

URGENCY OF WIRETAPPING IN ERADICATION OF CRIMINAL ACTION OF CORRUPTION IN INDONESIA

Taufik Hidayat
Hani Adhani

ABSTRACT

The rise of corruption cases that have hit the Indonesian nation has led to the establishment of state institutions that specifically deal with the eradication of corruption, namely the Corruption Eradication Commission (KPK). The existence of the KPK that was formed after the era reformation has had a positive impact on eradicating corruption. Since the KPK was established in 2004 at least 100 regional heads were arrested by the KPK for bribery and corruption. However, most of the KPK arrests of perpetrators of corruption were carried out by wiretapping mechanisms. The wiretapping was carried out without the control of the court, causing the KPK as if it could not be monitored. Even though as stipulated in the Corruption Crime Act, the wiretapping process carried out by the KPK must be based on permission from the court. This was also reinforced by the decision of the Constitutional Court which ruled in the case of testing laws related to the issue of wiretapping in the law on corruption and the law on Information and Electronic Transactions. In this research, we will discuss the extent of the urgency of wiretapping in eradicating corruption in Indonesia and how the constitutionality of wiretapping carried out by the KPK so that the tapping mechanism carried out by the KPK does not violate the constitutional rights of Indonesian citizens, and Indonesia can be free from corruption.

Keywords: KPK, Indonesia, Corruption, Wiretapping, Constitution, Constitutional Court.

1. INTRODUCTION

Indonesia as the country with the fifth largest population in the world has a challenging disease to cure, namely Corruption. The collapse of the Suharto regime, which has served as President for 32 years due to the many Suharto cronies who committed corruption. This caused the economy of Indonesia to be destroyed so that Indonesia experienced a monetary crisis in 1998. After the fall of the Suharto regime, the People's Consultative Assembly (MPR) which was a state high institution issued Decree of the Republic of Indonesia People's Consultative Assembly Number XI/MPR/1998 concerning Clean State Organizers and Free of Corruption, Collusion and Nepotism. This decree to purpose regulates the prohibition to commit corruption, collusion and nepotism. Another order of MPR is Decree Number VIII/MPR/2011 of 2001 concerning Recommendations on the Direction of the Policy for Eradicating and Preventing Corruption, Collusion and Nepotism. The second MPR Decree is part of efforts to eradicate corruption as a reform agenda.

Then after a general election in 1999 which was the first election held after the reform era, the People's Consultative Assembly (MPR) then made changes to the Indonesian constitution (UUD 1945). One of the substantial things done in the amendment to the Indonesian constitution is related to the limitation of the President's term of office. The end of office of the President of Indonesia is finally limited only to a period of 5 years and after that can just be re-elected for only one term so that the total tenure of the President is ten years. It is intended that the President who is the holder of executive power does not abuse his power because too long power tends to be corrupt.

This limitation of presidential power was finally followed by restrictions on the power of other political positions such as Governors, Mayors and Regents. Another thing that is also regulated in the Indonesian constitution as a result of the amendment is the establishment of new institutions which are controlled directly in the constitution (Josef M. Monteiro, 2012) such as the Constitutional Court, Judicial Commission and Regional Representative Council (DPD) as well as new institutions regulated in laws such as the Corruption Eradication Commission (KPK).

The formation of the KPK Law by the House of Representatives is an effort to implement the MPR Decree and amendments to the Indonesian constitution specifically to eradicate corrupt practices that have become a culture in Indonesia.

The establishment of the KPK as a particular institution in combating corruption is an effort to create a just, prosperous and prosperous society based on Pancasila and the Constitution of the Republic of Indonesia 1945, eradication of criminal acts of corruption that have occurred until now cannot be implemented optimally.

Therefore the pattern of eradication of action corruption needs to be increased professionally, intensively and sustainable because corruption has hurt state finances, the economy country, and hamper national development. Also, government institutions that handle corruption cases have not functioned effectively and efficiently in combating corruption. Therefore the establishment of a KPK institution is needed to carry out extraordinary methods of law enforcement through the establishment of a particular body that has broad, independent authority and is free from any power in the effort to eradicate corruption, which is carried out optimally, intensively, effectively, professionally and continuous. (Sekretariat Negara RI, 2002a)

However, as the establishment of the Corruption Eradication Commission progressed, there was the authority of the KPK regulated in Article 12 of the Corruption Eradication Commission Law related to the task of investigation, investigation and prosecution, namely tapping and recording conversations. (Sekretariat Negara RI, 2002b) This tapping mechanism has become controversial because many state officials ranging from ministers, governors, regents and members of the House of Representatives were caught in the KPK for committing corruption after being tapped by the KPK. (Tempo.co, 2015) This caused many citizens to submit a judicial review of the article tapping in the KPK law to the Constitutional Court because it was deemed contrary to the constitution. (Banjarasin.tribunnews.com, 2012)

2. RESEARCH METHODOLOGY

This study uses the qualitative method to accumulate and analyse data. Primary and secondary legal materials are referred to assist the research. For primary sources, the study analyses relevant some constitutions, laws, conventions and judicial doctrines relating to eradication corruption and wiretapping. It also refers to secondary resources where analysis is made from academic journals, juristic interpretations, newspaper articles as well as legal textbooks.

Moreover, to enrich to the current development of the notion the study refers to web pages and other online resources where relevant data have been analysed to find out problem encountered and challenges faced in implementing the rules as well as to propose any possible improvement of the concept of wiretapping and eradication corruption.

