

# **THE EXIGENCY OF HUMAN RIGHTS APPROACHES IN THE INTERCEPTION OF COMMUNICATION BILL: AN EFFORT TO STRENGTHEN THE INDONESIAN CRIMINAL JUSTICE SYSTEMS**

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## **Abstract**

Tapping in a human rights perspective is a form of limitation of the right to privacy. As an effort to guarantee human rights protection, tapping as a part of The Interception of Communication Bill arrangements must be following the principles of human rights restrictions. Some of the anomalies in The Interception of Communication Bill appear in vague forms and open up the broad ways of potential violations of individual rights. For this reason, the principles of legality and prudence as a form of control over government actions need to offset the urgency of tapping. Data collection methods use discussions and interviews to enrich and test secondary data findings. This research stipulates that The Interception of Communication Bill use tapping as an induced instrument in criminal law enforcement. At the same time, tapping is regulated regardless of the readiness of the legal apparatus; this naturally raises technical problems in the matter of implementation and opens the door to abuse of authority. Furthermore, based on the need for comprehensive regulation, it is necessary to look at a comprehensive regulatory scheme in the legal system. The

functional control that is in line with the tapping mechanism needs to look at the character of the Indonesian criminal justice system.

*Penyadapan dalam perspektif HAM merupakan bentuk pembatasan hak atas privasi. Guna menjamin perlindungan terhadap HAM, maka pengaturan penyadapan harus dalam sesuai dengan prinsip pembatasan HAM. Beberapa anomali dalam RUU Penyadapan muncul dalam bentuk yang samar dan membuka luas bentuk potensi pelanggaran hak-hak individu. Untuk itu prinsip legalitas dan kehati-hatian sebagai bentuk kontrol terhadap perbuatan pemerintah perlu untuk mengimbangi urgensi penyadapan. Metode pengumpulan data menggunakan diskusi dan wawancara, untuk memperkaya dan menguji temuan data sekunder. Kajian ini memposisikan RUU Penyadapan sebagai kebutuhan yang dipaksakan dalam kebutuhan penegakan hukum pidana. Bersamaan dengan itu pengaturan penyadapan yang diatur tanpa melihat kesiapan dari aparat pelaksana, hal ini tentu menimbulkan permasalahan teknis dalam persoalan penerapan dan membuka pintu penyalahgunaan kewenangan. Berlanjut dari itu, berpijak pada kebutuhan pengaturan yang komprehensif, perlu melihat kembali skema pengaturan yang komprehensif dalam sistem hukum. Adapun kontrol fungsional yang sejalan dengan mekanisme perizinan penyadapan perlu melihat karakter dari sistem peradilan pidana Indonesia.*

**Keywords:** The Precautionary Principle, The Interception of Communication Bill, Human Rights Perceptive, Legal System

## Introduction

The decision of the Constitutional Court Number 5/PUU-VIII/2010 concerning the review of Law Number 11 of 2008 concerning Information and Electronic Transactions of the 1945 Constitution of the Republic of Indonesia (hereinafter abbreviated to the 1945 Constitution), emphasizes that the tapping and recording of talks is a limitation on human rights. Therefore, the limitation included in the aspect of law enforcement must be done through the law as regulated in Article 28J paragraph (2) of the 1945 Constitution. The Constitutional Court, in its deliberation, emphasized the regulation regarding: *first*, who is authorized to issue a tapping order; *second*, the recording can be issued after sufficient preliminary evidence is obtained, which means that the tapping and recording of the conversation are to perfect the evidence. The situation referred to, and the constitutional

mandate of the Constitutional Court's decision became the legitimacy of the Indonesian House of Representatives (DPR) to initiate The Interception of Communication Bill (hereinafter abbreviated as Tapping Bill) under the pretext of unification of various regulations governing tapping that is spread in a variety of tapping arrangements by various institutions and law enforcement officers in Indonesia. Tapping Bill has been in the National Legislation Program (*Prolegnas*) since 2017,<sup>1</sup> it is even targeted to be finished before the 2014-2019 DPR membership period ends. However, until the end of the said period, the Tapping Bill has not yet been completed and is now still included in the National Legislation Program.

It becomes interesting when the following debate is presented as an argument for each group of pros and cons of restrictions on human rights in the tapping bill. For pro-tapping groups, these two principles are often put forward as a basis for defense, namely (1) the principle of legality. The interpretation of this principle requires that tapping does not violate human rights (hereinafter abbreviated to human rights) as long as the provisions regarding tapping are set out in positive legal norms (*prescribed by law*) that applies nationally clearly and in detail; formulated sensibly and not carelessly; and the rules set out in the articles are not ambiguous or multi-interpretation.<sup>2</sup> Many case references at the international level can be observed as lessons learned related to the application of the principle of legality related to restrictions on human rights in the context of state tapping actions, including the Pinkney case against the Government of Canada,<sup>3</sup> and Anna Maroufidou's case against the Swedish Government.<sup>4</sup> In principle, all decisions in the case illustrate that restrictions on human

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<sup>1</sup> Andhika Prasetya, "RUU Penyadapan Resmi Masuk Prolegnas di DPR", *Detik News* (21 Nov 2017), <https://news.detik.com/berita/d-3736305/ruu-penyadapan-resmi-masuk-prolegnas-di-dpr>, accessed 20 May 2020.

