

Constitutionality of Wiretapping by KPK in Optimization of Red-Handed Catch Operations

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Abstract

Corruption is usually carried out in congregation and involves state administrators and/or law enforcement officers. This situation makes the Corruption Eradication Commission (KPK) often carry out Red-Handed Catch Operations/*Operasi Tangkap Tangan* (OTT). From these operations, the act of wiretapping has a very vital role in the success of OTT. However, KPK's steps in conducting wiretapping are sometimes disputed by various parties on the grounds that wiretapping has the potential to be misused by certain elements within KPK which can threaten a person's right to privacy and violate human rights. By relying on library research, this research is normative juridical research using qualitative descriptive data analysis techniques. The results of the study show that wiretapping is prohibited by law on the grounds of violating a person's right to privacy, but for the sake of law enforcement and eradication of corruption, wiretapping conducted by KPK is constitutional and does not conflict with Article 28D Paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Privacy is not classified as a non-derogable right, KPK wiretapping is still limited and only aimed at someone who is indicated to have committed corruption.

Korupsi lazimnya dilakukan secara berjamaah serta melibatkan aktor penyelenggara negara dan atau aparat penegak hukum. Situasi ini membuat KPK acap kali melakukan Operasi Tangkap Tangan (OTT). Dari serangkaian operasi tersebut, tindakan penyadapan memiliki peran yang sangat vital dalam menyukseskan OTT. Namun, langkah KPK dalam melakukan penyadapan kadang kala dipermasalahkan oleh berbagai pihak dengan alasan, penyadapan sangat potensial disalahgunakan oleh oknum tertentu di lingkungan KPK yang dapat mengancam hak privasi seseorang serta melanggar HAM. Dengan bertumpuh pada kajian pustaka (library research) maka penelitian ini merupakan penelitian yuridis normative dengan menggunakan tehnik analisa data deskriptif kualitatif. Hasil Penelitian menunjukkan bahwa penyadapan oleh hukum itu dilarang dengan alasan melanggar hak privasi seseorang,

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namun demi penegakan hukum dan pemberantasan korupsi, penyadapan yang dilakukan oleh KPK sifatnya konstitusional dan tidak bertentangan dengan Pasal 28D Ayat (1) UUD NRI 1945. Dilain sisi, walaupun hak privasi bukan tergolong sebagai non-derogable rights, penyadapan KPK tetap terbatas dan hanya ditujukan terhadap seseorang yang terindikasi melakukan korupsi.

Key words: *Corruption; Eradication Commission, Wiretapping; Red-Handed Catch Operation.*

Introduction

After the collapse of the Suharto regime in 1998, the political system and government in Indonesia began to improve in a democratic direction. During the transition from Suharto's authoritarian regime to a democratic regime led by BJ. Habibie has opened the faucet of democracy as wide as possible, so that civil and political liberties are strongly felt, but behind all of that the octopus of corruption by the Suharto regime's elite still grips firmly in the three branches of power, both executive, legislative and judicial. Therefore, progressive, and radical government policies are needed against Corruption, Collusion, and Nepotism for the sake of a bright future for Indonesia.

With the momentum of reform and the spirit that surged in the souls of the reformers at that time, they were able to encourage and pressure policy makers to formulate various legal norms which were then contained in various laws and regulations such as Decree of the People's Consultative Assembly of the Republic of Indonesia Number XI/MPR/1998 concerning State Organizers that are Clean and Free of Corruption, Collusion and Nepotism; Law Number 28 of 1999 concerning State Administrators that are Clean and Free from Corruption, Collusion, and Nepotism, and Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption as amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes. Besides, it would not be complete if it was only limited to statutory policies without being equipped with a commission/institution that fights to enforce the law (law enforcement) in eradicating corruption. So, in 2003 through Law Number 30 of 2002 concerning the Corruption Eradication Commission, KPK was officially formed and established as an independent institution specifically designed to play a role as a trigger mechanism for the prosecutor's office and the police in suppressing corruption.

KPK in carrying out its function as a trigger mechanism is of course designed to have broad authority and is different from other law enforcement institutions. One of the special designs referred to is contained in Article 12 Paragraph (1) letter a of Law no. 30 of 2002 which authorizes KPK to conduct wiretapping and record conversations both during investigations, investigations and prosecutions.¹ This is very logical with the argument that corruption wherever its tempus and locus delicti is basically a crime that always takes advantage of position, where most of the perpetrators are educated people who are always oriented towards enriching themselves, their group or class.²

It was from this basis of authority that during the leadership of Agus Rahardjo, KPK was very active in holding Red-Handed Catch Operations/*Operasi Tangkap Tangan* (OTT) against state officials in the executive and legislative branches. In fact, not infrequently in several OTT cases, KPK has also arrested high-profile corruptors who come from the judiciary who are actually law enforcement officers and representatives of God in the world. However, apart from the success of KPK in carrying out OTT, of course it raises concerns from some parties who feel angry that they will become the target of the next KPK operation. The concerns of various parties are reflected in all the efforts made to dwarf the position and function of KPK itself, so it is not surprising that Law no. 30 of 2002 concerning KPK is the law that is most frequently reviewed by judicial review. And it should be known together that the authority to wiretapping and recording conversations as regulated in Article 12 Paragraph (1) letter a of KPK Law is one of the main motives in the examination of KPK Law at the Constitutional Court. (Aris et al., 2019) The existence of the wiretapping provision is considered as a form of state violation of the rights of citizens guaranteed by the constitution as stated in Article 28 G Paragraph (1) of the 1945 Constitution which states that “*Setiap orang berhak atas perlindungan diri pribadi, keluarga, kehormatan, martabat, dan harta benda yang di bawah kekuasaannya, serta berhak atas rasa aman dan perlindungan dari ancaman ketakutan untuk berbuat atau tidak berbuat sesuatu yang merupakan hak asasi*” (Everyone has the right to personal protection, family, honor, dignity, and property under his control, and has the right to a sense of security and protection from the threat of fear to do or not do something which is a human right). Therefore, based on the description above, it is necessary to study how the constitutionality of KPK's wiretapping authority in maximizing OTT is necessary.

