

# Corruption Eradication Commission's Wiretapping: Should it Need Permit by Supervisory Council?

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**Abstract**--This research is about the authority of wiretapping by the Indonesian Corruption Eradication Commission (KPK) and the existence of a Supervisory Council as the giver of wiretapping permission. At the time the new KPK Law was enacted many responses had been raised by legal scholars who had caused a kind of polemic around the substance of "wiretapping", which illustrates an ideal law. The purpose of this study is to find out the rationale for the existence of a Supervisory Council in granting wiretapping permission which is the basis of the polemic. The results of the study concluded that the obligation to obtain permission from the Supervisory Council is contrary to the principle of independence from the KPK, namely as a state institution that is free from the influence of any power in carrying out its duties and authorities. The researcher recommends that the wiretapping permit mechanism be an integrated task of the KPK in conducting investigations and investigations. Permission to tap from the Supervisory Council will hamper KPK performance. Considering the Supervisory Council was formed to oversee the implementation of the duties and authority of the KPK not included in the technical case handling.

**Key words**--KPK, Investigation, Wiretapping, Supervisory Council

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## I. INTRODUCTION

Corruption identified as a latent and globalized crime that needs serious attention and potential to harm the country's finances and economy. As Issa Luna-Pla and José R. Nicolás-Carlock call corruption contrary to the goals of every modern government by distorting the goal for which all socio-political structures are created and sacrificing public welfare for the benefit of a handful of people [1]. The eradication of corruption that has occurred so far has not been carried out optimally, so it needs to be elevated. Indonesian investigative institutions that handle criminal cases have not functioned effectively and efficiently in eradicating corruption so that it is formed a law on the Corruption Eradication Commission (hereinafter, KPK).

The Corruption Eradication Commission formed because of the mandate of Article 43 paragraph (1) of Law Number 31 of 1999 concerning Eradication of Corruption, stating, "Within 2 (two) years since this law comes into force a Corruption Eradication Commission formed." Corruption cases that occurred so far have not been able to be carried out optimally, so the KPK was formed. KPK is an independent institution that it is task and authority to eradicate criminal acts of corruption as stipulated in Law Number 30 of 2002 concerning the Corruption Eradication Commission [2]. The tasks of the KPK as stated in article 6 of Law Number 30 of 2002 are quite heavy so that the KPK can conduct wiretapping and recording in carrying out the tasks of investigation and prosecution. Following the function and purpose of criminal law as said by Moeljatno,

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"that the function and purpose of criminal law are to prevent the inhibition or obstruction of the coming of the aspired society [3].

Furthermore, Law Number 30 of 2002 then amended by Law Number 19 of 2011. Wiretapping is regulated in Articles 12B to 12D. The provision regulates wiretapping mechanisms that need written permission from the Supervisory Council. The wiretapping permission is an attempt to reform the law because wiretapping activity did not used need a permit. The existence of this permit brings a new institution, which is the Supervisory Council.

The existence of the Supervisory Council in the new KPK Law is certainly intended to provide a new procedure for handling the wiretapping process. Considering the Supervisory Council provision is new rules, of course, rules alone can do nothing without the implementation of those rules. Therefore, the Supervisory Council provision is more difficult to implement, because it related to human factors. This human factor is an important factor because humans are subject to cultural, political and socio-economic dimensions.

This paper would like to suggest whether it is appropriate that the wiretapping by the KPK must be with written permission from the Supervisory Council, bearing in mind that the KPK is expected to be the motor of corruption eradication. The establishment of the Supervisory Council is expected to support and assist the task of tapping for the implementation of the new KPK Law. What is the urgency for the Supervisory Council to be formed regarding wiretapping? Can we expect a lot with Law Number 19 of 2019 regarding the new KPK, considering the task of wiretapping is a task in the field of case handling, which is a series of investigative activities that cannot be separated between investigative and tapping activities which are also the authority of the KPK investigator? Given the task of the Supervisory Council only oversees the performance of the Commission and does not know the ins and outs of handling corruption cases that are being investigated.

## **II. METHOD**

This article is related to wiretapping conducted by the KPK which must ask for written permission from the Supervisory Council in the new KPK Law, namely Law Number 19 of 2019. This legal research is normative which, according to Peter Mahmud Marzuki, "legal research is conducted to find solutions to issues that arise. The results achieved are not accepting or rejecting the proposed hypothesis, but rather prescribing what should be the issue raised"[4].

