



## The Comparative Study on the Principle of Guilt in Wiretapping in Indonesia and the Netherlands

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### **Abstract**

This study aims to reveal the different principles of guilt in UUU ITE, RKUHP, and RUU Penyadapan, and the principle of guilt in the penalization of wiretapping according to criminal law policy. This is normative research using the prescriptive analytics. This library research employed conceptual approach, statutory approach, as well as comparative approach. It was concluded that there are different provisions on the principle of guilt in Indonesia and the Netherlands. Furthermore, UU ITE, RKUHP and RUU Penyadapan contain the phrase “dengan sengaja”, while Wetboek van Strafrecht still contains the phrase “dengan sengaja”.

**Keywords:** *Guilt; Wiretapping; Indonesia and the Netherlands*

### **Introduction**

Wiretapping in Indonesia is regulated in Law Number 11 of 2008 on the Electronic Information and Transactions (UU ITE). It is stated that wiretapping is against the law if it is not explicitly regulated by laws and regulations and without a court’s approval. *Mutatis mutandis*, wiretapping is related to two legal domains, i.e. substantive criminal law and procedural criminal law. It is deemed to be against the law if there is no clear legal basis.

**Edmon Makarim** says that wiretapping is an action of secretly listening the communication of the relevant parties using particular devices or communication cables to record on communication facilities usually using cables and home phone networks.<sup>1</sup> On the other hand, **Reda Manthovani** defines wiretapping as listening to (recording) secret information of relevant parties intentionally without their knowledge.<sup>2</sup>

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<sup>1</sup> Edmon Makarim; Analisis Terhadap Kontroversi Rancangan Peraturan Pemerintah Tentang Tata Cara Intersepsi yang Sesuai Hukum ( Jakarta; badan Penerbit FH UI, *Jurnal Hukum dan Pembangunan* , Tahun Ke 40 No 2, April Juni 2010) p. 226

<sup>2</sup>Reda Manthovani, 2015, *Penyadapan vs Privasi*, Bhuana ilmu komputer, Jakarta, p. 13

According to *Black Law Dictionary*, wiretapping is *electronic or mechanical eavesdropping usually done by law enforcement officers under court order, to listen to private conversation*<sup>3</sup>. In terms of the reform of the Indonesian Draft Penal Code (RUU KUHP), wiretapping has been included in the draft, so that *mutatis mutandis* wiretapping is punishable according to RUU KUHP. It cannot be separated from substantive and cultural reform in the Indonesian criminal law.

The reform has been done since 1964 through in-depth study by Indonesian criminal law experts, i.e. **Moeljatno, Sudarto, Roeslan Saleh, Omar Seno Adji**, and continued by the second generation: **Mardjono Reksodiputro, JE.Sahetapy, Muladi, Barda Nawawi Arief**, and the third generation: **Eddy OS Hiariej, Hakristuti Hakrisnowo**, etc. They attempted to amend or replace KUHP as the legacy of the classical thought in the Dutch criminal law. It was asserted by **Muladi**<sup>4</sup> that the Indonesian criminal law still adheres to the doctrines and case law of the Dutch criminal law.<sup>5</sup>

The principle of decolonialization in the RUU KUHP is the reason why Indonesia needs KUHP reflecting the life of the nation. In addition, **Barda Nawawi Arief**<sup>6</sup> states that the order of a nation's life depends on the substance of its criminal law.<sup>7</sup>

Guilt constitutes the basic element or foundation of an offense. If there is guilt in a deed, *mutatis mutandis* the deed is considered to a criminal act. The principle of *Geen straf zonder schuld* is the basic principle in criminal law. According to Jan Remmelink, it is a condemnation by the society with ethical standards in a particular time toward those perpetrating deviate acts which can actually be avoided.<sup>8</sup> In short, guilt deviates from the decency in a particular place.