3. HISTORY OF CORRUPTION

Corruption is not something new in the history of human civilisation. It has even been discussed since 2000 years ago when a Prime Minister of the Kingdom of India named Kautilya wrote a book called Arthashastra. Similarly, Dante, who in the past seven centuries also wrote about corruption (bribery) as a crime, Shakespeare also alluded to corruption as a form of crime. A famous phrase in 1887 concerning corruption from the English historian Lord Acton, namely "power tends to corrupt, absolute power corrupts absolutely". This confirms that corruption has the potential to appear anywhere regardless of race, geography or economic capacity. (Achmad Badjuri, 2011)

Noach's criminologist said that corruption is a form of crime. Crime is an action that cannot be eliminated as long as humans are still on earth. Corruption as a form of crime must be limited, strived to be reduced and even eradicated even though it requires effort that is not easy. This thought is in line with criminologist Frank Tanembaun who says: crime is eternal-as eternal as a society. (Achmad Badjuri, 2011)

The crime of corruption is also one of the crimes that can be categorised as a transnational crime which is organised. It is said that because organised transnational crime involves a systematic system and its elements are very conducive. The first element is the existence of an excellent criminal group due to ethnic ties, political interests, group interests, and other interests with a distinct code of ethics. The second element is the existence of a protection group, which among others consists of law enforcement and professional individuals. The third element is community groups or groups of people who enjoy the results of systematically committed crimes or crimes. (Nyoman Serikat Putra Jaya, 2010)

Corruption in Indonesia has been going on for quite a long time and is well known by the world, even by the Transparency International (TI) survey since 1995-2000 Indonesia has always been in the top ten positions as the most corrupt country in the world. (Trimedya Panjaitan, 2016) The achievement of corruption that has been achieved by Indonesia, also, to directly harming the economic growth and equitable distribution of national development. Also has a negative impact on the entry of foreign investment into Indonesia and even donor institutions from developed countries often use survey results from international institutions, such as IT and PERC as a reference to investment decision making in Indonesia. (Achmad Badjuri, 2011)

Corruption has been very detrimental to state finances and has a negative impact on the entry of foreign investment into Indonesia, so corruption crimes should be eradicated. The eradication of massive corruption is currently carried out by law enforcement officials, has proven that corruption in Indonesia has become entrenched into something dangerous is an extraordinary crime that is spread both in the executive, legislative and judicial institutions. (Detiknews, 2015)

4. HISTORY OF THE COMMISSION OF ERADICATION OF CORRUPTION (KPK)

The establishment of an Anti-Corruption Institution, namely the Corruption Eradication Commission originated from the provisions of Article 43 of Act No. 31 of 1999 concerning the Eradication of Corruption Crimes as amended by Act No. 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Criminal Acts Corruption. In which the law states that it is necessary to establish an independent Corruption Eradication Commission with the duty and authority to eradicate corruption.

The establishment of the KPK institution is due to the eradication of corruption that currently cannot be optimally implemented so that it needs to be professionally, intensively, and continuously improved because corruption has harmed the country's finances, the country's economy, and hampered national development. Also, government institutions that handle corruption cases have not functioned effectively and efficiently in combating corruption. The three things above are the primary references for the establishment of the Corruption Eradication Commission. (Josef M. Monteiro, 2012)

Another thing that underlies the formation of the KPK is because the crime of corruption in Indonesia is widespread in the community. Its development continues to increase from year to year, both from the number of cases that occur and the amount of state financial losses and regarding the quality of criminal acts carried out increasingly systematically and scope that enters all aspects of people's lives. The increase in uncontrolled corruption will bring disaster not only to the national economic growth but

also to the life of the nation and state in general. Extensive and systematic corruption is also a violation of social rights and economic rights of the community, and because of that, corruption can no longer be classified as an ordinary crime but has become an extraordinary crime. Even so, in its efforts to eradicate it can no longer be done ordinarily, but extraordinary methods demand it. (Suwidi Tono, 2017)

Also, in the general explanation of the KPK Law, it was stated that law enforcement to eradicate criminal acts of corruption carried out conventionally had been proven to experience various obstacles.

For this reason, an extraordinary law enforcement method is needed through the establishment of a particular body that has broad, independent authority and is free from any power in the effort to eradicate corruption, whose implementation is carried out optimally, intensively, effectively, professionally and sustainably. (Sekretariat Negara RI, 2002a)

To realise the rule of law, the Government of Indonesia has laid a strong policy foundation in its efforts to combat corruption. These policies are contained in various statutes and regulations, including in the Decree of the People's Consultative Assembly of the Republic of Indonesia Number XI/MPR/1998 concerning Organizers of Clean and Free Corruption, Collusion and Nepotism. Law Number 28 of 1999 concerning State Administrators that Are Clean and Free of Corruption, Collusion and Nepotism, and Law Number 31 of 1999 concerning Eradication of Corruption Crimes as amended by Act Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption Crimes.