¹ Article 12 Paragraph (1) letter a of Law no. 30 of 2002 reads, "In carrying out the task of investigating, investigating and prosecuting as referred to in Article 6 letter c, the Corruption Eradication Commission has the authority to wiretap and record conversations.

² Tb. Ronny Rahman Nitibaskara, 2007, *Tegakkan Hukum Gunakan Hukum*, PT, Kompas Media Nusantara, Jakarta, p. 26

Discussion

The Urgency of Wiretapping and Recording of Talks in Eradicating Corruption

Corruption as a type of crime that belongs to the category of extraordinary crime inspired the birth and formation of KPK to support law enforcement in Indonesia. There are at least three rational reasons that can explain it; **first**, from an economic point of view, where the high efficiency demanded in the growth and continuity of national development is hampered because corruption is like a parasite that results in various budget leaks both at the central and regional levels so that the impact is very detrimental to the country's economy.³ **Second**; From the aspect of Human Rights, either directly or indirectly, corruption causes violations of the social and economic rights of the community at large.⁴ **Third**, the practice of corruption is not only local, but has become a transnational crime that affects the entire society and economy.⁵

Besides the three reasons mentioned above, in reality other law enforcement officers, both the police and the prosecutor office, are not able to work efficiently and effectively in preventing and eradicating corruption. Likewise, the judiciary, which is actually a place to seek justice, does not function properly, even the judiciary in Indonesia is identical with judicial corruption, which then has an impact on the selective law enforcement system.

On the condition of law enforcement, Bagir Manan stated that the due process of law (right and just law enforcement) was hampered by three social aspects, namely, (1) there is no courage that arises in a person to defend justice both for himself and his environment which according to him stems from the fear or apathy of the community. The emergence of apathy and fear of society at least occurs because basically the authorities act authoritarian and perpetuate oppression, thereby eliminating the courage or desire to fight for the interests of themselves and the community. On the one hand, there is a social structure that accepts the will of the rulers without daring to criticize; (2) Law enforcement, since the reformation period has often been colored by excessive public pressure or intervention. Public views or opinions in law enforcement are indeed very urgent in order to control power, so that the law does not become a tool for the authorities to act arbitrarily. However, according to him, what must be prevented is that public views or opinions should not become pressure that demeans and creates fear for law enforcement officials. If this is the case, then the due process of law will not only be complicated by the apathetic condition of society, completely accepting the

³ See the preamble considering the letters a and b of Law no. 31 of 1999

⁴ Consideration letter a of Law no. 20 Year 2001

⁵ See preamble to letter b United Nation Convention Against Corruption (UNCAC 2003)

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will of the authorities, but also in a society that “dictates” law enforcement actors either because of certain privileges or based on the use of freedom; (3) there is a paradigm shift in the minds of justice seekers themselves, where the majority of justice seekers view that the court is a place to seek victory, no longer a place to seek justice.

This paradigm then motivates anyone in order to win a case willing to justify various ways by utilizing all relationships, either directly or indirectly. It is an open secret that, wherever and whenever they are, including within the judiciary itself, Corruption, Collusion and Nepotism (KKN) is not a phenomenon that just happens, but the trigger is due to a symbiotic mutualism that creates cooperation between many parties such as judges and litigants facilitated by court clerks. Thus, in general, bribery initiatives come from litigants in order to win a case, and one of the astonishing facts in the mass media is that several advocates have to become prisoners at the court because they were caught by KPK in bribery cases in the process of settling cases in court.⁶

On that basis, KPK was then designed as a trigger mechanism for other institutions in an effort to accelerate the eradication of corruption assigned to⁷ to supervise and coordinate with other authorized agencies⁸ in the prevention and eradication of corruption. From this function, we understand that KPK was not born to monopolize the eradication of corruption, because the task of preventing and eradicating corruption was the authority of the Police, the Prosecutor Office and other institutions but did not function optimally. So that the duties and authorities of KPK do not overlap with other agencies, as regulated in Law no. 32 of 2002 Article 11 clearly shows the demarcation of the authority of the Corruption Eradication Commission and other institutions, in which the anti-corruption commission may only conduct investigations, investigations, and prosecutions of criminal acts of corruption by category; **first**, Corruption cases involving state officials, law enforcement officers, or against other people who are related to criminal acts of corruption committed by state officials or law enforcement officers; **second**, seizing the attention that is troubling the community; and/or, **third**;

⁶ Prof. Dr. Bagir Manan, S.H., M.C.L., 2005, *Sistem Peradilan Berwibawa (Suatu Pencarian)*, UII Pres, Yogyakarta, p. 3

⁷ Explicitly, Article 6 of Law no. 30 of 2002 regulates the tasks of the KPK, namely, Coordinate and supervise with other authorized agencies in eradicating corruption; take steps to prevent corruption, including monitoring the administration of the state and conducting investigations, investigations, and prosecutions of criminal acts of corruption.

⁸ The State Audit Board (BPK), the Commission for Examining the Wealth of State Organizers, the Financial and Development Supervisory Agency, and the Inspectorate of Non-Departmental Government Departments or Institutions are agencies that are also given the authority to prevent and eradicate corruption outside the institutions of the Police and the Prosecutor Office.

corruption that causes state losses of at least Rp. 1,000,000,000.00 (one billion rupiah).

With this limitation, it indicates that KPK's authority to investigate corruption cases is limited to the minimum value of state losses incurred in the amount of Rp. 1,000,000,000.00 (one billion rupiah), or the perpetrators come from the circle of power, both as state administrators and law enforcement officials as well as parties related to corruption cases involving state administrators and law enforcement officers, and or the corruption crime gets concern for the public.

Based on these three categories, it is obvious that this will make it difficult for law enforcement institutions (including KPK) to investigate and prosecute if the investigation continues using conventional methods as has been done by the police and prosecutors. Recognizing this and the urgency of the method of wiretapping and recording of conversations in an effort to crack down on crimes classified as extraordinary crimes, the formation of Law no. 30 of 2002 includes the authority to conduct wiretapping and recording of conversations as expressly regulated in Article 12 Paragraph (1) letter a of KPK Law which reads, " In carrying out the duties of investigation, investigation and prosecution as referred to in Article 6 letter c, the Corruption Eradication Commission has the authority to wiretap and record conversations. This authority will then become KPK's most effective weapon in maximizing the Red-Handed Catch Operation against corruptors with their colleagues.

