

# **The Human Rights Act and The Electronic Surveillance in Indonesia Criminal Justice**

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*Human rights are rights to be enjoyed by individuals in their own societies and implemented and enforced under their laws and institutions. The Surveillance of Interception of Communications operates within the office of Enforcements Operations, handles all request to conduct domestic surveillance of wire, oral, and electronic communication for law enforcement purpose. The research focus on the need for interception as new investigative techniques by law enforcement with its greater potential causing difficulties to access justice and fairness of the trial, as it's represents serious interference with privacy rights as guaranteed by the constitutional law. The primary source examined for this paper was ancient domestic and international law books. The aims is to examines existing law covering the use of technical surveillance devices with the requirements of the right to respect for private and family life as a fundamental rights.*

## **INTRODUCTION**

Human Rights are the distinctive legal, moral and political concept of the last sixty years. Professor Donnelly et.al wrote Rights in General, Rights in English has to principal senses. We speak of something being right; or What makes something 'right' depends on what standard we are using. Something may be right in the sense that is s fair or equitable, although the outcomes may not be equal. The term human rights indicate both their nature and their source, they are the rights that one has simply because one is human (Donnelly, Whelan, 2017, p 1). Fernando Volio observed with the exception for the right to life, it is impossible to determine which right or aggregate or rights protected by the ICCPR is of greatest importance. All are closely interrelated. The dignity, peace, and happiness of every individual depend upon the observance of all of them. The violation of any one right not only seriously disrupts the life of the victim but also diminished the rights of others (in Henkin 1981 eds. p184). In relating to legal personality Manfred Nowak, however examines Article 16 ICCPR provides "*Everyone shall have the right to recognition everywhere as. a person before the law*". Recognition of legal personality is thus a necessary prerequisite to all other rights of the individual, the capacity to be a person before the law. This article guarantees to all human beings the right to recognition as a person before the law. The historical background of the latter provision indicates that recognition of legal personality was to be accompanied by the granting of the most diverse of private rights. Nowak also argued in the right to Privacy Article 17 ICCPR is the core of the *liberal concept of freedom*. (Nowak, 2005 p 369-377).

The rapid developments of human rights conceptual due to globalization affecting both technology and law with enthusiasm, Professor Murray, outlining the interaction between the law of and other aspects

of the information society. Murray demonstrates how issues such as government, free expression, and crime are affected by the increasingly prevalent role information technology plays in our everyday lives. He examines some of the technologies involved, the challenge they pose to the current legal settlement and ask what, if anything needs to be done to protect the rights of the individual against the forever developing technologies for digital surveillance. Electronic or digital surveillance is now the cornerstone of signal intelligence (SIGINT) and computer network exploitation (CNE). These can take a number of forms from basic digital interception, storage and transmission facilities, to device tracking, and threat assessment. By choosing a selection of tools it is possible for governments, or private citizens, to track an individual, to monitor his behaviour, and to monitor his communications network, which data may be used for a variety of purpose (Murray,2016 p 590).

This paper has undertaken to analyze the challenges and problems of Electronic Surveillance focuses on Surveillance of Interception of Communications on the need for interception as new investigative techniques by law enforcement KPK the Indonesian Corruption Eradication Commission with its greater potential causing difficulties in the concept of fairness of the trial proceedings, “change Justice” in the specific context of criminal justice process and human rights. The research questions: *define authority and power requires for interception of communication, How are these concepts used in law enforcement agency? On what basis the criminal justice system considered interception of communication as evidence?* For Example, KPK Targets Setya Novanto using Federal Bureau Investigation (FBI) electronic interception data taken from Johannes Marliem a US Citizen in the early stages of an investigation. The public prosecutor of the Corruption Eradication Commission (KPK) revealed a recording of conversation occurred between former Home Affairs Ministry officials Sugiharto and Biomorf director Johannes Marliem. It was found from the recording that there was money from the electronic ID cards (e-KTP) procurement project given to House of Representatives (DPR) Speaker Setya Novanto.

Madeleine Colvin observed, the issue is the extent to which informers and undercover officers intrude upon privacy rights under Article 8 The European Convention and Criminal Law (ECHR). Interestingly, the European Court appears to have taken a less straightforward approach to this kind of surveillance compared to its approach to the use of technical devices. It seems likely that an officer who insinuates himself into a suspect’s home or seeks to participate in a person’s private life (as in the *Colin Stagg* case) is intruding upon a person’s private rights. This could also be argued when surveillance is used in the early stages of an investigation for intelligence gathering purposes where there is only suspicion of criminal activity. In these circumstances, it is difficult to draw a distinction between the intrusion caused by an undercover officer and that caused by a bugging device (Beatson, 1999 p 79).

