

**The Dilemma Of The Right To Privacy In Indonesia:
Does Indonesia's Corruption Eradication Commission (KPK) in Spying People Violate
International Human Rights Laws to Protect the Right to Privacy?**

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Abstract: *Corruption is a serious crime in Indonesia. Indonesia commonly recognize that Corruption as extra ordinary crime that has to be combated by extra ordinary means as well. Interception has been determined as the best way to reduce the number of these engaged in corruption, Indonesia is adherence to some international human rights instrument aims to support the basic rights of the people. The scope of the concept of privacy, in some theorists' perspective has sailed to be properly conceptualized. In addition, the international community recognizes privacy is a fundamental human right which is well-described in several Conventions. This reflects the importance of the right to privacy for every individual in the world, either for adult, children or for people who have disabilities. Some of the interception actions done by the KPK, do not comply with the international principles on human rights in electronic surveillance actions. This means Indonesia must improve its laws through adding some articles in order to fully comply with international principles on human rights in electronic surveillance actions. The research method used is normative juridical, normative juridical is research based on the analysis of legal materials in the form of several legal principles and several legal theories as well as laws and regulations that are in accordance with the problems in this study.*

Keywords: *Corruption, privacy, human rights.*

I. INTRODUCTION

Corruption has become a serious focus for Indonesia, particularly since the reform of 1998.¹ In 2001, the Corruption Perceptions Index ranked 91 countries. Indonesia was number four of the top five countries with levels of perceived corruption in government and public administration in the world, followed by Azerbaijan, Bolivia, Cameroon, Kenya, Uganda, Nigeria and Bangladesh.² In 2017, the Corruption Perceptions Index ranked 180 countries by their perceived levels of public sector corruption according to experts and business people, using scale of 0 to 100, with 0 for highly corrupt country and 100 for very clean country. Indonesia was number 95 out of 180 countries.³

Under the Law Number 30 of 2002 of the Commission for the Eradication of Criminal Acts of Corruption (hereafter UU KPK), KPK has the authority to spy on people by tapping into their communication lines and records their conversations. By this interception power, KPK has captured many corruptors in Indonesia. The number of people getting ensnared by KPK in corruption case, from 2004 to 2017 are 163 Echelons (I, II, III); 145 senators in House of

¹ Ardian Maulana & Hokky Situngkir, *Dynamics of the Corruption Eradication in Indonesia*, SSRN ELECTRON. J. 1–10 (2013), <http://papers.ssrn.com/abstract=2326176>.

² TRANSPERANCYINTERNATIONAL, CORRUPTIONPERCEPTIONSINDEX2001(2001), https://www.transparency.org/research/cpi/cpi_2001/0.

³ TRANSPERANCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2017 (2017), https://www.transparency.org/news/feature/corruption_perceptions_index_2017.

Representative (DPR and DPRD); 127 Regent, Mayor and Deputy positions; 60 Governors; 17 Judges; 15 Commissioners; 7 for The Heads of Ministry or Agency; 25 Ambassadors and 80 officers in several institutions.⁴ In earlier two months of 2018, 7 Regents were captured by KPK.⁵ Mostly, they were going to run for the 2018 regional Head Election (Pilkada). Laode M. Syarief as KPK Deputy Chairman said that the politic cost in Indonesia is very high. The high cost of politic leads regional head candidates dragged by corruption case.⁶

Undoubtedly, the use of wiretapping can be admitted as one of the major ways KPK can uncover many white-color-crimes. Actually, wiretapping is a common way for law enforcers to reveal a case or scandal. However, in some cases, wiretapping has a risk of abuse of power. On December 16, 2005, The New York Times reported that President Bush authorized the National Security Agency (NSA) to conduct unwarranted wiretapping on American citizens. He secretly authorized the NSA to eavesdrop on Americans and others in the United States without the court-approval.⁷ He defended his more than 30 unwarranted wiretapping authorizations under the mantle of national security and he would continue to do so. He ignored the requirement of the Foreign Intelligence Surveillance Act (FISA) which Congress passed in 1978.⁸ In Indonesia, an alleged abuse of power was once suspected of the former chairman of the KPK, Antasari Azhar whose wife terrorized by unknown people, in order to protect his family, he asked his team to tap Rhani Juliani and Nasrudin Zulkarnaen's cell phone.⁹ Former Deputy of Legal Affairs and Laws, Human Rights and Security of Indonesia's Representative Council, Soeripto, said there was a tendency of abuse of power (KPK) in the process of tapping the phone Rani and Nasrudin, especially if the tapping has no correlated to the aims of investigation of corruption.¹⁰ Based on the cases which described before, this paper argues that there is a conflict between the state interest in combating crimes or in protecting state and the right of citizens in obtaining the right of privacy.

