

# Wiretapping Authority of Public Prosecutors Regarding the Executions of Court Decisions

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**Abstract:** Wiretapping issue started to emerge after the record of telephone conversation was used in the judicial review of Article 32 Paragraph (1) letter c of Law Number 30 of 2002 concerning the Corruption Eradication Commission (KPK) in the Constitutional Court. This issue continues to become a discourse, especially when Legislation Body (Baleg) is currently discussing the Wiretapping Bill, emphasizing on the use of wiretapping authority to track state's assets in corruption cases. This normative juridical research was conducted in the form of descriptive research, in which primary and secondary data collected through observation, document review and literature review were analyzed qualitatively. The stages of data analysis included data reduction, data presentation and conclusion drawing. The results showed the Public Prosecutor Office's wiretapping authority in executing the court decisions related to corruption has permanent legal force. This wiretapping authority is expected to support the execution of court decisions that have permanent legal force in order to return the State's Assets. The discussion of the Wiretapping Bill is expected to provide the prosecutor the authority to conduct wiretapping to support State's Asset Recovery as the realization of the Center of Integrated Criminal Justice System.

**Keywords :** Authority, Wiretapping, Public Prosecutor Office, Asset Recovery.

## 1 Introduction

Wiretapping based on Law Number 11 of 2008 concerning Electronic Information and Transactions (UU ITE) is an activity to listen, record, deflect, change, inhibit, and/or record the transmission of Electronic Information and/or Electronic Documents that are not public, either using communication cable network or wireless networks, such as electromagnetic radiation or radiofrequency. But of course, the elements of wiretapping must be fulfilled, as stated in Article 31 paragraphs (1) and (2) of the ITE Law. The act of wiretapping as stipulated in Article 31 of the ITE Law itself has the following purposes: First, law enforcers have the authority to conduct wiretapping which is carried out in the context of law enforcement. Second, wiretapping must be based on a request for law enforcement. Third, the authority for wiretapping and wiretapping requests in the context of law enforcement must be determined by law.

In the Constitutional Court's Decision Number 5/PUU-VIII/2010, it has cancelled Article 31 paragraph 4 of the Electronic Information and Transaction (ITE) Law which contains "tapping procedures regulated by the government." The Constitutional Court believes that restrictions on wiretapping must be regulated by law to avoid abuse of authority that violates human rights. The Constitutional Court deems it necessary to remind that wiretapping and recording of conversations are restrictions on human rights as stipulated in Article 28 J paragraph (2) of the 1945 Constitution.

The issue of wiretapping actually started when the telephone conversation was recorded at the judicial review session of Article 32 Paragraph (1) letter c of Law Number 30 of 2002 concerning the Corruption Eradication Commission (KPK) at the Constitutional Court. This issue continues to be a discourse, especially at this time the Legislative Body (Baleg) is discussing the Wiretapping Bill which raises the option of wiretapping authority to pursue state assets resulting from corruption related to the return of state assets in criminal acts of corruption. The pros and cons of wiretapping issues continue to occur. Those who are pro see that wiretapping is legal, just like what the KPK did in ensnaring the perpetrators of corruption in Indonesia.

Through wiretapping, the KPK has succeeded in uncovering the perpetrators of corruption, which sometimes also involves other law enforcement institutions. While the contra argues that telephone conversations, including internet access activities, are private areas protected by law in order to avoid the publication of private matters. On the other hand, Law Number 36 of 1999 concerning Telecommunications also explicitly guarantees the privacy of telecommunications service users. Similarly, Law on Information and Electronic Transactions (ITE) Number 11 of 2008 also prohibits wiretapping.

However, there are still exceptions and spaces that allow wiretapping based on the two laws. maybe carried out for the purposes of the criminal justice process at the written request of the Attorney General and or the Head of the Indonesian National Police for certain criminal acts as well as the investigator's request for certain criminal acts in accordance with the applicable law. Law Number 30 of 2002, the KPK in carrying out its investigation, investigation, and prosecution duties can also conduct wiretapping and record conversations.

The Prosecutor's Office is a law enforcement agency regulated in Article 36 of Law Number 16 of 2004 concerning the Prosecutor's Office. The Prosecutor's Office itself is a state institution that is authorized by the state to implement court decisions that have permanent legal force as stipulated in Article 270 of the Criminal Procedure Code. However, the Prosecutor's Office often experiences obstacles and obstacles in carrying out the execution of decisions that have permanent legal force related to corruption in an effort to recover state financial losses. The absence of the prosecutor's authority to conduct wiretapping in the context of the execution process has made efforts to restore state finances to be not optimal. Crimes that continue to grow in line with technological developments and society make the perpetrators of criminal acts of corruption freer to hide their assets. Thus, legal instruments must also develop following it in order to overcome the crimes that occur. This article intends to analyse the prosecutor's authority in conducting wiretapping for the purpose of executing court decisions that have permanent legal force in the context of Asset Recovery and recovering state financial losses.