Cruft, Liao, Renzo observed, the philosophical Foundations of human rights has grown in institutional and rhetorical importance during the last two decades-witness, for example, the embedding of the European Convention on Human Rights (ECHR) in 1998 and the frequent framing of measures to resist terrorism as involving a ‘balancing’ of the human rights of suspects and potential victims (Cruft et al, 2015, p 2-10). Parallel of these developments, Samantha Benson debate when human rights are approached as legal norms, human rights are primarily guaranteed by domestic law, and usually *qua* constitutional rights and in the form of a constitutional bill or rights. Since 1948, however, human rights have also been protected through international human rights law and constitutional rights law as the ‘dual human rights regime has been famously coined by Gerald Neuman as dual positivization (Neuman, 2008:749-68,750, 2003 cited Benson in Cruft et.al 2015, p 279). Moreover, Benson wrote that constitutional rights either pre-exist the adoption of international human rights law or ought to be adopted for ratification. Nor does the reason for their co-existence lie in the content or the structure of human rights protected, as those are held to be, by large, similar in practice. She argues that International human rights are not there to fill the gaps of domestic law. Finally, does the key to the relationship between domestic and international human rights lie in their enforcement mechanism, as respect for both human rights regimes are owed by domestic institutions, implemented and monitored by domestic institutions in roughly the same way (Gardbaum 750-1, Dworkin 2011, 333-4 cited Benson in Cruft et.al 2015 p 280).

The fact that the concept of Human Rights is not new to the Indonesian people who had to wage a protracted struggle in the course of hundreds of years of colonial rule in order to exercise their right of

self-determination, one of the most fundamental of human rights. Indonesia's commitment to the promotion and protection of human rights in the entire Indonesian territory is derived from Pancasila (Five Pillars), notably from the second pillar of "A just and civilized humanity" as well as relevant articles in the 1945 Constitutions which came into being prior to the adoption of the United Nations Universal Declaration of Human Rights in 1948. This commitment of the people of Indonesia to the promotion and protection of human rights has also been inspired by the values, customs, culture and traditions of the Indonesian people. The paper examines the use of technical surveillance devices with requirements of ICCPR and ECHR as the idea of rights by all in virtue of their humanity. Indeed, understanding "sense of justice" in the criminal process and human rights implications of electronic surveillance change the impact of policies. This approach clarifies policy-making by illustrating a number of aspects relating to the extent of the influence of international law must be incorporated first to be part of domestic law order. This present significance of the basic guarantees of a constitutional bill of rights that also governs criminal justice process, "the inescapable dilemma" of criminal procedure.

Method of this paper based on normative juridical research, as McLeod wrote "overview of the legal basis of the constitution as the foundation of any real understanding" (McLeod, 1999, p 1). The conceptual approach is used to study the views and doctrines that develop within the jurisprudence. Reviewing the literature to provide a theoretical background and to establish the links between human rights and the use of intercepts evidence in the criminal proceeding. As a method, it focuses on collecting analyzing, and mixing both quantitative and qualitative data in a single study. Tashakkori and Tedllie define 'mixed methods as a combining of quantitative and qualitative approaches in the methodology of a study'(Tashakkori et al. 1998:ix cited Kumar, 2014, p 20)). This paper, therefore consider the legal frame work of International and National law. The idea is to find legal understanding, concept and principles relevant to the issues, we look beyond the law in the books to the law in action. The objective of this paper to examines existing law and procedure covering the use of technical surveillance devices by KPK the Indonesian Corruption Eradication Commission with the requirements of The Human Rights Act, the right to respect for private and family life as a fundamental right for all citizens. This paper focused and dedicated to ending abuse of power, abuse of process, discrimination in the criminal process by Law Enforcement, particularly in corruption case by using interception of communication in the early stages of an investigation to target or suspected criminals. More broadly, to emphasize the essence on law enforcers that act arbitrarily in the criminal procedural results in gross human rights violations.

## **INTERCEPTION OF COMMUNICATION POLICY FOR LAW ENFORCEMENT PURPOSE**

Ethic in Criminal justice today as Edmund Burke explained,

'The greater the power, the more dangerous the abuse'. In a philosophical sense, the essence of criminal justice is achieving the proper balance between matters of the world and matters of the soul. If the balance is tilted toward the former, concern for humanity suffers, and if it is tilted toward the latter, concern for individuality is diminished, Precisely, the moral of criminal justice should be '*how much social control is necessary before a community of citizens is turned into a community of barbarians?*' or *how much humanity should accompany punishment in the equation of justice?*' (cited Souryal, 2015 p 339).