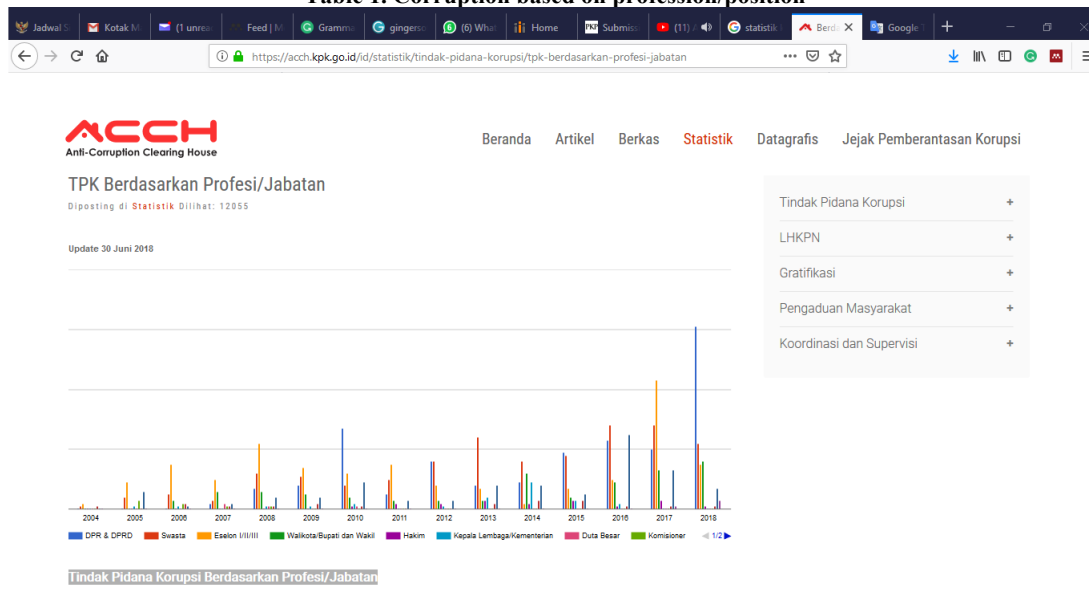
5. KPK MAIN TASK

That based on the provisions of Article 43 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes as amended by Act Number 20 of 2001, the Corruption Eradication Commission has the authority to coordinate and supervise, including conducting investigations, investigations and prosecutions, while regarding formation, organizational structure, work procedures and accountability, duties and power and their membership is regulated by law. (Sekretariat Negara RI, 2002b)

The KPK Law was formed based on the provisions contained in the Law on the Eradication of Corruption Crime, although the eradication of criminal acts of corruption has been carried out by various institutions such as the prosecutor's office and the police and other bodies relating to the eradication of criminal acts of corruption. Therefore the regulation of the authority of the Corruption Eradication Commission in this Act is carried out carefully so that there is no overlapping of authority with these various agencies. (Thontowi, 2008)

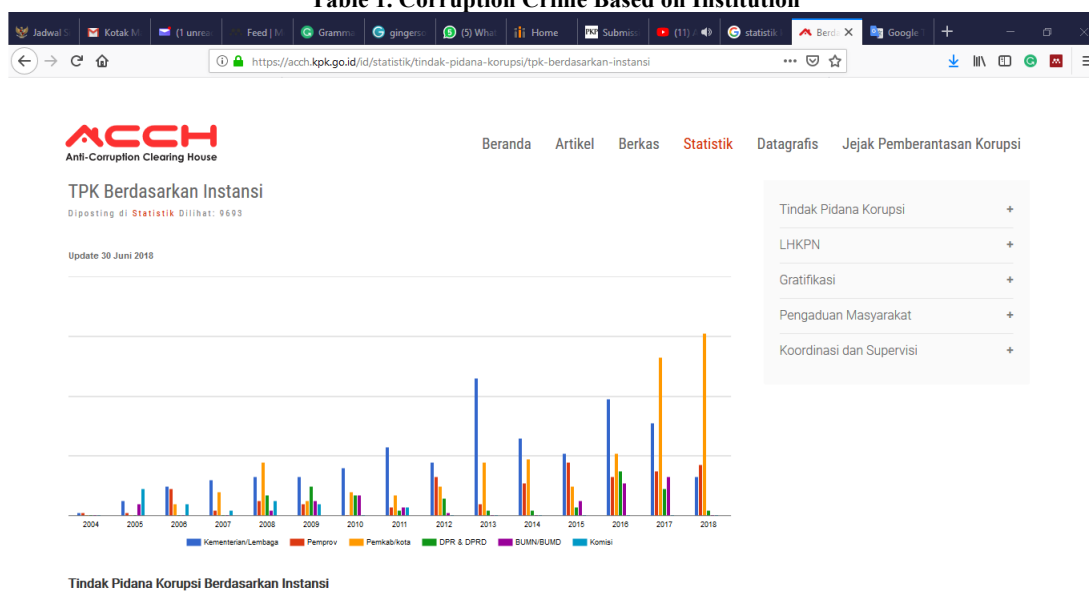
Since 2004 the Corruption Eradication Commission has arrested suspects of corruption. The following are statistics on criminal acts of corruption based on profession and agency:

Table 1. Corruption based on profession/position



Source: <https://acch.kpk.go.id/id/statistik/tindak-pidana-korupsi/tpk-berdasarkan-profesi-jabatan>

Table 1. Corruption Crime Based on Institution



Source: <https://acch.kpk.go.id/id/statistik/tindak-pidana-korupsi/tpk-berdasarkan-instansi>

6. KPK AND WIRETAPPING

One of the authorities possessed by the KPK in terms of efforts to eradicate corruption stipulated in the KPK Law is the authority to conduct wiretapping as specified in Article 12 paragraph (1) letter a, which states "In carrying out investigative, investigative and prosecuting duties as referred to in Article 6 letter c, the Corruption Eradication Commission is authorized: a. Tapping and recording conversations; ".(Sekretariat Negara RI, 2002a)

