

The Harmonization of Wiretapping Regulations in Indonesia: Law Enforcement Perspective

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ABSTRACT

Systems regarding the legal remedy of communication interception can be found in several regulations. However, those systems are not supported by horizontal harmonization since each regulation governs the mechanism differently, so there is a disparity among interception regulation. This paper analyzes the harmonization of wiretapping regulations in Indonesia from a law enforcement perspective with an inventory of regulations governing the current mechanism of interception. The results concluded that first, the disparity in intercepting authority of communication interception practice regulated by several institutions in the same form of crime eradication authority must be reformulated to restore overlapping regulations. Secondly, the interception regulation as a coercive force that derogates the right to privacy must contain detailed provisions in terms of a permit request and the wiretapping authority. The permit application must contain the purpose of the request for wiretapping permission descriptively. Moreover, these provisions must explicitly regulate legal subjects that are authorized to conduct wiretapping practice in the form of clear mechanisms and coordination with the direct superiors and court supervision regulating the interception procedure as well as the cooperation between law enforcement officials and telecommunications service providers. Third, prospectively interception regulations can be assessed from the political will of the legislators. The decision of the Constitutional Court No. 5/PUU-VIII/2010 mandates the need for horizontal harmonization of interception regulations in the form of the Interception Bill, which is also included in the 2019 National Legislation Program.

Keywords: *Harmonization; Wiretapping; Coercive Force; the Right to Privacy*

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INTRODUCTION

The increasingly massive, fast growth of crime has faced a new reality in the technological network that, in fact, breaks down the reality. The transformation of crimes that creates a bias between illusion and reality has led to extraordinary conditions through disruption into the virtual realm. This leads to the fact that the law encounters extraordinary



situations that force the law to metamorphose according to these extraordinary conditions.¹ Bearing in mind that Indonesia is currently fighting the extraordinary crimes such as corruption, narcotics, terrorism, crimes that disturb economic stability, and environmental crimes, the mode of crime is disrupted through digital correspondence. The increase of crime contaminates the stability of a country through the extraction process into the government through the role and influence of the elites in government (*trading influence*) or so-called *white-collar crime*.²

The transformation of legal instruments is needed to balance and even exceed the criminal movements that continue to regenerate themselves in *a sich*. Technological evolution is both a blessing and a disaster that runs on the thread of paradox. This growth is assumed to have a very big impact on the configuration of law in people's lives. According to Ramli, the rapid development of technology has even penetrated the linkages between telecommunications, information technology, and broadcasting. These three elements spur the flow of information quickly and easily accessible to anyone. It can break through the boundaries of human life.³

The symbiosis that occurs between law and society in the context of the development of information and communication technology also helps the development of the legal configuration in Indonesia. The consolidation between law and society with technology is a legal convergence.⁴ Legal convergence demands a new paradigm for legal configuration to dynamically walk and move into virtual reality. The entanglement of law into the flow of information technology plays an important role in reaching the sector of virtual crime and unrestricted access to crime correspondence in it.⁵ One of the compatible legal instruments, in this case, is the interception of communication.⁶

Communication interception has become a powerful tool in dealing with the aforementioned extraordinary crimes. Corruption Eradication Commission (KPK) is a legal institution that actively engages wiretapping instruments as a powerful tool in eradicating corruption. On top of that, the majority of corruption cases in Indonesia can be solved through the application of wiretapping practices.

¹ Prahassacitta, V. (2016). The Concept of Extraordinary Crime in Indonesia Legal System: Is The Concept an Effective Criminal Policy?. *Humaniora*, 7(4), 513–521. DOI: <https://doi.org/https://doi.org/10.21512/humaniora.v7i4.3604>.

² Marbun R.G., et al. (2020). Tinjauan Yuridis Tindak Pidana Korupsi Sebagai Extra Ordinary Crime. *Jurnal Ilmiah Simantek*, 4(3), 234–243.

³ Ramli, A.M. (2008). Dinamika Konvergensi Hukum Telematika Dalam Sistem Hukum Nasional. *Jurnal Legislasi Indonesia*, 5(4), 1–11.

⁴ Budhijanto, D. (2014). Peran Hukum Telekomunikasi Terhadap Implikasi Konvergensi Teknologi Informasi Dan Komunikasi. *Jurnal Dinamika Hukum*, 14(1), 134–150. DOI: <https://doi.org/http://dx.doi.org/10.20884/1.jdh.2014.14.1.283>.

⁵ Mohanan, J., Kothuri, N., & Bhikkaji, B. (2020). The Target Guarding Problem: A real time solution for noise corrupted measurements. *European Journal of Control*, 54, 111-118. p.114

⁶ Afifah, W. (2020). The urgency of Wiretapping in Getting Evidence in Criminal Measures. *DiH: Jurnal Ilmu Hukum*, 16(2), 139–270. DOI: <https://doi.org/https://doi.org/10.30996/dih.v16i2.3410>.

This success definitely would not come without obstacles. As a double-edged sword, the success of interception in eradicating corruption has brought bright hopes for the eradication of corruption in Indonesia, yet the practice of wiretapping must deal with a great wall of respect for the right to privacy in the embracing the rights of everyone. In fact, the regulation of communication interception seems disorganized.

According to Solove, the right to privacy is a fundamental right and essential, democratic freedom, which is also an appreciation of individual values and creativity.⁷ Likewise, Warren and Brandeis also view the right to privacy as the right to enjoy life (*right to be alive*) and the right not to be disturbed (*right to be let alone*), so that their recognition by law is inevitable and becomes the substance of the values of constitutional Human Rights.⁸ In line with Solove, Mswela defines that The right to be let alone is a privacy right that focuses on protecting one's private life, including one's body, sexual preferences, home, and family life. The basis of this right is that outsiders must not interfere in one's private life. The right to privacy means that everyone has freedoms within the sphere of personal autonomy, which cannot be accessed by anyone without their consent.⁹

The right to privacy becomes central in the International Covenant on Civil and Political Rights (ICCPR) as part of the integrity rights. The ICCPR has established rights for every person to be protected from arbitrary and illegitimate interferences interrupting their privacy such as personal life, family, home, correspondence (conversation via phone, chat, e-mail), as well as against the honor and reputation.¹⁰ Therefore, the process of legislation governing the regulation of wiretapping was supposed to apply the paradigm of *integrity rights* in underlying its philosophical foundation.