Indonesia has transformed from one of Southeast Asia's most repressive and centralized political system to its most decentralized and democratic. Simon Butt says despite this, obstacles still remain that hinder Indonesia achieving the 'rule of law', and in particular, the country is consistently ranked as having one of the highest levels of corruption in the world (Butt, 2017 p 1). This paper is the product of ideas by the lives of convicted crime who have been locked away for decades to access justice as fairness due to the discretion by the millennium law enforcer. I was motivated by our political commitment to breaks new ground in legal writing particularly on the criminal process in combating corruption. By

introducing rights into the analysis of criminal justice procedure, makes an important contribution to understanding on fairness to articulating what is now recognized as the respect that the law and law enforcement should pay to human rights and discrimination against them. We can begin to understand what makes law work and how it the Law governs interactions between law enforcement institution,

Indonesian courts have always engaged with the jurisprudence of the Dutch Colonial System those regulations remained in force until such time a new law was enacted to repeal them. The new order includes the bill of Indonesian Criminal Process is regulated in Law No. 8 of 1981 is so called KUHAP or Kitab Undang-Undang Hukum Acara Pidana an Indonesian Code of Criminal Procedure that replaced the old criminal procedure contained in HIR 1941, a Dutch regulation concerning the Procedural Law in Hinda Belanda (Indonesia). When the Law was enacted in 1981, it was considered a masterpiece, because the law made some changes and even included some innovations considered to be significant improvements on notion of fundamental rights that have a pervasive and controlling influence at all stages of the criminal justice process. On the one hand, Indonesia has a long way to go in the fight against corruption. *How have the state obligations referred to corruption?* One of state contribute more to fighting corruption in Indonesia is the Anti-Corruption Commission (Komisi Pemberantasan Korupsi, or KPK) and the Anti-Corruption Court (ACC), established in 2003 due to the international influence on governance of interest in combating corruption.

In accordance to the Law number 31 of 1991 concerning Eradication Of The Criminal Act of Corruption, the team were designed to take particular types of corruption cases. In the Indonesian criminal justice system, the KPK is one of the components to the systems beside the Police, the Attorney General and the Court. However KPK's authority to initiate and to take over corruption cases. Other power aimed at making KPK investigations and prosecutions easier and convictions more likely in the ACC. KPK appoints and dismisses its own criminal investigators and prosecutors. All of the enforcers are working under one roof called KPK. Despite all extra ordinary powers KPK has, in the criminal process the KPK is as a general principle subject to the Indonesian Code of Criminal Procedure Law No.8/1981 (KUHAP) as the existing law provides legal evidence materials referred to Article 184 (1) KUHP are: a. the testimony of a witness; b. information by an expert; c. a letter; d. an indication; e. the statement of a defendant. (2) Matters which are generally known need not be proved. The questions now *where is the position for the electronic of interception communications as criminal evidence in the Indonesian Code of Criminal Procedure (KUHAP)?*

The law (KUHAP) does not recognize the electronic evidence includes interception of communication. The main purpose of the Code of Criminal Procedure No.8/1981 (KUHAP) is to incorporate the Amendment to the 1945 Constitution of the State of the Republic of Indonesia as the basic fundamental law. The effect of the KUHAP is to give the force of ordinary law in Indonesia. Thus the law guaranteed to all the rights of most relevance to the investigation and prosecution of crime such as the right to life, the right to respect for private and family life, home and correspondence, the right to freedom from discrimination, the right a fair trial and in the enjoyment of those rights and freedoms as referred to articles in ICCPR. In addition, Indonesia has ratified two of the most basic human rights instruments: the International Covenant on Economic, Social and Cultural Rights (ICESC) and the International Covenant on Civil and Political Rights (ICCPR) through Law No. 11 and Law No. 12 of 2005. While all rights set down in the ICCPR impact to some extent on the criminal justice system.

