

# LEGAL PROBLEMS OF WIREBREAKING REGULATIONS IN THE NEW KUHAP: THE PERSPECTIVE OF DUE PROCESS OF LAW AND PROTECTION OF PRIVACY RIGHTS

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## Abstract

Wiretapping is one of the most effective methods for uncovering crimes, especially those committed in an organized, transnational manner, and utilizing information technology. However, on the other hand, wiretapping is a form of restriction on the right to privacy because it is carried out secretly and allows the state to gain complete access to a person's private communications. The regulation of wiretapping in the New Criminal Procedure Code (KUHAP) through Article 136 is an important development in Indonesian criminal procedure law because it is the first time that wiretapping is recognized as a coercive measure in general criminal procedure law. However, this regulation is still vague and leaves further regulation to separate laws, thus giving rise to various legal problems. This study aims to analyze the legal problems of the regulation of wiretapping in the New KUHAP and formulate a concept for an ideal regulation of wiretapping based on the principles of due process of law and protection of the right to privacy. This study uses a normative legal research method with a statutory approach, a conceptual approach, and a comparative approach. The research results show that Article 136 of the New Criminal Procedure Code still leaves gaps in norms regarding procedures, licensing mechanisms, oversight, the use of wiretapping results, the destruction of irrelevant information, and compensation mechanisms. Therefore, comprehensive wiretapping regulations are needed to achieve a balance between law enforcement and human rights protection.

**Keywords:** Wiretapping, Criminal Procedure Law, Due Process of Law, Right to Privacy, Evidence.

## INTRODUCTION

The development of information and communication technology has transformed the nature of crime, making it increasingly complex, organized, and difficult to uncover through conventional investigative methods. Crimes such as corruption, money laundering, human trafficking, terrorism, and cybercrime are generally committed through closed electronic communications, making it difficult for law enforcement officials to directly obtain evidence. In such situations, wiretapping has become one of the most effective investigative instruments for obtaining relevant information and evidence. However, wiretapping is inherently a violation of human rights, particularly the right to privacy and confidentiality of communications. Unlike searches or seizures, which are generally directly known to the affected party, wiretapping is conducted covertly without the knowledge of the subject.

This hidden nature makes wiretapping a highly intrusive form of state intervention into a person's private life. The right to privacy in the Indonesian legal system has been constitutionally guaranteed through Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which provides protection for the individual, family, honor, dignity and sense of security from the threat of fear. In addition, Article 32 of Law Number 39 of 1999 concerning the Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified through Law Number 12 of 2005, also prohibits arbitrary interference with a person's private life and correspondence. Although the right to privacy is a fundamental right, it is not an absolute right. The Constitutional Court in Decision Number 5/PUU-VIII/2010 emphasized that the right to privacy can be limited by law as long as the limitation is carried out for a legitimate purpose, is proportionate, and is accompanied by an adequate oversight mechanism. Therefore, wiretapping for law enforcement purposes is possible as long as it is regulated explicitly and in detail in the

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law. Over time, regulations on wiretapping in Indonesia have been scattered across various sectoral laws, including the Corruption Eradication Law, the Money Laundering Law, the Narcotics Law, and the Electronic Information and Transactions Law. This situation has resulted in the absence of uniform standards regarding procedures, timeframes, licensing mechanisms, and oversight of wiretapping. A significant change then occurred with the enactment of the New Criminal Procedure Code, which, through Article 136, places wiretapping as a form of coercive measure within general criminal procedure law. This article states that investigators may conduct wiretapping for investigative purposes, and further provisions regarding wiretapping are regulated by separate laws. While this recognition represents a progressive development, the regulations are still very brief and do not provide a comprehensive legal framework.

The main problem lies in the nature of Article 136 of the Criminal Procedure Code, which remains a blank norm. This provision does not regulate the material and formal requirements for wiretapping, the authority to grant permission, the time limit for wiretapping, the management of wiretapping results, the oversight mechanism, the forum for objections, or the right to compensation for injured parties. This regulatory vacuum has the potential to create legal uncertainty and abuse of authority, which ultimately threatens the protection of human rights. In addition, issues also arise regarding the validity of wiretapping results obtained illegally, the use of information irrelevant to the crime being investigated, and the absence of a redress mechanism for parties whose privacy rights have been violated. These problems indicate that the recognition of wiretapping as a coercive measure must be accompanied by strict regulations based on the principle of due process of law.

## FORMULATION OF THE PROBLEM

1. How is the legal problem of the regulation of wiretapping in Article 136 of the New Criminal Procedure Code reviewed from the principles of legality, protection of privacy rights, and due process of law ?
2. What is the ideal model for regulating wiretapping in the Indonesian legal system to ensure a balance between the interests of law enforcement and the protection of human rights?