## **Tapping**

The Big Indonesian Dictionary (2016) defines tapping as listening (recording) information (secrets, talks) of other people intentionally without the person's knowledge. In terminology, wiretapping can be interpreted as a process, away, or showing an act, or the act of tapping (Kristian, 2013). Wiretapping in the English phrase is referred to as interception which translates as arresting, capturing, intercepting, or bypassing. Lawful Interception is carried out by law enforcement agencies to intercept communications mostly (Branch, 2003) using network forensic techniques (Spiekermann, Keller, & Eggendorfer, 2018).

The purpose of Lawful Interception itself can vary and differ for each country. This refers to the definition of jurisdiction of each country, as well as the initial definition of Lawful Interception itself. Lawful Interception is necessary to protect national security or to detect

criminal evidence but must be permitted under strict guidelines and regulations (Han, et al, 2011). Several laws of the Republic of Indonesia have defined the word "wiretapping", as follows:

- a. Wiretapping is an activity or series of investigation or investigation activities by tapping conversations, messages, information, and/or communication networks made by telephone and/or other electronic communication tools (Article 1 Number 19 of Law No. 35 of 2009 concerning Narcotics).
- b. Interception or wiretapping is an activity to listen to, record, deflect, change, inhibit, and/or record the transmission of Electronic Information and/or Electronic Documents that are not public in nature, either using a communication cable network or a wireless network, such as electromagnetic radiation or radio frequency (Explanation of Article 31 paragraph (1) of the Law of the Republic of Indonesia Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions).
- c. Wiretapping is an activity to listen, record, and/or record the transmission of electronic information and/or electronic documents that are not public, whether using wired networks, communications, wireless networks, such as electromagnetic radiation or radiofrequency or other electronic devices (Article 1 Number (5) 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).

## **2 Research Methods**

The method used in this study is a normative legal research method. Thus, data collection techniques will be carried out. sourced from secondary data such as legislation, legal theory, opinions of legal experts, as well as legal provisions relating to the discussion to be achieved in this research. The type of research used is a normative juridical research type, the approach used is a statutory approach, namely by reviewing legislation related to the central theme of the research. In addition, other approaches are used to clarify the scientific analysis needed in normative research.

## **3 Results and Discussion**

### **Wiretapping Regulations Currently in Force in Indonesia**

In almost all countries, the institution authorized to tap must be authorized by an institution outside the institution. As in the United States (US), wiretapping must obtain a court order for its implementation. It is regulated in Title III of Omnibus Crime and Safe Street Act 1968, Foreign Intelligence Surveillance Act 1978, The Pen Register and Trap and Trace Devices Chapter of Title 18 in 18 U.S.C 3121-3127. Wiretapping acts in Title III of the Omnibus Crime and Safe Street Act 1968. Wiretapping in the UK must also require permission from an institution outside the institution entitled to wiretapping. That is seeking permission from The Secretary of State or The Home Secretary who is responsible for British law and order.

This wiretapping is aimed at national security interests to protect from serious crimes, the national economy, or giving effect to the provisions governing international legal aid agreements. Wiretapping arrangements In France are strictly regulated and must be strictly authorized by the court and supervised by an independent commission appointed by the French

President on the proposal of the Vice President for a term of 6 years. Meanwhile in the Netherlands, investigators must obtain a warrant issued by a judge. This wiretapping is intended for serious crimes such as those whose criminal penalties are above 4 years in prison, intelligence interests, national security, and national defence (Saputra, 2019).

In Indonesia, the instrument of wiretapping as an authority of the legal apparatus actually has a long history. During the Colonial period in the Dutch East Indies (Based on the decision of the King of the Netherlands dated July 25, 1893 No. 36) it can be considered the oldest regulation in Indonesia regarding wiretapping of information that was limited to mail traffic at post offices throughout Indonesia. In its development, a number of laws, related to the special authority of State apparatus to conduct wiretapping communications, have been regulated in at least six laws, namely the Psychotropic Law, Narcotics Law No. Eradication of Criminal Acts of Terrorism, the KPK Law and the ITE Law No. 11 of 2008.

The definition of wiretapping is also regulated in several laws and regulations. Furthermore, the technical regulation of wiretapping is also contained in the Regulation of the Minister of Communication and Information Number 11/PER/M.KOMINFO/02/2006 concerning Technical Wiretapping on Information stating that legal interception of information is carried out with the aim of investigating, investigating, prosecuting and adjudicating against a criminal act (Article 3).

