

## **The Legitimacy of Wiretapping Results from the *Komisi Pemberantasan Korupsi* as Evidence in Corruption Cases Linked to Indonesian Legal Provisions**

**Hetty Hassanah**

Faculty of Law, Universitas Komputer Indonesia, Bandung, Indonesia  
hetty.hassanah@email.unikom.ac.id

**Abstract.** The increasingly widespread criminal acts of corruption have made corruption an extraordinary crime. Currently, there is already an independent institution created based on law, namely the Komisi Pemberantasan Korupsi (hereinafter referred to as the KPK). In its development, the KPK has been able to uncover several corruption cases in Indonesia, with various pieces of evidence including evidence in the form of intercepted communications from the perpetrators who have misused this communication facility to commit crimes. This research was conducted to find out the authority of KPK to wiretap the cases it handled and the validity of the wiretapping results carried out by the KPK as evidence. The previous research was about wiretapping as legal evidence in criminal cases so that it can support research on the validity of KPK wiretapping results as evidence in corruption cases. Based on the results of previous research, it is known that everyone is prohibited from wiretapping any information, but wiretapping can be done for the benefit of the criminal justice process. Meanwhile, this research was conducted to obtain clear information about the validity of wiretapping results as evidence in corruption cases.

**Keywords:** Corruption Cases, Wiretapping Results, Evidence.

### **1. Introduction**

The emergence of the internet that accompanies the globalization of communication (global communication network) has made the world borderless and has caused significant changes in social, cultural, economic and law enforcement patterns. Currently there are several regulations in Indonesian positive law in the field of information technology, including Law Number 36 of 1999 concerning Telecommunications and Law Number 11 of 2008 concerning Information and Electronic Transactions which were later amended by Law Number 19 of 2016. However, problems still arise in its application, because sometimes one regulation and another is inconsistent or contradicts one another, resulting in many different legal interpretations by law enforcers in

Indonesia. The use of information technology is also carried out in the process of law enforcement related to several criminal acts that have occurred, including in the process of eradicating corruption in Indonesia. The criminal act of corruption which is increasingly widespread in various fields has made corruption an extraordinary crime[1]. In addition, corruption has also harmed state finances and based on research results, the World Bank stated that leakage of development funds reached 45% [2].

The rapid telecommunication facilities in Indonesia not only provide benefits to the community, but there are also many misuses which give rise to new crimes. The convenience provided in communicating has created the reality that many parties are abusing the intended opportunity to commit acts against the law through this communication facility. At present, there is already an independent institution created under a law, namely the Corruption Eradication Commission (hereinafter referred to as the KPK), which is based on Law Number 30 of 2002 concerning the Corruption Eradication Commission. In its development, the KPK has been able to uncover several corruption cases in Indonesia, with various pieces of evidence including evidence in the form of intercepted communications from the perpetrators who have misused this communication facility to commit crimes.

Some parties argue that the interception or wiretapping carried out by the KPK has violated individual privacy rights as part of human rights, because the KPK has entered a person's private territory. This opinion is based on the provisions of the 1958 European Convention Concerning the Protection of Human Rights, Article 8 paragraph (1) which states that every person has the right to respect for his personal or family life, his household and his correspondence. Furthermore, article 17 of the 1966 International Covenant on Civil and Political Rights, which states that no one can arbitrarily or unlawfully interfere in personal, family, home or correspondence matters. However, in Article 28J paragraph (2) of the 1945 Constitution emphasized that in carrying out their rights and obligations, everyone must comply with the limitations set by law, as well as Article 73 of the Human Rights Law confirms the same thing. In addition, Article 40 of Law Number 36 of 1999 concerning Telecommunications stipulates that everyone is prohibited from carrying out wiretapping actions on information channeled through telecommunications networks in any form, except for the interests of the criminal justice process as stipulated in Article 42 paragraph (2) letter b Law Number 36 of 1999 concerning Telecommunications which states that for the purposes of criminal justice proceedings, telecommunications service providers can record information sent and/or received by telecommunications service providers and can provide the necessary information at the request of investigators for certain criminal acts in accordance with the law. applicable laws.

