WIRETAPPING AS A CORRUPTION CRIMINAL DISCLOSURE INSTRUMENT

Dwi Antoro[1], I Nyoman Nurjaya[2], Ismail Navianto[3], Abdul Madjid[4]

[1] PhD. Candidate at Faculty of Law, Brawijaya University; [2] Professor at Faculty of Law, Brawijaya University; [3-4] Lecturer at Faculty of Law, Brawijaya University, INDONESIA.

childa.ub@gmail.com

ABSTRACT

The problem of corruption which is so complex in both its mode and effect, has spurred law enforcement officials to implement law enforcement in eradicating corruption with precise strategies. The purpose of this study is to describe the importance of wiretapping carried out by prosecutors in handling cases of criminal acts of corruption associated with the Criminal Procedure Code, and proof of trial in law in Indonesia. This research uses normative legal research methods with various approaches, including the legislative approach, historical approach and concept approach. This study uses analytical techniques with deductive logic that is processing legal materials deductively namely explaining the general and drawing it to a specific conclusion. The results showed that the authority to wiretapping by prosecutors as investigators was only limited to the explanation of the article, while the explanation of the article could not be more extensive than what was stated in an article contained in the body of the legislation. Tapping in principle violates the rights of people as regulated in Article 19 of the International Declaration on Human Rights. So tapping must really be done very selectively about a case. Tapping can only be carried out on cases of a very special nature or extraordinary criminal cases such as those on terrorism cases, cases of corruption of enormous value, cases of gross human rights violations and other criminal cases of a very extraordinary nature. Provisions regarding legal evidence in the evidence of corruption cases have been broadened in the provisions of the Law on the Eradication of Corruption, and in the evidentiary court must include experts to prove that the results of wiretapping are true of authenticity based on the legal theory of proof.

Keywords: Corruption, wiretapping, law in Indonesia.

INTRODUCTION

Public response to corruption behavior is very high, so people blaspheme the corrupt behavior. The current corrupt behavior is regulated by elements of state officials, local officials, private officials, legislative members, and even law enforcers. Law enforcement efforts to eradicate corruption by law enforcement officials (APH) need to be implemented as soon as possible and as soon as possible with a strategy for handling criminal acts that require innovation and an extraordinary strategy of law enforcement when compared to handling general crime.

The importance of law enforcement efforts in eradicating criminal acts of corruption, so that the Act also prioritizes the completion of corruption cases compared to other cases, as stated in Article 25 of Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning Eradication of Criminal Acts Corruption, that "Investigations, prosecutions and hearings in

ISSN: 2223-9944, e ISSN: 2223-9553

court hearings in cases of corruption must take precedence over other cases for the speedy resolution".[42]

In contrast to general criminal offenses where investigations are carried out by the police, investigations of corruption can also be carried out by Corruption Eradication Commission Investigators and Prosecutors' Investigators. So great is the problem of corruption that law enforcement efforts must be handled by several parties. The community is familiar with other corruption investigation institutions, namely the Corruption Eradication Commission (KPK), which in carrying out their investigations has a good strategy in disclosing corruption cases, including by performing certain techniques, including intercepting the disclosure and fulfillment of the evidence/proof.

There have been many cases of corruption that have been proven in the trial of the Corruption Criminal Court which are supported by evidence of wiretapping of the parties involved. And related to wiretapping in supporting the task of Investigators and Public Prosecutors Corruption Eradication Commission has been regulated in Law number 30 of 2002 concerning Corruption Eradication Commission. This authority is only one of the many authorities possessed by the Law Enforcement Agency, as stated in Article 12 paragraph (1) of Law number 30 of 2002.

The question is "is wiretapping also the authority of an investigating prosecutor?", And the question is an interesting question. Based on the research carried out to further discuss the authority of investigating prosecutors to carry out wiretapping in handling a corruption case, regarding the legality of wiretapping activities in handling corruption cases based on laws and regulations in force in Indonesia in terms of typology law, the wiretapping relationship is related to Human Rights (HAM), and also regarding the position of the wiretapping conducted by the Prosecutor in proving cases of corruption in court in relation to being evidence.