<sup>2</sup> Mohamed Elewa Badar, "Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments," *International Journal of Human Rights*, vol. 7, no. 4 (2003), p. 63.

<sup>3</sup> Larry James Pinkney v. Canada, Comm. 27/1978, U.N. Doc. CCPR/C/OP/1 at 12 (HRC 1980), *University of Minnesota Library* (2 April 1980), [https://hrlibrary.umn.edu/undoc/html/27\\_1978.htm](https://hrlibrary.umn.edu/undoc/html/27_1978.htm), accessed 23 July 2020

<sup>4</sup> Anna Maroufidou v. Sweden, Communication No. R.13/58, U.N. Doc. Supp. No. 40 (A/36/40) at 160 (1981), *University of Minnesota Library* (9 April 1981), <https://hrlibrary.umn.edu/undoc/session/36/13-58.htm>, accessed 23 July 2020

rights related to tapping must be done carefully, not haphazardly, and have been regulated completely in positive domestic law; and the principle of national security. In line with the rights of personal freedom that fall into the domain of derogable right, the aspect of reduction or restriction in its fulfilment becomes a discussion that needs to be examined in depth.

Legal and human rights instruments emphasize the principle of *necesitas* which emphasizes that restrictions can be imposed if they are proportional to the threats faced and not permitted to be discriminatory. The reasons for limiting rights that fall into the category of *derogable rights* as the *Siracusa Principles* are for (i) maintaining national security or public order or health or public morality; and (ii) respecting the rights or freedoms of others. For this reason, if tapping is not strictly regulated and prudent, it will actually become a “*clawback*” that provides a potential for abuse by the State.<sup>5</sup>

On the one hand, the anti-tapping group firmly states that tapping actions are not only an invasion of privacy as part of human rights, the looseness of legal instruments in tapping is also often abused by the government for a variety of interests which ultimately citizens will suffer losses,<sup>6</sup> without any mechanism juridical justice (*access to justice and fair trial*) related to compensation for losses suffered.<sup>7</sup> Especially when entering the civilization of *Big Data* and the *Internet of Things* today, where citizens dependence on communication technology devices connected to each other is increasingly high, the intersection between human rights and government intercepts is so vulnerable to abuse.<sup>8</sup> For this reason, to balance the interests of human rights and the State in harmony, referring to Article 6 letter b of Law Number 15 of 2019 concerning Amendments to Law Number 11 of 2012 concerning Formation of

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<sup>5</sup> Misra Dewita, “Aspek Hukum Hak Asasi Manusia Dalam Tindakan Penyadapan Yang Dilakukan Oleh Komisi Pemberantasan Tindak Pidana Korupsi”, Master Thesis, Indonesian University, July 2011.

<sup>6</sup> Joseph Noreña, “Unfaithful but Not Without Privacy Protections: The Seventh Circuit Addresses When Courts Should Consider an E-Mail Tapping Unlawful in *Epstein v. Epstein*”, *Boston College Law Review*, vol. 59, no. 9 (2018), p. 391.

<sup>7</sup> Simon Bronitt, “Electronic surveillance, Human Rights and Criminal Justice”, *Australian Journal of Human Rights*, vol. 3, no. 2 (1997), p 183.

<sup>8</sup> David Nersessian, “The law and Ethics of Big Data Analytics: A New Role for International Human Rights in the search for Global Standards”, *Business Horizons*, Elsevier, vol. 61, no. 6 (2018), p. 845.

Laws and Regulations states that “*Material of Laws and Regulations. Must reflect the principle: (b) humanity*”. Based on the explanation referred to as “*the principle of humanity*”, any material content of legislation must reflect the protection and respect for human rights and the dignity and dignity of each citizen and Indonesian population in a proportional manner.<sup>9</sup>

Under the background of the background as mentioned above, this study seeks to examine the coherence and consistency of the Tapping Bill with the human rights approach (hereinafter abbreviated to human rights), so that several key issues can be answered, including: (1) How the application of human rights restrictions in The Tapping Bill, especially in the aspect of criminal law enforcement, (2) How does the principle of prudence in tapping operations anticipate violations of rights after the limitation of human rights and the mechanism of recovery for victims; and (3) How is the intersection between the draft Tapping Bill and other legal instruments. In order to simplify the direction of research, the above problem is focused on the research question of how tapping arrangements carried out in the Tapping Bill accommodate human rights principles and norms.

## Methodology

This study seeks to examine the concepts and arrangements of the Tapping Bill with the concept of human rights. For this reason, primary data collection is done by conducting focus group discussions and directional interviews with several relevant parties in this issue including law enforcement officials; academics or experts; government and legal activists; while secondary data collection is based on materials in the form of national and international human rights instruments, relevant textbooks, journals, decisions and other sources.