Furthermore, in Chapter VII regarding prohibited acts, Article 31 paragraph (1) of Law Number 11 of 2008 Concerning Electronic Information and Transactions (hereinafter referred to as the ITE Law) confirms that everyone is prohibited from deliberately and without rights or against the law carrying out interception or wiretapping, on electronic information and or electronic documents in a computer and/or certain electronic systems belonging to other people, and based on Article 47 of the ITE Law, it regulates criminal sanctions for those who fulfill the elements of Article 31 paragraph (1) above. However, there are those who argue that lawful wiretapping is carried out based on Article 12 of Law Number 30 of 2002 concerning the KPK which states that in the context of investigations, investigations and prosecutions, the KPK can conduct wiretapping and record conversations. This provision emphasizes that wiretapping can be

carried out in three stages of the *pro justisia* process in extra ordinary cases, including criminal acts of corruption and criminal acts of bribery.

Based on the provisions above, it appears that there is a discrepancy between several regulations regarding wiretapping, so that until now the KPK's authority in wiretapping is still controversial in the community and this greatly affects the next stage, namely making the wiretapping results as evidence in the criminal justice process. In legal practice in Indonesia, there are legal provisions regarding evidence, which are regulated in Law Number 8 of 1981 concerning Criminal Procedure Code (hereinafter referred to as the Criminal Procedure Code). Article 184 paragraph (1) of the Criminal Procedure Code stipulates that valid evidence is:

1. witness statement;
2. expert testimony;
3. letter;
4. instructions;
5. testimony of the accused.

The provisions regarding the evidence above constitute the provisions of the criminal procedural law which are coercive (*dwingen recht*), meaning that all types of evidence that have been regulated in the article cannot be added or subtracted[3].. When viewed from the provisions of Article 184 paragraph (1) above, wiretapping results are not one of the pieces of evidence that are legally recognized.

The draft Criminal Procedure Code (KUHAP) has accommodated changes regarding evidence and evidence. Electronic letters and recordings that were previously evidence, in the draft KUHAP become evidence. Arrangements regarding wiretapping are also accommodated in the draft Criminal Procedure Code. In essence, in the draft KUHAP, wiretapping may not be carried out, except for unavoidable circumstances as stipulated in Article 83 of the draft KUHAP. Wiretapping can be carried out after there is sufficient preliminary evidence, but this provision does not apply if the case cannot be uncovered without wiretapping. Wiretapping can be carried out in the investigation of serious cases such as cases of corruption, money laundering or terrorism. In the United States Constitution, wiretapping is a violation of human rights, especially individual privacy rights, because it is given a limitation on wiretapping, both through procedural and substantive rules. According to the provisions of law in America, certain cases such as corruption cases must be handled and examined through a reverse evidentiary system. The reverse proof theory aims to answer the origin of a person's very large assets, which he should not have when viewed from the amount of income that should be received each month. Thus wiretapping is not permitted in the said cases.

Meanwhile, in Article 26 A of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, it is emphasized that the results of the recording include evidence of instructions. In addition, Article 5 paragraph (1) and (2) of the ITE Law states that electronic information and/or electronic documents and/or printouts are valid evidence as an extension of valid evidence in accordance with the procedural law in force in Indonesia. . Thus, there are various legal provisions that give rise to different legal interpretations among law enforcers in Indonesia regarding the validity of wiretapping results by the KPK as evidence in the criminal justice process, including in corruption crimes and bribery crimes such as the Artalyta case, as criminal acts extraordinary crimes (*extra ordinary cases*), on



the one hand the wiretapping action carried out by the KPK on Artalyta's conversation is considered to violate a person's individual rights, but on the other hand in the process of eradicating criminal acts of corruption, supporting evidence is needed, including making the wiretapping results as evidence in the criminal justice process, so that there is a gap between the existing legal provisions (*das sollen*) and the reality in society (*das sein*). This research was conducted to find out the KPK's authority to wiretap the cases it handled and the validity of the wiretapping results carried out by the KPK as evidence.

## 2. Method

The specification of this research is analytical descriptive, namely presenting facts systematically. The approach method that will be used is a normative juridical approach, in this case testing and studying secondary data regarding the KPK's authority to wiretap the cases it handles and the validity of the wiretapping results carried out by the KPK as evidence. All data obtained is analyzed qualitatively juridically, in this case, the analysis is carried out by considering the hierarchy of laws and regulations so that one legislation does not conflict with other laws and regulations and legal certainty.