RESEARCH METHOD

This type of research is normative juridical research which is a process to find the rule of law, legal principles and legal doctrines in order to address the legal issues encountered.[43] The research approach used is the conceptual approach, historical approach and legislation approach.[44] The legal material from normative research can be divided into three namely,

1. Primary legal material, is the main legal material in this study, which consists of legislation relating to this research.
2. Secondary legal law, which includes, minutes of the session of the House of Representatives of the Republic of Indonesia with the Government of the Republic of Indonesia related to the discussion of the Corruption Act and the new Corruption Eradication Commission Act and its academic text (while still draft law), dissertation research results, theses, books and other scientific libraries that provide understanding of primary legal materials, such as legal science textbooks, legal journals, legal reports, and print/electronic media, materials internet, as well as the results of other studies that support this research.

[42] Indonesia, Law concerning Eradication of Corruption, Number 31 of 1999, State Gazette of the Republic of Indonesia of 1999 Number 140, Supplement to the State Gazette of the Republic of Indonesia Number 4150, Article 25.
[43] Marzuki, Peter Mahmud. Penelitian Hukum (Jakarta : Kencana Prenada Media, 2011), p.35.
[44] Ibid, p. 138.

ISSN: 2223-9944, e ISSN: 2223-9553

3. Tertiary Law Materials are legal materials that provide an understanding of primary and secondary legal materials, including legal and political dictionaries, encyclopedias, empirical data, and others.

The technique of searching primary and secondary legal materials is done by studying literature and searching through the internet (internet searching).[45] The analysis technique in this research is to use analytical techniques with deductive logic that is to process legal material deductively that is to explain general things and draw them to a specific conclusion.[46]

RESULTS AND DISCUSSION

Legality of Wiretapping Conducted by Investigating Prosecutors in Investigating Corruption Cases Based on Legislation in force in Indonesia in terms of legal typology

Responsive legal approach is expected to help solve problems that occur in the community. The purpose of the law must be truly to prosper the community in the greater interests, not for the interests of those in power. Philippe Nonet and Philip Selznick end a certain way of thinking that is linear and mathematical, what is meant is to put the development and development of a linear law that is packaged in the form of "MODERNIZATION THEORY".[47] The theory of modernization simply says that developing countries will reach a level of legal development that is enjoyed by developed or modern countries as long as they want to follow the path taken by the developed society. If developing countries are able to remove obstacles to modernization, they will be guaranteed to become developed countries. This guarantee is largely unproven and the theory is abandoned.

Before stepping into responsive legal thinking, Nonet and Selznick distinguished three basic classifications of law in society, namely:

a. Law as a service of refressive power, (repressive law),
b. Law as a separate institution capable of taming repression and protecting the integrity of itself (autonomous law), and
c. Law as a facilitator of various responses to social needs and aspirations (responsive law).

In Law Number 16 Year 2004 concerning the Attorney General's Office of the Republic of Indonesia Article 30 explains:

1) In the criminal field, the prosecutor's office has a duty and authority:

a Prosecute
b Carry out the determination of judges and court decisions that have permanent legal force
c Conduct supervision of the implementation of conditional criminal decisions, supervision criminal decisions, and conditional release decisions;
d Carry out investigations on certain criminal acts based on the law;
e Complete a specific case file and for that reason can carry out additional examinations before being submitted to the court which in its implementation is coordinated with the investigator.

2) In the field of civil and state administration, prosecutors with special powers can act both inside and outside the court for and on behalf of the state or government.[48]

[45] Satjipto Rahadjo, Ilmu Hukum, (Bandung: Citra Aditya Bhakti, 2000), p. 255.
[46] Abdlatif and Hasbi Ali. Perihal Kaedah Hukum, (Bandung: Citra Aditya Bakti, 2010), p.9.
[47] Philippe Nonet and Philip Selznick. *Hukum Responsif : Pilihan di Masa Transisi*. (Jakarta: Perkumpulan untuk Pembaharuan Hukum Berbasis Masyarakat dan Ekologis (HuMa) [S.l.]: Ford Foundation, 2003). Transleted by Rafael Edy Bosco; ed.: Bivitri Susanti.
[48] Indonesia, Law Numer 16 of 2004, Op.Cit.,Article 30.