The privacy benchmark at international level can be found in the Universal Declaration of Human Rights 1948 (hereinafter UDHR), the UDHR recognized and protected people's right to

⁴ KATA DATA News and Research, *Ternyata Pejabat Swasta Paling Banyak Tertangkap Korupsi KPK* "It turns out Private Officials Most Caught Corruption by KPK" (2017), <https://databoks.katadata.co.id/datapublish/2017/06/21/ternyata-pejabat-swasta-paling-banyak-tertangkap-korupsi-kpk> (last visited Feb 28, 2018).

⁵ Abba Gabrillin, *Belum Genap 2 Bulan Tahun 2018, Tujuh Kepala Daerah Jadi Tersangka KPK "Not Even Even 2 Months In 2018, Seven Regional Heads became suspects KPK,"* KOMPAS.COM, February 15, 2018, <http://nasional.kompas.com/read/2018/02/15/08153641/belum-genap-2-bulan-tahun-2018-tujuh-kepala-daerah-jadi-tersangka-kpk>.

⁶ KPK on Many Regional Head Candidates Getting Ensnared by Corruption Cases, NETRAL ENGLISH "PEOPLE REFLECTION" (2018) <http://www.en.netralnews.com/news/currentnews/read/18485/kpk.on.many.regional.head.candidates.getting.ensnared.by.corruption.cases> (last visited Feb 27, 2018).

⁷ JAMES RISEN and ERIC LICHTBLAU, *Bush Lets U.S. Spy on Callers Without Courts*, THE NEW YORK TIMES, December 16, 2005, <http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

⁸ Jan Frel, *AN ABUSE OF POWER THE NSA WIRETAPPING SCANDAL IS AN OBJECT LESSON IN HOW THE AMERICAN PRESIDENCY -- NOT JUST THIS PRESIDENT -- HAS GAINED TOO MUCH POWER* ALTERNET (2006), https://www.alternet.org/story/30350/an_abuse_of_power (last visited Feb 27, 2018).

⁹ Atas Perintah Antasari, KPK Sadap Telepon Rhani & Nasrudin "On Antasari Order, KPK Tap Phone Rhani & Nasrudin," DETIK.COM, June 19, 2009, <https://news.detik.com/berita/1150735/atas-perintah-antasari-kpk-sadap-telepon-rhani--nasrudin>.

¹⁰ Selain Kasus Korupsi, Penyadapan Penyalahgunaan Wewenang KPK "Beside of Corrrption Case, KPK's Tapping is Abuse of Power," KOMPAS.COM, June 23, 2009, <http://regional.kompas.com/read/2009/06/23/13341416/selain.kasus.korupsi.penyadapan.penyalahgunaan.wewenang.kpk>.

privacy. Article 12 states: “No-one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honor or reputation. Everyone has the right to the protection of the law against such interference or attacks”.¹¹ Not only the UDHR specifically refers to privacy as a right, but also some of the international conventions have recognized that privacy as a right, such as The International Covenant on Civil and Political Rights (hereinafter ICCPR) which stated this in Article 17, the Convention on the Right of the Child (hereinafter CRC) which states this in Article 16, and also the International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter ICRMW) which states this in Article 14. Based on those international instruments, several questions inevitably arise: Does Indonesia's Corruption Eradication Commission (KPK) in spying on people violate international human rights laws to protect the right to privacy? In addition, the right to privacy might be limited by other rights, such as the right to life or the safety of community. How do international human rights instruments determine if the KPK is spying indeed unlawful? Are Indonesian laws consistent with the international human rights principles regarding the right to privacy?

Before answering those questions, this paper will attempt to explain why people need government to protect their privacy. This paper argues that concept is crucial thing when we are dealing with problems which involve privacy. Scholars, lawyers and judges will have to adopt multiple conceptions of privacy. Therefore, this paper will outline the concept of the right to privacy from several privacy theorists'. To determine whether or not the KPK is indeed acting unlawfully, this paper will use the privacy rights theory and the international human rights covenants in examining the right to privacy. Lastly, this paper will determine whether Indonesia laws comply with international human rights' principles in international covenants in order to uphold the right of privacy for Indonesian people.

II. RESEARCH METHODS

The research method used is normative juridical, normative juridical is research based on the analysis of legal materials in the form of several legal principles and several legal theories as well as laws and regulations that are in accordance with the problems in this study.

III. RESULT AND DISCUSSION

a. The Right to Privacy

i. Why Do We Need Government to Protect Our Privacy?