## 3. Result and Discussion

The process of law enforcement in Indonesia is still ongoing. Cooperation between law enforcers (police, prosecutors, judges and advocates) continues to be forged in overcoming all legal problems both in the civil, criminal, state administration and other judicial spheres. Until now, the crime rate in Indonesia continues to grow rapidly along with the development of increasingly sophisticated information and telecommunications technology. The rapid development of information and telecommunication technology, in addition to providing benefits to society on the one hand, is often misused, causing acts against the law, including corruption and bribery.

Prevention or preventive efforts against crime are part of criminal politics, as a whole the principles and methods that form the basis and reaction to violations of the law[4]. Therefore it is very important to build a strong moral even though it can still pave the way for crimes to occur. At present, there is already an independent institution created based on law, namely the Corruption Eradication Commission (hereinafter referred to as the KPK), which is based on Law Number 30 of 2002 concerning the Corruption Eradication Commission. KPK, in its development has succeeded in uncovering several corruption cases in Indonesia[5].

Every action taken by investigators must have a legal basis and considerations that can be accounted for, as well as the KPK, which has certain authority in handling corruption cases in Indonesia. One of the KPK's actions in investigating corruption cases is wiretapping. Wiretapping has several legal bases and considerations. Among other things, Article 12 letter (a) of Law Number 30 of 2002 regulates wiretapping as part of the actions that may be carried out by the KPK Team in carrying out investigations, investigations and prosecutions. In terms of formal legality, the KPK has the authority to carry out this action in order to carry out surveillance, find evidence and prove the existence of allegations of corruption and take them to court. Another consideration for wiretapping is that there has been a strong allegation obtained from monitoring reports (indications) and sufficient initial evidence, even though the KPK has formal legal authority to carry out wiretapping, this does not mean that the KPK can be arbitrary in its use. There must be procedures that can be accounted for before wiretapping.

The pros and cons of the KPK's authority have often been debated, although in the end it came to the conclusion that in corruption cases other than police and prosecutor investigators, it is also recognized based on the above law that the Corruption Eradication Commission acts as an investigator. In the process of investigating this corruption case by the Corruption Eradication Committee, it must also refer to the criminal procedural law in force in Indonesia, in this case Law Number 8 of 1981 Concerning Criminal Procedure Code (hereinafter referred to as the Criminal Procedure Code). Prior to an investigation, of course, the KPK also had to collect strong initial evidence that the case at hand was indeed a corruption case, therefore the KPK was not given the authority to issue a Case Investigation Termination Letter (SP3). There are various ways that the KPK has used to obtain evidence in this corruption case, including through wiretapping of telephones/communications in which the results of the wiretapping are used as evidence in the criminal trial of the corruption case.

According to the Elucidation of the ITE Law, Article 31 states that;  
"Interception or wiretapping is an activity to listen, record, deflect, modify, inhibit and/or record the transmission of electronic information and/or electronic documents that are not public, either using wired communication networks or wireless networks, such as electromagnetic radiation or radio frequency."

Based on Article 1 number 1 of the ITE Law, what is meant by electronic information is one or a set of electronic data, including but not limited to writing, sound, pictures, maps, designs, photos, electronic data interchange (EDI), electronic mail (electronic mail). , telegram, telex, telecopy, or the like, letters, signs, numbers, access codes, symbols or perforations that have been processed which have meaning or can be understood by people who are able to understand them. Meanwhile, Article 1 point 4 of the ITE Law states that what is meant by electronic documents is any electronic information that is created, forwarded, sent, received or stored in analog, digital, electromagnetic, optical or the like, which can be seen, displayed and/or or heard through a computer or electronic system, including but not limited to written, sound, images, maps, designs, photographs or the like, letters, signs, numbers, access codes, symbols or perforations that have been processed which have meaning or can be understood by people who can understand it[6].