Wiretapping and Recording of Conversations in terms of Aspects of Human Rights and Law Enforcement

Along with KPK's achievements in uncovering major cases involving political party elites, KPK's wiretapping authority was then led to form public opinion as a form of violation of the law and violate a person's right to privacy (violation of human rights). This issue continues to be discussed in public because it is considered that KPK wiretapping does not have a strong legal basis so that it has an impact on KPK wiretapping procedures and mechanisms that are not transparent.⁹ Responding to this, it is necessary to fundamentally understand that wiretapping¹⁰ is generally an act that is prohibited by law because it violates a person's right to privacy. In the perspective of international law, the recognition and respect for

⁹ Puteri Hikmawati, *Operasi Tangkap Tangan Dalam Penanganan Kasus Korupsi*, Jurnal Negara Hukum, Vol. 9, No. 1, June 2018, p. 20

¹⁰ Wiretapping is actually the traditional term for the interception of telephone conversations. Initially, this practice was done by installing a device on a radio network or telephone office. However, in its development, the notion of wiretapping is no longer limited to telephone interception, but also other electronic devices. See Whitfield Diffie and Susan Landau, 1998, *Privacy on the Line: The Politics of Wiretapping and Encryption*, (The MIT Press, Massachusetts).

one's privacy is institutionalized in the Universal Declaration of Human Rights (UDHR). Article 12 of the UDHR states that no one may be disturbed in his personal affairs, his family, his household, or his correspondence, nor is he allowed to violate his honor and good name. Everyone has the right to legal protection against such harassment or assault.

Furthermore, 16 years after the Declaration of Human Rights in Paris, France (December 16, 1966, to be precise), the International Covenant on Civil and Political Rights reaffirms that the nation state recognizes the right to privacy which must be protected from all forms of interference, both from other people and by the state (ruler). This is firmly institutionalized in Article 17 paragraph (1) and paragraph (2), which states that no one can "arbitrarily" or "unlawfully" interfere with personal problems, his family, his home or letter correspondence, or unlawfully attacked his honor and reputation. Therefore, any form of interference or attack as previously mentioned, then everyone has the right to legal protection. In the context of national law, the recognition and protection of the right to privacy has only been institutionalized in detail after the second amendment to the 1945 Constitution, namely Article 28 G paragraph (1) of the 1945 Constitution which states that everyone has the right to protection of personal, family, honor, dignity, and property who are under their control and have the right to a sense of security and protection from the threat of fear to do or not do something which is a human right.¹¹

Based on the legal norms argument above, we can conclude that both KPK and other law enforcement officers who conduct wiretapping in the context of Human Rights (HAM) are certainly an act that violates one's privacy rights to freedom and confidentiality so that it is contrary to the principle of non self-incrimination which is universally applicable, namely the right of every defendant in a criminal case not to provide information that can harm or incriminate himself before the trial or vice versa every defendant has the right to provide information that is beneficial to himself. In addition, wiretapping evidence held by KPK investigators will also be contrary to the principle of unlawful legal evidence, this is none other than because the wiretapping results are part of the evidence obtained by violating someone's right to privacy and against the law/illegitimate.¹² But apart from that, in realizing national ideals, the state is obliged to provide legal protection to all Indonesian people from the domino effect of corruption so that progressive

¹¹ Second Amendment to the 1945 Constitution of the Republic of Indonesia

¹² Muhammad Rizal Akbar. "Kebijakan KPK dalam Penanggulangan Tindak Pidana Korupsi melalui Operasi Tangkap Tangan", Jurnal Fakultas Hukum Universitas Lampung. 2016.

policies are needed that can "neglect" human rights that are not classified as non-derogable rights.

W.D. Ross, one of the moral philosophers, argued that to get out of a dilemmatic situation like the *a quo* above, then one way out is to use the *prima facie* principle, which is a principle where two values at the same level (fundamental) face each other, then it should be choose one value that should take precedence over the other values. Likewise, in terms of the value of the public interest, which is compared with the value of personal interest, the priority is the value of the public interest as one of the main objectives of law according to the teachings of utilitarianism is the maximum benefit for the maximum number of people. On the basis of this choice, individual interests (individual rights) at the implementation and protection level must be adjusted so that the desired public interest can be realized.¹³

So based on the teachings of W.D Ross, the results of wiretapping found in the process of investigation and investigation of criminal acts of corruption can be used as evidence and legally recognized in order to uncover a case so that wiretapping is allowed. If it is explored further about the granting of wiretapping authority to KPK, then the *legis ratio* of wiretapping itself, namely generally corruption is a crime that takes advantage of position, where the actors are people who are educated and understand the law so that law enforcement officers of course find it difficult to drag the main actor. In addition, large-scale corruption is not carried out independently, but "in congregation" supported by various parties within the power elite circle so that this crime looks neat and well-organized.

So that the crimes committed are not detected by law enforcement officers (KPK), the *modus operandi* used is the "coffee shop" agreement which is not stated in the form of a written agreement. In addition to the reasons mentioned above, it should also be noted that KPK does not have the authority to issue an Investigation Termination Order (SP3). This is where one of the urgencies of wiretapping by KPK in obtaining and preparing sufficient initial evidence, because to prove someone has committed corruption requires a minimum of two pieces of evidence.¹⁴

With the arguments above, it can be clearly understood that the authority or act of wiretapping by KPK investigators against someone suspected of committing a

¹³ See the written statement given by Prof. Dr. Bernard Arief Sidharta, S.H as an expert witness in the judicial review of KPK Law at the Constitutional Court (Constitutional Court Decision Number 012-016-019/PUU-IV/2006)

¹⁴ The Government's written answer through the Minister of Law and Human Rights to the questions of the constitutional judges and the attorneys for Petitioner II that were submitted at the trial on October 11, 2006, against the judicial review of the KPK Law (Constitutional Court Decision Number 012-016-019/PUU-IV/2006)