Furthermore, the data obtained were analyzed using qualitative-normative techniques. This technique is used to see the application of human rights norms in the formation of legislation, especially in the articles in the Tapping Bill. This analysis method is in line with the views of FonsCoomand and Fred Grunfeld in *Methods of Human Rights Research: A Primer*, which emphasizes in human rights research carried out by

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<sup>9</sup> Agus Suntoro, “Penerapan Asas dan Norma Hak Asasi Manusia Dalam Undang-Undang Pemberantasan Tindak Pidana Terorisme,” *Negara Hukum*, vol. 11, no. 1 (2020), p. 65.

looking at the compatibility of the subject matter with the contents of human rights standards, the effectiveness of international and domestic law enforcement mechanisms, the level of compliance with human rights standards by the State and non-state actors, the role of human rights in foreign policy.<sup>10</sup> This conception is also in line with Todd Landman's thoughts in *Measuring Human Rights: Principle, Practice, and Policy*, emphasizing four functions of analysis of human rights, namely: (a) carrying out contextual descriptions and documentation of violations; (b) classification of various types of violations; (c) mapping and recognizing patterns of violations, space and time; and (d) secondary analysis that explains violations and solutions to reduce them in the future. Whereas the indicators for evaluating are based on aspects, namely: (1) international and national human rights standards; (2) general indicators are based on norms stipulated in the constitution; and (3) specific indicators including civil rights, political rights, economic rights, social rights and cultural rights.<sup>11</sup>

### **Tapping and Human Rights Restriction in Criminal Law**

The validity of tapping, especially in investigations, is recognized in various countries as it has helped many legal processes that make it easier for law enforcement officials to uncover criminal acts. In line with technological developments, the needs and effectiveness of tapping broaden the scope and definition of tapping itself.<sup>12</sup> However, the authority of the law enforcement apparatus must still be limited so that abuse of authority does not occur. Although in Indonesia there has never been a report and lawsuit regarding the results of tapping, except for the public's view of the screening of tapping results which are sometimes considered not to focus on the main evidence.

Indonesia needs to compare and take knowledge from the formation of regulations regarding tapping in various countries, for

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<sup>10</sup> Fons Coomans, Fred Grünfeld, and Menno T. Kamminga, "Methods of Human Rights Research: A Primer", *Human Rights Quarterly*, vol. 32, no. 1 (2010), p. 179.

<sup>11</sup> Todd Landman, "Measuring Human Rights : Principle, Practice and Policy", *Journal Human Rights Quarterly*, *Jhon Hopkin University*, vol. 26, no. 4 (2004), p. 932.

<sup>12</sup> Mitchell Congram, Peter Bell and Mark Lauchs, *Policing Transnational Organized Crime and Corruption*, *Policing Transnational Organized Crime and Corruption* (London: Palgrave Macmillan, 2013), p. 1-10.

example, the United States which initially considered that tapping in world war and alcohol trade was not a violation of human rights. However, the paradigm changed in 1960 which began to arise the awareness of the State to try to protect personal rights from unauthorized tapping by regulating that tapping must be based on a court order as regulated in Title III of the Omnibus Safe Streets and Crime Control Act and Crime Control Act 1968; The Foreign Intelligence Surveillance Act 1978; The Pen Registers and Trap and Trace Devices 2011 (chapter of Title 18); Communication Assistance for Law Enforcement Act (CALEA) 1994; and the Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act 2001.

Likewise, Britain began regulating tapping in 1984. This situation emerges because of the background of the European Court of Human Rights's decision regarding the arbitrary tapping case by the British Government against James Malone. This situation encourages the establishment of legal surveillance (in tapping) to provide protection to individuals related to arbitrary interference by the State. Then it was followed up by issuing *The Tapping of Communications Act* 1985 (The 1985 Act), and then replaced by *Regulation of the Investigatory Power Act* (RIPA) 2000. The regulation besides giving authority to government agencies to be involved in tapping, supervision, monitoring to investigate telephone, text messages, e-mails and so on. The context is for state security, public order, the country's economy and crime detection, and preventing the practice of social unrest.

While the Government of Netherland began to be open in tapping activity in 1994. The Netherlands forming laws governing tapping including the *Telecommunication Facilities Act* (*wet op de telecommunicatievoorzieningen*) and the *Dutch Telecommunications Act* (*Telecommunicatie Wet*) and renewal through *The Intelligence and Security Services Act* 2002, which emphasizes the cooperation of public telecommunications network providers to store data resulting from communications for investigation, tracking and prosecution. In fact, this legal framework is easing from the previous doctrine, which before 1971 banned tapping by law enforcement officials altogether - although it was limited only to national security and defense. Even since 2000 in the formation of the law on special forced efforts (*wet bijzondere opsporingsbevoegdheden*) regulates the expansion of the authority

of tapping, although emphasizing that illegal tapping does not have a valid evidence value and regulates the testing mechanism of tapping as a means of collecting evidence.

The need for regulation and formation of tapping laws in Indonesia is divided into two significant discourses. The first thought is to judge it as an excessive effort in the era of democracy and a climate of citizens' freedom because it is seen as contrary to law and human rights. Concerning that the Tapping Law will lead to the exclusivity that regulates tapping through the law, even though it is only a technical matter in investigations so that it is not specifically feasible to regulate because there are other piece of evidences as in Article 182 of the Criminal Procedure Code.<sup>13</sup>

The thinking which considers that the Tapping Law is urgency is based on tactical thinking that was empirically tapping has been regulated and spread in various instruments, almost 20 (twenty) laws and internal regulations. This authority is given to various law enforcers and/or other government agencies so that uniformity is needed to avoid arbitrariness. In line with the view of the Constitutional Court in decision Number: 5/PUU-VIII/2010, which sees the empirical reliance of so many regulations and institutions that conduct tapping.<sup>14</sup>

This conception of need or urgency is influenced by the view that in principle tapping is contrary to human rights. Therefore, in the human rights doctrine, as explained in the previous discussion, it is emphasized that tapping is included in the *derogable rights* regime, the limitation must also be through the law so that the establishment of the Tapping Law is a necessity and must. Even though in reality, up to now there have not been many (almost never) conducted eavesdropping in investigations to collect evidence carried out by law enforcement officers, especially the Police and Prosecutors. Standard practices in the process of investigating and carrying out court decisions (limited search of escaped convicts), limited to *log data records*, *cloning devices* and *check*

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<sup>13</sup> Interview with Dr. Edmon Makarim, Dean Faculty of Law Indonesian University at 3 July 2019 and interview with Prof. Jawahir Thontowi, Lecture at Indonesian Islam University (UII) at 31 July 2019.