ISSN: 2223-9944, e ISSN: 2223-9553

And this is clarified in the explanation of Article 30 paragraph (1) letter d referred to:

"The authority in this provision is the authority as regulated for example in Law Number 26 of 2000 concerning the Human Rights Court and Law Number 31 of 1999 concerning Eradication of Corruption Crimes as amended by Law No. 20 of 2001 jo. Law Number 30 of 2002 concerning the Corruption Eradication Commission Commission".

It can be seen in Article 30 paragraph (1) letter d above that in addition to being a prosecuting institution, the Prosecutor's Office also has another authority, namely carrying out investigations of certain criminal acts. Thus the Prosecutor's Office can be an investigator in certain criminal acts. The authority of the prosecutor's office to carry out certain criminal investigations is intended to accommodate several statutory provisions that give the authority to the prosecutor's office to carry out an investigation, for example in Law Number 26 of 2000 concerning Human Rights Courts and Law Number 31 of 1999 concerning Eradication of Acts Criminal Corruption as amended by Act Number 20 of 2001, and Act Number 30 of 2002 concerning the Corruption Eradication Commission.

In accordance with Article 284 paragraph (2) of the Criminal Procedure Code which states:

"Within two years after this law was enacted, the provisions of this law shall apply to all cases, with the temporary exception of special provisions of criminal procedure as mentioned in certain laws, until there is a change and/or is declared no longer valid."[49]

In the explanation, it is stated that what is meant by "special provisions on criminal procedure as mentioned in certain laws" are special provisions on criminal procedure as mentioned in:

- Law on Investigation, Prosecution and Judgment of Economic Crimes (Law No. 7 of 1955);
- Law concerning Eradication of Corruption (Act No. 3 of 1971).

With a note that all special provisions of criminal procedure as mentioned in certain laws will be reviewed, amended or revoked in the shortest possible time. So that there is a unity of opinion regarding the meaning of Article 284 paragraph (2) of the Criminal Procedure Code, Government Regulation Number 27 of 1983 concerning the implementation of the Criminal Procedure Code is issued. Article 17 of Government Regulation Number 27 of 1983 is stated:

"Investigators according to the specific provisions of the criminal procedure referred to in certain laws as referred to in Article 284 paragraph (2) of the Criminal Procedure Code are carried out by Investigators, Prosecutors and other Authorized Investigating Officers based on statutory regulations."[50]

The explanation states that "the authority to investigate certain criminal acts which are specifically regulated by certain laws is carried out by Investigators, Prosecutors and other Authorized Investigating Officers to be appointed based on the law." With the enactment of the Criminal Procedure Code, which stipulates that the investigative tasks are fully delegated to investigating officials as stipulated in Article 6 of the Criminal Procedure Code, the prosecutor's office is no longer authorized to conduct investigations on general criminal cases. However, in accordance with the provisions of Article 284 paragraph (2) of the Criminal Procedure Code jo. Article 17 Government Regulation Number 27 of 1983, the Prosecutor is authorized to conduct an investigation of certain criminal acts (Special Crimes).

Thus the contents of this Law are the legal basis for a Prosecutor to conduct wiretapping activities in order to obtain evidence of a case of corruption which is being handled. The

[49] Indonesia, Law Numer 8 of 1981, Op.Cit.,Article 284 Paragraph 2.
[50] Indonesia, Government Regulation Number 27 of 1983, Loc.Cit.

ISSN: 2223-9944, e ISSN: 2223-9553

authority to conduct wiretapping can be carried out by other investigators who are authorized by the Law to conduct wiretapping, including police investigators, and KPK investigators.