In terms of the articles on wiretapping in RKUHP and RUU *Penyadapan*, they can overlap as wiretapping is also regulated by UU ITE. From the legal policy's point of view, RUU *Penyadapan* is also talked in the legislative body. Thus, in law enforcement there will be *Overcriminalization*<sup>9</sup> by the law enforcers, the principle of *lex specialis derogat legi generali*<sup>10</sup> will blur, and *mutatis mutandis* it affects and is likely to violate human rights. On the other side, wiretapping is *Mala in Se*<sup>11</sup>, instead of *Mala Prohibita*.<sup>12</sup> If wiretapping is not regulated, there will be disharmony and violation of individual's privacy whose rights are guaranteed. Wiretapping has to be conducted solely for the sake of strategic interest or law enforcement.

Wiretapping is deemed very effective to reveal general and special criminal cases. According to **Indriyanto Seno Adji**, interception (wiretapping) is effective technological means in law enforcement to combat systemic or organized crimes, such as corruption, narcotics, human rights abuse, and other interstate crimes.<sup>13</sup> This research was conducted due to the differences or unsuitability of the norm of the article on the principle of guilt in wiretapping and the state's authority to conduct wiretapping.

<sup>3</sup> Free translation; *Menguping secara elektronik dan mekanikal yang biasanya dilakukan oleh aparat penegak hukum berdasarkan perintah pengadilan untuk mendengarkan percakapan pribadi*. See Garner Bryan A. *Black law Dictionary* (Editor in chief) ST Paul ; West Group, Eight Edition, 2004.

<sup>4</sup> Criminal Law Professor at Universitas Diponegoro

<sup>5</sup> Muladi and Diah Sulistyani, 2016, *Kompeksitas Perkembangan Tindak Pidana dan Kebijakan Kriminal*, Alumni, Bandung, p. 35

<sup>6</sup> Criminal Law Professor at Universitas Diponegoro

<sup>7</sup> Barda Nawawi Arief, 2010, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan*, third edition, Kencana, Bandung, p. 32

<sup>8</sup> Jan Remmelink, 2003, *Komentar Atas Pasal-pasal terpenting dari Kitab Undang-undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-undang Hukum Pidana Indonesia*, Gramedia Pustaka Utama, Jakarta, p. 212

<sup>9</sup> The overuse of criminal law.

<sup>10</sup> Undang-undang yang bersifat khusus mengesampingkan Undang-undang yang bersifat umum.

<sup>11</sup> Wrong or evil in itself.

<sup>12</sup> Wrong as prohibited.

<sup>13</sup> Indriyanto Seno Adji, 2009, *Korupsi, dan Penegakan Hukum*, Diadit Media, Jakarta, p. 489

Nevertheless, wiretapping is *mala in se* and theoretically the articles in RUU KUHP, UU ITE and RUU *Penyadapan* still sparks debate about the element and *beestandeel* of the delict, i.e. the form of guilt using the phrase “*melawan hukum*” (against the law), instead of the form of guilt, i.e. intent maupun negligence.

### **Research Methodology**

This is doctrinal legal research systematically explaining the law stipulating particular legal categories. The aims are to reveal the differences in the principle of guilt in UU ITE, RUU KUHP, and RUU *Penyadapan*, as well as the needs for the reconstruction of the principle of guilt in the penalization of wiretapping from the perspective of criminal law policy. This normative research uses prescriptive analytics, conceptual approach, statutory approach, and comparative approach with library research.

### **Discussions**

#### 1. The principle of guilt in wiretapping in Indonesia

UU ITE constitutes a progressive step to deal with cyber crimes. It explicitly contains criminal provisions to make use of the law. Indeed, it is an administrative penal law. In terms of criminal provisions in UU ITE, the delict of wiretapping is regulated in Article 31 paragraph (1) of UU ITE.