Substantially, the infringement of privacy rights, *mutatis mutandis*, is a violation of Human Rights, so that the regulation of the wiretapping practice must be viewed in a holistic manner and formulated properly.¹¹ In the context of Human Rights, there are two kinds of rights, namely human rights restricted by the state (derogable rights) and the absolute human rights (non-derogable rights).¹² The right to privacy is considered as "derogable rights" that in the process of reconstruction of the criminal justice system and the demands

⁷ Solove, D.J. (2008). *Understanding Privacy*. London: Harvard University Press. p. 4-5.

⁸ Citron, D.K. (2010). Mainstreaming Privacy Torts. *California Law Review*, 98(6), 1805–1852. DOI: <https://doi.org/10.2307/25799956>.

⁹ Mswela, M.M. (2019). Tagging and Tracking of Persons with Albinism: A Reflection of Some Critical Human Rights and Ethical Issues Arising from the Use of the Global Positioning System (GPS) as part of a Solution to Cracking Down on Violent Crimes Against Persons with Albinism. *Potchefstroom Electronic Law Journal*, 22(1), 1–27. DOI: <https://doi.org/http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5206>.

¹⁰ Eddyono, S.W. & Napitupulu, E.A.T. (2013) *Komentar Atas Pengaturan Penyadapan Dalam Rancangan KUHAP Seri Pembaharuan Hukum Acara Pidana*. Jakarta: Institute for Criminal Justice Reform. p. 9.

¹¹ Fitria, R.A. (2017). Penyadapan Sebagai Alat Bukti Dalam Tindak Pidana Umum Berdasarkan Hukum Acara Pidana. *Mimbar Keadilan Agustus(2)*, 160–82. DOI: <https://doi.org/https://doi.org/10.30996/mk.v0i0.2192>.

¹² Matompo, O.S. (2014). Pembatasan Terhadap Hak Asasi Manusia Dalam Prespektif Keadaan Darurat. *Media Hukum*, 21(1), 57–72.

of the amendment of criminal law (penal reform) in Indonesia, the regulation governing the precise, aligned, and comprehensive limitation of human rights is required.¹³

Wiretapping practice is considered a forced effort conducted by law enforcement officers that, in fact, derogate rights to privacy. Harahap explains that the coercive force is an authority given directly by the legislation to law enforcement officials to perform the actions of reduction, restriction of independence, and the rights of the suspects.¹⁴ The coercive force must be responsibly implemented as stipulated in The Code of Criminal Procedure (KUHAP) as a form of *due process of law*.¹⁵ The regulation entrustment on the restriction of Human Rights granted to the law enforcement officials is solely in the interest of law enforcement. This view in the context of law enforcement is referred to as a "*full enforcement concept*", namely the concept of fully enforcing the law based on procedural law as a procedural framework for the actions of law enforcement officials who pay two main concerns, namely the effectiveness of law enforcement and respect for one's privacy rights.¹⁶

Lebret said that the restriction on human rights referred to in Article 4 Section (1) of the ICCPR, which states that "a public emergency that threatens the life of the nation," considering that it must be declared officially, is limited and is not discriminatory. Derogation of human rights is carried out by the state to create a balance between individual rights and collective rights of society, especially in conditions of maintaining stability and state security.¹⁷ Limitations on human rights must refer to international principles, namely the principles of legality, legitimate aim, necessity, safeguards against illegitimate access, competent judicial authority, proportionality, adequacy, transparency, integrity of communication and system, and due process.¹⁸

Therefore, the coercive force is stated in Article 77 of the Act Number 8, 1981 on The Code of Criminal Procedure (KUHAP), in terms of arrest, detention, termination of investigations, and prosecution. Coercive force is gradually expanded in the form of search, confiscation, detainment of suspects, and an interception. According to Indriyanto Seno Adji, the authority of coercive force can be limited directly by the officials for reasonable

¹³ Fahmi, A.A., & Wijaya, (2018). D.P. Does Indonesia's Corruption Eradication Commission (KPK) in Spying on People Violate the International Human Rights Laws in Protecting the Right to Privacy?. in *1st International Conference on Social Sciences (ICSS 2018)*. Amsterdam: Atlantis Press. pp. 1233–1237. DOI: <https://doi.org/https://doi.org/10.2991/icss-18.2018.259>.

¹⁴ Harahap, M.Y. (2009). *Pembahasan Permasalahan Dan Penerapan KUHAP, Pemeriksaan Sidang Pengadilan, Banding, Kasasi Dan Peninjauan Kembali*. Jakarta: Sinar Grafika. p. 8.

¹⁵ *Ibid.* p. 9

¹⁶ Lisnawati, E. (2017). Keabsahan Alat Bukti Elektronik Pasca Putusan Mahkamah Konstitusi No.20/PUU-XVI/2016 Dalam Perspektif Criminal Justice System. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 5(4), 677–693. DOI: <https://doi.org/https://doi.org/10.24843/JMHU.2016.v05.i04.p04>.

¹⁷ Lebret, A. (2020). COVID-19 Pandemic and Derogation to Human Rights. *Journal of Law and the Biosciences*, 7(1), 1–15. DOI: <https://doi.org/https://doi.org/10.1093/jlb/lsaa015>.