In the Law, the Corruption Eradication Commission does not explain what is meant by wiretapping and how the tapping mechanism can be carried out by the KPK. Understanding of wiretapping is at least arranged in three laws as follows: (Mahkamah Konstitusi RI, 2010)

- Article 31 of Law Number 11 Year 2008 concerning Information and Electronic Transactions that what is meant by "interception or interception" is an activity to listen, record, divert, change, inhibit and/or record the transmission of Electronic Information and/or Electronic Documents which are not public, using either a wired communication network or a wireless network, such as electromagnetic radiation or radio frequency;
 - Article 40 of Law Number 36 of 1999 concerning Telecommunications, which is meant by wiretapping is the activity of installing tools or enhancements on telecommunications networks to obtain information illegally. The information held by someone is a personal right that must be protected so that tapping must be prohibited;
 - Article 1 number 19 of Law Number 35 the Year 2009 concerning Narcotics, which states that Tapping is an activity or series of investigative or investigative activities by intercepting conversations, messages, information, and communication networks conducted through telephone and communication devices other electronics;
- That from the three definitions, it can be concluded that tapping covers three aspects, namely: (Mahkamah Konstitusi RI, 2010)
- The process of inhibiting or recording information.
 - Activities violate the law and must, therefore, be prohibited.
 - Can only be done by authorised Police Officer Investigators.

In the context of eradicating corruption in Indonesia, the KPK institution is the only institution that is given the authority to conduct eavesdropping in the context of disclosing corruption. Although the power to intercept and record conversations has been regulated in Article 12 paragraph (1) as mentioned above, the law does not explicitly govern the procedures and mechanisms of wiretapping. The matter regarding the mechanism and regulation of wiretapping is precisely regulated in other laws besides the KPK law, namely the Telecommunications Law, Electronic Information and Transaction Law, and the Criminal Procedure Law (KUHP).

KPK in conducting tapping is not arbitrary; there is a mechanism. According to KPK Chairman, Agus Raharja, in conducting tapping, there is an internal mechanism that regulates the tapping process. This is based on the Constitutional Court Decision stating that a law must control the tapping mechanism. Tapping will be carried out by the KPK at the suggestion of the KPK Directorate of Investigation after collecting information material. Before wiretapping was carried out by officers, namely the executor, the proposal of the Directorate of KPK Investigation to conduct tapping was reported to the KPK leadership. After five KPK leaders agreed and signed a letter order, then a new wiretapping action was taken. The officer who conducts tapping or executor is the Monitoring Directorate under the KPK Deputy Information and Data. (Sindonews.com, 2017)

One of the things that underlie the regulation of authority to do tapping by the KPK is that law enforcement to eradicate corruption that has been done conventionally has proven to have various obstacles.

Along with the increase in corruption crimes that utilise information technology, to compensate the KPK also uses information technology, namely by conducting tapping as stipulated in Article 12 paragraph (1) of Law Number 30 of 2002 concerning the Corruption Eradication Commission. (Kristian and Yopi Gunawan, 2012)

7. ERADICATION OF CORRUPTION AND WIRETAPPING

This phenomenon and reality are very alarming so that the problem of corruption is not only the task of the KPK or law enforcers, but it has become a problem for all of us, therefore eradicating corruption is not just a maximum repressive effort but also a preventative effort. The action against corruptors aims to create deterrent effects for perpetrators of criminal acts and as an effort to save the State's finances.

Corruption is a hidden crime that only involves certain people and is difficult to detect, unlike other crimes such as theft, robbery or plunders that leave traces and are easily traced. Along with the development of technological advances, the problem of proving crime cases can be done using sophisticated technology facilities because the perpetrators of crimes also use advanced technology, especially information and communication technology. The use of information, media and communication technology today has changed both the behaviour of the people and human civilisation globally. The development of information technology has also caused borderless relations and caused significant social, economic and cultural changes that took place so quickly. Information technology has become a double-edged sword because, in addition to contributing to the improvement of well-being, progress and human civilisation, it has also become an effective means of lawlessness. (Nyoman Serikat Putra Jaya, 2018) Therefore, corruption crimes can be detected and investigated by utilising the technology, namely through tapping. Without tapping instruments, it is not possible for the KPK to identify perpetrators of corruption and at the same time prosecute them in court.

The act of wiretapping is an extraordinary effort in the context of preventing and eradicating criminal acts in certain circumstances, such as criminal acts of corruption that can have an impact on the destruction of economic stability and state finances. In these conditions, there are exceptions or waivers of the protection of human rights, especially personal rights or privacy of one's life as a person, family life, life or interests of the group, and all correspondence. (Kristian and Yopi Gunawan, 2012) The act of wiretapping in Indonesia, including tapping carried out by the KPK has a juridical basis that regulates and legitimises acts of wiretapping in the form of provisions. The laws of wiretapping carried out by the KPK are legally controlled in the decisions of the Constitutional Court. The KPK has internal mechanisms that regulate the tapping process, as described above.

The internal mechanism of the KPK in conducting eavesdropping only regulates the procedures for implementing tapes where the tapping activities are carried out by the executor, and no technical mechanism controls clearly and explicitly how to do tapping in detail. Thus, in this wiretapping, there are fundamental problems, namely that it is not clearly and expressly regulated how procedures and procedures for conducting tapping in detail so that the acts of wiretapping carried out do not guarantee that human rights violations do not occur. Corruption there is a vacuum of law or rules that should be there, namely rules about procedures and procedures for conducting tapping in detail. This is the juridical reason for this research, namely the existence of a legal vacuum because there are no detailed rules regarding procedures and procedures for tapping activities carried out by the KPK.