Thus, the wiretapping rule is considered constitutional as long as it is interpreted at the request of the police, prosecutors, and/or other law enforcement institutions themselves in accordance with the Constitutional Court Decision Number 20/PUU-XIII/2015. Previously, through the Constitutional Court Decision in Case Number 006/PUU I/2003 PUU-I/2003, the Court also explained that the right to privacy is not part of rights that cannot be reduced under any circumstances (non-derogable rights), so that the state can impose restrictions on the implementation of these rights by using the law, as regulated in Article 28J paragraph (2) of the 1945 Constitution. The Constitutional Court stated “to prevent the possibility of abuse of authority for wiretapping and recording, the Constitutional Court believes that it is necessary to enact a set of regulations that regulate the and the procedures for tapping and recording in question”

However, the Constitutional Court views that wiretapping must be carried out very carefully so that the privacy rights of citizens guaranteed by the constitution are not violated. The Constitutional Court also revealed that until now there has been no law specifically regulating wiretapping. The Constitutional Court emphasized that every interception action must be carried out legally, especially in the context of law enforcement. This affirmation is carried out within the framework of the due process of law so that the protection of the rights of citizens as mandated by the constitution. In order to avoid potential violations of human rights, wiretapping must be strictly regulated. Wiretapping barriers for state apparatus in various worlds have also developed. Wiretapping can only be used in special conditions and prerequisites, for example: (1) there is a clear official authority based on the law that gives wiretapping permits (2) there is a guarantee for a definite period of time in conducting wiretapping (3) restrictions on the handling of wiretapping material (4) restrictions regarding who can access wiretapping and other restrictions.

### **Wiretapping Authority is required by the Prosecutor's Office in the Execution Process of Court Decisions That Have Permanent Legal Force**

Along with the times, the variety of crimes today is increasingly sophisticated. In cases involving assets, for example, criminals are so good at hiding their assets that it makes it difficult

for law enforcement officials. Therefore, more up-to-date methods are also needed in the law enforcement process. In general, the law governing wiretapping currently stipulates that the implementation of wiretapping for the sake of law enforcement is only at the investigation stage. As we all know that the birth of the Corruption Crime Act is not solely aimed at punishing corruptors which creates a deterrent effect on perpetrators of corruption, but must also be able to restore state losses that have been corrupted. The Prosecutor's Office as a legal apparatus plays a very important role in efforts to recover state financial losses as a prosecution apparatus.

Indriyanto Seno Adji argues that the return of state losses due to corruption is a law enforcement system that requires a process of eliminating rights to the assets of perpetrators from the State who are victims of harm, both financial losses and state asset losses, can be carried out in various ways such as confiscation, freezing, confiscation, both in local, regional, and international competencies so that wealth can be returned to the legitimate state (victim) (Adji, 2009). Practices in various countries also show that the issue of Asset Recovery has been integrated into the legal system, and places the prosecutor's office as the main element in it. This legal practice is due to the role of the prosecutor's office as the Center of Integrated Criminal Justice System, and in Indonesia, it is appropriate that the prosecutor be the leader in Asset Recovery (Widyopramono, 2014).

The development of Asset Recovery arrangements in the history of Indonesian laws and regulations itself has begun in the Central War Authority Regulation No. PRT/PEPERPU/013/1958 concerning Investigation, Prosecution, and Examination of Corruption and Property Ownership. Further developments are listed in Government Regulation in Lieu of Law Number 24 of 1960 concerning the Investigation, Prosecution, and Examination of Criminal Acts of Corruption, and Law Number 3 of 1971 concerning Eradication of Criminal Acts of Corruption. Then in the Criminal Procedure Code, it is more complete to regulate confiscation, such as confiscated assets will not be returned if it is decided by a judge to be confiscated by the state.

The arrangement of the concept of asset confiscation was then regulated in Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption which was later amended by Law 20 of 2001 (UU PTPK). Compared to the previous law, the regulation on asset confiscation is broader and more complete. This can be seen by the inclusion of arrangements for the seizure of assets both criminally and civilly. The law on the eradication of criminal acts of corruption allows the confiscation of assets resulting from criminal acts through criminal prosecution. If the public prosecutor can prove the guilt of the accused in committing the crime and the assets that have been confiscated in the case in question are the proceeds of criminal acts (Yunus, 2013).