The right to privacy is one of the most important rights people should have. Logically, privacy is an individual conscience issue in which individual himself decides what part of his private life and how much of it he is willing to expose to others.¹² Every person has secrets, which must not share with other people. Commonly, the reason is it will damage his reputation or his dignity in social affairs which might not only effect him but also for his larger family.

The necessity of the protection of the rights by the state begins with the nature of law concept and one of these adherents is Locke. He said:

¹¹ The World Health Assembly, *Universal Declaration of Human Rights*, 2 INT. J. HUM. RIGHTS 84–88 (1998), <http://www.tandfonline.com/doi/abs/10.1080/13642989808406748>.

¹² Michel Kelly-Gagnon, SHOULD WE TRUST THE GOVERNMENT TO PROTECT OUR ONLINE PRIVACY? MEI: IDEAS FOR A MORE PROSPEROUS SOCIETY (2011), <https://www.iedm.org/36638-should-we-trust-the-government-to-protect-our-online-privacy> (last visited Apr 17, 2018).

“Every man is born with a double right: First, a right of freedom to his person, which no other man has a power over, but free disposal of it lies in himself. Secondly, a right, before any other man, to inherit, with his Brethren, his father goods”¹³

Moreover, he also asserted that every man being, as has been shewed, naturally free. The only way to put him into subjection to any earthly power such as laws and governments is from his own consent.¹⁴ In addition, one of the 18th century’s most important political thinkers with his contribution of the idea of the relationship between human society and the individual, Jean-Jacques Rousseau, said that people could only experience true freedom if they lived in a civil society that ensured the rights and wellbeing of its citizens.¹⁵ Indeed, an unregulated freedom between individuals will only cause chaos. Naturally, individuals need the state to manage their lives. Therefore, to avoid chaos and turmoil among people it is necessary to limit the rights and freedoms of such individuals for the common good.

The “Social Contract” is the first tool where people gave their rights to the government to grant and create a legal limit about how people behave. But, in exercising its authority state is obliged to guarantee and properly protect the basic rights that at birth are the property of every individual. One of those rights is a right of privacy.

Government should be able to create proper regulation to ensure respect for individual rights; both a right between individuals and a right between individuals and government. On the other hand, individuals are obliged to respect the rights of others in the life of the community. Otherwise, government has the authority to use coercion in the application of rules or law create peace and social justice.

ii. The Concept of Privacy

During the last century, the concept of privacy has played a large role in legal discussion and judgement.¹⁶ Some scholars say that the right of privacy is like the right to be left alone.¹⁷ The scholars who expressed that concept are Samuel Warren and Louis Brandeis. In a Harvard Law Review article, they argued that privacy was an emerging right that needed to be recognized. They said that the right to privacy was not something that is found by only looking at the Constitution. But cultural values and new technology also should have a significant role in developing a new understanding of the right. They further noted that “the value of privacy is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all”.¹⁸ Indeed, they also affirmed that violation of privacy was a harm worse than some physical injury.¹⁹

In addition to the rights to be left alone concept, the “limited access” concept has been recognized by several privacy theorists. It is likely related to the right to be left alone concept but not equivalent to solitude. Solitude is a form of seclusion from society. This concept extends far

¹³ JOHN LOCKE, *LOCKE: TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 1963).

¹⁴ JOHN LOCKE, *LOCKE: TWO TREATIES OF GOVERNMENT* (Peter Laslett ed., Studen Edi ed. 2004).

¹⁵ Rousseau, *The Social Contract*, THE BRITISH LIBRARY, <http://www.bl.uk/learning/timeline/item126710.html> (last visited Apr 17, 2018).

¹⁶ James H. Moor, *The ethics of privacy Protection*, 39 *LIBR. TRENDS* 70 (2004).

¹⁷ *Recent Developments in the Right of Privacy*, 15, No. 4 *UNIV. CHICAGO LAW REV.* 927 (1948).

¹⁸ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. LAW REV.* 200 (1890).

¹⁹ Moor, *supra* note.

beyond the freedom of government interference, as well as intrusions by the press and others.²⁰ One of the famous aspects of privacy is that of control over personal information. This concept can be viewed as a limitation access to people's data information which cannot be owned by other people. Several theorists tried to define the scope of what constitutes personal information over which individuals should exercise control, but the more they try the more they find difficulties. For instance, Richard Parker has attempted to define the scope of personal information, he thought is "Privacy is control over when and by whom the various parts of us can be sensed by others". That definition sounds very broad. Daniel J. Solove responds to Parker's concept, by saying "Parker's definition would make most interpersonal contact in society a privacy invasion because it brings unwanted access to the self. Yet, we are frequently seen and heard by others without perceiving it as even the slightest invasion of privacy".²¹ On the other hand, David O'Brien said the conception of privacy as the control of information is too narrow. He argues that many privacy goals involve an individual's freedom to engage in private activities.²²