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criminal act of corruption is basically prohibited by law. However, in the context of law enforcement, wiretapping is not an unconstitutional act against Article 28 D Paragraph (1) and Article 28 G Paragraph (1) of the 1945 Constitution. Because it is well known that the constitutional rights as referred to in Article 28D Paragraph (1) and Article 28G Paragraph (1) of the 1945 Constitution are not included in the category of non-derogable rights as considered by the Judges of the Constitutional Court in the Constitutional Court Decision Number 006/PUU-I/2003. In its decision, the Constitutional Court is of the opinion that as stipulated in Article 28I paragraph (1) of the 1945 Constitution, the rights as stipulated in Article 28D paragraph (1) and Article 28G Paragraph (1) of the 1945 Constitution are not included in the category of rights that cannot be reduced under any circumstances (non derogable rights). As a comparison in dealing with wiretapping, we can refer to the practice developed in a liberal American country, where human rights and the constitution are upheld. Dr. Chairul Huda¹⁵, explained that in the practice of wiretapping in the United States, court permission is not an absolute requirement to initiate wiretapping as long as it is related to national security and law enforcement cases so that the absence of court permission does not necessarily make the wiretapping authority unconstitutional.

With the *legis a quo ratio* above, based on the provisions of Article 28J paragraph (2) of the 1945 Constitution, the state as the highest authority in the organization of power has the authority to limit a person's rights and freedoms, but must go through the provisions stipulated by law so that In the context of law enforcement in the field of corruption, wiretapping and rights restrictions are very urgent considering the nature of corruption as an extraordinary crime. For this reason, in responding to public concerns that at any time they are threatened with being the target of KPK wiretapping, it does not need to be taken too seriously, because KPK's wiretapping authority has been clearly regulated in the provisions of Article 11 letter c jo. Article 12 Paragraph (1) letter a of the Corruption Eradication Commission Law wherein the restrictions do not apply in general but are only limited to those who are suspected of being indicated for committing a criminal act of corruption with the characteristics of corruption that involve a state loss of at least IDR 1,000,000,000 (one billion rupiah). Even in 2003, through the Constitutional Court Decision No. 006/PUU-I/2003 The Court still emphasizes the need to issue a set of regulations governing the procedures and requirements for wiretapping and recording of conversations in order to avoid abuse of power by certain parties in KPK.¹⁶

¹⁵ Saksi ahli dalam sidang uji Materi UU KPK tanggal 11 Oktober 2006

¹⁶ Decision of the Constitutional Court (MK) Number 006/PUU-I/2003

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In 2017, before Commission III of the DPR RI, Agus Rahardjo (Chairman of KPK in 2015-2019) explained that the wiretapping carried out by KPK was not carried out arbitrarily. The wiretapping process started from KPK Investigation Directorate, which submitted a wiretapping proposal based on the results of collecting information (*Pengumpulan Bahan Keterangan/pulbaket*) to the wiretapping executor (Deputy for Information and Data of KPK). The proposal is then forwarded to KPK leaders. The wiretapping operation can only be carried out if the five KPK leaders agree and sign a wiretapping order (*Surat Perintah Penyadapan/sprindap*).¹⁷

Hary Budiarto, Deputy for Information and Data of KPK, explained that a more complete explanation regarding the wiretapping of KPK was explained by Hary Budiarto. He explained that institutionally, the wiretapping carried out by KPK involved three deputies with different roles, namely the Deputy for Enforcement acting as a user and conveying the target number to be tapped which was then followed up by wiretapping by the Deputy for Information and Data. The output of the entire wiretapping process will be audited by the Deputy for Internal Supervision and Public Complaints (*Pengawasan Internal dan Pengaduan Masyarakat/PPIM*). Meanwhile, in technical terms, wiretapping of a person's phone number is not carried out arbitrarily, but is only related to legal cases handled by the anti-corruption commission. Likewise with the wiretapping period, the tools used by KPK are limited to storing the wiretapped phone numbers, which is a maximum of 30 days, so beyond that time period the wiretapping tool will automatically cancel the tapped phone number. Likewise with the tapped output, considering the privacy rights of a person being tapped, then filtering the words to be translated and then made in a summary. The consequence is that if the wiretapping process does not produce results in the first 30 days of wiretapping, then to re-tap the same number, the approval of five KPK leaders is required by signing a new wiretapping order. This is necessary, because the validity period of the wiretapping warrant is only the first 30 days.

Implementation of KPK Wiretapping in Red-Handed Catch Operations (OTT)

The success obtained by KPK in carrying out red-handed catch operations, according to Johan Budi¹⁸ is inseparable from the active role of the community in

¹⁷Merdeka.com, "Begini Cara KPK Melakukan Penyadapan Terhadap Target" <https://www.merdeka.com/peristiwa/begini-cara-kpk-melakukan-penyadapan-terhadap-target.html> accessed on 31 May 2019

¹⁸ Johan Budi, who was the spokesperson for KPK in 2006-2014, served as the Deputy for Prevention of KPK (2014-2015), and together with Taufiqurrahman Ruki, Indriyanto Seno served as Acting (Plt) of KPK Leaders (2015) replacing Abraham Samad and Bambang Widjojanto.

providing reports to KPK. The impact was that during the fourth volume of the leadership of KPK under the command of Agus Rahardjo Cs, KPK often surprised the public because it was synonymous with Red-Handed Catch Operation (OTT). In the operation, the evidence found varied from denominations of US dollars and rupiah whose nominal was in the range of tens of millions to billions of rupiah but in fact not all KPK operations were accompanied by evidence in the field as happened in OTT case. Former Constitutional Court Judge, Patrialis Akbar.