If we analyze the problem regarding the legality of the Investigating Prosecutor in tapping into the theory of legal typology (legal classification), then the writer will discuss the purposes of the three legal typologies referred to as follows:[51] :

a. Repressive law is a law that serves repressive power and repressive social order. Governing power is repressive, when it pays little attention to the interests of the people who are ordered, meaning that it tends to ignore those interests or reject its legitimacy.

b. Autonomous law is oriented towards overseeing repressive power. In this sense autonomous law is the antithesis of repressive law in the same way as "rule by law" ie law only as a means of governing in relation to rule based on law. Autonomous law focuses its attention on the empirical social conditions of power based on the law of institutional reality-reality in which these ideals are embodied, namely the special potentials of these institutions to contribute to the appropriateness of social life, but also their limitations.

c. Responsive law which is certainly responsive can be interpreted as serving the needs and social interests experienced and discovered, not by officials but by the people. Responsiveness implies a commitment to "law in the consumer's perspective". Nonet and Selznick point to the complicated dilemmas within institutions between integrity and openness. Integrity means that an institution in serving social needs remains bound to the procedures and ways of working that distinguish it from other institutions.

The presence of this theory invites us to be critical while offering possible solutions to the practice of Indonesian law to the most fundamental aspects, namely building Indonesian Jurisprudence. Responsive Law Enforcement is expected to help solve problems that occur in the community. The purpose of the law must be truly to prosper the community in the greater interests, not for the interests of the ruling elite. This book again does not claim that responsive law is the best choice of a legal system, even though responsive law provides a promising offer for the chaotic legal conditions in Indonesia.

Wiretapping is associated with human rights

Tapping people's conversation is illegal. Tapping activities for the investigation process should be carried out procedurally and cannot be done haphazardly. This activity is certainly disturbing someone's privacy so it is strongly opposed. But on the other hand, tapping can be a very effective way to find out very confidential information. So sometimes the tapping process is justified. Especially to assist the investigation process in cases that are very dangerous/large, especially in the case of Corruption. The biggest opportunity to carry out this activity is the telecommunications company.

In *Universal Decralation Of Human Right (UDHR) adopted and proclaimed by General Assembly* resolution *217 A (III) of 10 December 1948 Article 19* mentioned that:

"*Everyone has* the *right to freedom of opinion and expression; this right includes freedom to hold opinions without interfence and to seek, receive and impart information and ideas through any media and regardless of frontiers"*.[52]

[51] Philippe Nonet and Philip Selznick. *Hukum Responsif : Pilihan di Masa Transisi*. (Jakarta: Perkumpulan untuk Pembaharuan Hukum Berbasis Masyarakat dan Ekologis (HuMa) [S.l.]: Ford Foundation, 2003). Transleted by Rafael Edy Bosco; ed.: Bivitri Susanti.

ISSN: 2223-9944, e ISSN: 2223-9553

There are various opinions from legal experts about wiretapping related to Human Rights. As the author quotes from the statement of the expert in Criminal Law, University of Indonesia, Dr. Rudy Satrio at the Discussion entitled "KPK: Between Life and Death", was held on Saturday, November 17, 2006, which stated that the authority of wiretapping possessed by the KPK was not a special authority, but an authority which was also possessed by police investigators and prosecutors in carrying out their investigations. It was also stressed that in relation to the investigation process, investigators must look for evidence. If the investigator is required to retrieve information relating to criminal offenses the investigator must tap. This does not violate Asazi human rights, according to Dr. Rudy Satrio.[53]

The basic rights possessed by every Indonesian citizen in terms of communicating and conveying information are regulated in the 1945 Constitution namely Article 28F which states that:

“Everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, own, store, process and deliver information using all types of available channels”.[54]

Tapping also according to the author is in conflict with Law Number 39 of 99 Concerning Human Rights as stated in Article 32 "Independence and secrecy in relation to correspondence including communication links via electronic means may not be disturbed, except by order of a judge or other legal authority in accordance with the provisions legislation”.

Currently in Indonesia there are Rights Protection Institutions which sometimes have different opinions/clash with the task of law enforcement by law enforcement officers. This clash/difference can be avoided by each party by understanding their respective duties. Then another thing that must be considered by the Prosecutors investigating is that in some parts of the Indonesian community it seems that they already have the habit and omission of corrupt behavior that has been firmly attached, so that when investigators do the task of tapping it is possible for a reaction from a group of people who feel disadvantaged without expressing the reasons which is fundamental in terms of law. This can be solely due to the fear of certain parties who already have the habit of corrupt actions. But basically, most Indonesian citizens support the efforts of law enforcement officials in combating corruption, including conducting wiretapping to obtain additional evidence.