In addition, what is meant by an electronic system according to Article 1 number 5 is a series of electronic devices or procedures that function to prepare, collect, process, analyze, store, display, announce, send and/or disseminate electronic information. Thus, wiretapping has been carried out by the KPK, such as the wiretapping of Artalyta's conversation with officials at the Attorney General's Office, which is a wiretapping action as referred to in the Elucidation of Article 31 of the ITE Law above. The Corruption Eradication Commission in its performance has used the wiretapping results as evidence in criminal justice, especially corruption, which also does not rule out the possibility of other crimes such as bribery, as happened in the Artalyta case. There are those who argue that the interception or wiretapping carried out by the KPK has violated individual privacy rights as part of human rights, because the KPK has entered a person's private area. This opinion is based on the provisions of the 1958 European Convention Concerning the Protection of Human Rights, Article 8 paragraph (1) which states that every person has the right to respect for his personal or family life, his household and his correspondence. Furthermore, article 17 of the 1966 International Covenant on Civil and Political Rights, which states that no one can arbitrarily or unlawfully interfere in personal, family, home or correspondence matters. However, in Article 28J paragraph (2) of the 1945 Constitution it is emphasized that in carrying out their rights and obligations, everyone must comply with the limitations set by law, as well as Article 73

of the Human Rights Law confirms the same thing. In addition, Article 40 of Law Number 36 of 1999 concerning Telecommunications stipulates that everyone is prohibited from carrying out wiretapping actions on information channeled through telecommunications networks in any form, except for the interests of the criminal justice process as stipulated in Article 42 paragraph (2) letter b Law Number 36 of 1999 concerning Telecommunications which states that for the purposes of criminal justice proceedings, telecommunications service providers can record information sent and/or received by telecommunications service providers and can provide the necessary information at the request of investigators for certain criminal acts in accordance with the law. applicable laws.

Furthermore, in Chapter VII regarding prohibited acts, Article 31 paragraph (1) of Law Number 11 of 2008 Concerning Electronic Information and Transactions (hereinafter referred to as the ITE Law) confirms that everyone is prohibited from deliberately and without rights or against the law carrying out interception or wiretapping. on electronic information and or electronic documents in a computer and/or certain electronic systems belonging to other people, and based on Article 47 of the ITE Law, it regulates criminal sanctions for those who fulfill the elements of Article 31 paragraph (1) above[7].

However, there are those who argue that wiretapping is a legally valid action, based on Article 12 of Law Number 30 of 2002 concerning the KPK which states that in the context of investigations, investigations and prosecutions, the KPK can conduct wiretapping and record conversations[8]. This provision emphasizes that wiretapping can be carried out in three stages of the pro justisia process in extra ordinary cases, including criminal acts of corruption and criminal acts of bribery. The wiretapping results which were used as evidence by the KPK were based on the provisions of Article 5 paragraph (1) of the ITE Law which reads:

"Electronic information and/or electronic documents and/or printouts are valid legal evidence"

Meanwhile, article 5 paragraph (2) of the ITE Law also confirms that:

"Electronic information and/or electronic documents and/or printouts as referred to in paragraph 1 are an extension of valid evidence in accordance with the procedural law in force in Indonesia"

In addition, the use of wiretapping results as evidence by the KPK is based on the idea that there is an extensive legal interpretation by expanding the definition of clue evidence as stipulated in article 184 of the Criminal Procedure Code.

Before discussing the directive evidence in Article 184 of the Criminal Procedure Code, it must first be known about the evidentiary process that plays a role in the criminal justice process. Proof is the central point of examining cases in court proceedings. Evidence is provisions that contain outlines and guidelines regarding ways that are justified by law to prove the guilt of the accused. Proof is also a provision that regulates evidence that is justified by law which can be used by judges in proving the guilt of the accused.

Therefore, judges cannot use evidence that is contrary to the law. The truth of a decision must be tested by means of evidence that is legally valid and has the power of proof attached to every piece of evidence found. Thus, the evidence used by the judge to make a decision must be in accordance with the provisions of the law which are limitatively regulated in Article 184 of the Criminal Procedure Code, namely that valid evidence is[9]:



1. witness statement;
2. expert testimony;
3. letter;
4. instructions;
5. testimony of the accused.

The provisions regarding the evidence above constitute the provisions of the criminal procedural law which are coercive (*dwingen recht*), meaning that all types of evidence that have been regulated in the article cannot be added or subtracted.