¹⁸ Clement, A. (2016). Addressing Mass State Surveillance Through Transparency and Network Sovereignty, Within a Framework of International Human Rights Law – a Canadian Perspective. *Chinese Journal of Journalism and Communication Studies*, 23 Special Issue on Internet Governance, 31–52.

excuses. Its limitation and control can only be performed in two ways, namely a court order carried out in the interests of justice and legal power given based on the stipulation of the law.¹⁹

The holistic distinction on legal interception regulations occurs due to a conflict with Article 32 Act number 39/2009 on Human Rights (Human Rights Act) which has enacted the formulation techniques of coercive force mechanism that does not only accommodate the interests of law enforcement but also does not neglect the rights of suspects. On that account, the ideal formulation of coercive force should regulate the permit and supervision mechanism precisely as well as legal remedies that can be carried out by the suspect due to the indemnity obtained out of the context of law enforcement.

Contextually, this research focuses on the issue of legal interception (wiretapping) regulations which its construction in criminal procedural law have not obtained a harmonious level at the present day. Whereas the position of communication interception as part of a coercive force requires the construction of harmonious regulations so that the ideals of law enforcement whose manifestations are the fulfillment of human rights can be achieved in harmony.

ANALYSIS AND DISCUSSION

A. Interception Regulations in Indonesia

Considering the number of regulations regarding lawful interception that has been inventoried, obviously there are 18 (eighteen) laws regulating wiretapping practice. Unfortunately, these numbers indicate the absence of synchronization or harmonization of wiretapping regulations that seem overlapping, as seen in the existence of disparities in each of the wiretapping mechanisms and regulations governing each.

Table 1. Interception Regulation in Indonesia

No.	Regulation	Description
1.	Article 55 of the Act Number 5,1997 on Psychotropic	Giving authorities to National Police investigators to conduct wiretapping regarding psychotropic criminal offenses the period of wiretapping practice is set into 30 days maximum. However, there is no time extension set.
2.	Article 26A of the Act Number 20, 2001 on Amendment to Act	provide legality to law enforcement officers to be able to use electronic evidence, one of which

¹⁹Adji, I.S. (2015). *Pra-Peradilan Dan KUHAP*. Jakarta: Diadit Media. p. 60.

No.	Regulation	Description
	Number 31, 1999 on Eradication of Criminal Acts of Corruption	is wiretapping. The regulation is restricted to the investigator's authority which specifically aims to accelerate the process of investigation.
3.	Article 42 Section (2) of the Act Number 36, 1999 on Telecommunication	Regulating the obligation of telecommunications service enterprises to store the communication data as well as the recording of communication data made by its users and/or for criminal justice purposes.
4.	Article 12 Section (1) <i>unctis</i> Article 12B, Article 12C, Article 12D of the Act Number 19, 2019 on Second Amendment to the Act Number 30, 2002 on Corruption Eradication Commission.	Regulating the position of the Supervisory Board as a surveillance agency responsible for wiretapping practice ranging from licensing, supervision, to the use of the recording.
5.	Article 19 Section (2) of the Act Number 18, 2003 on Advocate	Regulating protection against interception on electronic communications as well as the right to the advocate's confidential relationship with his/her client.
6.	Article 31 of the Act Number 21, 2007 on Combating Trafficking in Persons	Regulating the authority of investigators to practice wiretapping related to trafficking in persons based on sufficient preliminary evidence with written permission to the Chief of the Court for a maximum period of 1 (one) year.
7.	Article 77 and Article 78 of the Act Number 35, 2009 on Narcotics	Regulating the authority of investigators (National Narcotic Agency (BNN) and Police investigators) on drug trafficking of following the sufficient preliminary evidence obtained from the various practice of communication interception. The wiretapping term is set into a maximum of 3 months and 1 term extension if necessary. The wiretapping practice is considered legal enclosed by the written permission of the Chief of the Court. The wiretapping, unless in urge, is allowed to be made ahead of time and the investigators are

No.	Regulation	Description
		obliged to ask for a warrant to the Chief of the Court once twenty-four hours at the latest.
8.	Article 32 of the Act Number 17, 2011 on State Intelligence.	Regulating the authority of wiretapping conducting by the National Intelligence Agency (BIN) regarding information on activities that threaten national interest and security. It is carried out on the orders of the Chief of the State Intelligence Agency and the Chief of the Court. Furthermore, the wiretapping term is up to 6 (six) months and might be extended as needed.
9.	Article 20 Section (3) of the Act Number 18, 2011 on Amendment to the Act Number 22, 2004 on Judicial Commission.	The Judicial Commission may request assistance from law enforcement officials to conduct wiretapping related to a violation of the Code of Conduct and/or the Judicial Code of Conduct of Judges.
10.	Article 11 Section (5) of the Government Regulation Number 19, 2000 on Corruption Eradication Joint Team	Regulating the authority of the investigator to conduct wiretapping but the regulations regarding the authority are not explicitly stated.
11.	Article 31 and Article 31A of the Act Number 5, 2018 on Amendments to the Act Number 15, 2003 concerning the Stipulation of Perppu Number 1, 2002 on Combating Terrorism Crimes into Law (the Terrorism Law).	Regulating the authority of investigators based on sufficient preliminary evidence to conduct wiretapping practice related to terrorism. It is carried out on the behest of the Chief of the District Court in the jurisdiction area of the appointed investigators for 1 (one) year and can be extended 1 (one) time for 1 (one) year. The wiretapping recordings are confidential and must be accounted to the supervisor of the investigator and reported regularly to the ministry in the field of communication and informatics affairs.
12.	Article 31 Section (3) of the Act Number 19, 2016 concerning Amendments to the Act Number	Regulating the prohibition of wiretapping, except for the interest of law enforcement on the request of the Police, Attorney General's Office,