Wiretapping is associated with Corruption Case Evidence Based on Article 26A of Law No. 31/1999 in conjunction with Law No. 20/2001 concerning the Eradication of Corruption

The legal basis for expanding the types of evidence evidence is regulated in Article 26A of Law No. 31/1999 in conjunction with Law No. 20/2001 concerning the Eradication of Corruption, the contents of which are as follows*:*

" Valid evidence in the instructions referred to in article 188 paragraph 2 of Law No. 8/1981 concerning the Criminal Procedure Code, specifically for criminal acts of corruption can also be obtained from:

[52] Malmgren, Otto, *International Human Right Documents (a Compilation of United Nation Conventions, Optional protocols, General Comments and General Recommendations*. 2nd edition. (Oslo: University of Oslo faculty of Law, 2002, p. 19.

[53] Kompas.com. *Pemberantasan Korupsi, KPK Jangan Dibubarkan*. Monday edition, November 20, 2006. p. 3.

[54] Redaksi Sinar Grafika. *UUD 1945 Hasil Amandemen dan Proses Amandemen UUD 1945 Secara Lengkap (pertama 1999 – Keempat 2002).* Firt Printed. (Jakarta : Sinar Grafika, 2002), Article 28F, p. 22.

ISSN: 2223-9944, e ISSN: 2223-9553

a. Other evidence in the form of information that is spoken, sent, received, or stored electronically with optical devices or similar to it, and
b. Documents, i.e. any recorded data 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, physical objects other than paper, or recorded electronically, in the form of text, sound , images, maps, designs, photographs, letters, signs, numbers or perforations that have meaning".[55]

KPK investigators also have the authority to conduct wiretaps and record conversations. This authority is stated in article 12 paragraph (1) letter a of Law No.30 of 2002 concerning the Corruption Eradication Commission. The same thing is regulated in the Amendment to the Law on Information and Electronic Transactions (Amendment to Law Number 11 of 2008). Article 5 states that "electronic information and/or printouts of electronic information are legal evidence and have legal consequences".

Which in the explanation mentioned:

Paragraph (1)

Electronic information can mean electronic records, electronic documents, electronic contracts, electronic letters, or electronic signatures. Also includes certain electronic information which is a reference of electronic information.

Paragraph (4)

This provision is an exception to the position of electronic documents and electronic signatures. In making and executing wills, securities, agreements with objects of immovable property, ownership documents such as certificates of ownership, electronic documents and electronic signatures do not have the same status as other written documents and manual signatures in general.[56]

Of course, electronic information is declared valid when using an electronic system in accordance with applicable laws and regulations. This arrangement refers to the 1996 UNCITRAL Model Law on Electronic Commerce which states that electronic transactions are recognized as equals on paper so they cannot be rejected as court evidence[57].

Actually the expansion of this evidence needs to be done in order to accommodate the development of information technology that is increasingly influential in all aspects of life. Starting from the activities of correspondence (e-mail) to large-scale economic transactions can be done via the internet so that it is not impossible that there is a criminal offense involving the activities mentioned above. The limited number of evidence contained in the Criminal Procedure Code now does not mean limiting investigators to advance electronic documents as evidence in court.

CONCLUSION

1. Law Number 31 of 1999 Concerning Eradication of Corruption as amended by Law Number 20 of 2001 Article 26 states that the authority to conduct wiretapping by the

[55] Indonesia, Law concerning Amendment to Law R.I Number 31 of 1999 concerning Eradication of Corruption, Number 20 of 2001, LN Number 134 of 2001, TLN Number 4150, Article 26A.
[56]Indonesia, Amendments to the Law of the Republic of Indonesia Regarding Information and Electronic Transactions, Article 5 and Elucidation of Article 5.
[57]hukumonline.com. Alat Bukti Elektronik Kian Mendapat Tempat, Revisi KUHAP, Badan Legislasi DPR mulai mengundang berbagai pihak untuk memberikan masukan terhadap revisi KUHAP. Thursday edition, November 17, 2016, availabe at http://www.hukumonline.com/detail.asp?id=15123&cl=berita.