To sum up, the concept of privacy seems so hard to conceptualize as legal and policy problem. Attempting what types of information over which individuals should have control ends up being vague. When theorist attempt to define what constitutes personal information, the conceptions become limited or expansive.

b. The Right to Privacy under International Human Rights Instruments The Right to Privacy in Several International Covenants

In this digital age, privacy has become one of the most important human rights issues. Several international human rights instruments recognize privacy is a fundamental human right. Privacy underpins human dignity and other key values such as freedom of association and freedom of speech.²³ These instruments below, reflects how important the right to privacy for every person in the world.

i. The Universal Declaration of Human Rights (UDHR)

In 1946, the UDHR was drafted. The UDHR paved way to the ICCPR and the International Covenant on Economic Social and Cultural Rights (hereafter ICESCR). Those has been an explosion of human rights treaties over the years. Since the UDHR was drafted, it was clear enough that privacy would be guaranteed in one form or another.²⁴ Through Article 12 The UDHR, it tries to protect the right to privacy of people constructively. The Article 12 of the UDHR stated:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and

²⁰ Daniel J. Solove, *Conceptualizing privacy*, 90 CALIF. LAW REV. 1087–1155 (2002).

²¹ *Id.*

²² *Id.*

²³ Privacy International, *PRIVACY AND HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND PRACTICE GLOBAL INTERNET LIBERTY CAMPAIGN*, <http://gilc.org/privacy/survey/intro.html> (last visited Apr 17, 2018).

²⁴ Oliver Diggelmann & Maria Nicole Cleis, *How the right to privacy became a human right*, 14 HUM. RIGHTS LAW REV. 441–458 (2014).

reputation. Everyone has the right to the protection of the law against such interference or attacks.”²⁵

Asbjørn Eide said in his book *The Universal Declaration of Human Rights: A Commentary* that this article is an umbrella article. They argue that the scope of this article is too broad because it does not only protect for person's privacy but also to his family, home, correspondence even for attacking upon his honor and reputation.²⁶ However, this paper argues that article 12 does fit in this era. Since the advances in information communication technology are significantly improved, clearly that technologies are vulnerable to electronic surveillance and interception. Amplifying the scope of the right to privacy will prevent people from abuse of power which might have an effect on his family. Even for law enforcement reasons, government should be able to protect the crucial information of the suspects. Government should not expose the suspects' information to the public, because it may cause such a negative effect to people around them.

For example, in *Al Amin's* corruption case, KPK disseminated the evidence to the public when he was about to hand over 71 million rupiah to someone. KPK also presented to the public the evidence that there was a young lady in the hotel with *Al Amin*. People believed she was a prostituted.²⁷ *Al Amin* became trending topic in his hometown.²⁸ As a result, Kristina who the wife of *Al-Amin* feel ashamed and stressed which resulted in the end of the marital relationship.

This paper's point of view is, KPK. in this case already attacked *Al Amin's* honor and dignity. Even for the law enforcement reasons, KPK should have the information from the public. All the information they got from their operation should have been viewed and heard for KPK's team only, or when KPK brought him to the court. Because everyone who claimed as a criminal shall have the right to be presumed innocent until proved guilty and had final decision from the court.

ii. The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is a key international human rights treaty which provide a range of protections for civil and political rights. The ICCPR, the UDHR, ICESCR and First Optional Protocol to the International Covenant on Civil on Political Rights (hereafter FOIPICPR) are considered the International Bill of Human Rights.²⁹ The ICCPR, was adopted by the U.N General Assembly in 1996 and came into force in 1976. At least 167 countries have ratified in December 2013, including Indonesia. Indonesia ratified or acceded in February 23, 2006 and entered to force on May 23, 2006.

²⁵ The World Health Assembly, *supra* note.

²⁶ ALLAN ROSAS ASBJØRN EIDE, GUDMUNDUR ALFREDSSON, GÖRAN MELANDER, LARS ADAM REHOF, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS : A COMMENTARY / EDITED BY ASBJØRN EIDE [AND OTHERS] ; WITH THE COLLABORATION OF THERESA SWINEHART.* (1992).

²⁷ *Al-Amin Nasution Dibekuk KPK (Al-Amin Nasution Arrested by KPK)*, HUKUM ONLINE.COM, April 9,

2008, <http://www.hukumonline.com/berita/baca/hol18962/alamin-nasution-dibekuk-kpk>.

²⁸ Rachmat Hidayat, *Al Amin Nasution Jadi "Buah Bibir" Warga Jambi (Al Amin Nasution Become Hot Topic in Jambi)*, KOMPAS.COM, 2008, at 1, <https://news.kompas.com/read/2008/04/10/12034593/al.amin.nasution.jadi.buah.bibir.warga.jambi>.