<sup>14</sup> Interview with Dr. Pujiono, Lecture at Diponegoro University (UNDIP) at 29 July 2019 and Dr. Sigit Suseno Vice Chancellor Padjajaran University (UNPAD) at 21 August 2019.



locations.<sup>15</sup> In contrast, to the Corruption Eradication Commission (KPK) which uses tapping as one of the instruments for disclosing corruption.

The follow-up of the concept of urgency in the establishment of the Tapping Law is to be *constrained to the extent of lawful tapping* as part of the criminal law framework that should be carried out by an official state institution that has authoritatively in accordance with national and international regulations, there is a definite period in conducting tapping, has accountability for the results of tapping as a piece of digital forensic evidence when it will be submitted at trial, and there are restrictions on the parties who can access tapping. This framework is in line with regulations in the *Convention on Cybercrime, 23.XI.2001* in Budapest, which regulates the prohibition of illegal access to devices for personal privacy, arbitrariness in tapping, data and tapping systems, misuse of devices, and various other matters.<sup>16</sup>

Based on the relativity and anticipation of abuse in the implementation of tapping, Agustinus Pohan stressed the importance of establishing special parameters for investigators, namely the existence of reasonable suspicion and the principle of proportionality.<sup>17</sup> This context is needed to balance the level of urgency in the use of forced efforts in law enforcement with the interests of individuals whose rights will be violated. The implication is that the use of forced measures in the tapping room is severely restricted to only those crimes that fall into serious categorization (*serious crime*). This paradigmatic must become an *intrusive* pattern which is announced that tapping is only equally treated in uncovering serious criminal offenses. The implication is that the tapping is not the main modality in the technique of disclosing cases/criminal acts to find the first evidence, it only functions if there is no other way in the investigation technique. If this method is obeyed, then in law enforcement a principle of subsidiarity will be created which

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<sup>15</sup> Interview with Central Java Police and DI Yogyakarta Police at 29 July 2019, West Java Police and Cimahi Prosecutor at 22 August 2019, Police Law Division and Attorney General at 3 July 2019.

<sup>16</sup> Council of Europe, "Convention on Cybercrime" *Council of Europe* (November 2001), <https://publication/uuid/0FC286B2-0C05-4905-893D-D5B785096DEA>.

<sup>17</sup> Interview with Dr. Agustinus Pohan, Lecture of Parahyangan University (Unpar) at 23 August 2019.

emphasizes effectiveness in the use of means of tapping and respecting human rights,<sup>18</sup> which are not misused for purposes other than the law.<sup>19</sup>

If we refer to The Interception of Communication Bill Article 6 paragraph (2), this tapping will be applied to a very diverse criminal offence including (a). Corruption; (b) deprivation of liberty/abduction; (c) trafficking in persons; (d) smuggling; (e) money laundering and/or counterfeiting; (f) psychotropic drugs and/or narcotics; (g) mining without permission; (h) fishing without permission; (i) customs; and (j) forest destruction. Thus, the regulation regarding criminal offences that can be intercepted is a combination of international criminal acts and *transnational crime*, which is so broad in scope that it needs restrictions.<sup>20</sup>

Again, to discuss how human rights relate to tapping, we need to refer to the conception of guarantees for the protection of the right to personal freedom. The right to privacy is normatively referred to as privacy is one of the fundamental elements in the field of human rights that must be respected, protected and upheld, including by the State through its apparatus. The range of regulation on the right to personal freedom is described starting from international and national instruments such as the provisions of Article 13 of the *Universal Declaration of Human Right* (UDHR), Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR), 16 General Comments of ICCPR, Article 38G paragraph (1 ) and 28F of the 1945 Constitution, Article 29 paragraph (1) and Article 32 of Law Number 39 of 1999 concerning Human Rights.

In summary, this conception gives recognition and guarantees to every person not to be treated arbitrarily with disturbing actions concerning personal, family, household or correspondence matters, besides that, an attack on his/her honor and reputation is also prohibited. Thus, the consequence is the existence of an effort to protect from acts of harassment or attack on someone's freedom and efforts to recover if there is a violation of these rights. Thus, it can be said that the concept of privacy is an idea to maintain personal integrity

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<sup>18</sup> Johannes Keiler, Michele Panzavolta, and David Roef, Criminal Law, in Jaap Hage, Antonia Waltermann, and Bram Akkermans (Eds.), *Introduction to Law* (Switzerland: Springer, 2017).

<sup>19</sup> Interview with Central Java Police at 29 July 2019 and interview with West Java Police at 22 August 2019.

