



Legal Implications of Wiretap Evidence in the Terrorism Investigation Process

Article	Abstract
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INTRODUCTION

In essence, a society always wants a calm and orderly life, harmonious and peaceful and far from the disturbance of crimes that threaten people's lives.¹ The crime of terrorism is a form of international dimension crime that is very frightening to the public. In various countries in the world, terrorism crimes have occurred both in developed and developing countries, and the acts of terrorism have claimed victims indiscriminately. This has caused the United Nations in its congress in Vienna Austria in 2000 to raise the theme of The Prevention of Crime and The Treatment of Offenders, among others, mentioning terrorism as a development of violent acts that

¹ Ana Fauzia, Fathul Hamdani & Deva Gama Rizky Octavia, "The Revitalization of the Indonesian Legal System in the Order of Realizing the Ideal State Law" (2021) 3:1 Progress Law Rev 12-25.

need attention. According to Muladi, terrorism is an Extraordinary Crime that also requires handling by utilizing Extraordinary Measures due to various reasons.²

The right to life is the most basic human right for all human beings. The right to life is part of human rights that have non derogable rights. This means that this right must be owned by everyone, it also signifies that everyone has the right to live and no one else can take away his or her right to life.³ The exclusion of deprivation of the right to life does not include the deprivation of one's right to life by another person without any justification based on the prevailing laws and regulations. One example of deprivation of the right to life without justification is murder through acts of terror. Acts of terror have violated human values, dignity, and religious norms. Terror has also shown its movement as a tragedy of human rights.

In realizing the national goals as referred to in the preamble of the 1945 Constitution, namely to protect the entire Indonesian nation and the entire Indonesian homeland, to advance the general welfare, educate the nation's life, and participate in implementing world order based on independence, lasting peace, and social justice, it is necessary to enforce law and order consistently and continuously. Terrorism has eliminated lives regardless of the victim and caused widespread public fear, or loss of independence, as well as property losses, therefore it is necessary to implement eradication measures. Terrorism has a wide network that poses a threat to national and international peace and security. Terrorism eradication is based on national and international commitments by establishing national laws and regulations that refer to international conventions and laws and regulations related to terrorism.

Terrorism is a coordinated attack that aims to generate a feeling of terror against a group of people. Unlike war, acts of terrorism are not subject to the procedures of warfare such as the suddenness of the time of execution and the random target of casualties and often civilians. The term terrorist by counter-terrorism experts is said to refer to perpetrators who do not belong to a recognized armed force or do not comply with the rules of the armed forces. Acts of terrorism also imply that terrorist attacks are inhumane and unjustified, and therefore the perpetrators ("terrorists") deserve cruel retribution.

Due to the negative meanings that the words "terrorist" and "terrorism" carry, terrorists generally refer to themselves as separatists, liberation fighters, crusaders, militants, mujahideen, and others. The true meaning of jihad, mujahideen is far from the acts of terrorism that attack civilians while not engaging in war. Terrorism itself is often seen in the name of religion.⁴

Apart from individual perpetrators, terrorism can be carried out by the state or known as state terrorism. For example, as stated by Noam Chomsky who calls the United States in that category. The issue of double standards has always colored various mentions that originally originated in the West. For example, when the United States calls many groups in the world terrorists, on the other hand, media coverage shows the fact that the United States has committed horrific acts of terrorism that violate agreed conventions. **BRUSSEL:** The EU's strategy for tackling terrorism was today discussed at the EU Council of Interior Ministers in Brussels. Among other things, how to deal with radicalization among youth and their recruitment by terror organizations. Plans to regulate the arrival of immigrants and the collection of telephone and internet data will also be discussed. For

² Ana Fauzia & Fathul Hamdani, "Analysis of the Implementation of the Non-Conviction-Based Concept in the Practice of Asset Recovery of Money Laundering Criminal Act in Indonesia from the Perspective of Presumption of Innocence" (2021) 11:1 J.Jurisprud 57-67.

³ Ana Fauzia & Fathul Hamdani, "Aktualisasi nilai-nilai Pancasila dan konstitusi melalui pelokalan kebijakan Hak Asasi Manusia (HAM) di daerah" (2021) 2:2 J Indones Berdaya 157-166.

⁴ Utsman Sabian, *Menuju Penegakan Hukum Responsif* (Yogyakarta: Pustaka Pelajar, 2008).