No.	Regulation	Description
	11, 2008 on Electronic Information and Transactions.	or other institutions whose authority is regulated by law.
13.	Article 87 <i>in junctis</i> Article 88, and Article 89 of the Government Regulation Number 52, 2000 on Operation of Telecommunications Service.	Regulating the requests of information and records of telecommunications service providers by the Attorney General and/or the National Police for certain crimes with a copy to the Ministry of Communication and Information. The information request must contain the object being recorded, also the recording period and the results of the recording must be submitted confidentially to the Attorney General and/or Police investigator.
14.	Article 1 of the Ministry Information and Communication Regulation Number 8, 2014 on Technical Requirements for Valid Betting Tools and Devices for Internet Protocol Based Information on Mobile Network Operation and Limited Mobility Network	Regulates technical requirements regarding the wiretapping of internet protocol-based information provided by telecommunications network and service providers to law enforcement officials based on international standards issued by the European Telecommunications Standards Institute (ETSI).
15.	The Chief of State Police of Republic of Indonesia Regulation Number 5, 2010 on Wiretapping Procedure in the Monitoring Center of Republic of Indonesia National Police	Issuing guidelines of wiretapping requests, wiretapping implementation, monitoring, handling, and supervision in handling the wiretapping results obtained.
16.	Standard Operational Procedure of Corruption Eradication Commission (KPK)	Confidential, inaccessible.
17.	The Chief of State Police of Republic of Indonesia Regulation concerning Corruption	Confidential, inaccessible.

Source: *Indonesian for Criminal Justice Reform (ICJR)*.²⁰

²⁰Eddyono. S.W. (2014). Mengurai Pengaturan Penyadapan Dalam Rancangan KUHAP, *Teropong Media Hukum dan Keadilan*, 1(1), 35–41.

The description above apparently shows a disharmony of interception regulations in terms of the mechanism of the coercive force such as the official who holds the authority to give permission and the forms or models of surveillance control in conducting interception practice. Furthermore, the inadequate protection of privacy in terms of wiretapping records distribution that is potentially to be abused at any time by irresponsible law enforcement officials and the mechanism of claim for privacy losses caused by procedural errors have not been specified in detail. Nevertheless, some of the above regulations have already begun to accommodate these provisions.²¹

Disharmonization and disparity of wiretapping regulations will certainly have an impact on the law enforcement process which requires clear procedures and is oriented towards the due process of law so that law enforcement officials do not arbitrarily commit forced attempts.

The three important notes that the authors have described are based on the conditions of regulatory disharmony above. First, there are disparities in wiretapping permit mechanisms. Any coercive practice that shows a reduction in the right to privacy should be given as a court order and regulated force of law. The above regulation shows disharmony at the level of the wiretapping permit. In the Corruption Eradication Commission Law, the legality of tapping is carried out with the permission of the Supervisory Board, while other law enforcement agencies require a court order. Meanwhile, wiretapping based on the State Intelligence Law is carried out with the permission of the Head of the State Intelligence Agency (BIN) along with a court order.

This problem became the main concern of the Constitutional Court in its Decision No. 5 / PUU-VIII / 2010 mandated legislators to immediately enact a specific wiretapping law. Moreover, the form of wiretapping that is categorized as a coercive force should be regulated equally and in proportion to other legal remedies as in the Criminal Procedure Code (KUHAP) which requires a court order. According to the Constitutional Court, regulations related to wiretapping licenses from the court must cover three important things, namely which institution is authorized to carry out wiretapping, it must state the specific purpose of wiretapping, it must be clear that the coordination of legal subjects who carry out wiretapping (law enforcement officials with telecommunications service providers).

When viewed comparatively, the United States is an example of a country that specifically regulates the existence of an authority that manages wiretapping permits, namely the States Foreign Intelligence Surveillance Court (FISA). This can certainly be an example of good practice so that the mechanism for processing and granting permits is

²¹Nussy, J.E. (2020). Mekanisme Komisi Pemberantasan Korupsi Dalam Proses Penyiapan Dilihat Dari Perspektif Hak Asasi Manusia. *Jurnal Belo*, 5(2), 74–85. DOI: <https://doi.org/https://doi.org/10.30598/belovol5issue2>. p. 74-85.

centered on one authority, namely based on a court order or a credible separate institution.²²

Secondly, the issuing of a wiretapping order must also be accompanied by a mechanism of monitoring the interception process. Monitoring is expected as a form of accountability of authority that has been given within a certain period. The period is intended to restrain the wiretapping practice as adjusted with law enforcement needs. Each wiretapping regulation has a different tapping duration. This indicates that there is no common perception regarding how long the wiretapping authority is given to law enforcement officials. This condition certainly creates vulnerability to violations of a person's privacy rights, especially if the duration is not accompanied by a strict monitoring process. Therefore, it is important to regulate the duration of wiretapping and monitoring according to the principle of non-discrimination. The results must be in the form of a report made by the investigators to their supervisors. This will have an impact on the investigative mechanism in obtaining legal evidence.²³

Thirdly, legal remedies are required for the targeted parties regarding the alleged procedural errors during the wiretapping practice or in case of private data or information leakage that is completely unrelated to the crime. At this point, the existence of the Tapping Law must regulate the mechanism for providing reparations or compensation for victims of wiretapping whose tapping results were misused by law enforcement officials as stipulated in Article 2 of the ICCPR. This mechanism can be implemented through pretrial institutions whose authority is to examine acts of coercion illegally and determine the act of wiretapping as an unlawful interception.²⁴

Not all tapping results correlate with criminal acts, this is because tapping records all of a person's activities. The principle is that only activities that are correlated with criminal acts should be taken by law enforcement officials as evidence, while other personal data must be destroyed. This principle is known as "*velox et exactus*" in that wiretapping must contain current and accurate information in accordance with the specific interests of law enforcement. This principle emphasizes the strict separation between information as evidence and information as personal data.²⁵ According to Dewi, personal data is a fundamental human right. Therefore, it is appropriate for the state to develop a good legal

²²Salim, H., Kurnia, M., & Azhari, N.D. (2019). Analisis Keabsahan Penyadapan Yang Dilakukan Oleh Komisi Pemberantasan Korupsi Tanpa Izin Pengadilan. *ADIL: Jurnal Hukum*, 9(2), 80–99. DOI: <https://doi.org/https://doi.org/10.33476/ajl.v9i2.830>.