This research is expected to provide theoretical contributions to the development of criminal procedural law, particularly regarding the relationship between coercive measures, the right to privacy, and the rule of law, as well as provide practical recommendations for lawmakers in formulating laws regarding wiretapping that are more comprehensive and accountable.

## RESEARCH METHODS

This research is a normative legal research that uses a statutory approach ( statute approach ), a conceptual approach ( conceptual approach ), and a comparative approach ( comparative approach ). The statutory approach is carried out by examining various laws and regulations related to wiretapping and the protection of privacy rights. The conceptual approach is used to analyze the concepts of due process of law , the right to privacy, legality, and the validity of evidence. Meanwhile, a comparative approach is used to examine the regulation of wiretapping in several countries as material in formulating an ideal regulatory model for Indonesia. The legal materials used consist of primary legal materials in the form of laws and regulations and Constitutional Court decisions, secondary legal materials in the form of books, scientific journals, and research results, and tertiary legal materials in the form of legal dictionaries and encyclopedias. All legal materials were collected through literature studies and analyzed qualitatively with a descriptive-prescriptive nature.

## RESULTS AND DISCUSSION

### A. The Position of Wiretapping as a Coercive Measure in the New Criminal Procedure Code

In criminal procedure, coercive measures are a series of actions granted by law to law enforcement officers to limit or reduce certain rights of a person in the interests of law enforcement and the search for material truth. Coercive measures are essentially actions that under normal circumstances are classified as unlawful acts, but lose their unlawful nature because they are carried out based on the authority granted by law. According to M. Yahya Harahap, coercive measures are actions that directly affect and limit human rights so that their implementation must be carried out strictly and cannot be done arbitrarily. Therefore, every form of coercive measures must fulfill the principle of legality, namely being carried out based on law, by authorized officials, and in accordance with determined procedures. The inclusion of wiretapping as a form of coercive measure in Article 136 of the New Criminal Procedure Code is conceptually an important development in Indonesian

criminal procedure law. Prior to the enactment of the New Criminal Procedure Code, wiretapping was not regulated in general criminal procedure law, but was instead scattered across various sectoral laws, such as the Corruption Eradication Law, the Money Laundering Law, the Narcotics Law, and the Corruption Eradication Commission Law. The recognition of wiretapping as a coercive measure demonstrates the legislators' recognition of its importance as a means of obtaining evidence in the development of modern crime. However, unlike arrest, detention, search, and seizure, which have relatively comprehensive procedural regulations, wiretapping is regulated only in one very brief article.

Wiretapping differs substantially from other forms of coercive measures. Arrest and detention restrict a person's freedom of movement, searches restrict the right to privacy, and confiscation restricts the right to control objects. Meanwhile, wiretapping directly restricts a person's right to privacy and the confidentiality of communications. The level of intrusion of wiretapping on human rights is arguably even higher than other forms of coercive measures. Wiretapping is conducted secretly, without the knowledge of the party being wiretapped, and allows law enforcement officials to gain access to almost all of a person's communications, including those completely unrelated to the crime being investigated. The Constitutional Court, through Decision Number 5/PUU-VIII/2010, emphasized that wiretapping constitutes a restriction on human rights, and therefore its regulation must be carried out through law and accompanied by adequate oversight mechanisms. This decision emphasized that the regulation of wiretapping must not only grant authority to law enforcement officials but must also guarantee the protection of citizens' right to privacy.

From a constitutional perspective, restrictions on human rights can only be justified if they meet the following principles: Legality ; Necessity ; Proportionality ; and Accountability . The principle of legality dictates that wiretapping should only be conducted if there is a clear legal basis. The principle of necessity dictates that wiretapping should only be conducted if there is no other, less burdensome means of obtaining the required information. The principle of proportionality requires a balance between the interests of law enforcement and restrictions on privacy rights. Meanwhile, the principle of accountability demands oversight and accountability mechanisms for the implementation of wiretapping. Therefore, the recognition of wiretapping as a coercive measure in Article 136 of the New Criminal Procedure Code must be accompanied by detailed and comprehensive regulations. Without adequate regulations, wiretapping has the potential to transform from a law enforcement instrument into a hidden surveillance instrument that threatens citizens' freedoms.

## **B. The Problem of the Normative Void in Article 136 of the New Criminal Procedure Code**

Article 136 of the New Criminal Procedure Code consists of only two paragraphs, namely: (1) Investigators may conduct wiretapping for investigative purposes; (2) Provisions regarding wiretapping as referred to in paragraph (1) are regulated by the Law on Wiretapping. This formulation shows that the legislators only recognize the existence of wiretapping as a coercive measure without providing further regulations regarding the procedures for its implementation.