Despite Indonesia has the Law of Criminal Procedure that upholds the human rights which considered as the masterpiece of criminal law, however due to the globalization phenomenon and global crimes problem, 'there is a dark side to globalization, criminal have learned to take advantage of the globalized economy and the opening of borders in new and dangerous ways, policymakers have developed a number of international and domestic criminal justice institutions'(Fichtelberg, 2008 p 1-8). In response of these the electronic evidence had taken place on Law number 31 of 1999 concerning Corruption Eradication with the promulgation of law number 20 of 2001 on Corruption Eradication Commission (Law of KPK) article 26 A which authorized the agency (KPK) to use 'intercept and record communications' as surveillance methods as part of electronic evidence in criminal process. Moreover Article 38 (b) Law number 15 of 2002 on Money Laundering Crime and Article 27 (b) Law number 15 of 2003 on Terrorism

Eradication (Law of Terrorism) had passed, giving authority to investigators to intercept communications. Madeline Colvin examine this growing reliance by law enforcement agencies on new technology with its greater potential for intrusion can represent serious interference with privacy rights as guaranteed by Article 8 of European Convention on Human Rights (ECHR). Colvin argues that surveillance of interception communications covers any activity that involves the covert watching of a location or persons or the overt listening to communication between people over a period of time. This employs covert investigative methods to target or suspected criminals rather than waiting to investigate a crime after it has happened (Colvin 1998, Beatson 1999 ed. p 74).

The Focus is on the existing Law of KPK mandated such authorization to allow the investigator or prosecutor for intercepts without a state court judge approval. This privileges authorization given by the law to the enforcement agency 'without' restrictions governing interception of communication is the law of contradiction of the human rights movement, conflicting to the ICCPR and the Amendment of 1945 Indonesian Constitution as well as The Human Rights Act Law number 39 of 1999 incorporates about the protection of human rights, particularly the right to freedom of communication of privacy.

## **INTERCEPTION OF COMMUNICATION EVIDENCE MATTERS**

William Twining observed, that before 1800 century, problem of proof are as old as pervasive as the law itself, one would accordingly expect them to be reflected even in the earliest legal literature. The law of evidence has been a battle ground for many controversies. The most prominent and persistent debates, not surprisingly, largely concern criminal evidence. Some long running controversies about presumptions, logical and legal relevancy, the meaning of 'real evidence' for example in so far as they are still unsettled can be treated as primarily conceptual and classificatory puzzles that can be accommodated within the general or theoretical part of the law of evidence as it is presented here (Twining, 2006 p 37) . While Jerome Hall says the basic dilemma of criminal procedure consists in the fact 'the easier it is made to prove guilt', 'the more difficult does it become to establish innocence'(Hall, 1952, Goldstein et.al.1971 p 231). The law of evidence has traditionally been perceived as a dry, highly technical, and mysterious subject. Twining (2006 p 223) argues that problems of evidence in criminal procedure are close related to the handling of evidence in other kinds of practical decision making and academic disciplines. The case for treating the principle of freedom of proof, the logic of proof and basic evidentiary concepts as an integral part, indeed the general part of the law of evidence. While Roscoe Pound explained that the three chief factors in the administration of justice are (1) the men by whom it is administered, (2) the machinery of legal and political institution by means of which they administer justice, and (3) the environment in which they do so (Pound et. al. 1922 pp.559-82, Goldstein et. al. 1971 p 101).

There are other considerations regarding the application scientific methods in criminal procedure for such Electronic Interception of Communications evidence is progressively becoming a key component in corruption cases in Indonesia. Gradually, e-mails, recordings, text messages and social media posts are presented as evidence that can make or break a case. Still, not all law enforcement officers or judges allow electronic evidence in investigations or courts, nor do they know how to deal with electronic evidence due to contradicting laws, vague regulations and a lack of standard procedures. In recent years, major corruption cases have generated a great deal of media coverage in Indonesia and illustrate an absence of common understanding about electronic evidence. For example in 2015, it was revealed through recorded conversations that Setya Novanto the Speaker of the House of Representatives asked for a gift of shares from Freeport Indonesia, a major mining company. However, allegations were dismissed after the Indonesian Constitutional Court ruled that recordings presented in this case were not admissible, as such electronic recordings must be made by law enforcers only instead of individual citizen. In facing the court rule, KPK argues that this ruling was seen as a step backwards in the fight against corruption, as the Speaker of the House remains in his position and the chairman of a major political party.