<sup>20</sup> Interview with Dr. Pujiono, Lecture at Diponegoro University (UNDIP) at 29 July 2019.

and dignity, and the right to privacy is the ability of individuals to have control over the information used. The right to privacy is a key element of individual freedom and dignity. Privacy protection is a powerful driver for the realization of political, spiritual, and even sexual freedom. The collection and distribution of personal data is a violation of someone's privacy. Therefore, privacy includes the right to determine whether or not to provide personal data.

In the context of the State, it is understood that every individual has the right to choose which information is his secret and which information is published, on the other hand, there is a state apparatus especially in the law enforcement process that seeks and digs information for the disclosure of a crime, in addition to intelligence needs for security reasons country. Including adequate guarantees of abuse.<sup>21</sup> It is that always touches that needs to be regulated in regulation.

Guarantees for the protection of privacy as intended implementation are fulfilled through the mechanism of claims and reports regarding defamation articles or compensation (fines). Therefore, privacy as a right that must be protected, interpreted by the Judge in making his decision not only depends on the consequences (*injuries resulting*) from the violation of privacy, but also must consider the value of the protection given to thoughts, feelings, and emotions, expressed through writing or art media, for example, the value of the right not to be vilified, the right to not get acts of violence/assault or other preventing nature.

Marren Samuel and Brandiels Louis G. emphasizes five elements or elements in protecting the right to privacy, which includes:<sup>22</sup>

1. A person's privacy must not be violated for publications relating to material or matters of public interest;
2. The privacy should not be violated on information or material in special situations, for example there must be the protection of the right to privacy when a statement is requested at a hearing, when making policy in parliament or made by a public institution. Although the information conveyed by the individual is a normal conversation or statement;

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<sup>21</sup> Hilaire Barnett, *Constitutional and Administrative Law* (London: Cavendish Publishing Limited, 2002), p.641-642

<sup>22</sup> Louis D Brandeis and Samuel D Warren, "The Right to Privacy", *Harvard Law Rev*, vol. 5, no. 5 (1980), p. 193.

3. The rule of law must regulate opportunities for victims of violations of the right to privacy to submit compensation for their cases;
4. Disputes over the right to privacy can be stopped when there is a mediation channel (communication between individuals); and
5. Information published in the truth is relative and not always *good*. The injured individual has the right to make a rebuttal to correct the information published, and the individual or institution that publishes must exercise the right of reply to that publication.

The United Nations intensively emphasized the regulation of privacy in 1976 by encouraging the creation of an international standard on the protection of personal data by emphasizing obligations to the State that is, first, the State must immediately regulate the protection of individual privacy by drafting laws that contain opportunities for individuals who feel that their privacy rights have been violated to file their case (compensation); secondly, establishing regulations containing sanctions to be imposed on those who violate both prison sentences and fines for violations including: (a) spying on or tapping into someone's speech unless there is a court order or other authorized state agency; (b) Publicly disclosing someone's personal information; (c) spy on a person with equipment/technology unless there is a court order or other authorized body; third, it is possible for the State to conduct tapping in the interest of national security on conditions permitted by international and domestic law.<sup>23</sup>

This pressure point then becomes a guideline that tapping or tapping is given space in a democratic country, but it is not necessarily done arbitrarily, because it will reduce and deprive a person's human rights, including in the enforcement of criminal law. The importance of regulating the limits, scope and mechanism of restoring rights, especially to avoid the pretext of disclosure of cases that have never been disputed before (finding fault) because it can interfere with a person's privacy rights. The context and concept is also one of the considerations of the Constitutional Court in decision Number: 5/PUU-VIII/2010 and decision Number: 006/PUU-I/2003, by deciding that tapping

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<sup>23</sup> Herlambang Perdana, *Kebebasan Berekspresi di Indonesia; Hukum, Dinamika Masalah, dan Tantangannya* (Jakarta: ELSAM, 2016), p. 13.

arrangements should be established in a special law. This circumstance is urgent because until now, the regulations regarding tapping which reduce human rights, especially the right to personal freedom (privacy) are still varied, some are at the level of laws, government regulations, even just the Standard Operating Procedure (SOP) of each agency (especially law enforcement officer), and very much depends on the policies of each law enforcement agency. This law is needed because up to now. There is still no synchronous regulation regarding tapping so that it has the potential to harm the constitutional rights of citizens in general. Government regulations cannot regulate restrictions on human rights because they are only administrative arrangements and do not have the authority to accommodate restrictions on human rights.

In the context of human rights, there are no restrictions that can be regulated in regulations other than the law as regulated in Article 28J (2) Second Amendment of the 1945 Constitution. Thus in international human rights regulations such as the International Covenant on Civil and Political Rights (ICCPR) and the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights all stipulate that the limitation of rights must not exceed those stipulated by the covenant and stipulates that there are strong reasons for the reasons for restrictions to be carried out, and are determined by law by basing them on aspects that should not be arbitrary and reasonable, clear and accessible restrictions, protection and recovery.

### **Application of the Precautionary Principle and Restoration of Victims' Rights**

The decision of the Constitutional Court Number 5/PUU-VIII/2010 does not guide regulating the material content stipulated in the tapping law. However, in legal considerations, it seems that they accept and agree with the main points of the information *ad informandum*. Ifdhal Kasim and Mohammad Fajrul Falaakh. In summary, what needs to be regulated in the tapping law includes: the authority to conduct tapping; categories of legal subjects who are authorized to conduct tapping; there is an official authority appointed to permit tapping; the procedure of tapping; the purpose of tapping specifically; a guaranteed period in making tapping; restrictions on handling material from

tapping results; restrictions regarding parties who can access of tapping; supervision of tapping, and the use of tapping results.