²⁹ FRANK NEWMAN DAVID WEISSBRODT, FIONNUALA NI AOLAİN, JOAN FITZPATRICK, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* (4th ed. 2009).

The ICCPR obligates countries to ratifying the treaty in order to protect and preserve a basic human right of people.³⁰ One of the human rights that well covered by ICCPR is the right of privacy. At least 2 Articles which discussed about the right of privacy.³¹ The right is enshrined in Article 14, and Article 17:

“(1) ... when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice...”

(2) “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”³²

Additionally, Article 17 stated:

“(1) 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. (2) Everyone has the right to the protection of the law against such interference or attacks.”³³

iii. The Convention on the Right of the Child (CRC)

The CRC is a Convention which deals with the child-specific needs and rights. Countries that ratified this Convention are bound to it by international law and must act in the best interest of the child. Although the CRC was adopted by the UN General Assembly in 1989, it was first available for signature was on January 26, 1990. Indonesia was one of the countries which signed on the first day of this Convention.³⁴ Considering that a child should be fully prepared to live an individual life in society, the CRC tries to protect the of the life of the child as well as his right to privacy through Article 16 (1) and (2). With regard to the right of privacy for children, the Article 16 of CRC explained that:

“(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation (2) The child has the right to the protection of the law against such interference or attacks.”³⁵

³⁰ THE COVENANT ON CIVIL & POLITICAL RIGHTS (ICCPR), ACLU (2014), <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> (last visited Apr 18, 2018).

³¹ Definitions of the right to privacy, CLAIMING HUMAN RIGHTS GUIDE TO INTERNATIONAL PROCEDURES AVAILABLE IN CASES OF HUMAN RIGHTS VIOLATION SINAFRICA, http://www.claiminghumanrights.org/privacy_definition.html (last visited Apr 18, 2018).

³² United Nations Human Rights, *International Covenant on Civil and Political Rights*, UNITED NATIONS HUM. RIGHTS 26 (1976), <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

³³ *Id.*

³⁴ Convention on the Rights of the Child, UNITED TREATY COLLECTION (1989), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Apr 18, 2018).

³⁵ Unicef, *FACT SHEET : A summary of the rights under the Convention on the Rights of the Child*, 1 ADV. HUMANIT. 1-4 (2011).

iv. The International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)

For the first time, in 1972, the UN raised its concern about the rights of migrant workers. On December 18, 1990, the ICRMW was adopted by the UN General Assembly and entered into force on July 1, 2003.³⁶ Indonesia signed this Convention on September 22, 2004. Eight years later, Indonesia ratified this Convention, on May 31, 2012.³⁷

The right to privacy in this Convention is described in Article 14 states:

“No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honor and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.”³⁸

v. The Convention on the Rights of Persons with Disabilities (CRPD)

Disabled people are uniquely at risk of discrimination when privacy protections fail because institutional and other settings in which people with disabilities often live are particularly subject to private and public intrusion. People with disabling conditions are canaries in the coal mine for loss of privacy by everyone.³⁹ The protection of the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others is significantly important. Indonesia signed this Convention Indonesia started to sign on March 30, 2007, then ratified it on November 30, 2011.⁴⁰

The privacy article of CRPD aligns with privacy protection in other international human rights instruments. The human rights instrument above served as inspiration for the CRPD provision.⁴¹ The right to privacy can be found in the Article 22 of CRPD. In terms of the right of privacy, Article 22 of CRPD provides that:

“1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence or other types of communication or to unlawful attacks on his or her honor and reputation. Persons with

³⁶ Protection of the Rights of Migrant Workers, WORLD HEALTH ORGAN. 1 (2003), <http://www.who.int/hhr/Migrants.pdf>.

³⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UNITED TREATY COLLECTION (1990).

³⁸ INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES, 6 (1990).

³⁹ Mark C Weber, *Protection for Privacy under the United Nations Convention on the Rights of Persons with Disabilities*, 478 (2017).

⁴⁰ United Nations Human Rights Commissioner, CRPD LIST OF COUNTRIES: CONVENTION, OPTIONAL PROTOCOL SIGNATURES, RATIFICATIONS DISABLED WORLD: TOWARDS TOMORROW (2014), <https://www.disabled-world.com/disability/discrimination/crpd-milestone.php> (last visited Apr 19, 2018).

⁴¹ Weber, *supra* note.

disabilities have the right to the protection of the law against such interference or attacks.