From the background description and formulation of the problem, the method of writing is normative legal research. Moving on from the regulation for the authority of the KPK as investigators to conduct wiretapping and the authority of the Supervisory Council in granting wiretapping permission. Considering that the task of tapping is an integral part of the task of the KPK as investigators of ongoing cases, it is of course intended to provide a new style in the procedure for handling criminal justice in harmony with the realm of independence community. Because all forms of wiretapping actions by the KPK are aimed at the public interest in eradicating corruption, a fast process is needed.

Writing is done by doing a conceptual approach and the statutory approach [5]. Through a conceptual approach, review subjected the KPK authority to conduct wiretapping and the authority to give wiretapping permits by the Supervisory Council. Therefore, with the new KPK Law, namely, Law No. 19 of 2019, can we expect a lot with the new KPK Law?

### **III. RESULTS AND DISCUSSIONS**

#### **Changes in Corruption Eradication Commission**

The problem of corruption in Indonesia such an old disease that difficult to eradicate and instead, corrupt practices flourish. Evaluation and improvement of the corruption law and other sets of rules such as the KPK Law continues to be improved even have been repeatedly amended and renewed, even repeatedly discussed in various seminars, scientific meetings to provide a suggestion for improvement. Corruption still not diminish, but instead, it will become even more prevalent. According to Romli Atmasasmita the corruption as a crime related to the element of loss for the country which is difficult to prove because of the material offense [6]. Therefore it is not easy to prove corruption let alone eradicate it. Likewise, although there has been a lot of progress in eradicating corruption, we still don't know how to measure the level of corruption systematically and also don't know how to control it [7].

The rule that is considered good and is following what is desired by the community cannot do anything without the implementation of that rule. Therefore the problem is not with the law or with law enforcers who have the authority to eradicate it, but the fact is when faced with concrete conditions in the field, it appears that our legal power and law enforcement agencies deal with corruption cases. The powerlessness in handling corruption cases is because according to Indriyanto Seno Adji, "in general these corruptions contain activities which are manifestations of corrupt acts in the broad sense of using power or influence attached to a civil servant or a special position owned by someone in a public office improperly [8].

Given the distinctive element of corruption compared to the conventional crime in Criminal Code that is, "enriching or benefiting oneself or another person or entity, misusing status or position and harming state finances"[9]. Therefore, the element "can harm the country's finances or the country's economy" as an element of Article 2 and 3 of Law Number 31 of 1999 concerning Eradication of Corruption Crimes must exist and can be calculated.

In principle, the amendment and improvement of the law on the Corruption Eradication Commission is not a guarantee for better efforts to tackling corruption. Amendments to the law must also consider the public need, especially the desire to strengthen the corruption eradication commission, even if it is not favored by perpetrators. Given the perpetrators of corruption are people who have positions. As Nur Basuki Winarno said, "the granting of authority to officials will give birth to the rights and obligations to achieve the goals and purposes set out in the legislation. Deviations from the intended purposes and objectives are categorized as abuse of authority [10].

If the KPK is desired as a strong institution as demonstrated by the police and attorney general's office, then it takes a strong political will to make the KPK institution as the main force of corruption eradication. Considering there are two main things in the regulation to eradicate corruption, namely as a preventive and repressive effort [11]. A study in South Korea, for example, shows that strong anti-corruption policy is positively proportional to fighting corruption. While a strong anti-corruption policy is not enough without a strong political will to implement it [12].

The need for changes a law must be reviewed from jurisprudence aspect that cannot be separate from the concept of law enforcement. Besides, an evaluation of the law is still needed if there are weaknesses in the

existing formulation policy. An evaluation or review even for the amended law needs to be done because there is a close link between the formulation policy, the law enforcement policy and the eradicate corruption policy. Weaknesses in the penal law policy to tackle corruption will affect law enforcement in eradicating corruption. Considering law enforcement efforts and the problem of combating corruption eradication by the government through the KPK institution still faces many obstacles. The government seems to have no political will in cracking down on corruptors in Indonesia. While the establishment of KPK institutions to create good governance and clean government is needed at all institutional levels both regional and national.

As the main driver of the eradication of corruption, the KPK institution was formed under the mandate of Article 43 of Law Number 31 of 1999. The drafting of the law as a constitutional means should also be prepared in line to establish the KPK institution as a driving force for corruption eradication. Which is in line with the ideals of independence whose aim is to advance the public interest. Furthermore, the new KPK law states that the KPK is a state institution within the executive power family that carries out the task of preventing and eradicating criminal acts of corruption. This can be interpreted as saying that the KPK is taking preventive measures, hoping that the public will not commit criminal acts of corruption.