In the Human Right Council Twentieth Session document with Agenda A/HRC/20/14 regarding the *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorists: Framework principles for securing the human rights of victims of terrorism*,<sup>24</sup> also provides arrangements for tapping that must also be obeyed in tapping for disclosure of criminal offenses. In summary, these provisions regulate the requirements in the face of, i.e. they must be regulated in regulations with the following provisions: (1) regulating the categories of actions taken; (2) objectives in the implementation of tapping; (3) clear arrangements regarding the subject that is tapping as well as the tapped object; (4) arrangements regarding the time limit and duration of tapping performed; (5) arrangements related to licensing by authoritative institutions concerning tapping mechanisms; and (6) limits in supervision to emphasize the principle of proportionality and *necesitas*.

One other point that is no less important than the scope of the regulation relating to tapping actions is that it is ensured that the use of tapping actions by authorities must be carried out based on the principle of prudence. Interpretation of this principle is given an understanding that government action in the case of tapping must be based on the four fundamental frameworks cumulatively. First, tapping must obtain legal approval before the tapping is carried out (*legalize approval ex-ante*). This is intended so that the action of tapping is carried out by the authorities (*bevoegdheid*) and is not an illegal activity in order to minimize the potential for counter-claims by parties/citizens harmed due to tapping actions. Second, the action of tapping needs to be taken only at a time when an event that has a great potential threatens a country's sovereignty. Related to the qualification of the initial event, which is indicated to threaten a country's sovereignty, the government needs to formulate in detail by keeping abreast of the latest developments in the use of communication technology. Third, the interpretation of the precautionary principle sees that the action of tapping must be placed

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<sup>24</sup> Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, International Organization, vol. A/HRC/20/1, 2012 (4 June 2012) <https://www.ochcr.org/EN/Issues/Terrorism/Pages/Annual.aspx>, accessed at 24 June 2020.

in a proportional and balanced framework. This implies that the action of tapping continues to be carried out in methods and ways that as much as possible can avoid violations of human rights (*absence of less intrusive means*), especially violations of citizens' privacy rights. Fourth, careful treatment of tapping is carried out fairly to everyone, without distinguishing race or viewing the nationality of a person or party as the subject of government tapping. This fair standing includes foreign nationals in the domestic territory while still observing human rights provisions that apply internationally.

Based on this principle, placing the community as an object of tapping that has human rights, especially the right to *privacy*, must be protected and respected. Therefore, any regulation made in the framework of tapping for the sake of law enforcement must position humans not to be victims of arbitrary tapping (*abuse of power*) and/or be an aggrieved party entitled to obtain reparations. Therefore, seeing that tapping is obliged to heed a number of comprehensive provisions, such as the principle of legality and the principle of prudence, then the end of the discussion on limiting human rights related to tapping actions by the government is narrowed to the issue of control, recovery and compensation mechanisms. The basic assumption is built from the perspective of public law that all government actions must be held accountable.<sup>25</sup> Even though government authority is free and bound, in *ipso facto* the actions of the government are appropriate to comply with the rules of the game in order to prevent acts of *abuse of power* or arbitrary acts (*detournement du pouvoir*).<sup>26</sup>

In human rights theory, the understanding of victims is regulated in the *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power* 1985 (*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*) and Basic Principles and Guidelines on Rights Recovery and Reparation of Victims of Human Rights Violations of Human Rights (*Basic Principles and Guidelines on the Right to A Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*). The two documents

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<sup>25</sup> Anna Erliyana, "Judicial Control Terhadap Kewenangan Administrasi Negara: Tinjauan Aspek Liability (Tanggung Jawab) dan Remedy (Pemulihan/GantiRugi)", *Jurnal Hukum dan Pembangunan*, vol. 28 (1998), p. 98.

<sup>26</sup> Kenneth Culp Davis, *Administrative Law and Government* (St. Paul: West Publishing Co, 1960), p. 52-53.

generally stated that those referred to as victims in the field of human rights were:

“Individuals or groups who suffered loss, including physical or mental injury, emotional suffering, economic loss or real deprivation of their basic rights, for actions or omission constituting grave violations of international human rights law, or serious violations of international humanitarian law. The term victim also includes, insofar as it is appropriate, a direct family or person who is directly under the responsibility of the victims and those who have suffered in helping the victims who are miserable or preventing people from becoming victims”.<sup>27</sup>

Thus, explicitly the categorization of victims is not only those who suffer directly, but the parties who are harmed as a result of actions in this context are in haphazard law enforcement. Victims must get effective remedies before national authorities.<sup>28</sup>

Thus, the regulations established in the Tapping Bill need to be more strict about specific arrangements and procedures that can be implemented to recover the losses incurred by the state apparatus to the people who are victims of these human rights violations. Various forms and formulas in the recovery of victims' rights can be taken either judicially, for example, by lawsuits, claim for compensation, or non-judicial through regulation in legislation. The results of the form of recovery are quite diverse, including compensation in the form of giving a sum of compensation for losses suffered by the victim, rehabilitation of good name, actions of the perpetrators (government officials) to submit an apology or regret for the actions taken, as well as the replacement of property suffered by the victim.