2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others”⁴²

vi. Comparison with The European Convention on Human Rights (ECHR) and African Charter on Human and Peoples’ Rights

As comparison in Europe countries, for European people the ECHR is like guardian to protect their rights. The ECHR formally the Convention for the protection of human rights and fundamental freedom which is an international treaty to protect human rights in Europe countries. Article 8 of the ECHR provides a right in terms of the right of privacy. In Article 8 stated that: “(1) everyone has the right to respect for his private and family life, his home and his correspondence”,⁴³ and then followed by number 2 of Article 8, it states that: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.⁴⁴

The primary purpose of Article 8 is to protect arbitrary interferences with private and family, life, home and correspondence. In order to invoke Article 8, the people must show that their complaint falls within at least one of four interests identified in the Article. The court has defined the scope of this Article broadly, even when a specific right is not out in the Article. But, the scope of that article is limitless.⁴⁵

In the African Charter on Human and Peoples’ Rights also well known as Banjul Charter.⁴⁶ It is an international human rights instrument that is intended to protect human rights and basic freedoms in the African continent. This charter was adopted in Nairobi June 27, 1981. Then entered into force October 21, 1986. One of 68 articles in this charter described the right of privacy as well which states in Article 4, “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”⁴⁷

Sum up, the international community has established such an international standard on the protection of privacy for every element of people, including children, workers, family workers, disability people. The right to privacy also recognized not only for European people and American people but also it is recognized by African people. Thus, each country is not only obliged to protect the right to privacy for their citizens, but also country should prohibit

⁴² UNITED NATION, CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND OPTIONAL PROTOCOL 15.

⁴³ Colin Warbrick, *Federal Aspects of the European Convention on Human Rights*, 10 MICH. J. INT’L L. 698 (1989), www.echr.coe.int.

⁴⁴ *Id.*

⁴⁵ European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life*, (2017), http://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

⁴⁶ African Commission on Human and Peoples’ Rights, , <http://www.achpr.org/instruments/achpr/> (last visited Apr 19, 2018).

⁴⁷ PART I RIGHTS, CHAPTER I HUMAN & PEOPLES RIGHTS, AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS 2 (1986), <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>.

every violation which against the rights of privacy through the application of laws within a country.

c. The International Human Rights Principles

If we look at the international human rights instrument as described above, clearly, Indonesia seems very active in protecting the right of privacy. Indonesia has already ratified the international human rights instruments regarding the right of privacy. But, does KPK in spying on people violate international human rights laws protecting the right to privacy? And also, we might think that the right to privacy might be limited by other competing rights. So, to determine if KPK spying is indeed unlawful this section will focus on some principles of the international human right laws.

Rights can be divided into two forms, as derogable or non-derogable rights. Article 4 of the ICCPR provides for a derogation power, which means to allow governments to temporarily suspend the application of some rights in the exceptional circumstances.⁴⁸ Then, the right to privacy constitutes as derogable rights. Article 4 (2) of the ICCPR explains that derogation is only limited to:

- Right to life which provides in article 6⁴⁹
- Freedom from torture or cruel, inhuman and degrading treatment or punishment; and freedom from medical or scientific experimentation without consent which provides article 7⁵⁰
- Freedom from slavery and servitude which provides in article 8 (1) and (2)⁵¹
- Freedom from imprisonment for inability to fulfil a contractual obligation which provides in article 11⁵²
- Prohibition against the retrospective operation of criminal law which provides in article 15⁵³
- Right to recognition before the law which provides article 16⁵⁴
- Freedom of thought, conscience and religion which provides in article 18⁵⁵

Since the right to privacy constitutes as derogable rights, countries might take measures derogating from certain of their obligation under the Covenant, including the prohibition on interference with privacy and attacks on reputation. Such measures might only be taken to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law. Moreover, the measures shall not involve discrimination solely on the ground of race, color, sex, language, religion or social origin. For limitations itself ICCPR does not set out the reasons

⁴⁸ Human Rights Committee, ABSOLUTE RIGHTS AUSTRALIAN GOVERNMENT: ATTORNEY-GENERAL'S DEPARTMENT (2001), <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx> (last visited Apr 19, 2018).

⁴⁹ THE COVENANT ON CIVIL & POLITICAL RIGHTS (ICCPR), *supra* note.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

for which the guarantees in it might be limited. In any event, limitations on privacy must be authorized by law and must not be arbitrary.⁵⁶

The term unlawful means that no interference can take place except as authorized under domestic law. The use of the term arbitrary in the ICCPR means that any interferences with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.⁵⁷ So basically, wiretapping or interception is prohibited and violation of people's private zone. However, in certain situation either wiretapping and interception can be justified when used for law enforcement and national security.