8. DECISION OF CONSTITUTIONAL COURT ABOUT WIRETAPPING

The issue of tapping is indeed the subject of discussion for all Indonesian citizens after the establishment of the KPK. On one side of tapping, it is easy for the KPK to carry out Hand-Catch Operations (OTT) against perpetrators of corruption, but on the other hand, wiretapping must also be carried out correctly by the laws and regulations. Given the fact that the KPK does not have a standard mechanism related to wiretapping, the issue finally enters the Constitutional Court. (Banjarmasin.tribunnews.com, 2012)

According to data from the website of the Constitutional Court, compared to the issue of wiretapping, there are at least four cases that were entered into cases in the Constitutional Court, namely Case 006/PUU-I/2003, case 012-016-019/PUU-IV/2006, case 5/PUU- VIII/2010, and case 7/PUU-X/2012. However, of the four cases, two cases were granted by the Constitutional Court related to this tapping issue. Namely, first decision on Case Number 012-016-019/PUU-IV/2006 concerning the testing of Law of the Republic of Indonesia Number 30 of 2002 concerning Criminal Eradication Commission Corruption submitted by former members of the Central KPU, Mulyana Wirakusumah. In its legal considerations related to wiretapping, the Constitutional Court stated that in the Decision of the Constitutional Court Number 006/ PUU-I/2003.

In its legal considerations when deciding on the petition for review article 12 Paragraph (1) letter an of the KPK Law it has stated, among other things. "To prevent the possibility of misuse of authority for the tapping and recording of the Constitutional Court, it is deemed necessary to stipulate a set of rules that regulate the terms and procedures for such interception and recording. " The Court's legal considerations are in accordance with the provisions of Article 32 of Act Number 39 of 1999 concerning Human Rights which states, "Independence and confidentiality in correspondence including communication through electronic means must not be disturbed, except on the orders of judges or powers others that are legitimate in accordance with the provisions of the laws and regulations." The Court considers it necessary to remind the sound of the Court's legal considerations in Decision Number 006/PUU-I/2003 because tapping and recording of talks is a limitation on human rights, where such restrictions can only be carried out by law, as determined by Article 28J Paragraph (2) of the 1945 Constitution. The said law must then formulate, among other things, who has the authority to issue the wiretapping and recording commands. And what are

the tapping and recording commands the conversation can only be published after sufficient initial evidence is obtained, which means that the tapping and recording of the conversation are to perfect the proof, or it is precisely the tapping and recording of the conversation that can be done to find sufficient preliminary evidence. By Article 28J Paragraph (2) of the 1945 Constitution, all these must be regulated by law to avoid abuse of authority that violates human rights. (Mahkamah Konstitusi RI, 2010)

Second, the decision of the Constitutional Court Number 5/PUU-VIII/2010 submitted by Anggara, who submitted a request for testing of Law Number 11 of 2008 concerning Information and Electronic Transactions. In the case decision 5/PUU-VIII/2010, the Constitutional Court argued that the activities and authorities of wiretapping were compassionate because, on the one hand, it was a limitation of human rights, but on the other hand had aspects of legal interests. Therefore, regulation regarding the legality of wiretapping must be adequately formulated and formulated by the 1945 Constitution of the Republic of Indonesia. Also, the Court is of the opinion that because tapping is a violation of human rights as stated in Article 28J paragraph (2) The 1945 Constitution of the Republic of Indonesia is very reasonable. It is fitting that the state wants to deviate from the privacy rights of these citizens, the state must vary in the form of laws and not in the form of government regulations. The legal consideration of the Constitutional Court is also a reference in the general explanation of the Law of the Republic of Indonesia Number 19 of 2016 concerning Amendments to Law Number 11 the Year 2008 concerning Information and Electronic Transactions. (Mahkamah Konstitusi RI, 2010)

Third, based on the Decision of the Constitutional Court Number 20 / PUU-XIV / 2016, the Constitutional Court believes that in order to prevent differences in interpretation of Article 5 paragraph (1) and paragraph (2) of the ITE Law, the Court affirms that every interception must be done legally, especially again in the context of law enforcement. Therefore, the Court in its decision to add a word or phrase "specifically" to the phrase "Electronic Information and Electronic Documents". To avoid interpretations that the decision will narrow the meaning contained in Article 5 paragraph (1) and paragraph (2) of the ITE Law, to provide the legal certainty with the existence of Electronic Information and Electronic Documents as evidence needs to be reaffirmed in Explanation of Article 5 ITE Law. (Mahkamah Konstitusi RI, 2016).

9. REGULATION ABOUT WIRETAPPING

The act of wiretapping is an extraordinary effort in the context of preventing and eradicating criminal acts in certain circumstances, such as criminal acts of corruption that can have an impact on the destruction of economic stability and state finances. In these conditions, there are exceptions or waivers of the protection of human rights, especially personal rights or privacy of one's life as a person, family life, life or interests of the group, and all correspondence (Kristian and Yopi Gunawan, 2012). The act of wiretapping in Indonesia, including tapping carried out by the KPK has a juridical basis that regulates and legitimises acts of wiretapping in the form of provisions. The laws of wiretapping carried out by the KPK are legally controlled in the decisions of the Constitutional Court. The KPK has internal mechanisms that regulate the tapping process, as described above.