Technically, a number of measurable steps that need to be taken in the aspects of control, recovery and compensation mechanisms in tapping actions are placed on a number of basic principles, including First, postulating to the principle of legality and the precautionary principle as discussed earlier, then the action of tapping is attached to the party that is legally authorized. In the sense that the command of

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<sup>27</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34, 29 November 1985, <https://www.undoc.org>, accessed at 25 June 2020.

<sup>28</sup> Hilaire Barnett, *Constitutional and Administrative Law*..., p. 641-642.



tapping should not be done only by verbal commands (factual actions), but must be in written form. The substance in tapping orders as contained in the scope formulated in this article so that starting from the purpose of tapping, the scope of tapping, who is the subject of tapping, the tapping procedures, up to the tapping mechanism also needs to be coherent with a human rights perspective. Overlapping arrangements with regard to the authority to provide written legalization of tapping actions at the domestic level need to be synchronized or harmonized vertically-horizontally. So that in the future there will be no terminology of responsibility relating to tapping actions when the legalization of tapping orders is carried out with just remedies from parties victim.

Second, in the context of public law, postulating Lotulung,<sup>29</sup> Jackson and Philips thoughts,<sup>30</sup> legalization of tapping measures can be taken if legal intercepts are qualified as actions by: (1) Externally invalid criteria, namely (a) Acts without authority or competence, including *rationae materiae*; *rationae locus*; *rationae temporis*; (b) Errors of form and erroneous manufacturing procedures, and (2) Internal illegitimate criteria, among others (a) contrary to statutory provisions, including acts or administrative actions contrary to legal motives or contrary to factual motives; (b) abuse of authority by the body and/or official in carrying out administrative acts or deeds (*detournement de pouvoir*) ie administrative actions or actions contrary to the objectives of the public interest; administrative actions or actions deviate from the public interest that has been outlined in the provisions of the legislation; or administrative deeds or actions deviate from the procedure set out in the provisions of the legislation;

Third, in accordance with the mandate of international provisions related to human rights, the victim who is harmed by the government tapping action must be given a fair trial process mechanism to be able to file a claim for recovery and a claim for compensation. Related to the claim for recovery, it is deemed necessary to formulate normatively the forms of recovery, the criteria for recovery, and concrete actions from the government as a form of recovery provided by the government to

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<sup>29</sup> Paulus Efendie Lotulung, *Beberapa Sistem Tentang Kontrol Segi Hukum Terhadap Pemerintah* (Bandung: Citra Aditya Bakti, 1993), p. 11-12

<sup>30</sup> O. Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (London: Sweet & Maxwell Ltd, 1987), p. 245-300.

victims. As for the claim for damages, the amount and mechanism of compensation for losses provided by the government to victims also need to be formulated in detail into positive legal norms in the future. For this reason, several options from an international perspective can be used as qualifications for size, amount, and mechanism related to compensation, such as *economic loss models*, *punitive damages*, or *specific performances models*.<sup>31</sup>

Unfortunately, if we pay close attention to the provisions in the Draft Bill, *efforts are* still needed to remind the legislators, both the government and the legislature, to be more careful in applying the precautionary principle in the drafting of this regulation because the implications of human rights violations are very large, especially since there is no regulation regarding recovery mechanisms. Which is effective both judicial and non-judicial, which is regulated for victims of potential *abuse of power* in tapping.

### **Intersection Tapping Law with the other Special Criminal Law**

One of the considerations of the Constitutional Court in its decision regarding the mandate for the establishment of the Tapping Bill is in the framework of uniforming regulations and the unification of various regulations divorced in various legislative products. The implication of this mandate is the need for comprehensive tapping arrangements, which are expected to accommodate the processes and needs of various crimes that have different characters. This certainly requires careful observation and compatibility between the Tapping Bill and other regulations. Based on the Tapping Bill, the position of the Criminal Code and the Criminal Procedure Code is relevant to see the regulatory requirements.

The position of the Tapping Bill if faced with the Criminal Code and the Criminal Procedure Code, then the Criminal Code as a material law, is useful to see how a criminal act requires tapping in its resolution or not. Whereas the Criminal Procedure Code, with formal legal character, looks at the procedures and procedures for tapping, and its relationship with law enforcement officials and procedures.

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<sup>31</sup> Susan Freiwald and Sylvain M  t  le, "Reforming Surveillance Law: The Swiss Model", *Berkeley Technology Law Journal*, vol. 28, no. 2 (2013), p. 1261.

Some issues that need to be harmonized and synchronized are in the Tapping Bill, which regulates the phrase “official” responsible for tapping. The lack of clarity about figures and official boundaries still leaves problems in the scope of the law enforcement function if implemented. In the Criminal Code and Criminal Procedure Code determine officials are functional officials or those who carry out functions, such as investigators, public prosecutors, judges, etc. All of which play a role in the criminal justice process. However, in the Tapping Bill, the understanding is narrower that “officials” are limited to those who have the role of structural officials. However, in several other articles in the Tapping Bill, it also includes the function of functional officials; in the end, there is a contradiction about the subject which is most responsible for carrying out the tapping and can be legally prosecuted for making a mistake.