In addition, to be justified of such interception action must be in accordance with international principle concerning the application of human rights that limit the act of interception. The Inter American Court of Human Rights (hereafter IACtHR) and the European Court of Human Rights (hereafter EctHR) also deal with human right violations related to state surveillance and interception. These principles consist of legality, legitimate aim, necessity and proportionality, safeguards toward illegitimate access, and lastly due process.⁵⁸ In the next chapter, this paper will examine how much Indonesia's laws abide by these international human rights' principles solid in international covenants in order to uphold the right of privacy for Indonesian people.

d. The Right to Privacy in Indonesia

i. Corruption as an Extra Ordinary Crime

Corruption is not something new. It is a deep-rooted age-old phenomenon existing in innumerable forms, without cultural boundaries, operating in both private and public sectors, applying to developing and developed country.⁵⁹ Kofi Annan in the introduction of the International Convention against Corruption (ICC) said that "corruption was an insidious plague with a wide range of corrosive effects on societies".⁶⁰ This means that corruption is not an ordinary crime. Even if there is no statement that categorized corruption as an extraordinary crime in UU KPK, Indonesian people commonly agreed that corruption is an extraordinary crime. To combat such an extraordinary crime Indonesia created an *ad hoc* institution, the KPK which was formed to operate independently, free from any and all influences, with the main purpose of improving the effectiveness and efficiency of efforts to eradicate corruption as stated in Article 3 and 4, the Law Number 30 of 2002 on the Commission for the Eradication of Criminal Acts of Corruption.⁶¹

⁵⁶ Privacy and reputation, AUSTRALIAN GOVERNMENT: ATTORNEY-GENERAL'S DEPARTMENT (2005), <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Privacyandreputation.aspx> (last visited Apr 9, 2018).

⁵⁷ *Id.*

⁵⁸ PRIVACY INTERNATIONAL, THE PRINCIPLES ON THE APPLICATION OF HUMAN RIGHTS TO COMMUNICATIONS SURVEILLANCE IN THE JURISPRUDANCE OF REGIONAL HUMAN RIGHTS COURTS (2013).

⁵⁹ Dini Dewi Heniarti, *INDONESIA IS COMBATING CORRUPTION : A Struggle between the Extra-Ordinary Measurement and Extraordinary People A . Preface*, 24 333–358 (2016).

⁶⁰ Indah Amaritasari, *Corruption: An extraordinary crime*, THE JAKARTA POST, 2014, at 1, <http://www.thejakartapost.com/news/2014/02/23/corruption-an-extraordinary-crime.html>.

⁶¹ Indonesia: Law on the Commission for the Eradication of Criminal Acts of Corruption (Law No. 30 of 2002), (2002), <http://www.acrc.go.kr/file/file.do?command=downFile&encodedKey=MTE5XzE%3D>.

Moreover, under Article 12 (1), KPK has authority to spy on people by tapping into their communication lines and recording their conversations.⁶² By this interception power, KPK becomes a more powerful body than other institutions in combating corruption. Some people said KPK is such a “Super Power Body” which is capable of capturing notorious corruptors sitting in well-respected national chairs the governmental public service.⁶³

In addition, Indonesia has ratified some international convention regarding anti-corruption including the United Nation Convention against Corruption, the Rome Statute and United Nation on Trans-National Organized Crime. None of these conventions declare corruption as an extraordinary crime or the most serious of crimes. The first Statute which said that corruption as extraordinary crime or the most serious crime was a Rome Statute only. The concept of the most serious crime in Rome Statute then adjusted with the Indonesian legal system.

The concept of extraordinary crime is part of criminal policy, but it is without standard definition. Criminal policy is a crime eradication effort through criminal legislation drafted for social welfare protection purposes.⁶⁴ As part of criminal policy, a state has authority to select which crime should be determined as the extraordinary crime. Selecting crimes are built on politics, legal and social interest priority from the state.⁶⁵

ii. The 1945 Constitution of the Republic of Indonesia (UUD 1945)

Nearly every country in the world recognizes a right of privacy explicitly in their Constitution, as well as Indonesia. Indonesian commitment to the right to privacy can be find in the Constitution of the Republic of Indonesia. First, Article 28 F of UUD 1945; “Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels.”⁶⁶

Second, Article 28 G of UUD 1945 (I) of the fourth amendment, which acknowledges the obligations of the state protect each individual, family, dignity, and shall have the right to feel secure against and receive protection from the threats to human rights.⁶⁷

iii. The Constitutional Court Decision (Mahkamah Konstitusi or MK)

Despite of UUD 1945 to protect the right of privacy for Indonesian people, this protection is reinforced by the existence of three decisions of the Constitutional Court which provides

⁶² *Id.*

⁶³ Maulana and Situngkir, *supra* note.