The internal mechanism of the KPK in conducting eavesdropping only regulates the procedures for implementing tapes where the tapping activities are carried out by the executor; no technical mechanism regulates clearly and explicitly how to do tapping in detail. Thus, in this wiretapping, there are fundamental problems, namely that it is not clearly and explicitly regulated how procedures and procedures for conducting tapping in detail so that the acts of wiretapping carried out do not guarantee that human rights violations do not occur. Corruption there is a vacuum of law or rules that should be there, namely rules about procedures and procedures for conducting tapping in detail. This is the juridical reason for this research, namely the existence of a legal vacuum because there are no detailed rules regarding procedures for tapping activities carried out by the KPK.

Meanwhile, the philosophical reason is that legal norms in the form of regulations or laws concerning wiretapping that is made must not conflict with the Indonesian nation's philosophy, namely the values of the Pancasila and the Indonesian Constitution (the 1945 Constitution), which recognise, respect and protect dignified human rights. (Keempat, Negara, & Indonesia, 2002) As for the sociological reasons, tapping legislation must be by the Indonesian social norms such as ethics, courtesy norms, appropriateness norms, feasibility norms, and so on, so that tapping regulations need to be accompanied by SOPs that do not conflict with these social values.

Subjectively, the law is made to defend the interests of natural and legitimate protection of individual rights, so that the KPK's wiretapping activities do not exceed the limits and take away one's privacy rights. Besides that also in tapping do not ignore the principle of presumption of innocence. In other words, in carrying out its authority, the act of wiretapping by the KPK must comply with and obey the principle of due process of law. Objectively, each has the same position in the eyes of the law so that the wiretapping rules made to regulate acts of wiretapping must be made with consideration of privacy rights, by the principle of respect for human rights, and by philosophical foundations, juridical basis and sociological basis as stipulated in Law Number 12 of 2011 concerning the Establishment of Legislation Regulations.

In the eradication of corruption, synergy is needed between law enforcement agencies, both the Attorney General's Office, the Police and the Corruption Eradication Commission. To ensure legal certainty in Indonesia, the authority of tapping should not only be given to the KPK but also provided the same power to other law enforcement agencies. That at this time only the KPK was given extraordinary authority, especially regarding being given the authority to conduct wiretapping. While the Prosecutor's Office and the Police do not have the power to tap which is explicitly given in the Law, so that in the context of law enforcement the authority should also be given to the Prosecutors and the Police so that there are no institutional discriminatory actions to ensure effective law enforcement. For this reason, we need a legal, political will from the government together with the House of Representatives in carrying out criminal policies to ensure justice, certainty and usefulness in law enforcement in the context of realising the rule of law in Indonesia. Therefore, regulations concerning wiretapping are comprehensive including tapping procedures and techniques, which apply to all institutions authorised to carry out wiretapping. The legislation is also by the

juridical, philosophical, and sociological foundations and does not conflict with the Constitution which expressly states the protection, promotion, enforcement and fulfilment of human rights, and does not conflict with other laws and regulations above. (Sudirman Sidabukke, 2008)

That tapping regulations based on Article 31 paragraph (4) of Law 11/2008 are regulated in Government Regulations. The provisions regarding wiretapping, already in some laws, including:

1. Article 12 paragraph (1) letter an of Law Number 30 of 2002 concerning the Corruption Eradication Commission which states, "In carrying out the tasks of investigation, investigation and prosecution as referred to in Article 6 letter c, the Corruption Eradication Commission has the authority to wiretap and record conversations. "
2. Article 42 paragraph (2) and paragraph (3) of Law Number 36 the Year 1999 concerning Telecommunications which states: Paragraph (2). For the criminal justice process, providers of telecommunications services can record information sent and or received by service providers communication and can provide necessary information on a. written request of the Attorney General and or Chief of Police of the Republic of Indonesia for certain criminal acts. b. The request of the investigator for certain criminal acts by the applicable law. Paragraph (3): "Government Regulation shall regulate provisions regarding the procedure for requesting and providing information records as referred to in paragraph (2)."
3. Article 43 of Law Number 36 of 1999 concerning Telecommunications. Which states: "Provision of information records by telecommunications service providers to users of telecommunications services as referred to in Article 41 and for the purposes of the criminal justice process as referred to in Article 42 paragraph (2) does not constitute violation of Article 40; "Whereas the articles in the Law above have provided a legal action for the making of Government Regulations. The material content of the Government Regulation on procedures for wiretapping will not conflict with the Law because Government Regulation is a rule that is an elaboration of the Law so that the existence of Government Regulations is not at all contrary to the 1945 Constitution;

Information tapping regulations have been issued by the Government of Indonesia, including:

- Law Number 35 of 2009 concerning Narcotics.
- Law Number 36 of 1999 concerning Telecommunications.
- Law Number 30 of 2002 concerning the Corruption Eradication Commission.
- Law Number 11 of 2008 concerning Information and Electronic Transactions.
- Law Number 15 of 2003 concerning Determination of Government Regulation in lieu of Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism, becoming Law.
- Ministerial Regulation Number 01/P/M.KOMINFO/03/2008 concerning Recording Information for the interests of Defense and State Security.