In general, there are several theories regarding the proof system, namely[10]:

1. Conviction in time theory, namely a system of proof which states that the guilt or failure of a defendant is solely determined by the judge's assessment of the conviction. The judge's conviction can be obtained through the evidence presented at trial.
2. Conviction Raisonee Theory, is an evidentiary system based on the judge's conviction to determine whether or not the defendant is guilty, but in this system the judge's conviction is limited and must be based on clear and acceptable reasons which must be described in his decision.
3. Positive Theory of Proof According to Law, is evidence based on a conviction-in-time theory. Proof in this system is based on valid evidence that has been stipulated by law accompanied by the judge's conviction in determining whether the defendant is guilty or not.
4. Theory of Proof according to Law Negatively (*Negatief Wettelijke stelsel*), is a proof system that uses a combination theory of positive statutory proof systems with a system of proof based on conviction or Conviction in time theory. The formulation of this theory is that the guilt or failure of a defendant is determined by the judge's conviction based on the method and legal means of evidence according to law.

Meanwhile, the evidentiary system adopted by the Criminal Procedure Code is a negative statutory evidentiary system, because it is a combination of a positive statutory evidentiary system with a conviction-in-time theory. This can be seen from the provisions of Article 183 of the Criminal Procedure Code which emphasizes that a judge may not impose a sentence on a person unless, with at least two valid pieces of evidence, he obtains confidence that a crime has actually occurred and that the defendant is guilty of committing it. Talking about clue evidence, it is inseparable from the provisions of Article 188 (2) of the Criminal Procedure Code which limits the authority of judges in obtaining clue evidence, which can only be obtained from[11]:

1. witness statement;
2. letters;
3. statement of the accused.

Based on the above, directive evidence can only be taken from the three pieces of evidence above. In general, new evidence is needed if other evidence does not meet the minimum evidentiary limit set forth in Article 183 of the Criminal Procedure Code above. Thus, clue evidence is evidence that depends on other evidence, namely witness evidence, letters and

statements of the accused. Guidance evidence has the same evidentiary power as other evidence, but the judge is not bound by the truth of the agreement embodied by the instructions, so the judge is free to evaluate and use it in proving efforts. In addition, instructions as evidence cannot stand alone to prove the guilt of the accused, because judges are still bound by the minimum limit of proof according to the provisions of Article 183 of the Criminal Procedure Code.

Wiretapping results can be considered as clues, because they can be categorized as electronic information and/or documents which are an extension of documentary evidence as material to be used as a guide for judges in proving a case including corruption cases where there are indications of a criminal act of bribery which has been described in section previously.

#### **4. Conclusion**

Based on the description of the analysis in the previous section, it can be concluded as follows:

1. The recording of conversations resulting from wiretapping by the KPK has the power of proof based on Law Number 8 of 1981 concerning Criminal Procedure Code, because the results of wiretapping are part of electronic information, so the results of wiretapping are one of the legally valid pieces of evidence as emphasized in Article 5 paragraph (1) of the ITE Law, apart from that it is also stated in Article 5 paragraph (2) of the ITE Law that wiretapping results as electronic information which are considered legally valid as evidence are an extension of the provisions of evidence in accordance with the applicable procedural law, in this case Article 184 of the Criminal Procedure Code, particularly as a means of evidence, so that the wiretapping results carried out by the Corruption Eradication Committee have the power of proof according to Law Number 8 of 1981 concerning Criminal Procedure Code (KUHAP).

2. The results of wiretapping by the KPK as evidence do not conflict with Article 40 of Law Number 36 of 1999 concerning Telecommunications, because wiretapping actions which are prohibited according to Article 40 of the Telecommunications Law are exempted from wiretapping carried out by the KPK, according to the provisions of Article 42 paragraph (2) letter b of the Telecommunications Law which stipulates that for the purposes of criminal justice proceedings, telecommunications service providers can record information sent and/or received by telecommunications service providers and can provide the necessary information at the request of investigators for certain criminal acts in accordance with applicable laws, including wiretapping actions that have been carried out by the KPK as an independent institution that has the authority to conduct investigations, investigations and prosecutions of corruption cases in Indonesia as stipulated by Law Number 30 of 2002 concerning KPK, specifically yes Article 12 letter a

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