Novanto filed a judicial review against Information Technology Law that allows electronic information and documents to be used as legal investigation evidence and the court, particularly the electronic evidence of Wire Tapping recorded. In practice the prosecutor was using the Wire Taping as

investigation evidence to prove guilty Novanto. The Constitutional Court Ruled (Novanto v Information Technology Act), case number 20/PUU-XIV/2016 admitted that Wire Tapping as illegal and unlawfully evidence against the constitutional rights of the nation, particularly the rights to privacy in communication protected by Article 28F of the 1945 Constitution of Republic of Indonesia. Beside that, the material evidence of Wire Tapping was recorded for individual purposes instead of law enforcement purposes. Susan Haack (2014) asked, Is a trial a search for truth or is it something more, or something less, than that? The Constitution judges argued in the ruled that in the terms of operations the law enforcers whose using the electronic surveillance by technical devices should be in accordance with the law, they have proven to be of limited scope only. To avoid any rights violation of the nation by the law enforcers, operations of electronic evidence by technical devices such as Wire Tapping should be using in very limited areas of surveillance. According to the ruled, when law enforcers use electronic evidence as illegally or unlawfully, obtained, the evidence shall be ignored by the judges or considered invaluable by the court as the evidence was collected illegitimately (unlawful legal evidence). A legal opinion obtained by Justice concluded that the judges in the trial considered that the evidence was illegal.

Comparative study to the US Administrative Office of The US Court (1982) in relations to the use of technical surveillance devices as evidence in criminal procedure with requirements of Human rights Act, it also raises the need for regulatory controls over other forms of surveillance such as operation using undercover law enforcers in the United States based on Title 18 U.S.C. Section 2519 (2) requires every state and Federal judge to file a written report with the Director of the Administrative Office of the U.S. Courts on each application for an order authorizing the interception of communication. This report, furnished within 30 days of the denial or expiration of the court order (including all extensions), contains detailed information including the name of the applicant, the offense specified in the application in the type of interception device the type of location and the duration of the authorized intercept. The results of the intercepts in terms of arrests, trials convictions and the number of motions to suppress evidence obtained through the use of the intercept are also provide. Neither the judge nor the prosecutor submits information concerning the identity of the parties to the interception. Moreover both as well as the US Department of justice, submitted annual reports on court authorized wiretaps. (US Administrative Office of the US Courts, 1982 p1-3). For example see figure 1 summary reported were as follows:

**FIGURE 1**  
**REPORTED COST AND REPORTED JURISDICTIONS WITH STATUTES AUTHORIZING**  
**THE INTERCEPTION OF WIRE OR ORAL COMMUNICATION DURING THE PERIOD**  
**JANUARY 1, 1981 TO DECEMBER 31, 1981**

Cost of Intercepts Reported Cost	Number of intercepts	Jurisdiction	Statutory Citation**	Reported use of Wiretap 1981
Total.....	52	Federal .....	18:2510 - 2520	Yes
\$ 1,000 or less .....	38	Arizona .....	13-1051 – 13-1061; 13-3004 – 13-3014	Yes
\$ 1,001 to \$ 2,000.....	54	Colorado .....	16-15-101	Yes
\$ 2,001 to \$ 5,000.....	82	Connecticut .....	54-41a – 54-41s	Yes
\$ 5,001 to \$ 10,000.....	111	Delaware .....	11 Del.C.Sect.1336	Yes
\$ 10,001 to \$ 25,000.....	142	Dist. of Columbia	23:541 – 23:556	No
\$ 25,001 to \$ 50,000.....	67	Florida .....	934.01 – 934.10	Yes
\$ 50,001 to \$ 100,000.....	34	Georgia .....	26-3004	Yes
More than \$ 100,000.....	24	Hawaii .....	803-41 – 803-50	Yes
		Idaho .....	18-6701 –18- 6710	Yes
Average Cost Per Intercept .	\$ 21,686	Kansas .....	22-2514-22-2516	Yes

Source: US Administrative Office of the US Courts, 1982 p 4-5 (Modified: total 29 reduced to 11 State Jurisdiction)

As seen in figure 1, costs for installing and monitoring wiretaps continue to increase. The average for the 552 intercepts for which a cost figure was reported was \$21,686, a 26,5% rise over the average cost reported in 1980. Since 1975, average costs have more than tripled. Summary and analysis of Reports by state jurisdictions, as well as the Federal agent, submitted reports on court authorized wiretaps as appears in Figure 1. Despite that Indonesian Constitutional Court Ruled, case number 20/PUU-XIV/2016 admitted that the electronic evidence such as interception of communication, wire taping as the unlawfully, unfairly, obtained. The Court considered that the use of intercept or electronic devices by law enforcement should be limited scope only, since the constitutional rights of the nation, particularly the rights to privacy in communication protected by Article 28F of the 1945 Constitution of Republic of Indonesia was violated by the interception of a private communications. By contrast the existing Law of KPK mandated such authorization to allow the investigator or prosecutor for intercepts without a state court judge approval and 'without' restrictions governing interception of communication. In performing their duties the agency still remains to operate any type of intercepts in early stages of investigation and use such evidence without extensive authority, is independent and free from any kind of power in the efforts of combating corruption. Despite that Interception or Wire Tapping is carried out by the KPK under strict internal Standard Operating Procedures, however there is no reporting requirements of the statute and no regulations are explained to submit summary and analysis or reports transparent. For this action, no prosecutor's or judges report appears to public.