German interior minister Wolfgang Schäuble, this is his introductory visit to the EU Council of Ministers.⁵

This is of course very concerning, how thin is the mentality of the Indonesian youth so that it is very easy for the terrorist 'brain' to implant its ideology? Many say that the youth is the backbone of the nation's development, and the success and progress of future development will be determined by the creativity of the youth. Of course, the creativity of the youth meant above does not mean that the youth must be creative to bomb objects determined by the terrorist brains. If the 'terrorist brains' continue to influence the youth, it will certainly be very detrimental to the development of Indonesia in the future.

The development of the Police's ability to deal with terrorism is quite encouraging. Many perpetrators associated with terrorism have been arrested, but of course, it must continue to be done so that the space for terrorists to move is increasingly limited, and not to spread terror again in Indonesia. The way the brains of terrorism spread their ideology is by disguising their teachings with religious teachings. In other words, the brains of terrorism spread their ideology by influencing a person's way of thinking.

The rapid advancement of science and technology in the fields of telecommunications, information, and computers has resulted in a modern application of life. Information and communication technology has changed the behavior and lifestyle of people globally. The development of information technology has also caused the world to become borderless (borderless) and caused significant social, cultural, and economic changes and law enforcement patterns to take place so quickly.⁶ Information technology is currently a double-edged sword because, in addition to contributing to the improvement of welfare, progress, and human civilization, it is also an effective means of unlawful acts. Along with the development of information technology and telecommunications today, which has provided benefits for people in the world, among others, it provides convenience in interacting without having to face each other directly. Another reality is that the development of information and telecommunications technology is often misused by the public, including in Indonesia, to commit or cause an act that can be against the law. Therefore, there is increasing pressure for the law to enter into the realm of digital technology. This includes legal policies regarding wiretapping, which will be used as evidence in the context of investigations to deal with the reality of developments that occur in society.

In the judicial process, especially a trial as it should be, the most crucial and urgent matters are in the process of evidence. The presumption of innocence must be prioritized in the judicial process to maintain the dignity of the judiciary. Because the answer that will be found in the judicial evidentiary process is one of the most important things, especially for the Panel of Judges in deciding a criminal case. In this case, the position of the law of evidence, especially regarding wiretapping, as usual, will be in a dilemmatic position so a compromise path is needed. On the one hand, so that the law can always recognize the times and technological developments, based on this background, the author raises research entitled "Legal Implications of Wiretap Evidence in the Terrorism Investigation Process". The regulation of wiretapping in the investigation process in Indonesian criminal procedure law cannot be separated from the utilization of information technology and the social dynamics that occur in society. Wiretapping for the law enforcement process must have clear rules. The position and strength of wiretapping results in the investigation process in proving criminal cases in the legislation are not contrary to the law. The Criminal Procedure Code, hereinafter referred to as KUHAP has provided exceptions to the provisions of

⁵ Hukum Online, "Jerat Hukum dan Contoh Terorisme di Indonesia," (2023), daring: <<https://www.hukumonline.com/berita/a/contoh-terorisme-di-indonesia-lt6503c9f20d050/>>.

⁶ Sri Suatmiati & Edy Kastro, "Legal and Institutional Framework on Counter-Terrorism in Indonesia" (2020) 27:1 J Media Huk 68-78.

procedural law in certain special criminal laws. For this reason, a clear legal basis is needed to regulate matters regarding wiretapping.

RESEARCH METHODS

The writing of this article is a writing that uses normative legal research methods. The research is conducted on invitation laws and positive norms in the legislative system related to the problem at hand.⁷ All legal materials obtained are collected from the literature both obtained from primary and secondary legal materials, and these legal materials will be carried out stages and steps of research by inventorying, classifying, and analyzing legal materials and then formulating the results of the analysis in a conclusion.

ANALYSIS AND DISCUSSION

The Position of Wiretap Results in the Investigation Process

Changes in society and technology have had a profound effect on changes in the law, including in the criminal law system, both material criminal law implemented in the Criminal Code and formal criminal law contained in Law Number 8 of 1981 concerning Criminal Procedure. It is a common opinion that proving means giving certainty to the judge about the existence of certain events.

Both in civil procedure law and in criminal procedure, proof has a very central role. In essence, proof begins when it is known that there is a legal event. If there are criminal elements (preliminary evidence that a criminal offense has occurred) then the process begins by conducting an investigation, then an investigation is carried out.⁸ Criminal law considers that evidence is an essential part of determining the fate of a defendant. Proving whether or not the defendant committed the act charged is the most important part of criminal proceedings. This is also where human rights are at stake. What are the consequences if a person who is charged is proven to have committed the charged act based on the available evidence accompanied by the judge's conviction, even though it is not true? For this reason, criminal procedure law aims to seek material truth. In criminal procedure law, what is sought is material truth. The material truth is the truth according to the facts. About investigations in the Criminal Procedure Code, the knowledge and understanding of investigations needs to be stated with certainty and clarity, because it directly offends and limits human rights. As a special law, Law No. 15/2003 on the Eradication of the Criminal Acts of Terrorism regulates materially and formally at the same time.