The kind of intent in the delict of wiretapping in Article 31 is:

- (1) Any Person who knowingly and without authority or unlawfully carries out interception or wiretapping of Electronic Information and/or Electronic Documents in certain Computers and/or Electronic Systems of other Persons.
- 2) Any Person who knowingly and without authority or unlawfully carries out interception of the transmission of non-public Electronic Information and/or Electronic Documents from, to, and in certain Computers and/or Electronic Systems of other Persons, whether or not causing alteration, deletion, and or termination of Electronic Information and/or Electronic Documents in transmission

From the article above, the consequence of intent is intended and known by the defendant, as said by Vos. Compared to Jonkers' view that the intent is the simplest one, Eddy OS Hiariej states that the deed, act, and result of the offense are realized. By looking at several views of criminal law experts, the intent in UU ITE is reflected in the phrases “*dengan sengaja*” (knowingly) and “*melawan hukum*” (against the law), so that the perpetrators can be punished based on the article on wiretapping. The objects of the article are electronic information and electronic documents in a particular computer or electronic system of other persons. It can be concluded that wiretapping in Article 31 paragraph (1) requires the relationship of the deed, act and realized consequence; the intent must be absolute or can be said to involve all kinds and types of intent.<sup>14</sup>

Moreover, KUHP does not regulate wiretapping. Therefore, for the sake of the codification of criminal law, the delict of wiretapping was included in Article 257 and 258 of the Draft Penal Code (RKUHP) in 2019.

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<sup>14</sup> Eddy OS Hiariej, 2016, *Prinsip-Prinsip Hukum Pidana*, edisi Revisi, Cahaya atama Pustaka, Yogyakarta, p. 12.

### Article 257

- (1) Any person who unlawfully installs a device to listen to or record a conversation shall be punished by a maximum imprisonment of one year or a maximum fine of category II
- (2) Any person who uses the device in paragraph (1) shall be punished by a maximum imprisonment of one year and six months or a maximum fine of category III if he or she unlawfully:
  - i. Listens to a conversation
  - ii. Records the conversation,
  - iii. Possesses the conversation or its record as mentioned in the points a and b occurring inside or outside a dwelling, room, enclosed yard, by means of electronic facilities
- (3) Any person who disseminates or spread the record in paragraph (2) shall be punished by a maximum imprisonment of four years or a maximum fine of category IV
- (4) The provision in paragraph (1) shall not apply to the person who executes a statutory provision or an official order in Articles 31 and 32

### Article 258

Any person shall be punished by a maximum imprisonment of seven years or a maximum fine of category VI if he or she:

- d. Uses opportunities with tricks or unlawfully records a photographic picture of one or more persons in a dwelling or enclosed rooms by means of a device to their detriment
- e. Possessing the photographic picture known to be or allegedly acquired from the crime in the point a, or
- f. Disseminates or spreads the photographic picture in the point b by means of a technological device

The guilty in in the article is implicitly intent. Perhaps, what is meant by the lawmakers as “against the law” is *dolus as purpose (Opzet als oogmerk)*. It refers to Article 36 of RKUHP2019, i.e.:

- (1) Any Person is criminally liable for his or her intent or negligence.
- (2) An intentional crime is punishable, while an unintentional crime is punishable according to the explicit provisions of laws and regulations

From the article above, it is juridically the benchmark for the penalization of guilt in every delict in Book II of RKUHP 2019. It is certainly very logical if the draft article on wiretapping does not contain the kinds or types of intent. According to **Simons**, guilt must be interpreted as intent, and all elements of a delict must contain the intent.<sup>15</sup> On the other hand, **Van Hamel** held a different view that if the lawmakers do not use the words referring to the intent or the other words which can be interpreted as guilt, i.e. intent, the guilt in the delict must be interpreted as intent, but it does not comprise all elements, stating that the elements comprised must be studied Article by Article.<sup>16</sup>

According to **Van Bemmelen**, intent is a part of a crime if the perpetrator commits the crime with knowledge of the element (*Het opzet is op een bepaald bestanddeel van het strafbare feit gericht, indien*

<sup>15</sup> D. Simons in Eddy OS Hiariej 2016 *Op,Cit* p. 186

<sup>16</sup> *Ibid*

*gehandeld wordt in de onderstelling, dat it bestaendeel aanwezig is; wetenschap van de aanwezigheid is niet nodig).*<sup>17</sup>

Wiretapping is stipulated in UU ITE and the Recodification of RKUHP and will be stipulated in a special law on wiretapping. The Draft Bill on Wiretapping has been discussed with the House of Representatives.