According to a legal expert from Airlangga University, Didik Endro Purwoleksono, even though during OTT, no evidence was found on the suspect himself, so basically OTT can still be carried out on the suspect with the following criteria: (a) as soon as the offense is committed; (b) a moment later was called out by the general public as the person who did it; (c) if a moment later, objects are found which are strongly suspected to have been used to commit the crime, which indicates that he is the perpetrator, or (d) participated in or assisted in committing the crime.¹⁹

On the basis of the above interpretation and tracing OTT traces carried out by KPK during its existence, it can be seen clearly that there is a significant difference in OTT of KPK under the command of Agus Rahardjo Cs compared to the actions of the previous KPK leadership, from Taufiequrachman Ruki (KPK Volume I), Antasari Azhar (KPK Volume II), and Abraham Samad (KPK Volume III). During the leadership of Agus Rahardjo (KPK Volume IV), OTT was carried out more and more intensively so that corruption did not spread and involve many parties, so it is not surprising that from year to year OTT of KPK has increased significantly and 2018 became the year the most KPK conducted OTT.²⁰

The success of the Corruption Eradication Commission in carrying out various OTTs was responded to differently by various parties, some considered that OTT did not have a clear legal basis and caused a commotion. However, there are also those who continue to appreciate and support KPK. Strong criticism came from Attorney General H.M. Prasetyo and Professor of Padjadjaran University Romli Atmasasmita. For the Attorney General, OTT carried out by the Corruption Eradication Commission (KPK) only caused noise, but Indonesia's corruption perception index (GPA) did not increase. On the other hand, Romli Atmasasmita assessed that KPK OTT had so far been an illegal act and violated the principle of

¹⁹ Puteri Hikmawati, Op cit, p. 33

²⁰ Based on the author's search results in various electronic media, it was found that since 2014-2018 the most OTT Operations were carried out in 2018, and the results showed that there was an increasing trend of OTT every year as in 2014 and 2015 there were 5 times OTT with a total 12 people (2014) and 19 (2015) suspects. In 2016 there were 17 OTT cases with 58 suspects. In 2017 OTT was carried out 19 times with the number of suspects determined at that time 72 people and in 2018 there were 28 OTT with 108 suspects.

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due process of law²¹. According to him, the Corruption Eradication Commission in conducting OTT applies the method of entrapment which is not regulated in Law no. 30 of 2002 and also not in accordance with the provisions of the Criminal Code Article 1 number 19 concerning "Caught red-handed". Article 1 number 19 of the Criminal Code stipulates that being caught red-handed is a

"Tertangkapnya seorang pada waktu sedang melakukan tindak pidana atau dengan segera setelah saat tindak pidana itu dilakukan, atau sesaat kemudian diserukan oleh khalayak ramai sebagai orang yang melakukannya, atau apabila sesaat kemudian padanya ditemukan benda yang diduga keras telah dipergunakan untuk melakukan tindak pidana itu yang menunjukkan bahwa ia adalah pelakunya atau turut melakukan atau membantu melakukan tindak pidana itu".

Meaning: "The arrest of a person while committing a crime or immediately after the crime was committed, or a moment later being called out by the general public as the person who committed the crime, or if a moment later an object is found which is strongly suspected to have been used to commit the crime, which indicates that he is the perpetrator or has participated in or assisted in committing the crime."

Based on the formulation of Article 1 number 19 of the Criminal Code, he interprets that being caught red-handed is not an event where law enforcement officials have known about it for a long time, then a detention or arrest is made, but a red-handed event and then arrested. If the first approach is used, namely law enforcement officials have known for a long time, then an arrest is made, it is classified as entrapment. This kind of action is also not contained in the content of KPK Law, so entrapment by KPK is illegal. Furthermore, Romli Atmasasmita explained that only the narcotics law (Law No. 35 of 2009) regulates entrapment, not KPK Law, so he concluded that the entrapment method was only recognized and allowed by the Narcotics Law as confirmed by Article 75 letter (j), carry out covert purchase investigation techniques and controlled delivery, preceded by interdiction against narcotics illicit traffic, and letter (i) after there is sufficient initial evidence, wiretapping is carried out related to the misuse and circulation of illegal narcotics.

However, Romli Atmasasmita's opinion was denied by Professor of Criminal Law of UGM, Eddy Os Hiariej²². Eddy Os Hiariej views that OTT carried out by KPK can be interpreted as being caught red-handed and in accordance with Article

²¹Romli Atmasasmita, Guru Besar Emiritus Unpad, "OTT KPK" Sindonews. <https://nasional.sindonews.com/read/1244895/18/ott-kpk-1506991818> accessed on 26 May 2019

²² Eddy Os Hiariej, "Memaknai Tangkap Tangan" Kompas, September 29, 2017, edition, p. 6

1 number 19 of the Criminal Procedure Code. He reasoned that **first**, basically the wiretapping results were the initial evidence of the occurrence of a criminal act so that within a certain period of time he believed that KPK investigators must have carried out a series of wiretapping before OTT was carried out. **Second**, based on the provisions of Article 12 of Law no. 30 of 2002 concerning KPK, the wiretapping authority possessed by KPK is at the investigation stage. This means that the wiretapping by KPK is still at the stage of determining whether or not a criminal act has been committed.

Third, so that the initial evidence obtained previously became sufficient initial evidence, then to concretize a series of wiretapping actions, OTT was carried out. This means that the case can be processed criminally because it has at least two pieces of evidence. Fourth, per the definition of caught red-handed in Article 1 number 19 of the Criminal Procedure Code, it is very possible that an official who was arrested in OTT does not have one of the four conditions because it could be that money or evidence that is the object of a bribe does not yet exist or is not in the hands of the official. This means that the crime of bribery has not been completed or is still in the experimental stage. This is where what in experimental theory is called *geschorté poging* or tentative, or in German literature it is called *unbeendigter versuch* or stalled experiment.