On other example, in the corruption case of e-KTP. Speaker of the Indonesian Parliament Setya Novanto and two officials from the Ministry of Home Affairs have been declared suspect or have been convicted of embezzling funds possibly total amount up to US\$ 173 million from the ID card program as grand corruption case. According to the prosecutor's indictment number DAK-88/24/12/2017 *State v Novanto*, the CEO of the company Johannes Marliem contracted to develop and maintain the program was named a key witness, as he would have possessed 500 gigabytes of audio recordings implicating politicians, until his sudden death in the summer of 2017. This is generally perceived to be related to the case. At the time of his death, the Indonesian Corruption Eradication Commission had only been handed a small part of the audio recordings, which now seem to be unaccounted for. The Corruption Eradication Commission (KPK) said it had evidence of the recording of examination against Director of Biomorf Lone LLC, Johannes Marliem, by the United States Federal Bureau of Investigation (FBI).

In the examination, Novanto was mentioned to have received a flow of bribery funds for procurement of electronic ID card. KPK argues that they have evidence, including evidence of illicit flow of funds for procurement of ID cards. KPK's cooperation with the FBI is a reasonable form of cooperation in uncovering corruption cases across countries to expose transnational crime. Earlier in Novanto's trial, the KPK prosecutor again played an audio recorded between the FBI and Johannes Marliem. In the recording, there were two issues Marliem disclosed to FBI investigators. *First*, it related to the bargain price of software involving Novanto, the *second* related to the watches worth USD135 thousand given to the former chairman of Golkar Party. The recording of the interview was taken place in Los Angeles in August 2017. In the excerpt of the interview, Marliem stated that Novanto requested a software discount. However, Marliem sought to convince Novanto of the price and quality of the product. Not only that, in the recording Marliem admitted together with Andi Narogong (one of the suspected) gave a watch of Richard Mille brand to Novanto. However, the watch worth USD135.000 broken and returned by Novanto. Furthermore, Marliem brought the watch to the repair store at the Beverly Hills Los Angeles, USA. Once repaired, he returned the watch to Novanto.

According to the news Tempo.com published on 23 April 2018, KPK utilize all FBI evidence materials related the involvement of Setya Novanto in the electronic ID card graft case. Setya Novanto in the opening of his defense statement at the Jakarta Corruption Court, claimed he had been framed by the late Johannes Marliem, the boss of Biomorf Lone Indonesia, who recorded every meeting both men held. He argues that Johan Marlem was set him up since the beginning by recording their conversation each and of their dialogues. Biomorf Lone Indonesia was led by Marliem, which is a sister company to the United States Biomorf Lone LLC. The company became a subcontractor to the consortium that won the electronic ID card [e-KTP] project tender. Biomorf operated in conjunction with Quadra Solution that

worked on the civil biometric data records, checking clone data, and storing the data. Meanwhile, Biomorf worked on some projects worth up to Rp680 billion from the total e-KTP project value, which was estimated to be Rp5.84 trillion.

Finally, the effect of the electronic evidence by digital devices its impact on sentencing of Setya Novanto. Based on the Anti Corruption Court ruled number 130/PID.SUS/TPK/2017/PN.JKT.PST. dated 24 April 2018, the court sentenced Novanto for 15 years imprisoned, penalty fees of IDR 500 Millions and Compensation fee applicable at the time the criminal offence was committed for total amount of USD 7,3 Billions shall be paid to KPK. To hold otherwise would result confiscate his assets. In addition if his assets could not cover the compensation fee, court order extended 2 years sentenced imprisons may apply. also revoke Novanto's political rights for 5 years which will be due on parole.