Meanwhile, the criminalization of Terrorism as part of the development of criminal law can be done in many ways, such as through an evolutionary system in the form of amendments to articles of the Criminal Code.

1. Through a global system through a complete arrangement outside the Criminal Code including the specificity of its procedural law.
2. Compromise system in the form of inserting a new chapter in the Criminal Code on terrorism crimes.

However, it does not mean that the existence of a special case in crimes against state security means that law enforcers have more or unlimited authority solely to facilitate proof that someone has committed a crime against state security, but the deviation is in connection with the greater interests of state security that must be protected.

⁷ Peter Mahmud Marzuki, *Penelitian Hukum*, 13 ed (Jakarta: Kencana, 2017).

⁸ Edmon Makarin, *Kompilasi Hukum Telematika* (Jakarta: Raja Grafindo Persada, 2004).

The Power of Wiretap Results in the Investigation Process

Talking about the strength of evidence in criminal cases, we cannot be separated from the system of evidence in general. The legal system of evidence until now still uses old and conventional legal provisions. It has not been able to reach proof of criminal crimes that use digital devices as a result of advances in information technology, which places the position of technology products as evidence. As a result, there is legal uncertainty about digital evidence, which ironically, is inversely proportional to the increasingly widespread development of digital technology both domestically and abroad. The position of legal force in the wiretapping process as evidence in proving criminal cases, in general, is very relevant as evidence in a sophisticated and modern world. With the development of society, the emergence and occurrence of unconventional criminal acts whose characteristics are different from conventional criminal acts.⁹

To reveal and prove the occurrence of conventional criminal acts, other evidence is needed in addition to what has been recognized in the Criminal Procedure Code, such as data or information stored in electronic storage media. This is also the case with wiretapping, which is a very sensitive matter because on the one hand, it is a restriction of human rights but on the other hand it has aspects of legal interest. In theory, wiretapping often needs to be authorized by the court as evidence in proving a criminal case. It is usually only approved when other evidence is listed in Article 184 of the Criminal Procedure Code such as letters, witness testimony, clues, expert testimony, and oaths, which show that it is impossible to detect criminal acts that utilize communication information technology as a means or by conventional means.

In legal practice in Indonesia, there are legal provisions regarding evidence, which are regulated in the Criminal Procedure Code, which has mentioned in detail or limitation of legal evidence according to the law, namely:

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

By the provisions of Article 184 paragraph (1) of the Criminal Procedure Code, the aforementioned determines five types of valid evidence. Outside of these five types cannot be used as valid evidence. The provisions regarding the above evidence are provisions of criminal procedure law that are compelling (*dwingenrecht*), meaning that all types of evidence that have been regulated in the article cannot be added or reduced. Meanwhile, the 2008 Draft Bill of Criminal Procedure has accommodated the development of information technology as one of the means of evidence. As for the determination of evidence by the explanation above, it has been described that until today in the world of justice in the country 5 (five) types of evidence can be used in court as regulated in Article 184 of the Criminal Procedure Code. However, in the 2008 draft of the Criminal Procedure Bill, the valid evidence in court has changed to:

1. evidence;
2. letters;
3. electronic evidence
4. witness testimony;
5. expert testimony;
6. testimony of the defendant;

For criminal offenses that already have legal rules governing digital evidence (electronic evidence) is not a problem. Because the criminal offense that has been violated has special legal rules regarding electronic evidence as valid evidence before the court. So that existing electronic

⁹ Al Wisnubroto & G Widiartana, *Pembaharuan Hukum Acara Pidana* (Bandung: Citra Aditya Bakti, 2005).

evidence becomes evidence as regulated outside of Article 184 of the Criminal Procedure Code specifically has been considered as valid evidence before the court. Evidence of wiretapping in the use of recording devices and recording results as a legal basis for the use of electronic information/documents as evidence in court has been clear and has become clearer after the enactment of Law Number. 11 Year 2008 on Electronic Information and Transactions. It is considered to provide more legal certainty and a broader scope of applicability, not limited to corruption, money laundering, and terrorism crimes. In legal practice, the use of recording devices and recordings is part of the *pro justisia* process of criminal cases. The Criminal Procedure Code does not regulate recordings as evidence, but in Law No. 15/2003 on the Eradication of the Criminal Acts of Terrorism, recordings are valid evidence. Under Article 31 Paragraph 1 letter b of Law Number 15 the Year 2003 on the Eradication of the Criminal Acts of Terrorism, investigators who are assigned the task of conducting investigations and or investigations can carry out:

1. Based on sufficient preliminary evidence as referred to in Article 26 paragraph 4, the investigator shall be entitled to:
 - a. Open, examine, and confiscate letters and shipments through post or other delivery services that have a connection with the terrorism criminal case being examined;
 - b. Tapping telephone conversations or other communication devices suspected of being used to prepare, plan, and commit terrorism crimes.
2. The act of wiretapping as referred to in paragraph (1) letter b, may only be carried out by order of the chairman of the district court for a maximum period of 1 (one) year.
 - a. The actions as referred to in paragraph (1) and paragraph (2) shall be reported or accounted for by the investigator's superior.
 - b. Recordings are included as clue evidence.

Meanwhile, in the subsequent Criminal Procedure Code, clue evidence does not exist regarding recordings. The special law of evidence is not based solely on the provisions of the Criminal Procedure Code, as Article 183 of the Criminal Procedure Code stipulates as follows:

1. A judge shall not impose a sentence on a person unless he or she is convinced by at least two valid pieces of evidence that a criminal offense has occurred and that the defendant is guilty of committing it.
2. Strictly speaking, special provisions of the law of evidence are contained in special criminal laws outside of general criminal offenses as stipulated in Article 103 of the Criminal Code (KUHP). The special criminal law regulates the provisions of formal criminal law and material criminal law. The nature of the law of evidence can be categorized into general/conventional and special evidentiary law. The dimension of the general/conventional evidentiary law is contained in the provisions of the criminal procedure law as introduced by the Criminal Procedure Code (KUHAP).¹⁰

KUHAP as the basis of procedural law in Indonesia does not regulate the existence of digital or electronic evidence. However, arrangements regarding the strength of electronic digital evidence are found scattered in various laws and regulations that regulate it independently. However, referring to the provisions of positive law in Indonesia, several laws and regulations have regulated electronic evidence (digital evidence) as valid evidence before the court. Wiretapping as evidence can be justified and allowed in a special law. The constitutional angle of wiretapping to reveal a crime, as an exception, can be justified. This is because the freedom to communicate and obtain information as stipulated in Article 28F and Article 28G Paragraph (1) of the 1945 Constitution

¹⁰ Willa Wahyuni, "Penerapan Alat Bukti Petunjuk dalam Peradilan Pidana," (2022), daring: *Huk Online* <<https://www.hukumonline.com/berita/a/penerapan-alat-bukti-petunjuk-dalam-peradilan-pidana-lt630d424239c7c/>>.

are not articles that cannot be deviated from under any circumstances. This means that wiretapping may be carried out to uncover crimes based on specific statutory provisions (*lex specialis derogat legi generali*). The wiretapping process must be by the applicable laws and regulations and following what is required, among other things, the wiretapping carried out must be truly based on legal interests, the wiretapping process must also go through the approval of the relevant legal institutions.

CONCLUSION

As a special law, Law No. 15/2003 regulates materially and formally at the same time, so that there are exceptions to the principles generally regulated in the Criminal Code / Criminal Procedure Code. The applicability of *lex specialis derogat legi generalis* must fulfill the following criteria:

1. That exceptions to general laws are made by regulations at the same level as themselves, namely laws.
2. That the exception is stated in the specific Act so that the exception applies only to the extent of the stated exception and the non-excluded part remains in force to the extent that it does not conflict with the implementation of the specific Act.
3. Provisions regarding the position and strength of wiretapping results in the investigation process in proving criminal cases in laws and regulations are not contrary to the law. There are rules regarding the use of digital evidence in the form of electronic information, especially wiretapping, in Indonesian laws and regulations, especially those that regulate the provisions of Criminal Procedure Law outside the Criminal Procedure Code. The regulation itself has been contained in Article 284 paragraph (2) which provides exceptions to the provisions of procedural law in certain laws so that it is possible in special criminal laws including terrorism laws relating to criminal acts that contain wiretapping as part of the investigation which has given special or additional authority to investigators in carrying out investigative tasks. These laws and regulations regulate the use of digital evidence, but there are also differences in the use of digital evidence as evidence.

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