²³Alam, N. (2012). Konstitusionalitas Penyadapan (Interception) Dengan Peraturan Pemerintah Dari Sudut Pandang Perlindungan Hak Asasi Manusia: Analisa Putusan MK No. 5/PUU-VIII/2010. *Jatishwara*, 27(3), 45–66.

²⁴Suntoro, A. (2020). Penyadapan Dan Eksistensi Dewan Pengawas Komisi Pemberantasan Tindak Pidana Korupsi. *Jurnal Legislasi Indonesia*, 17(1), 25–37.

²⁵Sumariyastuti, S.H.D. (2019). Penyadapan Dalam Perspektif Hak Asasi Manusia. *Yurisprudensi*, 2(2), 135–153. DOI: <https://doi.org/http://dx.doi.org/10.33474/yur.v2i2.2229>.

instrument to accommodate the use of the results of interceptions as valid evidence and to protect one's data non-discriminatively.²⁶

It is important to restrict the use of intercepted results to be clearly and strictly regulated so that personal data can only be used for the sake of evidence. According to Dewi, the tapping regulation model in Indonesia tends to violate the right to privacy because each regulation is not built on the same interests. This is a weakness that afflicts the law enforcement process. For example, the absence of clear restrictions regarding the use of tapped results can be seen in various court proceedings that attach electronic evidence derived from the tapplings. Court visitors and journalists can cover the evidentiary process which reveals the results of the interceptions so that the personal data is widely spread.²⁷

B. Wiretapping and The Right to Privacy

The regulation of a coercive force must refer to the basic fundamental norms (*staat-fundamental norm*) stipulated in the 1945 Constitution of the Republic of Indonesia. As part of derogable rights in human rights, its formulation must be clear and the essence is expected to accommodate the spirit of the constitution under the mandate of Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Wiretapping is an act of coercive force which derogates the obligations of the country to guarantee the legal protection, legal certainty and equality (*vide* Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia), the right to communicate and obtain information (*vide* Article 28F of the 1945 Constitution of the Republic of Indonesia) and the right to personal life, home and family protection (*vide* Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia).

The guarantee of human rights above was born in the spirit of fulfilling privacy rights to the community. Wiretapping certainly derogates a person's privacy rights. However, the right to privacy is not part of non-derogable rights so that the state has the authority to deviate from it as long as it is regulated clearly and with a good mechanism.²⁸

Initially, the wiretapping policy in Indonesia led to differences in views between groups who opposed it and those who supported it. Groups that refuse to stand on the argument that tapping is a violation of the right to privacy as stipulated in the Constitution. Therefore, the right to privacy is a fundamental right that must be guaranteed by the state. While the groups that support it stand on the argument that the right to privacy is not a right that cannot be violated by the state. The author agrees with the supporting groups with the

²⁶Dewi, S. (2016). Konsep Perlindungan Hukum Atas Privasi Dan Data Pribadi Dikaitkan Dengan Penggunaan Cloud Computing Di Indonesia. *Yustisia Jurnal Hukum*, 5(1), 22–30. DOI: <https://doi.org/https://doi.org/10.20961/yustisia.v5i1.8712>.

²⁷Dewi, S. (2018). Privacy: An Overview of Indonesia Statutes Governing Lawful Interception. *Central European Journal of International and Security Studies*, 12(4), 586–597.

²⁸Rachmad, A. (2016). Legalitas Penyadapan Dalam Proses Peradilan Pidana Di Indonesia. *Jurnal Hukum Samudra Keadilan*, 2(2), 239–249.

note that wiretapping techniques must be regulated with appropriate standards and mechanisms to have clear dimensions or limits regarding the extent to which the wiretapping is carried out legally and for investigation and should not be out of this interest.²⁹

The concept and position of the right to privacy were introduced by two young lawyers in the United States, namely Brandeis and Warren in the case of *Olmstead v. the United States*. Brandeis and Warren both tested the constitutionality of wiretapping and confronted it with the concept of "*the right to be let alone*" as a fundamental right that has a profound influence on the development of human civilization. Brandeis said that any tapping purpose violates the principle of non-self-incrimination.³⁰

The views of Brandeis and Warren can be said to place the position of the right to privacy as a right that cannot be reduced by the state. The author agrees with the position of the right to privacy as a fundamental right but placing its position on rights that cannot be reduced by the state is wrong. It can be said that the entire law enforcement process certainly breaches a person's right to privacy, for example, arrest, detention, search, confiscation, and wiretapping. Without these tools, law enforcement officials cannot find evidence related to crimes. Of course, the process of finding evidence must be based on valid mechanisms and procedures.³¹

Based on Article 9 of the International Covenant on Civil and Political Rights (ICCPR) which regulates the protection of personal security from arbitrary legal proceedings unless the legal process is carried out legally (due process of law). Besides, Article 17 of the ICCPR stipulates that "*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation*". the ICCPR explicitly positions the right to privacy as part of the rights that can be reduced by each state party as long as it regulates good mechanisms and legal procedures (*due process of law*).

In the context of law enforcement in Indonesia, the concept of human rights derogation according to Article 32 of the Act on Human Rights must be established through law and with a court order mechanism. Initially, the provisions of the coercive force were clearly stated on the Code of Criminal Procedure containing a mechanism of notification to the court in terms of detention, search, and confiscation. As for the arrest, it must be following the internal police standards and procedures with the supervision of investigators. In case of a haphazard action, it can be examined through a pretrial procedure.