In such a context, evidence or bribes that are the object of bribes are not necessarily in the hands of state officials. However, it should be underlined, Article 15 of Law no. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption, clearly stipulates that attempting to commit a criminal act of corruption, providing assistance, or conspiracy to commit corruption is the same as a completed criminal act of corruption. Thus, OTT carried out by the Corruption Eradication Commission against state officials even without a situation as formulated in Article 1 number 19 of the Criminal Code, but in the context of experimentation, assistance or committing a malicious conspiracy to commit a criminal act of corruption can still be called caught red-handed.²³

From the description above, the arrest operation is a series of actions taken by the Corruption Eradication Commission to uncover a corruption case that is carried out in an organized, congregational manner, and involves parties within the circle of power. As for the condition of a person caught OTT, namely they are caught OTT when receiving a bribe, or after receiving a bribe, or when giving money that is suspected of being a bribe. In general, the modus operandi of corruption in various parts of the world is abuse or discretion (abuse of power, either position or authority), fraud (forgery), extortion (extortion), nepotism

²³ *Ibid*

(nepotism), and bribery (givers of bribes).²⁴ Judging from the *modus operandi*, KPK OTT data on state administrators in the executive, legislative, and judicial circles are usually involved in corruption cases involving bribery and abuse of authority. So, it is exactly what Montesquieu has conveyed in his work *The Spirit of Law*. According to him, there are three obsessions of people in power, namely maintaining power, increasing power, and using power.²⁵ Of these three power obsessions, which often encourage someone to abuse power so as to encourage someone to behave deviantly to enrich themselves, others, or corporations.²⁶ This situation in Lord Acton's view is "power tends to corrupt and absolute power to corrupt absolutely."²⁷ And this abuse of power is clearly illustrated in the corrupt system of state administration in Indonesia (triaspolitic corruption), so it is not wrong if we call Indonesia a kleptocratic country which is reflected in the phenomenon of corruption so far and the empirical facts of KPK OTT which has been carried out 128 times, in time span 2005-2019.

From executive power, for example, the first OTT of KPK was carried out against the Buol Regent Amran Batalipu in 2012. After 2012, a number of regional heads were also caught by KPK, namely in 2019 there were 9 regional heads netted in OTT, in 2018 there were 15 regional heads, in 2017 there were 7 regional heads, in 2016 there were 4 regional heads, and in 2013 only one regional head was netted in OTT. The modes of corruption vary, ranging from bribery in the management and approval of budgets, permits, conversion of forest land functions and exchanging forest areas, procurement/infrastructure projects to buying and selling positions. However, from these various modes, the regional heads who were caught by OTT by KPK mostly used the "bribery" mode of procurement/infrastructure projects which had implications for project fees.

Worse yet, the branch of judicial power which should be a place for people to seek justice has instead become a breeding ground for corruption, bribery and buying and selling of judges' decisions are commonplace even though almost every year some of their colleagues are caught in OTT. In OTT conducted by the Corruption Eradication Commission, so far, 2 Constitutional Court Justices should have acted as guardians and guardians of the constitution, but because of the temptation of power and material things, they have pawned the public's trust. The two judges are Akil Mochtar and Patrialis Akbar. Akil Mochtar is the Chief Justice of the Constitutional Court (MK) as well as the first Constitutional Court

²⁴ Rohim, 2008, *Modus Operandi Tindak Pidana Korupsi*, Pena Multi Media, Jakarta, p. 20.

²⁵ Montesquie, 1993, *Membatasaki Kekuasaan: Telah Mengenai Jiwa Undang-Undang*, PT. Gramedia Pustaka, p. 27

²⁶ <https://acch.kpk.go.id/id/artikel/riset-publik/ke-arrah-pergeseran-beban-pembuktian>.

²⁷ Hariman Satria, 2014 *Anatomi Hukum Pidana Khusus*, UII Press, Yogyakarta, p.21

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judge to be arrested by KPK. He was caught by OTT in 2013 in a bribery case in the process of handling post-conflict local elections in Gunung Mas, North Kalimantan, and Lebak Regency, Banten. Four years later (2017), in the midst of efforts to restore public trust in the Constitutional Court, “unlucky” fate also befell the Constitutional Court Judge, Patrialis Akbar, his actions were detected by KPK until he was finally arrested by KPK in the bribery case for testing the Law on Livestock and Animal Health.

The culture of corruption within the judiciary (judicial corruption) never ends. In the general judiciary, at least in 2016 there were two judges of corruption who were caught by OTT, they were Janner Purba and Toton. Janner Purba, who serves as a corruption judge and chairman of the Kepahiang District Court, was arrested by OTT in 2016. He was detained by KPK along with his colleague Toton, the ad hoc corruption judge of Bengkulu District Court and Amsori Bachsin, the Registrar at Bengkulu District Court. The three of them were involved in bribery while handling the case of misuse of the honorarium of the supervisor of M. Yunus Hospital Bengkulu.²⁸ Still in the same year, KPK also arrested Edy Nasution and Muhammad Santoso, the Registrar of Central Jakarta District Court. Eddy Nasution is involved in the bribery case for the registration of the case for review²⁹. Meanwhile, his colleague Muhammad Santoso was involved in the bribery case in the management of the civil case of PT. Mitra Maju Sukses versus PT. Kapuas Tunggal Persada³⁰. Apart from judges and registrars, corruption cases have also plagued officials within the Supreme Court. Andri Trisianto Sutrisna, who took advantage of his position as Head of the Sub-Directorate of Civil Cassation at the Supreme Court, tried to play in the bribery case of delaying the copy of the cassation decision on behalf of Ichsan, but unfortunately for his action, he was also arrested by KPK in OTT in 2016.³¹

It did not stop there, in 2017 KPK again intensely held OTT and succeeded in securing 2 judges, namely Dewi Suryana and Sudiwardono³² and a Substitute

²⁸ Liputan6.com, “ini kronologi operasi tangkap tangan 2 hakim di Bengkulu” <https://www.liputan6.com/news/read/2515010/ini-kronologi-operasi-tangkap-tangan-2-hakim-di-bengkulu> accessed on 1 June 2019

²⁹ Cnnindonesia.com, “Kilas Balik Kasus Suap PN Jakpus yang jerat Eddy Sindoro” <https://www.cnnindonesia.com/nasional/20181012194606-12-338083/kilas-balik-kasus-suap-pn-jakpus-yang-jerat-eddy-sindoro> accessed on 1 June 2019

³⁰ Kumparan.com, “eks panitera pengadilan negeri Jakarta pusat divonis 5 tahun penjara” <https://kumparan.com/@kumparannews/eks-panitera-pengadilan-negeri-jakarta-pusat-divonis-5-tahun-penjara> accessed on 1 June 2019