⁶⁴ B. N. ARIF, BUNGA RAMPAI KEBIJAKAN HUKUM PIDANA PERKEMBANGAN PENYUSUNAN KONSEP KUHP BARU (2008).

⁶⁵ Vidya Prahassacitta, Faculty Humanity & Major Business Law, *THE CONCEPT OF EXTRAORDINARY CRIME IN INDONESIA LEGAL SYSTEM : IS THE CONCEPT AN EFFECTIVE CRIMINAL POLICY ?*, 513–521.

⁶⁶ The House of Representative of Indonesia, Article 28 F, The 1945 Constitution of the Republic of Indonesia 14 (2002).

⁶⁷ *Id.*

strengthens the guarantee of privacy rights and its relation to communication interference by the state apparatus.⁶⁸

The first of these, is the decision of the Constitutional Court Number 006/PUU-I/2003 on the Judicial Review of Law No. 30 of 2002 on the Corruption Eradication Commission against the UUD 1945 filed by the State Examiner Wealth Commission (KPKPN) and a number of Indonesian citizens. The second is the consideration of the Constitutional Court law in the case Number 012 016-019/PUNN-IV/2006 which filed a petition for judicial review of Law No. 30 of 2002 on Corruption Eradication Commission filed by Mulyana Kusumah and a number of Indonesian citizens. The essence of the two decisions of the MK above is that the interception action regulated in Article 12 paragraph (1) sub-paragraph a UU KPK is not contradictory to the UUD 1945 as well as human rights, because the right to privacy is not an absolute right, but a right that can still be limited as long as regulated by law. Thirdly, in the Decision Number 5/PUU-VII/2010 dated February 24, 2011 the Constitutional Court has stated Article 31 paragraph 5 of Law Number 11 year 2008 about Information and Electronic Transactions is contradictory to the constitution of the Republic of Indonesia and has no binding legal force. The court decided that tapping and recording of speech is a limitation of human rights, which can only be done by law as regulated by Article 28J paragraph 2 of the UUD 1945.

iv. The Connection of Human Rights Principles and KPK

We might recall that there are some principles from IACtHR and EcTHR to justify interception act must be in accordance with international principle concerning the application of human rights that limit the act of interception.

First, is legality; the interception actions by KPK is regulated in Article 12 (1) of the law of KPK and also reinforced by three decisions of MK. Since KPK legally provided by law, this principle KPK is satisfied. Second, Legitimate Aim. This principle emphasizes that this interception or electronic surveillance action should be carried out with legitimate purpose. Here, KPK in Article 12 (1) of the Law of KPK clearly has been given the authority to conduct interception actions with regard to individuals suspected of being linked to a criminal corruption either in the process of investigation or prosecution. Third, Necessity. In this case is the limitation of surveillance measures. This principle attempts to confirms that interception is the last resort in finding information of about for the corruption issue. In Indonesia, there are no articles in laws which state that interception is the last resort. However, the fact that the amount of corruption in Indonesia massive, it could be said that this extraordinary crime surveillance is the last resort. Fourth, is Proportionality; this paper argues that proportionality means the information accessed will be used for the related crime and any unused information will be destroyed or will be returned to the spied-upon person. Moreover, KPK should not publish people's secrets which affect his family's dignity and family's honor. Lastly, Safeguard Against Illegitimate Access; This principle emphasizes the existence of both criminal and civil penalties against parties who use intercepted information in an unauthorized manner. This principle will have the result that all evidence resulting from unlawful interception should be considered as inadmissible evidence. This concept also is not recognized in the law of KPK.

Thus, with respect to the interception action which are done by the KPK some of them do not comply with the international principles on human rights in electronic surveillance

⁶⁸ REDA MANTHOVANI, PENYADAPAN VS PRIVACY: TINJAUAN YURIDIS DAN KOMPARATIF (2013).

action. This means Indonesia must add some articles in order to fully comply with the international principles on human rights in electronic surveillance actions.

IV. CONCLUSION

Corruption is a serious crime in Indonesia. Indonesia commonly recognize that Corruption as extra ordinary crime that has to be combated by extra ordinary means as well. Interception has been determined as the best way to reduce the number of these engaged in corruption, Indonesia is adherence to some international human rights instrument aims to support the basic rights of the people.

The scope of the concept of privacy, in some theorists' perspective has sailed to be properly conceptualized. In addition, the international community recognizes privacy is a fundamental human right which is well-described in several Conventions. This reflects the importance of the right to privacy for every individual in the world, either for adult, children or for people who have disabilities.

Some of the interception actions done by the KPK, do not comply with the international principles on human rights in electronic surveillance actions. This means Indonesia must improve its laws through adding some articles in order to fully comply with international principles on human rights in electronic surveillance actions.

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