The implementation of the KPK's duties as referred to Article 6 letter e of Law Number 19 of 2019 states that the KPK has the authority to conduct wiretapping. Tapping as referred to Article 12 paragraph (1) of Law Number 19 of 2019, is carried out after obtaining written permission from the Supervisory Council. Thus the KPK can only perform wiretapping after obtaining that written permission from the Supervisory Council. The existence of a permit to conduct wiretapping raises the question, can we expect a lot with Law Number 19 of 2019 considering that a perfect law without any instruments, especially human factors that support the success of the provisions related to wiretapping, will not achieve the expected results. What is the urgency of the permit, whether to prevent the abuse of authority or to extend the bureaucracy in handling corruption cases? Given the existence of the Supervisory Council in granting wiretapping permission, it is part of handling cases that are the authority of law enforcement officials. Is the permit not enough to the Chairperson of the KPK, why does it have to go to the Supervisory Council? Considering the purpose of forming a Supervisory Council is to oversee the performance of the KPK. The wiretapping must be licensed by the Supervisory Council, not in accordance with the procedures for handling the criminal justice process. The desired new style that is in harmony with the nature of independence which aims at the public interest becomes unattainable because of the long procedure since handling must be fast. It should be that the law which is a means of achievement is also arranged in line with these objectives, the existence of permits here adds to the length of handling cases and bureaucracy, of course, it takes time so that it will hamper the law enforcement process.

Since the beginning, the rejection of the formation of the Supervisory Council has become a polemic because it is one way to weaken the KPK institution. KPK as the driving force to eradicate corruption should not be left alone to face a variety of weakening. Regarding KPK's weakening, Bambang Widjojanto stated, "one of the ways to destroy the existence of KPK institutions is by carrying out" legislative attacks "by continuously proposing various revisions of the legislation aimed at delegating the KPK's authority and scope of authority. The revision of the KPK Law is an attempt to weaken in a way that seems legal, but is not legitimate "[13].

Bambang Widjojanto further explained that:

"In the draft revision of the KPK Law, there are several provisions that will have bad implications for the authority of the KPK in eradicating corruption such as, firstly forming a Supervisory Council outlined in Articles 37A to 37F, the concept of forming it is considered to only weaken the independence of the KPK. Second, the wiretapping must get written permission from the Supervisory Council for 1x24 hours and the wiretapping can be done if it has fulfilled sufficient preliminary evidence. Third, the KPK has the authority to stop the investigation and prosecution (SP3), the existence of this provision has the potential to open opportunities for corruptors to stop the ongoing corruption cases at the KPK. Fourth, the KPK can no longer recruit investigators other than the National Police and Prosecutors' institutions. Fifth, there is a proposal to dissolve the KPK, in article five of the draft KPK Bill it is stated that, "The KPK was formed for 12 years from the enactment of this law". Meaning, after 12 years since the passing of the KPK Bill, the KPK must be dissolved"[14].

The weakening of the KPK institution by the perpetrators of corruption by conducting a counter-attack shows that the problem of corruption is not as simple as one might imagine. As Zaenal Arifin Mochtar said, "... in the midst of the intense eradication of corruption, the facts speak that the corruptors have also prepared and used various methods to be free from corruption charges. It does not even stop there, it also destroys the eradication of corruption itself"[15]. In this connection Denny Indrayana states:

"It is so easy and vulnerable for KPK leaders and employees to be criminalized, especially when processing suspects who are also law enforcement officers. Therefore, a better legal protection system must be provided so that the KPK can work more calmly, while ensuring that the system is not used as protection for KPK members who are indeed problematic." [16]

### **Procedure of Wiretapping**

The new KPK Law, Law Number 19 of 2019, regulates that authority of wiretapping must be with the permission of the Supervisory Council. Granting permit authority for wiretapping to the Supervisory Council is seen as something that is not following the task of investigation that must be carried out by the KPK. Therefore, the new KPK Law has drawn criticism from various groups due to the existence of several articles that are considered to weaken the KPK institution as the motor of corruption eradication that has been trusted by the public. One of the most crucial is the provision on the need for written permission from the Supervisory Council to conduct wiretapping. The KPK as a corruption prevention institution in conducting wiretapping must obtain permission from the Supervisory Council which is considered to have violated the principle of law enforcement because it has entered the area of "projustitia", acted as the final determinant of an ongoing case, the procedure is getting longer, investigators cannot act quickly and directly to secure evidence that is likely to be removed or eliminated by certain parties with an interest in the case being investigated.