The Asset Recovery stage itself is divided into stages of tracking, freezing or blocking, confiscation, confiscation, and returning assets. In addition, the pre-confiscation stage in several countries is intended for preparation and analysis carried out prior to foreclosure, such as: seeing the priority of confiscated assets, the method of confiscation, profit, and loss, management, other issues, so that when the assets are confiscated, they can be easily managed. and the value remains at maximum when returned for the state. Returning assets is a legal action to take in order to restore state financial losses that have been corrupted.

Therefore, there are parties who are authorized to confiscate, confiscate and return these assets. These parties play a role in the confiscation process to deposit the auction results into the state treasury (Santosa, 2010). Based on ICW records, in 2018 the state suffered a loss of Rp 9.2 trillion based on 1,053 court decisions against 1,162 defendants. However, the return of state assets from the additional penalty of replacement money is only Rp. 805 billion and USD 3,012 (equivalent to Rp. 42 billion).

The prosecutor as the executor is a functional official who is authorized by law to act as the executor of court decisions that have permanent legal force. For cases and goods that are decided to be confiscated, it is included in the responsibility and authority to conduct auction sales and deposit the proceeds to the state treasury. Asset tracking and tracing is carried out on anyone who receives assets resulting from corruption, both to people who are related by blood or other related parties, namely individuals or legal entities. If there are assets that are found to have been taken abroad, the investigator shall request or report to the Attorney General of the Republic of Indonesia to trace or trace the assets located abroad.

Then the Attorney General makes a letter for tracking assets to the government of the destination country. Regarding the return of assets to be confiscated, it is outside the jurisdiction of Indonesia through Mutual Legal Assistance (MLA) (See Law No. 1 of 2006 concerning Mutual Assistance in Criminal Matters).

So far, the Prosecution Service's obstacle in tracking assets for perpetrators of criminal acts of corruption is because the Prosecutor's Office does not have the wiretapping authority like the KPK in carrying out its duties. Meanwhile, efforts to recover assets and restore state finances are certainly not an easy job. Wiretapping itself is a very effective tool in dismantling a crime, at least this expression is an understanding that is often spoken by many supporters of the use of the wiretapping method (Napitupulu, 2013).

In the future, the Prosecutor's Office must continue to make maximum efforts in tracking down the assets of corruptors. In order to maximize the tracking, tracing, confiscation of assets to the return of assets, in addition to using Law Number 31 of 1999 jo. Law No. 20 of 2001 concerning the Eradication of the Criminal Acts of Corruption must also apply Law No. 8 of 2010 concerning the Prevention of the Eradication of the Crime of Money Laundering so that the return of assets can be more effective. Self-tapping in practice is undeniably very useful as a way of uncovering crimes. Wiretapping has become the most effective alternative in criminal investigations along with the development of crime modes, including very serious crimes, and the development of technology as a medium for carrying out crimes (Edyono, 2014).

Thus, the essence of giving the Attorney General's Office the authority to conduct wiretapping is the exception and space provided by law in the context of the execution process of court decisions that have permanent legal force in order to optimize the eradication of corruption in Indonesia. The purpose of granting wiretapping authority in the execution process is to facilitate the work of the Prosecutor's Office in the execution process in order to track assets resulting from criminal acts of corruption which have become state losses, both visible and hidden assets. Meanwhile, the benefits obtained are optimizing the return of state finances resulting from corruption.

Through the discussion of the Wiretapping Bill, he hopes to strengthen the presence of the Corruption Act and the Money Laundering Law. In the case of corruption, the return of assets is very important. This is in line with the mandate of various Constitutional Court decisions related to wiretapping, namely the need for a special law that regulates wiretapping in general to the wiretapping procedures for each authorized institution. This law is very much needed because until now there is still no synchronous regulation regarding wiretapping, so it has the potential to harm the constitutional rights of citizens in general. On the other hand, in order to overcome the prosecutor's internal constraints, Standard Operating Procedures are also needed which are standardized by wiretapping in the execution process as a reference for the prosecutor's officers in carrying out their duties and roles in the asset tracking sector, so that the results achieved will be more systematic and more optimal in the future.

## 4 Conclusion

In the future, it is important to consider the authority of the Prosecutor's Office in conducting wiretapping in terms of the importance of executing court decisions related to corruption cases that have permanent legal force. Optimizing the return of state losses. The discussion of the Wiretapping Bill is expected to give the attorney general the authority to conduct wiretapping related to Asset Recovery so that the prosecutor's role as the Centre of Integrated Criminal Justice System can be realized. However, the granting of such authority must be accompanied by a number of wiretapping procedures and procedures so as not to violate human rights through Standard Operating Procedures in the wiretapping process as a reference for the prosecutor's office in carrying out their duties.

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