Likewise, concerning the purpose of tapping arrangements, namely to provide comprehensive arrangements in tapping practices - it is a question whether technical arrangements relating to formal aspects can be regulated outside the Criminal Procedure Code. Ideally, the spirit regulated in the Tapping Bill can be synchronized with the Draft Criminal Procedure Code which is being discussed by the Commission III of the Indonesian Parliament to produce a comprehensive, quality and integrated legal product with the criminal justice system.

The aspect of tapping, which is intersected with other regulations, is related to the technical tapping regulated in Minister of Communication and Information Regulation No. 11 of 2006 concerning Technical Tapping of Information. In general, the Ministry of Communication and Information facilitates law enforcement officials to conduct tapping. The mechanism that is regulated relates to the collaboration of law enforcement officials with the Ministry of Communication and Information to intervene in the lines of communication. This mechanism involves telecommunications providers by requiring internal regulations/SOPs from each law enforcement apparatus to be notified to the Director-General at the Ministry of Communication and Information. However, currently, there are around 20 (twenty) institutions which are given the authority to tap and/or conduct tapping to purchase, utilize and monitor each of them internally. Thus, it should be seen how the relationship in the Tapping Bill that was built with various internal regulations of each

institution, in addition to the budget efficiency factor also involves accountability and supervision. Ideally, the apparatus with tapping authority does not have tapping devices, while the owner of the tool, in this case, the Ministry of Communication and Information has the right to do tapping on the basis of *requests* from law enforcement officials to avoid *abuse of power*.

Likewise, related to tapping by the KPK which is excluded in the Tapping Bill and because of the political formation of legislation, through Law Number 19 Year 2019 regulates tapping by the KPK which must undergo approval by the Supervisory Board. Thus, whether the exemption meant can be interpreted as discrimination in law enforcement, or indeed the special character of corruption that forces the KPK to conduct tapping as an effective means. Some views emphasize the results of tapping should be positioned as evidence that complements the preliminary evidence, not from the beginning as in the KPK in investigation and investigation so that its use is not often used often, except in certain coercive conditions.

Back to the tapping mechanism in the bill previously, primarily the position of the Attorney General's Office and the judiciary as control. Taking a position at the investigation stage, requests for tapping are submitted to the chief prosecutor and forwarded to the head of the district court. But the prosecutor's position cannot refuse or approve, and immediately proceed to the district court. Control and supervision by the prosecutor and the court require more deepening. The prosecutor's position as the coordinator is very different from a district court that can approve or reject an application. As the coordinator, the Prosecutor's Office is the contact person. There is no control and supervision mechanism. This role is merely coordination because the functions of investigation, investigation and prosecution are joint work between the police and prosecutors.

The active role of prosecutors in the criminal justice system, often known in common law practice or the Anglo-Saxon Legal system. The prosecutor becomes the motor in the criminal justice process towards justice. The role of the police in the Anglo-Saxon system is limited to supporting the work of prosecutors. Meanwhile, Indonesia, which absorbs many civil law systems, prosecutors are passive and limited to the realm of limited prosecution and investigation. Therefore, the involvement of prosecutors as a liaison application is not too significant.

Moreover, the length of the bureaucracy has the potential to obscure the urgency of tapping.

Control and supervision by the head of the district court can be seen from two things. *First*, in the criminal justice system, the position of Judge is a functional counterpart to the police and prosecutors. *Second*, rights limitation mechanisms such as the extension of detention, confiscation of disputed assets, etc., which require the determination of judges in their jurisdiction. Control and supervision by the court, struggling between approving or rejecting tapping requests. The measure to approve or reject an application becomes very important accountability. In addition, the determination of the District Court is faced with moving and non-permanent tapping objects. The determination of the District Court is indirectly binding based on the jurisdiction of the relevant District Court.

## Conclusion

Rearrangement of the mosaics in this research issue, this study concludes that: First, empirically tapping actions have been carried out by various law enforcement institutions (especially central agencies) with various mechanisms, as well as their arrangements in the *hierarchy of* different legislative systems. Tapping is part of the limitation and/or reduction of human rights, especially *privacy rights* involving personal freedom. The international and national mechanisms of human rights set for the benefit of the criminal law should be in the form of legislation. For this reason, the restrictions imposed must be based on the existence of strong reasons regarding the reasons for the restrictions being made, such as reasonable suspicion and proportionality faced with specs that should not be arbitrary and reasonable, clear and accessible restrictions, and the existence of protection and recovery.

Second, the principle of prudence is a counterweight to the urgency of tapping. This complements the concept of limiting human rights as well as being a control mechanism for government actions. Safeguarding against the abuse of tapping authority is something that cannot be ruled out, based on the principle of legality and the precautionary principle. In line with that, the protection and recovery of tapping victims require clearer and more adequate arrangements. It is possible for the pre-trial mechanism and TUN dispute. Including calculating the loss of victims with a more scalable approach.

Third, the need for comprehensive tapping arrangements becomes a weakness that needs to be anticipated in the preparation process later. Isn't it more appropriate to regulate tapping later on in the scheme of changes or revisions to the Criminal Procedure Code and the Criminal Code? So it can be seen clearly the character and urgency of crime and tapping mechanisms. In addition, it is necessary to look at the precautionary principle with a permitting mechanism that is too long by involving the prosecutor. The *common law* atmosphere in the practice of prosecutors as the motor of the criminal justice system needs to be seen from the effectiveness and proportionality of the implementation. In functional control, the position of Judge must be the controlling centre in the criminal justice system.

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