³¹ Detik.com, “Jaksa KPK Ungkap Kronologi Kasus Suap Pejabat MA Andri Trisianto Sutrisna”, <https://news.detik.com/berita/d-3201508/jaksa-kpk-ungkap-kronologi-kasus-suap-pejabat-ma-andri-trisianto-sutrisna> accessed on 1 June 2019

³² Liputan6.com, Op cit, accessed on 1 June 2019

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Registrar. Bengkulu District Court Corruption Court Judge Dewi Suryana was involved in a bribery case when handling the case of Wilson, the defendant who was charged with a corruption case involving routine activities at the Bengkulu City Regional Finance and Asset Revenue Service (DPPKAD) in 2013. Meanwhile, Sudiwardono, a judge at the Manado High Court, was arrested by KPK in the case of accepting bribes related to an appeal filed by Marlina Moha Siahaan, a convict in corruption case of Bolaang Mongondow Village Government Apparatus Income Allowance (TPAPD). As for the Substitute Registrar, KPK secured Tarmizi who was involved in a bribery case worth Rp. 425 million and accommodation and transportation facilities worth 9.5 million from PT Aquamarine Divindo Inspection's lawyer, Ahkmah Zani.

In 2018, KPK was even more progressive in holding OTT, as a result there were four judges and 2 registrars who were arrested. The four judges are Iswahyudi Widodo, Irwan, Merry Purba, and Wahyu Widia Nurfitri. Iswahyudi Widodo and Irwan are judges at South Jakarta District Court. Both were caught OTT by KPK in November for accepting bribes for handling civil cases in court. Meanwhile, in August, Merry Purba, an Adhoc Judge at Medan District Court, was arrested by KPK OTT for allegedly being involved in a bribery case against a judge when handling a corruption case in the sale of the ex-HGU (*Hak Guna Usaha*) land for PTPN2. Meanwhile, in March, Wahyu Widia Nurfitri, a Judge at Tangerang District Court, was arrested by KPK on suspicion of bribery related to the management of a civil breach of contract case that was tried at Tangerang District Court.³³ And the latest case, in May 2019, also happened to the judge of Balikpapan District Court, Kayat. He was ambushed by KPK for allegedly accepting a bribe of Rp. 500 million so that Sudarman, the defendant in the letter forgery case, was acquitted.³⁴

In the legislative realm, the time span is 2004-2019, Indonesia Corruption Watch (ICW)³⁵ recorded that there were 254 members of the People's Legislative Council (DPR) who became prisoners (corruption). Of the total, there are 22 of them registered as members of the Indonesian House of Representatives (DPR RI)

³³ KOMPAS.com, "Kaleidoskop 2018, Daftar 29 OTT KPK Sepanjang 2018", <https://nasional.kompas.com/read/2018/12/18/12352721/kaleidoskop-2018-daftar-29-ott-kpk-sepanjang-2018?page=all> accessed on 1 May 2019.

³⁴ Tribunenews.com "Ott KPK di Balikpapan, Kayat Jadi Hakim Pertama tertangkap KPK Tahun 2019 dan Catatan hakim lainnya" <http://kaltim.tribunnews.com/2019/05/06/ott-kpk-di-balikpapan-kayat-jadi-hakim-pertama-tertangkap-kpk-tahun-2019-dan-catatan-hakim-lainnya> accessed on 2 June 2019.

³⁵ Detik.com, "ICW: 22 Anggota DPR Tersangka Korupsi sepanjang 2014-2019" <https://news.detik.com/berita/d-4500126/icw-22-anggota-dpr-tersangka-korupsi-sepanjang-2014-2019> accessed on 1 June 2019

and at least there are several people who have become prisoners because they were caught OTT by KPK. For example, OTT carried out by KPK during 2016 at least captured 2 DPR members, namely Damayanti Wisnu Putranti as a member of Commission V of DPR RI from PDI-P faction. She was caught in a bribery project within the Ministry of Public Works and Public Housing with a bribe value of around 8.1 billion rupiah. Another member of DPR is I Putu Sudiartana from Democrat faction who was arrested by KPK for accepting a bribe of Rp 500 million related to the general allocation fund (DAK) of West Sumatra Province. In addition to members of DPR, the Corruption Eradication Commission (KPK) has also arrested the chairman of DPD, Irman Gusman, who is suspected of receiving bribes related to the regulation of import sugar quotas from Bulog.

In 2017, it was Aditya Anugrah Mona's turn, a member of DPR Commission XI from Golkar Party who was arrested by KPK. Aditya is suspected of being involved in a bribery case against a Manado high judge in handling the appeal case of Marlina Moha Siahaan. In 2018, Eni Maulani Saragih (Vice Chairman of Commission VII of DPR) and Member of Commission XI of DPR Amin Santono added to the list of DPR members who were netted OTT conducted by KPK. Eni Maulani Saragih, a Golkar politician, was arrested by KPK for being involved in a bribery case for the Riau-1 power plant construction project in Riau Province. Meanwhile, Amin Santoso, a Democratic politician, was secured by KPK for the bribery case of regional financial balance funds in the Revised RAPBN (National Budget) for the 2018 fiscal year.

Based on the explanation above, we can conclude that in the executive realm, bribery occurs because of an interest in winning local government projects. In the legislative sphere, the modus operandi commonly used is a service fee for the presentation of project value (project rent/fee) in which members of the council use their power/influence to pass projects for local governments and ministries. Meanwhile, in the judiciary, it is more about buying and selling judge decisions which aim to influence the judge's decision so that they can win the case, so it is not uncommon in cases of bribery in court (judicial corruption) a symbiosis of mutualism that requires each other occurs (Aspan & Suwandi, 2020) which always involves advocates as justice-seeking powers, judges as unfair judges, and registrars as "bridges" intermediaries between advocates and judges.