The wiretapping by the KPK is listed in Article 12 paragraph (1) of Law Number 19 of 2019 which reads, "In carrying out the tasks of investigation as referred to in Article 6 letter e, the Corruption Eradication Commission is authorized to conduct wiretapping". Tapping as referred to Article 12 paragraph (1 ) Law Number 19 of 2019 is implemented after obtaining written permission from the Supervisory Council, thus the KPK can only conduct wiretapping after obtaining written permission from the Supervisory Council.

Wiretapping is a series of investigative tasks in the criminal justice field. The Supervisory Council extends to the handling of cases or Pro Justitia which is the authority of law enforcement officers. Therefore, the existence of this article needs to be evaluated because it is considered as a step backward law enforcement in corruption cases. After all, corruption is a dangerous disease for the community, detrimental to the country's finances and economy.

According to Article 12B of Law Number 19 of 2019 the tapping mechanism is as follows:

- 1) Tapping as referred to in Article 12 paragraph (1) shall be carried out after obtaining written permission from the Supervisory Council;
- 2) To obtain a permit as referred to in paragraph (1) is carried out based on a written request from the Chairman of the Corruption Eradication Commission;
- 3) The Supervisory Council may grant written permission to the request referred to in paragraph (2) no later than 1x24 hours (one-time twenty-four) hours from the time the request is submitted;
- 4) If the Chairperson of the Corruption Eradication Commission Chairperson gets written permission from the Supervisory Council as referred to in paragraph (3), the wiretapping is carried out no later than 6 (six) months from the date written permission is received and can be extended 1 (one) time for the same period.

After obtaining permission the provisions of Article 12C regulates as follows:

- 1) Investigators report ongoing wiretapping as referred to in Article 12 paragraph (1) to the Chairperson of the Corruption Eradication Commission regularly
- 2) Tapping as referred to in Article 12 paragraph (1) which has been completed must be accountable to the Chairperson of the Corruption Eradication Commission and the Supervisory Council no later than 14 (fourteen) working days from the date the wiretapping was completed.

Further more Article 12D of Law Number 19 of 2019 states:

- 1) The results of wiretapping as referred to in Article 12 paragraph (1) are confidential and only for the benefit of the court in eradicating corruption;
- 2) The results of wiretapping that are not related to corruption which are being handled by the Corruption Eradication Commission must be destroyed immediately;
- 3) If the obligations referred to in paragraph (2) are not destroyed, the officer and/or person who keeps the results of wiretapping is sentenced to criminal penalties under the provisions of the legislation

The articles mentioned above appear to be very weak compared to the previous law, namely Law Number 20 of 2002. The problem of the existence of a Supervisory Council related to wiretapping is very irrelevant, given that wiretapping is for the benefit of the judiciary and is not in line with the formation of a Supervisory Council. The wiretapping is related to the ongoing investigation of cases and the interests of the judiciary. Law No. 19 of 2019 is expected to provide a new style in the procedure for handling corruption cases so that they are in harmony with the realm of independence and all forms of action aimed at the interests of the rights of people who are violated to realize the eradication of corruption is not for others. The wiretapping must obtain written permission from the Supervisory Council for 1x24 hours and the wiretapping can be carried out if it has fulfilled sufficient preliminary evidence. Seeing the formulation of articles relating to wiretapping it seems difficult to understand that the action of wiretapping is aimed at the public interest in

the interests of the judiciary and the eradication of corruption. The revision of the law is not a guarantee that the corruption case will stop, evaluation of the new KPK Law is still needed, considering that the KPK institution was formed because the eradication of corruption that occurred until now has not been carried out optimally.

All the polemics over the new KPK Law illustrate an ideal law. Almost all perspectives depart from thoughts on legal protection for the KPK institution. Considering that this crime of corruption is an extraordinary crime. Imadah Thoyyibah states that corruption is a structural crime because there is a duality relationship between structure and genes which then binds to each other and misleads one another [17].

Besides, the UN International Convention in Vienna dated October 7, 2013, said that the corruption as an extraordinary crime, serious and violates the social and economic rights of the people. The existence of this KPK institution must be given extraordinary authority, not on the contrary weakened, because the KPK institution will deal with crimes committed in structural and extraordinary ways (extraordinary crime).

### **Procedure of Wiretapping**

Article 3 of Law Number 20 of 2002 in conjunction with Law Number 19 of 2019 reads, "Corruption Eradication Commission is a state institution within the executive power group which in carrying out its duties and authorities is independent and free from any influence of power.