ISSN: 2223-9944, e ISSN: 2223-9553

Prosecutor as the investigator is limited to the explanation of the article, while the explanation of the article cannot mention more broad of the matters mentioned in an article contained in the body of the legislation, if the mentioned mentioned contains a new norm or expand the norms contained in the article in the body of the legislation, then that cannot be used as a basis. Because basically the explanation only gives an interpretation of the norms contained in an article. The explanation cannot contain a formulation of new norms or expand/narrow/add norms contained in articles in the body of the legislation,

2. In the Universal Decralation of Human Rights (UDHR) states that in fact the tapping in principle violates the rights of people so that the tapping activity must be really very selective about a case with a special category or extraordinary criminal cases such as those against terrorism, corruption cases which have a very large value , cases of gross human rights violations and other extraordinary criminal cases.
3. LEGAL TIPELOGI Theory invites us to be critical while offering possible solutions to Indonesian legal practices to the most fundamental aspects, namely building Indonesian Jurisprudence. Especially related to RESPONSIVE LAW ENFORCEMENT is expected to help solve problems that occur in the community.
4. Provisions regarding the types of evidence contained in KUHAP Article 184, and specifically regulated in Article 26A of Law Number 31 of 1999 which has been amended by Law Number 20 of 2001 concerning Eradication of Corruption. And in the proof, the trial must include an expert in order to prove that the results of the tapping are true to its authenticity. This is as based on the legal theory of proof.

ISSN: 2223-9944, e ISSN: 2223-9553

REFERENCES

[1]. Abdlatif and Hasbi Ali. (2010). *Perihal Kaedah Hukum.* Bandung: Citra Aditya Bakti.

[2]. Malmgren, Otto. (2002). *International Human Right Documents (a Compilation of United Nation Conventions, Optional protocols, General Comments and General Recommendations*. 2nd edition. Oslo: University of Oslo faculty of Law.

[3]. Kompas.com. (2006). *Pemberantasan Korupsi, KPK Jangan Dibubarkan.* Monday edition, November 20, 2006.

[4]. Marzuki, Peter Mahmud. (2011). *Penelitian Hukum.* Jakarta : Kencana Prenada Media, 2011.

[5]. Philippe Nonet and Philip Selznick. (2003). *Hukum Responsif : Pilihan di Masa Transisi.* Jakarta: Perkumpulan untuk Pembaharuan Hukum Berbasis Masyarakat dan Ekologis (HuMa) [S.l.]: Ford Foundation. Transleted by Rafael Edy Bosco; ed.: Bivitri Susanti.

[6]. Redaksi Sinar Grafika. (2002). UUD 1945 Hasil Amandemen dan Proses Amandemen UUD 1945 Secara Lengkap (pertama 1999 – Keempat 2002). Firt Printed. Jakarta : Sinar Grafika.

[7]. Satjipto Rahadjo.(2000). *Ilmu Hukum.* Bandung: Citra Aditya Bhakti.

[8]. hukumonline.com. Alat Bukti Elektronik Kian Mendapat Tempat, Revisi KUHAP, Badan Legislasi DPR mulai mengundang berbagai pihak untuk memberikan masukan terhadap revisi KUHAP. Thursday edition, November 17, 2016, availabe at http://www.hukumonline.com/detail.asp?id=15123&cl=berita.

Laws And Regulations

[1]. Indonesia, Law concerning Eradication of Corruption, Number 31 of 1999, State Gazette of the Republic of Indonesia of 1999 Number 140, Supplement to the State Gazette of the Republic of Indonesia Number 4150, Article 25.

[2]. Indonesia, Law Number 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia.

[3]. Indonesia, Law No. 8 of 1981 concerning. Criminal Procedure Law

[4]. Indonesia, Government Regulation Number 27 of 1983 concerning the Implementation of the Criminal Procedure Code.

[5]. Indonesia, Law concerning Amendment to Law R.I Number 31 of 1999 concerning Eradication of Corruption, Number 20 of 2001, LN Number 134 of 2001, TLN Number 4150, Article 26A.

[6]. Indonesia, Amendments to the Law of the Republic of Indonesia Regarding Information and Electronic Transactions, Article 5 and Elucidation of Article 5.

ISSN: 2223-9944, e ISSN: 2223-9553