Whereas from the several laws and regulations above, there are regulations as follows: (Mahkamah Konstitusi RI, 2010)

- *First*, Article 40 of Law Number 36 of 1999 concerning Telecommunications states that every person is prohibited from engaging in tapping activities on information channelled through telecommunications networks in any form intended in the article to be illegal/legal tapping activities. Section 41 states, "... communication providers must record the use of telecommunications facilities used by users of telecommunications services ...". This means that in addition to law enforcement agencies, other bodies are entitled and obliged to carry out information recording. Furthermore, Article 42 paragraph (1) states, "Telecommunication service providers must keep information sent and received by customers of telecommunications services through the telecommunications network and telecommunications services it provides". If the telecommunications provider company violates the provisions contained in the article, namely by divulging information about its customers, the company will receive a prison sentence or a fine of two hundred million rupiahs.
- *Second*, Article 30 of Law Number 11 the Year 2008 concerning Information and Electronic Transactions regulates the prohibition of accessing other people's computers and electronic systems to steal information/electronic documents in any way without rights or against the law. Complete Article 31 paragraph (1) states, "Everyone intentionally and without rights or against the law conducts interception or tapping on Electronic Information in a secure Computer and Electronic System belonging to another person. (2) Everyone intentionally and without rights or against the law conduct interception of the transmission of Electronic Information and/or Electronic Documents that are not public from, to and within a certain Computer and/or Electronic System belonging to another person, whether that does not cause any changes or causes changes, removal, and/or termination of Electronic Information and/or Electronic Documents being transmitted. (3) Except for interception as referred to in paragraph (1) and paragraph (2), interception is carried out in the context of law enforcement at the request of the police, prosecutors, and other law enforcement institutions stipulated by law. (4) Government Regulation regulates further provisions regarding the interception procedure as referred to in paragraph (3)".
- *Third*, Article 12 paragraph (1) of Law Number 30 of 2002 concerning the Corruption Eradication Commission states, "In carrying out the tasks of investigation, investigation and prosecution as referred to in Article 6 letter c, the Corruption Eradication Commission has the authority to intercept and record talks".
- *Fourth*, Law No. 35 of 2009 concerning Narcotics states that BNN investigators allow tapping both of the court's permission and without the consent of the head of the court in advance. Tapping on the permission of the chief of a court is if there is sufficient initial evidence and in no more than three months from the interception letter received by the investigator. Whereas without the permission of the head of the court in an urgent situation and after that the consent of the Chief Justice is no more than one twenty-four hours (vide Article 75, Article 77, and Article 78 of Law 35/2009).
- *Fifth*, Article 31 of Law Number 15 of 2003 concerning Determination of Government Regulation in Lieu of Law Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism, Becoming an Act allows tapping information with the provision of obtaining permission from the district court and the time given is no more from one year.

- Sixth, Ministerial Regulation Number 01/P/M.KOMINFO/03/2008 concerning Recording Information for the interests of State Defense and Security which regulates the technical provisions of wiretapping, procedures for wiretapping aimed at the interests of the state without ignoring ethics and confidentiality of information.

10. HUMAN RIGHTS IN WIRETAPPING

Tapping as a deterrent and deterrent to crime also has a tendency that is dangerous for human rights, if it is in the wrong law because of poor regulation and wrong hands due to the absence of control, then tapping is very vulnerable to abuse. Moreover, if the legal rules underlying it are not by Human Rights, and there is a tendency of law enforcement officials to make tapping as the primary evidence, in combating crime, without attempting to first use other instruments as evidence in criminal cases. (Sudirman Sidabukke, 2008)

The controversy about the tapping mechanism that caused the violation of human rights was one of the issues that were always discussed at a hearing between the House of Representatives (DPR) and the KPK. Also, in the decision of the Constitutional Court related to the judicial review of the KPK law and ITE law specifically the issue of wiretapping, the Constitutional Court provided a guideline on the extent to which the KPK could use the authority to conduct eavesdropping in the following eradication of criminal acts of corruption:

1. The decision on Case Number 006/PUU-I/2003 concerning Judicial Review the KPK Law (Mahkamah Konstitusi RI, 2003)
The Constitutional Court in its legal considerations when deciding the petition for testing Article 12 paragraph (1) of the Corruption Eradication Commission Law has stated, among other things, "... in order to prevent the possibility of abuse of authority for tapping and recording the Constitutional Court, it is deemed necessary to stipulate regulations the intended way of tapping and recording ". The Court's legal considerations are in accordance with the provisions of Article 32 of Act Number 39 of 1999 concerning Human Rights which states, "*Independence and confidentiality in correspondence including communication through electronic means must not be disturbed, except on the orders of judges or powers others that are legitimate in accordance with the provisions of the laws and regulations*". Also, according to the Constitutional Court, because tapping and recording conversations is a limitation of human rights, such restrictions can only be carried out by law, as determined by Article 28J Paragraph (2) The 1945 Constitution. The law said must then formulate, among other things, who has the authority to issue an order to intercept and record conversations and whether the order to tap and record the conversation can only be issued after sufficient initial evidence is obtained. Which means that wiretapping and audio recording the means to perfect the proof, or even tapping and recording the conversation can be done to find sufficient initial evidence. By Article 28J paragraph (2) of the Indonesian Constitution (the 1945 Constitution), all these must be regulated by law to avoid abuse of authority that violates human rights;
2. Case Number 5/PUU-VIII/2010 concerning judicial review of Law Number 11 the Year 2008 concerning Information and Electronic Transactions. (Mahkamah Konstitusi RI, 2010)
In its legal considerations, the Constitutional Court stated that wiretapping is indeed a form of violation of rights of privacy that contradicts the 1945 Constitution. Rights of privacy are part of human rights that can be derogable, but restrictions on rights of privacy can only be done by law as stipulated in Article 28J paragraph (2) of the 1945 Constitution. According to the Constitutional Court, some Laws have given authority and regulated wiretapping, but the arrangement still has not provided a more transparent procedure regarding wiretapping. For example about the process for granting licenses, the limits of wiretapping authority, and those who are entitled to wiretapping. This is still not regulated in several laws. Also, according to the Constitutional Court, the application of tapping as one of the investigative and investigative authorities has helped many legal processes that make it easier for law enforcement officials to disclose criminal acts. However, the power of law enforcement officers must still be limited so that abuse of authority does not occur. Although the Petitioners stated that tapping deviations sometimes never happened, but to ensure the openness and legality of the eavesdropping itself, the Constitutional Court argued that the procedure for wiretapping must still be regulated by law. This is because up to now the regulations regarding tapping are still very dependent on the policies of each agency.