²⁹Christianto, H. (2016). Tindakan Penyadapan Ditinjau Dari Perspektif Hukum Pidana. *Jurnal Hukum Prioris*, 5(2), 89–106.

³⁰Schroeder, M.M. (2000). The Brandeis Legacy. *San Diego Law Review*, 37(3), 711–723, <https://digital.sandiego.edu/sdlr/vol37/iss3/4>.

³¹Congram, M., Bell, P., & Lauchs, M. (2013). *Policing transnational organized crime and corruption: Exploring the role of communication interception technology*. Springer.

The core of a court warrant in a coercive force act is a form of control and supervision of the judiciary over the actions taken by law enforcement officials as part of checks and balances. The dynamics of the criminal procedural law in the Code of Criminal Procedure that seem static and difficult to accommodate the dynamics of the law in society make the development of criminal procedural law formulations shift towards specific arrangements of law (*lex specialist*). Accordingly, the wiretapping practice derived as a new instrument was accommodated into various kinds of laws sporadically. Therefore, comprehensive and unified regulations are needed so as not to create different interpretations that lead to legal disorder.

C. The Urgency to Harmonize the Interception Regulations

In the process of setting up legislation, harmonization is a required, compulsory instrument to achieve the validity of a regulation so that the implementation of the regulation still obeys its principles. Due to the fact that a regulation must not conflict with the relevant statutes, vertical harmonization is required during the legislation process.³²

The principle of vertical harmonization is to ensure that the regulation meets the mandate of the constitution while horizontal harmonization is an attempt to standardize seemingly-similar provisions stated in several different regulations. The standardization is set so that in its implementation, each regulation to some extent does not overlap resulting in the emergence of legal uncertainty. In turn, this will lead to a disorder or disparity regulatory regime.

In vertical harmonization, the Telecommunication Law, the Psychotropic Law, the Corruption Eradication Commission (KPK) Law, the Anti-Corruption Law, the Narcotics Law, the Money Laundering Law, the Combating Trafficking in Persons Law, the State Intelligence Law, the Judicial Commission Law, and the Terrorism Law have achieved harmony regarding the stages of the criminal justice system that refers to the provisions in the Code of Criminal Procedure despite some modifications. The entire contents are in line with the provisions of Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. According to Reksodiputro, the application of the articles in the Criminal Procedure Code must always be interpreted as a crystallization of human rights values *an sich* that is bound as a morality of laws. Even though the redaction of the articles in the Criminal Procedure Code does not explicitly state (*lex scripta*) a redaction regarding human rights for a suspect or defendant, if examined holistically through the essence of the

³²Sudiarawan, K.A., Tanaya, P.E., & Hermanto, B. (2020). Discover the Legal Concept in the Sociological Study. *Substantive Justice International Journal of Law*, 3(1), 94-108. DOI: <http://dx.doi.org/10.33096/sjil.v3i1.69>

formulation, the Criminal Procedure Code actually rejects human rights violations on the whole process and stage of the criminal justice system.³³

Not only do the regulations refer to the Code of Criminal Procedure, but the aforementioned regulations also broaden the existing stages/consideration by including new provisions according to the regulation characteristics as *lex specialis*. One of these special stages is interception or wiretapping regulation. Deeply analyzing the regulations then correlating them to the process of vertical harmonization, harmony with the provisions of Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia has been achieved. However, the regulation obtaining disharmony justification is only identified in Article 31 paragraph (4) of the old Act on Electronic Information and Transaction based on the decision of the Constitutional Court of the Republic of Indonesia (MKRI) No. 5/PUU-VIII/2010. Article 31 paragraph (4) of the old Act on Electronic Information and Transaction states, "Further provisions regarding the interception procedure referring to paragraph (3) shall be regulated by Government Regulation."

Because the aforementioned provision based on the MKRI decision was contrary to the 1945 Constitution of the Republic of Indonesia, the MKRI revoked the provision. Consequently, the Electronic Information and Transaction (ITE) Law was revised to the enactment of the new ITE Law. The most fundamental change from the latest ITE Law is that the provisions and procedures for wiretapping must be regulated in a specific law. This is following the MKRI Decision above which mandates the drafting of a specific wiretapping law to accommodate all law enforcement activities.³⁴

As well as the vertical harmonization, horizontal harmonization also needs to be considered. Horizontal harmonization can be seen in two areas of wiretapping, namely wiretapping as a crime and wiretapping as a law enforcement tool (a way to collect evidence). Tapping in the context of a criminal act is regulated in Article 40 of the Telecommunication Law and Article 31 of the ITE Law.³⁵ Both the Telecommunication Law and the ITE Law regulate the prohibition of wiretapping that is not carried out based on law enforcement. However, both of them manage two different wiretapping areas. The Telecommunications Law prohibits wiretapping made on telecommunications networks, whether by telecommunications operators or individuals, for example tapping a person's telephone. Meanwhile, the ITE Law prohibits tapping of information and electronic documents based on internet protocol, for example tapping conversations on the

³³Rahmawati, D.L. (2020). Perlindungan Hukum Dalam Pemenuhan Hak-Hak Tahanan Di Rumah Tahanan Negara Kelas II A Kota Palu Dalam Perspektif Hak Asasi Manusia. *Tadulako Master Law Journal*, 4(2), 214–238. DOI: <https://doi.org/https://doi.org/10.22487/tmj.v4i2.202>.

³⁴Yuvens, D.A., Widigda, R.S., & Sharifa, A. (2017). Dilema Upaya Hukum Terhadap Penyadapan. *Jurnal Hukum Dan Pembangunan*, 47(3), 289–311. DOI: <https://doi.org/http://dx.doi.org/10.21143/jhp.vol47.no3.1578>.