### **1. Absence of Licensing Authority**

The first problem is the lack of regulations regarding who is authorized to grant wiretapping permits. In a democratic state governed by the rule of law, wiretapping generally requires prior authorization from the judiciary. Constitutional Court Decision No. 5/PUU-VIII/2010 states that wiretapping regulations must at least stipulate: the official authority authorized to grant permission; the requirements and procedures for wiretapping; the timeframe for wiretapping; supervision; and the use of wiretapping results. The absence of regulations regarding the authority to grant permission opens the opportunity for wiretapping to be carried out unilaterally by law enforcement officials.

### **2. No Restrictions on Types of Criminal Acts**

Article 136 of the New Criminal Procedure Code also does not provide any restrictions on the types of crimes that may constitute grounds for wiretapping. In international practice, wiretapping is generally permitted only in cases of: organized crime; terrorism; corruption; money laundering; drug trafficking; and other serious crimes. Without these restrictions, wiretapping could potentially be applied to all common crimes, including minor offenses that do not actually require such significant restrictions on privacy rights.

### **3. No Time Limit**

Article 136 also does not regulate the duration of wiretapping or the extension mechanism. However, without a clear time limit, wiretapping can continue continuously and result in excessive surveillance ( mass surveillance ).

4. Lack of Supervision

Oversight is a crucial element in regulating wiretapping. Oversight can be conducted through: judicial oversight; internal oversight; and external oversight. The absence of oversight regulations results in a lack of mechanisms to prevent abuse of authority.

5. Absence of Objection Mechanism

As a coercive measure, wiretapping should be able to test its legality through a pretrial mechanism. However, Article 136 of the New Criminal Procedure Code does not regulate: the right of the tapped party to file an objection; the procedure for testing legality; or the legal consequences if the wiretapping is declared illegal. This gap contradicts the principle of due process of law .

**C. The Validity of Wiretapping Results and the Fruit of the Poisonous Tree Doctrine**

One of the important principles in criminal evidence law is that evidence must not only be relevant but also legally obtained. The validity of wiretapping results depends on: the legal basis; the authority of the officer; the permitting procedure; the purpose of the wiretapping; and the time limit. If any of these conditions are not met, the wiretapping results should be considered invalid. This principle is known as the doctrine of the fruit of the poisonous tree , namely that evidence obtained through unlawful acts is also invalid. The application of this doctrine is crucial because it prevents officers from obtaining evidence through unlawful means, protects human rights, and maintains the integrity of the criminal justice system. Without the application of this doctrine, officers may be encouraged to ignore legal procedures in order to obtain evidence that incriminates someone. Therefore, the law on wiretapping should expressly state that: all wiretapping results obtained illegally cannot be used as evidence in criminal proceedings.

**D. The Problem of Irrelevant Information**

The characteristic of wiretapping that distinguishes it from other forms of coercive measures is the breadth of information it can obtain. Wiretapping not only yields information related to the crime for which it was conducted, but can also capture a wide range of personal information completely unrelated to law enforcement interests. This information can include family relationships, health conditions, professional communications, business relationships, and even private conversations outside the scope of the criminal case being investigated. This issue raises fundamental questions about how the law should treat irrelevant information ( or incidental findings ) obtained during the wiretapping process.

From the perspective of protecting privacy rights, information unrelated to the crime that formed the basis for the wiretapping should not be used for purposes other than the ongoing investigation. Using such information to open a new investigation, for general intelligence purposes, or even for non-judicial purposes has the potential to violate privacy rights and contradicts the principle of due process of law . The principle of due process of law requires that any restrictions on human rights be limited and only to the extent necessary to achieve a legitimate objective. Therefore, the use of information obtained irrelevant to the original criminal case constitutes a disproportionate expansion of state authority.

The Institute for Criminal Justice Reform (ICJR) stated that one of the weaknesses of wiretapping regulations in Indonesia is the lack of clear mechanisms regarding: examining wiretapping results, using wiretapping results, storing data, accessing wiretapping results, and destroying irrelevant information. This lack of regulation has the potential to encourage mass data collection practices . surveillance ) that does not comply with the principles of the rule of law. In international practice, various countries strictly regulate the management of wiretap data. Irrelevant information must be destroyed within a certain period of time and may not be retained without a valid reason. In some countries, the party subject to wiretapping must be notified after the wiretapping ends, as long as such notification does not interfere with law enforcement.