The criminal provisions are as follows:

- a. Any person who reveals the secret and/or process and/or result of wiretapping to other unauthorized party by every means and/or form shall be punished by a maximum imprisonment of six years and a maximum fine of Rp 300,000,000.
- b. Any person who lends, rents, trades, transfers, and/or distribute wiretapping tools and devices to the unauthorized other party shall be punished by a maximum imprisonment of ten years and a maximum fine of Rp 600,000,000.

From the criminal provisions above, it is not explicitly stated whether the guilt is intent or negligence. It is believed that the lawmakers follow the doctrine of **Simons** that if negligence is not explicitly stated, *mutatis mutandis*, the guilt is intent.

The kind of guilt is very fundamental in terms of the guilt in the norm of the article. As the criminal provisions of RUU *Penyadapan* use the verbs “*membocorkan*” (divulge) and/or “*mengungkapkan*” (reveal), the lawmakers uses the objectivity of guilt.

## 2. The principle of guilt in wiretapping in the Netherlands

Wiretapping in the Netherlands is regulated in the Dutch Criminal Code/*Wetboek Van Strafrecht*. This comparison is made as in terms of doctrines and case law, the Indonesian criminal law regimes follows the Dutch legal doctrines. The following is the article on wiretapping in *Wetboek Van Strafrecht*:

### *Article 139c*

*Elke persoon die opzettelijk en onrechtmatig onderschept of registreert door middel van een technisch apparaat gegevens die niet voor hem bestemd zijn en door middel van telecommunicatie worden verwerkt of overgedragen of door middel van een geautomatiseerd apparaat of systeem, wordt niet gestraft met gevangenisstraf meer dan een jaar of een boete van de vierde categorie (Any person who intentionally and unlawfully intercepts or records by means of a technical device data which is not intended for him and is processed or transferred by means telecommunication or by means of a computerised device or system, shall be liable to a term of imprisonment not exceeding one year or a fine of the fourth category)*

From the article above, it is believed that it contains guilt as intent (*opzet als oogmerk*). This asserts that the principle of guilt, i.e. intent, is still used by the Dutch lawmakers.

Wiretapping still uses intent as a certainty or *Opzeet als Ollmerrk*, so that the juridical consequence is that every norm will contain the phrases the phrase “*dengan sengaja*” (intentionally) or “*dengan maksud*” (purposefully). This asserts that the Netherlands still view that intent still needs to be proven in every criminal proceeding.

<sup>17</sup> *Ibid*

## Conclusions

The different principles of guilt in the formulation of the norms of wiretapping can be found in UU ITE, RKUHP, and RUU *Penyadapan*. They assert *expressive verbis* and some norms do not explicitly contain the phrase “*dengan sengaja*”. UU ITE still contains the phrases “*dengan sengaja*” and “*melawan hukum*”. It is theoretically consistent and has practical benefits. Theoretically speaking, the principle of guilt in UU ITE still contains guilt as intent or *Opzeet als Ookmerk*. It is different from the concepts in RKUHP and RUU *Penyadapan*, which do not explicitly state whether guilt as intent or negligence, as RKUHP has *Clausula exceptionalis*, i.e. Article 36 RKUHP, and RUU *Penyadapan* do not assert and contain intent or negligence *expressive verbis* at all. The phrase “*dengan sengaja*” is still formulated in RUU *Penyadapan*. In *Wetboek van Strafrecht, expressive verbis*, the phrase “*dengan sengaja*” is contained, so that intent is retained. In terms of legal structures, every law enforcer, particularly the investigators from the National Police, should have adequate educational background, i.e. law, so that he or she understands law

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