³⁵Afifah, W. *op.cit.* p. 142-143.

WhatsApp application. Horizontally these two regulatory areas are appropriate considering that both telecommunications and electronic information are two different areas.

Tapping in the framework of law enforcement is regulated in several regulations as in the previous table. *First*, horizontal harmonization regarding the wiretapping authority between the Corruption Eradication Commission (KPK), Attorney General's Office, and Indonesian National Police regarding regulations in the field of corruption act needs a deep analysis. It should be noted that the authority of corruption eradication is not only the domain of the KPK but also to the Attorney General's Office and the National Police. Therefore, given that these three institutions share equal authority in combating the same criminal act, the facilities provided by the law to the KPK, the Attorney General's Office, and the National Police, most notably regarding the authority of wiretapping practice must be evaluated.

The authority of wiretapping stated directly and clearly in eradicating corruption crime is only found in Article 12 paragraph (1) and (2) of Act on Corruption Eradication Commission, Article 26 of Act on Criminal Acts of Corruption and Article 26A of Act on Criminal Acts of Corruption. Although the Attorney General's Office and the National Police institution also have an authority in eradicating corruption, the authority of interception is not stipulated in the Code of Criminal Procedure. The authority for wiretapping by the police in cases of corruption is only regulated in The Chief of State Police of Republic of Indonesia Regulation Number 5/2010 on Wiretapping Procedure in the Monitoring Center of Republic of Indonesia National Police. Meanwhile, the attorney's authority for wiretapping in corruption cases has not been found. However, implicitly, both the Police and the Attorney General's Office rely on Article 42 of the Telecommunication Law.

Based on the three regulations above, it can be seen that the disharmony to the wiretapping authority exists. KPK regulates that the authority of wiretapping is stated clearly and completely while in the Attorney General's Office and the National Police Institution, the interception authority is not explicitly regulated. In the context of eradicating corruption, the authority given to the Attorney General's Office and the National Police is only based on the provisions stipulated in the Telecommunications Law. However, this provision does not cover the palpable mechanism of wiretapping practice. This obviously leads to the disparities in wiretapping mechanisms in the context of law enforcement in the coequal criminal level. As for the process of corruption eradication, each institution which holds the authority to eradicate should be given the same and clear mechanism so that the law enforcement process runs effectively. Disparity in authority will only lead to institutional conflict.

The enactment of the new KPK Law is precisely not responsive to the conditions mentioned above. The existence of the Supervisory Board as mandated by the new KPK

Law only raises new problems that increasingly create disharmonious spaces in the wiretapping mechanism. The reformulation process of the KPK Law, most notably in wiretapping regulation does not reach a large space in the criminal justice system and even tends to deny the criminal justice system.³⁶

Philosophical reasons built in the fulfillment of human rights should be placed in the exact corridor by the structure of a complete criminal justice system. The legislators seemed to work indifferently in stipulating the KPK Law with a wiretapping system that should be seen comprehensively. Horizontal harmonization into a universal wiretapping instrument formulation was left out. This was also expected to protect the entire building of the criminal justice system, for instance by updating it into the Interception Bill which is included in the 2019 National Legislation Program.³⁷

In addition to corruption, interception authority can also be found in the eradication of narcotics abuse. The Narcotics Law stipulates three authorized institutions in combating narcotics crimes, namely the National Narcotics Agency (BNN), the National Police Institution, and Civil Servant Investigators (PPNS). However, the anomaly raised by the Narcotics Act is that based on the provisions of article 75 of the Narcotics Law, the authority to intercept in the context of eradicating narcotics crimes is directly given only to BNN. Article 75 of the Narcotics Law does not mention the same authority to the National Police. However, the elaboration of wiretapping authority was actually expanded in the explanation of article 75 of the Narcotics Law which stipulates that wiretapping also includes the authority of the National Police in eradicating narcotics crimes.³⁸

Apparently, it differs from PPNS which obtains a limitation in the authority to eradicate narcotics crime indicated by the absence of wiretapping authority. This leads to a consideration that PPNS is in fact not the main investigators, but the ones who are functionally carrying out the task of assisting the main investigator of the Police and BNN within the scope of the law that forms the basis of each law.

Furthermore, the wiretapping regulations on money laundering also cause anomalies. Money laundering, in its essence, is a dependent crime, so that its position is a crime derived from the original crime (*predicate crime*).³⁹ The authorized institutions to investigate money laundering are KPK, BNN, National Police, Attorney General's Office, and PPNS. Of the criminal act regarding money laundering, wiretapping practice can be

³⁶Fadhil, M. (2019). Komisi Pemberantasan Korupsi, Politik Hukum Antikorupsi Dan Delegitimasi Pemberantasan Korupsi. *Al-Ahkam*, 15(2), 7-36. DOI: <http://dx.doi.org/10.37035/ajh.v15i2.2203>.

³⁷Suntoro, A. *op.cit.* p. 31.

³⁸Nalapraja, I. (2018). The Issue of Authority Between the National Police Republic of Indonesia and National Narcotics Agency in Handling The Case of Narcotics. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 7(4), 435–442. DOI: <https://doi.org/https://doi.org/10.24843/JMHU.2018.v07.i04.p02>.

³⁹Bayuaji, R., & Hidayat, M. (2017). Confiscation of Corruptor Assets Based U.U. 8 Year 2010 about Prevention and Eradication Of Money Laundering In National Criminal Law System, *Yurisdiksi: Jurnal Wacana Hukum Dan Sains*, 10(1), 73–108.

conducted based on the Financial Transaction Reports and Analysis Centre's (PPATK) recommendations. Article 44 of the Money Laundering Law confirms that the PPATK can recommend to law enforcement agencies on the importance of intercepting electronic information and/or electronic documents following the statutory provisions.