## **THE LINK OF ELECTRONIC EVIDENCE REGULATORY PROCESS AND HUMAN RIGHTS**

Professor Murray observes that as citizens, we have to understand the part of our contract with the state allows the state to carry out surveillance programmes for the laws enforcement purposes. We have always understood that governments have had the ability to intercept communications, to monitor and track movement and to obtain data from third parties 'under warrants' (Murray, 2016, p 590-591). However Novanto as the convicted was unaware of the truly massive scale of state surveillance programmes. The agency targets Novanto to proof guilt by using interception of evidence in the early stages of investigation. As evidence matters it's called an 'error' to the criminal process, according to Larry Laudan in related to Truth, Error and Criminal Law, he using the term 'error' in a more strictly logical and epistemic sense. Error has occurred, mean either (a) in a case that has reached the trial stage and gone to a verdict, the verdict is false or (b) in a case that does not progress that far, a guilty party has escaped trial or an innocent person has pleaded guilty and the courts have accepted that plea. In short, 'an error occurs when an innocent persons is deemed guilty or when a guilty person fails to be found guilty'. Laudan call the first sort of error *a false inculpatory finding and the second a false exculpatory finding* (Laudan, 2006 p 10-12 ).

Despite KPK's has set forth international cooperation with the FBI against transnational organized crime, the fact, that the evidence material is the recording of examination between the United States Federal agent (FBI) and Johannes Marliem which was taken place in Los Angeles, USA in 2017. While in the hearing, Corruption Eradication Commission (KPK) prosecutors played several recordings of conversations between Marliem, businessman Andi Agustinus, and Setya Novanto. The recording also had conversations between the president director of Quadra Solution, Anang Sugiana Sudiharjo, and Johannes Marliem that was used by the KPK as evidence to incriminate Setya Novanto on the trial. The discretion of law enforcers (KPK) by using several of electronic surveillance evidence are contradictions to the Constitutional Court Ruled case number 20/PUU-XIV/2016 that decided such electronic recordings should be provided by law officers instead of private individuals, moreover the court considered that law enforcement whose using the interception of communications as electronic evidence should be in accordance with the law, it has proven to be of limited scope only, to avoid the rights violation of the nation. According to the ruling, when law enforcers use evidence unlawfully, obtained. The judges shall ignore or considered invaluable by the court since the evidence was collected illegitimately (unlawful legal evidence).

In relation to the electronic evidence by technical devices, *does the agency (KPK) as the law enforcement was using illegally or unlawfully electronic surveillance evidence to proof guilt Setya Novanto and other defendants?* As mentioned above an FBI agent disclose the contents of intercepted communications and evidence derived there to KPK as foreign investigative or law enforcement officers to extend such disclosure to the official duties of the foreign officer. In addition, KPK as authorizes foreign investigative or law enforcement officers to use or disclose such contents or derivative evidence for the investigation of ID-card Corruption Case. The fact that such electronic surveillance evidence was taken by individual party Johannes Marliem a US Citizen who intercepted the conversations between him and other parties without consent by all parties. Provided interception was made for a criminal or tortuous



purpose. Despite the fact that such interception evidence was made by Marliem in several countries with differences jurisdiction and KPK used the electronic surveillance evidence in other jurisdiction at Indonesian Corruption Court to proof guilty Setya Novanto and other defendants, it said the evidence was subject to cross examination by the FBI against Johannes Marliem. *Does the interference of electronic surveillance evidence have a basis law?*

A recent report on the Electronic Surveillance Manual published by the United State Department of Justice that first developed by the Director of the Administrative Office of the U.S. Courts in November 1968, the regulations and reporting forms were revised in January 1981. Under 18 U.S.C. section 2511 (2) (d), Consensual Monitoring; “an individual may intercept an oral, wire, or electronic communication if that person is a party to the communication or a party to the communication has given consent (see *Griggs-Ryan v. Smith*, 904 F.2d 112 (1stCir.1990) (plaintiff was warned several times that all calls would be monitored). Provided interception was not made for a criminal or tortuous purpose”. “Thus, the focus is not upon whether the interception itself violated another law; it is upon whether the purpose for the interception its intended use was criminal or tortuous. To hold otherwise would result in the imposition of liability under the federal statute for something that is not prohibited by the federal statute (i.e., recording a conversation with the consent of only party), simply because the same act is prohibited by a state statute” (US Department of Justice, 2018 p 80-84). It becomes clear that the electronic surveillance evidence was made by Johannes Marliem as individual party result unlawfully evidence, since the recording was made without a basis law and the purpose of interception was unclear since the beginning.

