of Indonesia Number 1 of 2008 concerning Information Recording for National Defense and Security);*
  19. *Peraturan Kepala Kepolisian Republik Indonesia Nomor 5 Tahun 2010 tentang Tata Cara Penyadapan pada Pusat Pemantauan Kepolisian Negara Republik Indonesia (Regulation of the Chief of Police of the Republic of Indonesia Number*

5 of 2010 concerning Procedures for Wiretapping at the National Police Monitoring Center of the Republic of Indonesia); and

20. *Standar Operasional Prosedur Komisi Pemberantasan Tindak Pidana Korupsi (KPK) tentang Penyadapan* (Standard Operating Procedures of the Corruption Eradication Commission (KPK) of the Republic of Indonesia regarding Wiretapping).

The diversity of procedural legal regulations regarding wiretapping in Indonesia has had quite a serious impact, namely that the space for interpretation among law enforcement officials has become open. The police, prosecutor's office and Corruption Eradication Commission, for example, ultimately give rise to irregularities in the order of implementation, thus showing a violation of the principles of legal certainty and equality before the law.<sup>16</sup>

The *MKR's* Decision No. 5/PUU-VIII/2010, dated February 2, 2011, states that existing wiretapping mechanisms in other countries are carried out on condition that: (1) there is an official authority appointed by law to grant permission for wiretapping; (2) there is a guarantee of a definite time period for conducting wiretapping; (3) restrictions on handling wiretapping material; and (4) restrictions on people who can access wiretapping. The laws and regulations that are currently in force and regulate wiretapping should clearly regulate the authority to carry out or request wiretapping, the specific purpose of wiretapping, the categories of legal subjects who are authorized to carry out wiretapping, the procedures for wiretapping, the supervision of wiretapping, and the use of the results of wiretapping.<sup>17</sup>

As previously mentioned, the legal regulations regarding forced wiretapping in Indonesia are spread across approximately 20 (twenty) laws and regulations. There is not only one authority that gives permission to conduct wiretapping. This shows that the regulations regarding forced wiretapping efforts are still diverse and in accordance with the needs of each institution that has the authority to carry out wiretapping. The

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<sup>16</sup> Ifitahsari, *Mengatur Ulang Penyadapan Dalam Sistem Peradilan Pidana: Meninjau Praktik-Praktik Terbaik Pengaturan Penyadapan Di Berbagai Negara* (Jakarta: Institute for Criminal Justice Reform, 2020), 24.

<sup>17</sup> Mahkamah Konstitusi Republik Indonesia, "Putusan Nomor 5/PUU-VIII/2010, Tanggal 2 Februari 2011," 69–70.

mechanism for monitoring the implementation of wiretapping in Indonesia is still unclear.

Then, still according to legal considerations in *MKR*'s Decision No. 5/PUU-VIII/2010, dated February 2, 2011, the court considered that there was a need for a special law that regulates wiretapping in general and the procedures for wiretapping for each authorized institution. This law is really needed, because until now there is still no synchronized regulation regarding wiretapping, so it has the potential to harm the constitutional rights of citizens in general.<sup>18</sup>

Legal considerations as in *MKR*'s Decision No. 5/PUU-VIII/2010, dated February 2, 2011, shows that a special law is needed that can regulate wiretapping. This is because the regulations regarding wiretapping are still scattered in various laws and regulations. The enactment of the law on wiretapping is intended to create certainty and clarity regarding the process and implementation of wiretapping which is appropriate and does not violate each person's right to privacy, which is one of human rights.

### **Conclusion**

Coercive measures in criminal procedural law in Indonesia as regulated in the Criminal Procedure Code include arrest, detention, search, confiscation and examination of documents. In investigating special criminal acts, for example criminal acts of corruption, investigators during the investigation process can ask for assistance in wiretapping the communications equipment of someone who is suspected of being related to the case or another party as a form of developing the case. The wiretapping request must be supported by clear reasons.

Wiretapping is seeking information about a criminal act by placing a device to wiretap the communication device of a person who is suspected of committing a criminal act. Wiretapping is actually a violation of a person's right to privacy, but in certain cases wiretapping is used as a method to find evidence of the commission of a criminal act. Regulations regarding wiretapping in Indonesia are still diverse and there is no specific law that regulates it. For this reason, the Constitutional Court of the

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<sup>18</sup> Ibid., 70.

Republic of Indonesia through *MKR*'s Decision No. 5/PUU-VIII/2010, dated February 2, 2011, considers it necessary to have a special law that regulates wiretapping in general as well as wiretapping procedures for each authorized institution. This law is really needed because up to now there is still no synchronized regulation regarding wiretapping, so it has the potential to harm the constitutional rights of citizens in general.

### **Recommendation**

The government and the People's Representative Council of the Republic of Indonesia need to formulate a law that specifically regulates wiretapping. The reason is that currently the regulations are still spread across various laws and regulations and the procedures and implementation mechanisms are different for each authorized authority or institution. For this reason, in the future, the law regarding wiretapping must ensure that each individual's right to privacy is not violated, in order to create legal certainty and clarity regarding wiretapping.

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