The pivotal problem that arises here is that the provisions seem ambiguous. Also, the wiretapping authority of each law enforcement agency shares the same level. However, it is obvious that the vivid authority on wiretapping practice is under the control of KPK and BNN. The Act on Money Laundering does not provide transparent and equitable instruments to all concerned law enforcement agencies which are authorized combatting money laundering crimes; it only provides recommendations to each agency to conduct wiretapping. It is undeniable that a multitude of problems regarding regulations in Indonesia only cause anomalous and overlapping orders.

Moreover, the Judicial Commission Law also stipulates the provision that the Judicial Commission can seek assistance from law enforcement officials to conduct wiretapping concerning alleged violations of the code of conduct and/or a code of conduct for judges. The provision, unfortunately, does not stipulate further about the mechanism of assistance requests. If Judicial Commission officials ask the Police to conduct wiretapping, the Police officials will most probably get hindered by other regulations that do not comprehensively regulate wiretapping mechanisms.^{40,41}

The Combating Trafficking in Persons Law and the Terrorism Law are indeed way more comprehensive in regulating wiretapping practice regarding the mechanism of the procedure thoroughly. The police officials are given special authority to conduct wiretapping of alleged trafficking in persons and terrorism. Correspondingly, the State Intelligence Act comprehensively regulates the wiretapping mechanism conducted by the State Intelligence Agency (BIN) regarding alleged activities that threaten national interests and security.

The Advocate Law, on the other hand, precisely confronts resistance against wiretapping practice relating to the correspondence relationship between advocates and their clients. Article 19 paragraph (2) of Advocate Law clearly states the restriction on communication interception in the interests of the defense of the client. The advocate acquires the right to the confidentiality of his relationship with the client, including the protection of files and documents as the wiretapping practice result from the advocate's electronic communication tools. Therefore, horizontal harmonization is required to set limits

⁴⁰Munzil, F. (2017). Keberadaan Komisi Yudisial Dalam Rangka Membangun Peradilan Yang Bersih Dan Berwibawa. *Jurnal Hukum Media Justitia Nusantara*, 7(1), 1–12.

⁴¹ Saragih, Y. M., & Berlian, B. (2018). The Enforcement of the 2009 Law Number 46 on Corruption Court: The Role of Special Corruption Court. *Sriwijaya Law Review*, 2(2), 193-202. p, 195

on wiretapping so as not to violate the advocacy rights of advocates with clients who are already protected by the Advocate Law.⁴²

From all the wiretapping problems mentioned above, it can be seen that there is a very large disparity between the respective wiretapping regulations. Only the Terrorism Law, the Combating Trafficking in Persons Law, and the State Intelligence Law have comprehensively regulated the techniques and mechanisms of wiretapping, even though the three of them have their own schemes.

Meanwhile, other wiretapping regulations face the constraints of wide and overlapping disparities. As a result, the law enforcement process faces obstacles targeting the differences in equipment owned by each institution, both between the KPK and the Attorney General's Office and the Police, between the BNN and the Attorney General's Office and the Police, and the position of civil servant investigators. Therefore, prospectively, the Constitutional Court Decision has mandated the unification of the wiretapping law specifically (*the Interception Bill*) so that all law enforcement agencies are connected in the same regulatory gate and equipped with all the same wiretapping equipment, techniques, and mechanisms.

CONCLUSION

The disparity of interception authority on eradicating the identical crime should be reformulated in the form of unification of intercepting authority so that in the process of legal dynamics, the values of human rights protection in Indonesia will not fall. This turns out as an urgent demand for legal reform in Indonesia due to the broad and complex problem regarding legal system reform. *First*, the disparity in intercepting authority of communication interception practice regulated by several institutions in the same form of crime eradication authority must be reformulated to restore overlapping regulations. Therefore, the interception regulations that achieve harmony in the form of both vertical and horizontal harmonization are considered necessary.

Secondly, the interception regulation as a coercive force that derogates the right to privacy must contain detailed provisions in terms of a permit request and the wiretapping authority. The permit application must contain the purpose of the request for wiretapping permission descriptively. Moreover, these provisions must explicitly regulate legal subjects that are authorized to conduct wiretapping practice in the form of clear mechanisms and coordination with the direct superiors and court supervision regulating the interception procedure as well as the cooperation between law enforcement officials and telecommunications service providers; the telecommunications service providers are also

⁴²Pattipawae, D.R. (2012). Kedudukan Advokat Sebagai Penegak Hukum Dalam Hubungan Dengan Aparat Penegak Hukum Lainnya Untuk Menegakkan Hukum Dan Keadilan. *SASI*, 18(1), 63–71. DOI: <https://doi.org/https://doi.org/10.47268/sasi.v18i1.339>.

required to maintain the confidentiality of wiretapping documents in an integrated system. These provisions have to apply the interception period for a certain amount of time which can be extended within a certain time, the use of electronic evidence as a mean of proof (*bewijsvoering*), and the storage of interception result/records that have been used in the verification process so as not to be used by irresponsible parties and other illegal matters (*undue process*).

Third, prospectively interception regulations can be assessed from the *political will* of the legislators. The decision of the Constitutional Court No. 5/PUU-VIII/2010 mandates the need for horizontal harmonization of interception regulations in the form of the Interception Bill which is also included in the 2019 National Legislation Program. The most important focus in the reformulation process is to refine the Interception Bill which is unified and specific (*lex specialist*). Therefore, the best formula is creating regulation in the form of Interception Bill as a unified regulation that achieves harmony regarding lawful interception.

A constructive interception system will improve the performance of law enforcement officials to work effectively and in an orderly manner in line with the relevant law and human rights. Constructive and unified regulations will strengthen the structure of interception systems; not only on the mechanism conducted by law enforcement officials but also regarding integrative information technology.

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