Therefore, in fact, OTT carried out by KPK led to the risywah (bribery) case. In the law of evidence, the crime of bribery is a crime that is difficult to prove, even though the act of bribery is simple. Because in realizing bribery transactions, usually between the bribe recipient and the bribe giver as *causa proxima* always carry out a

silent operation and as much as possible do not leave evidence that the crime has been committed.³⁶

Conclusion

In the case of being caught red-handed, corruption is one of the most difficult cases to release the suspect from the law. Therefore, it is necessary to have active participation from the community to remote areas to report the corrupt behavior of state officials to KPK so that KPK can collect sufficient initial evidence from the start through wiretapping so that criminal acts of corruption that occur can be prevented as early as possible by carrying out arrest operations when, for a moment, and after a criminal act of corruption (bribery) occurs so that the crime can be prevented as early as possible and does not spread and involve many parties. Di satu sisi, menurut hukum penyadapan melanggar hak privasi seseorang. However, under Indonesian law, wiretapping is allowed because the right to privacy is not included in the category of non-derogable rights, so wiretapping is a constitutional act. It should be underlined that those who were wiretapped have been suspected of committing criminal acts of corruption, especially bribery, the results can be seen from KPK's findings in the 2015-2018 period as many as 32 regional heads were netted in OTT, in the executive realm in the 2016-2018 period at least one member DPD and six members of DPR RI were netted in OTT, and for the judicial area where justice seekers seek justice, it turns out that in the 2013-2019 period there were 11 judges who were arrested by KPK, of which two were judges of the Indonesian Constitutional Court.

References

- Akbar, R. (2017). *Kebijakan Kpk Dalam Penanggulangan Tindak Pidana Korupsi Melalui Operasi Tangkap Tangan*. *POENALE: Jurnal Bagian Hukum Pidana*, 4(1).
- Aris, I., Amir, I., & Amrianto, S. (2019). Konstitusionalitas Hak Angket Dewan Perwakilan Rakyat (DPR) Terhadap Komisi Pemberantasan Korupsi (KPK). *Al-Adalah: Jurnal Hukum Dan Politik Islam*, 4(2), 135-158. <https://doi.org/10.35673/ajmpi.v4i2.436>
- Aspan, Z., & Suwandi, W. (2020). Menjerat Kader, Melepas Partai Politik; Pertanggungjawaban Pidana Partai Politik Dalam Kasus Tindak Pidana Korupsi. *Al-Adalah: Jurnal Hukum Dan Politik Islam*, 5(1), 57-78. <https://doi.org/10.35673/ajmpi.v5i1.677>

Asyari, F. (2017). *Operasi Tangkap Tangan (OTT) Di Pusat dan Daerah Untuk Meraih*

³⁶ Fatimah Asyari, *Operasi Tangkap Tangan (Ott) Di Pusat Dan Daerah Untuk Meraih Wtp Terkait Masalah Pelanggaran Hukum*, *Jurnal LEGALITAS*, Volume 2 Number 1, 2017

Constitutionality of Wiretapping by KPK in Optimization...

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DOI: 10.35673/al-bayyinah.v4i2.2625

WTP Terkait Masalah Pelanggaran Hukum. *LEGALITAS*, 2(1), 57-66.

Eddy Os Hiariej, "Memaknai Tangkap Tangan" Kompas, September 29, 2017, edition, page 6

Hikmawati, P. (2018). *Operasi Tangkap Tangan Dalam Penanganan Kasus Korupsi (Arrest Hand Operation in Handling Corruption Case)*. Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan, 9(1).

Manan, Bagir. (2005). *Sistem Peradilan Berwibawa (Suatu Pencarian)*. Yogyakarta: UII Pres.

Montesquie. (1993). *Membatasi Kekuasaan: Telah Mengenai Jiwa Undang-Undang*, Jakarta: PT. Gramedia Pustaka.

Nitibaskara, Tb. Ronny Rahman. (2007). *Tegakkan Hukum Gunakan Hukum*, Jakarta: PT, Kompas Media Nusantara.

Rohim. (2008). *Modus Operandi Tindak Pidana Korupsi*, Jakarta: Pena Multi Media.

Satria, Hariman. (2014). *Anatomi Hukum Pidana Khusus*, Yogyakarta: UII Press.

Whitfield Diffie dan Susan Landau. (1998). *Privacy on the Line: The Politics of Wiretapping and Encryption*, Massachusetts: The MIT Press.

<https://acch.kpk.go.id/id/artikel/riset-publik/kearah-pergeseran-beban-pembuktian>

<https://www.merdeka.com/peristiwa/begini-cara-kpk-melakukan-penyadapan-terhadap-target.html> accessed on 31 May 2019

<https://nasional.kompas.com/read/2013/12/24/0825013/Mereka.yang.Tertangkap.Tangan.KPK.?page=all> accessed on 8 June 2019.

<https://nasional.sindonews.com/read/1244895/18/ott-kpk-1506991818> accessed on, 26 May 2019.

<https://www.liputan6.com/news/read/2515010/ini-kronologi-operasi-tangkap-tangan-2-hakim-di-bengkulu> accessed on 1 June 2019.

<https://www.cnnindonesia.com/nasional/20181012194606-12-338083/kilas-balik-kasus-suap-pn-jakpus-yang-jerat-eddy-sindoro> accessed on 1 June 2019.

<https://kumparan.com/@kumparannews/eks-panitera-pengadilan-negeri-jakarta-pusat-divonis-5-tahun-penjara> accessed on 1 June 2019.

<https://news.detik.com/berita/d-3201508/jaksa-kpk-ungkap-kronologi-kasus-suap-pejabat-ma-andri-trisianto-sutrisna> accessed on 1 June 2019.

Constitutionality of Wiretapping by KPK in Optimization...

Irfan Amir

DOI: 10.35673/al-bayyinah.v4i2.2625

<https://nasional.kompas.com/read/2018/12/18/12352721/kaleidoskop-2018-daftar-29-ott-kpk-sepanjang-2018?page=all> accessed on 1 May 2019.

<http://kaltim.tribunnews.com/2019/05/06/ott-kpk-di-balikpapan-kayat-jadi-hakim-pertama-tertangkap-kpk-tahun-2019-dan-catatan-hakim-lainnya> accessed on 2 June 2019.

<https://news.detik.com/berita/d-4500126/icw-22-anggota-dpr-tersangka-korupsi-sepanjang-2014-2019j> accessed on 1 June 2019.