Post -wiretapping notification serves a crucial role. First, it provides the tapped party with the opportunity to learn that their privacy rights have been restricted by the state. Second, it allows the tapped party to challenge the legality of the wiretapping. Without mandatory notification, a person could be subject to wiretapping without

ever knowing that their privacy rights have been restricted. This violates the principle of accountability and eliminates the individual's opportunity to obtain legal redress. Therefore, wiretapping laws must explicitly stipulate that irrelevant information must be destroyed, that information cannot be used as the basis for new investigations, that information cannot be used for general intelligence purposes, and that the tapped party must be notified after the wiretapping has ended, unless there is a legitimate reason to delay it.

#### **E. Legal Protection and Right to Compensation**

In a state governed by the rule of law, any action by law enforcement officials that restricts human rights must be accompanied by a redress mechanism if the action is unlawful. This principle is a logical consequence of due process of law, which requires the state not only to have the authority to restrict citizens' rights but also to be held accountable for any abuse of that authority. Wiretapping conducted without legal basis, without proper authorization, or without following established procedures is essentially a violation of the right to privacy. Therefore, parties harmed by such actions should have the right to file objections and seek compensation.

The Criminal Procedure Code has recognized the right to compensation and rehabilitation for individuals who experience illegal arrest, detention, search, or seizure. However, similar provisions have not been explicitly found in the context of wiretapping. The absence of a compensation mechanism in wiretapping raises serious problems because violations of the right to privacy often result in material, immaterial, psychological, social, and reputational losses. These losses can arise, for example, when a person's private communications are discovered by another party or when the results of the wiretapping are disseminated unlawfully. The right to compensation should be granted in several circumstances: (1) wiretapping is carried out without fulfilling legal requirements; (2) wiretapping is carried out without permission from the competent authority; (3) wiretapping is carried out beyond the specified time period; (4) wiretapping results are used outside of justified purposes; (5) wiretapping results are disseminated unlawfully. In addition to compensation, the injured party must also be given the right to obtain rehabilitation and restoration of his good name.

The legality of wiretapping should be tested through a pretrial hearing. As a form of coercive action, wiretapping should be subject to judicial oversight, just as arrest, detention, search, and seizure are. Pretrial hearings can serve to test the legality of wiretapping, determine whether wiretapping can be used as evidence, and determine rights to compensation and rehabilitation. Without such a mechanism, wiretapping has the potential to become an uncontrollable act and violate the principles of the rule of law.

#### **F. Reconstruction of Wiretapping Regulations in Indonesia**

Based on the various legal problems outlined above, more comprehensive regulation of wiretapping through separate legislation is needed. The law on wiretapping should at least regulate:

1. **Licensing Authority**  
Wiretapping can only be carried out after obtaining permission from the Chief Justice of the District Court or an appointed judge.
2. **Limitation of Types of Criminal Acts**  
Wiretapping can only be carried out for serious crimes, such as: corruption, terrorism, money laundering, narcotics, human trafficking, organized crime.
3. **Sufficient Initial Evidence**  
Wiretapping should not be carried out based on mere suspicion.
4. **Time period**  
Wiretapping must be limited to a certain period of time and can only be extended with court permission.
5. **Management of Wiretapping Results**  
There must be regulations regarding storage, access, use, and destruction.
6. **Irrelevant Information**  
Information that is not related to criminal acts must be destroyed and may not be used for other purposes.
7. **Post-Wiretap Notification**  
Once the wiretapping is over, the party being wiretapped must be notified of the action.
8. **Objection Mechanism**  
The injured party must be given the right to file an objection through a pre-trial hearing.

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9. Compensation and Rehabilitation  
Victims of illegal wiretapping must be given the right to obtain compensation, rehabilitation, and restoration of good name.
10. the Fruit of the Poisonous Tree Doctrine  
The law needs to emphasize that all wiretapping results obtained illegally cannot be used as evidence in criminal proceedings.

## CONCLUSION

Wiretapping is a crucial instrument in modern law enforcement, but at the same time represents a serious restriction on the rights to privacy and confidentiality of communications. The recognition of wiretapping as a coercive measure in Article 136 of the New Criminal Procedure Code represents a significant development in Indonesian criminal procedure law. However, the regulations remain vague and do not provide legal certainty regarding the requirements, procedures, oversight, management of wiretapping results, objection mechanisms, and the right to compensation. This lack of legal certainty has the potential to lead to abuse of authority and human rights violations. Therefore, a comprehensive law on wiretapping is needed that is oriented towards the principle of due process of law, with detailed provisions regarding the authority to grant permission, time limits, judicial oversight, destruction of irrelevant information, objection mechanisms, compensation, and the application of the "fruit of the poisonous tree" doctrine to illegally obtained wiretapping results.

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