According to the statute, only the Attorney General (or his designee) may authorize an application to a Federal judge for an order authorizing interception of wire or oral communications. For those states with wiretapping legislation, applications may be made only by a prosecuting attorney, “if such attorney is authorized by statute of the state to make an application to a state court judge of competent jurisdiction”. Since many wiretap orders are related to large scale criminal investigations which cross county and state boundaries, arrest, trials, and convictions resulting from these interceptions often do not occur within the same year as the installation of the intercept device (US Administrative Office of the US Courts, 1982 p1-3). Therefore, in accordance to the Electronic Surveillance Manual published by the United State Department Of Justice, Title 18 U.S.C. Section 2519(2) requires that supplementary reports be filled by prosecuting officials about additional court or police activity occurring as a result of intercepts reported in prior years. Moreover the manual set forth the procedures established by the Criminal Division of the Department Justice to obtain authorization to conduct electronic surveillance pursuant Title 18, United States Code, Sections 2510-2522 (2001) (Title II of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986 (ECPA), the Communications Assistance for Law Enforcement Act of 1994 (CALEA), the Anti-Terrorism and Effective Death Penalty Act of 1996 (Anti-Terrorism Act), the USA-Patriot Act of 2001, and the Homeland Security Act of 2002 and discusses the statutory requirements of each of the pleadings, Throughout this manual, the above federal wiretap statutes with occasionally be referred to collectively as “Title III” (US Department of Justice, 2018 p 1-4).

In the terms of the rights to privacy in communication protected by Article 28F of the 1945 Constitution of Republic of Indonesia, Article 17 of ICCPR and Article 8 of ECHR, *whether to admit KPK violate the human rights Act by using the interception of a private communications surveillance?* Francesco Facioni (2007) wrote that when a right is violated, access to justice is of fundamental importance for the injured individual and it is an essential component of the system of protection and enforcement of human right. He examine that access to justice is a synonym of judicial protection. Thus, from the point of view of the individual, term would normally refer to the right to seek a remedy before a court of law which is constituted by law and which can guarantee independence and impartiality in the application of law. Despite the fact that electronic surveillance evidence that used by KPK to proof guilt the defendants in ID card corruption case, it is said, the evidence is subject to cross examination by US FBI agent and Johannes Marliem. Justice Blakcmun at the US Supreme Court (cited in Haac 2014), had written a strongly worded dissent focused on the evidentiary issues,

‘despite the fact that such testimony is wrong two times out of three because, it is said, the testimony is subject to cross examination and impeachment. This is too much form me. When a person’s life is at stake, a requirement of greater reliability should prevail. Cross-examination and impeachment may not be enough, he argued when flimsy evidence is presented to jurors in the guise of science’.

Related to legal Framework for interception evidence may effects rights of privacy, morals, freedoms of others based on the 1945 Constitution of Republic Indonesia., ICCPR, ECHR and The Human Rights Act Law number 39 of 1999, The Human Rights Convention was seen as peripheral to our jurisprudence, it has been left to develop a framework for testing the fairness of the prosecution and trial process. Abuse of process is an area of the criminal law that is relatively new, however abuse of process has occurred in R v Conway the Canadian Supreme Court expressed its view of abuse of process in criminal justice as ‘central to our judicial system is the belief that the integrity of the court must be maintained. If the court is unable to preserve its own dignity by upholding the values that our society views as essential, we will not long have a legal system which can pride itself on its commitment to justice and truth and which commands the respect of the community it serves’(1989:2000 Coker, Young). Murray argues as a result, we accept that law enforcement agencies and the security and intelligence services will carry out surveillance operations in our collective interest. We rely on the principle of proportionality to ensure that this operations do not become a form of state control over the populace as happened in former East Germany. As their powers of surveillance and data gathering are so extensive, legislative controls are necessary to prevent abuse of unwarranted intrusion. This is why we have a strict legal framework to control the powers and ability of the state to monitor its own citizens and those external to the state (Murray, 2016 p 592-593).

## CONCLUSION

The first control is the 1945 Constitution of Republic Of Indonesia, the 1999 Human Rights Act., ICCPR and ECHR itself already noted, electronic surveillance is only compliant with the Articles where it fits within the articles, exceptions which require the interference with privacy be necessary in accordance with law and proportionate. The law enforcers discretions must consistent to the principle of law incorporated in international human rights instruments. The existing law of KPK and the 1999 Human Rights Law will clearly change the environment within which the debates on surveillance policing takes place. Clearly some of the methods presently in use inconsistent to the Articles on the 1945 Constitution of Republic Of Indonesia, ICCPR and ECHR which requirement of having a legal base.

The law of evidence has been a battleground for many controversies, nevertheless Criminal evidence remains the most important area of controversy. Here the disagreements are primarily political. The central issues relate to the relationship between, and the priorities to be accorded to competing values. We have not one law of evidence, but a series of laws of evidence and that this needs to be recognized in legislation, in judicial development of the law and in academic treatments.

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