Another thing that was also conveyed by the Constitutional Court in the decision was related to the opinions of two experts presented at the trial, namely Ifdhal Kasim and Mohammad Fajrul Falaakh who described the requirements for wiretapping that the KPK must fulfil, namely: (Mahkamah Konstitusi RI, 2010)

- a) There is an official authority designated in the Law to grant wiretapping permits.
- b) There is a guarantee of a definite period in conducting tapping.
- c) Limitation of handling tapping material.
- d) Restrictions concerning people who can access eavesdropping.

The main points of explanation of Mohammad Fajrul Falaakh stated that the Law on wiretapping should regulate: (Mahkamah Konstitusi RI, 2010)

- a) Authority to do, order or request tapping.
- b) The purpose of tapping individually.
- c) Categories of legal subjects who are authorised to do wiretapping.
- d) There is permission from the supervisor or consent of the judge before making tapping.
- e) Procedures for tapping.
- f) Supervision of eavesdropping.
- g) Use of wiretapping results.

According to experts, Article 31 paragraph (4) of the ITE Law cannot be justified because it does not allow for eavesdropping. Also, the entire ITE Law also does not regulate procedures for tapping which are further governed by Government Regulations. Therefore, according to the expert, Article 31 paragraph (3) and paragraph (4) of Law 11/2008 are contrary to the 1945 Constitution because it does not provide clear and certainty of rules regarding wiretapping.

Also, according to the Constitutional Court, it is necessary to have a special law that regulates wiretaps in general to the procedures for tapping for each authorised institution. This law is very much needed because until now there is still no synchronous regulation regarding wiretapping so that it has the potential to harm citizens' constitutional rights in general. Government regulations cannot regulate human rights restrictions. The form of Government Regulation is only an administrative arrangement and does not have the authority to accommodate limitations on human rights. Moreover, according to the Constitutional Court, the method of procedures for tapping Government Regulations is by the conception of delegated legislation in which the formation of Government Regulation materially is to implement the Law (vide Article 10 of Law Number 10 of 2004 concerning Establishment of Regulation 71 of Legislation). Also, systematically, Article 31 paragraph (4) of the ITE Law refers to paragraph (3) which requires the existence of an Act governing wiretaps which have not yet existed, so that it can be said that Article 31 paragraph (4) Acts ITE delegates something that has not been regulated. A rule that is hierarchically lower is a derivation or derivative of a regulation that is hierarchically higher and only controls the technical operation of the regulatory material on it, whereas in that case, no provisions are governing the conditions and procedures for tapping set in Article 31 paragraph (3) ITE Law.

Based on the two legal considerations of the Constitutional Court ruling above it can be concluded that the tapping mechanism carried out by the KPK institution must be based on the law. And if the tapping mechanism is not based on the law then it violates the Indonesian constitution, especially Article 28J paragraph (2) which states "*In exercising their rights and freedoms, every person must submit to the restrictions set by law with the sole purpose of guaranteeing the recognition and respect for the rights of freedom of others and to fulfil just demands in accordance with moral considerations, religious values, security, and public order in a democratic society*".

11. CONCLUSION

Corruption which is part of an extraordinary crime requires extraordinary ways to eradicate it. The Corruption Eradication Commission (KPK), which is a state institution given the authority to eliminate corruption, is an institution that is given specificity to intercept corruption perpetrators. Unfortunately, the arrangements related to eavesdropping have not been regulated in detail in the KPK law so that it causes a lot of contention regarding the norms which eventually goes forward to the Constitutional Court. The decision of the Constitutional Court related to the issue of wiretapping finally became a solution to the issue of tapping. The Constitutional Court in its decision gave a guideline on how the arrangement of wiretapping should be carried out to be in line with the Indonesian constitution. The Constitutional Court in its legal considerations provides a reference so that the mechanism of wiretapping must be regulated in a law specifically governing wiretapping. It is intended that there is no overriding arrangement between one act and another. Also, with the stipulation of wiretapping in a particular law, law enforcement officials, both the Police and the Prosecutor's Office, can act by the legal corridor and not carry out arbitrary actions that lead to abuse of power.

With this, the legislators (DPR) and the government must immediately prioritise the establishment of a draft law on wiretapping so that the process of eradicating corruption and going well without obstacles so that corruption can be eliminated immediately for the welfare of the people and nation of Indonesia.

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Taufik Hidayat
Faculty of Law, Diponegoro University.
Public Prosecutor's of the Republic of Indonesia
E-mail: Taupik1979@gmail.com,

Hani Adhani
Faculty of Law, International Islamic University Malaysia.
Constitutional Court of Republic of Indonesia
E-mail: adhanihani@gmail.com