The Supervisory Council is a non-structural body formed to oversee the implementation of the KPK's duties. The existence of the Supervisory Council is listed in Article 37A through Article 37F of Law Number 19 of 2019. The provisions of Article 37A paragraph (1) read, "To oversee the implementation of the duties and authority of the KPK a Supervisory Council was formed as referred to in Article 21 paragraph (1) letter a. Article 21 paragraph (1) of Law Number 19 Year 2019 states, "The KPK consists of (a) A Supervisory Council of 5 (five) people, (b) the Chairperson of the Corruption Eradication Commission consisting of 5 (five) members of the Corruption Eradication Commission, and (c) Corruption Eradication Commission employees.

Furthermore, regarding the duties and authorities of the Supervisory Council stipulated in Article 37B of Law Number 19 of 2009 concerning the KPK which reads:

- a) Oversee the implementation of duties and authority to eradicate corruption;
- b) Giving or not permit wiretapping, search, and seizure;
- c) Arrange and establish a code of ethics for the Head and Supervisor of the Corruption Eradication Commission;
- d) Receive and follow up on reports from the public regarding the alleged violation of the code of ethics by the Chairman and Staff of the Corruption Eradication Commission or violations of the provisions of this law;
- e) Holding a hearing to examine the alleged violation of the code of ethics by the Chairman and Staff of the Corruption Eradication Commission, and
- f) Evaluating the Corruption Eradication Commission's Leaders and Employees regularly once a year.

The concept of forming a Supervisory Council will only weaken the independence of the KPK. The purpose of the Supervisory Council is to prevent abuse of the authority of anti-corruption institutions. With the introduction of the new KPK Law, surely the existence of the Supervisory Council is intended to provide a

new style in the procedure for handling corruption cases that are in harmony with the nature of independence as referred to in Article 37A of the KPK Law Number 19 of 2019, namely to oversee the duties and authority of the KPK. Related to this, Dalinama Telaumbanua, stated that "If the Supervisory Council at the KPK is likened to a Commissioner of an Incorporated Company, where the Commissioner of an Incorporated Company is one of the organs of an Incorporated Company that oversees the performance of the director of an Incorporated Company" [18]. In line with this, Camelia Malik stated that commissioners in carrying out supervision and providing advice to directors must be made for the interests of the company [19].

According to Munir Fuady, "the definition of a commissioner is a company organ in addition to other corporate organs, which oversees the implementation of the duties of directors and the course of the company in general, and provides advice to directors and shareholders / RUPS both if requested or when not requested" [20].

That is why in Article 1 number 6 of Law Number 40 of 2007 concerning Incorporated Companies, define the commissioner as a corporate organ charged with conducting general and/or specific supervision as well as providing advice to directors in running the company.

One of the duties of the Supervisory Council is granting permits to conduct wiretapping, search and seizure such authority possessed by law enforcers in conducting investigations that constitutes an entity as stipulated in the Criminal Procedure Code. The granting of wiretapping, search and seizure licenses should be an integral part of the duties of the KPK as mandated in Article 6 letter c, Article 11 and Article 12. The KPK commissioners' authority becomes weak to conduct wiretapping because it cannot be directly carried out but must wait for permission from the Supervisory Council. According to Indriyanto Seno Adji, the formation of an independent KPK and this commission has the authority to investigate and prosecute as an institution that has synergy with existing law enforcement institutions (Police and Prosecutors' Office) [21].

The Supervisory Council's duties are listed in Article 37B starting with letters a, c, d, e, f related to supervision as stated in Article 37A which reads, "To oversee the implementation of the duties and authorities of the KPK a Supervisory Council was formed as referred to in Article 21 paragraph (1) letter a. Thus the Supervisory Council's task of granting wiretapping permits as Article 37B letter b should not be included in the Supervisory Council's duties because it does not include the implementation of the task of overseeing the KPK. Considering the existence of a supervisory board can be likened to the existence of a company board of commissioners whose job is to oversee the directors' duties in running the company in general and give advice to both directors and the General Meeting of Shareholders (GMS). Giving permission or not giving permission for wiretapping, search and/or confiscation is the authority of the investigator as regulated in Article 12 paragraph (1) of Law Number 19 of 2019.

Thus the Supervisory Council's duties are limited and restricted in the corridor of supervision of the KPK, which should only supervise the performance and follow up on reports of violations of the KPK leadership ethics or KPK employees so that it is not necessary to enter into technical case handling such as permitting to conduct wiretapping. The Supervisory Council in carrying out the task of wiretapping took on the role of the KPK Commissioners and could be said to be a form of weakening the KPK institution. The KPK institution as an independent institution, should not recognize the Supervisory Council. The supervision system



in the KPK has been carried out by the House of Representatives (DPR) through a hearing with the DPR, and the BPK oversees the use of the budget, besides KPK reports periodically to the president.

The many cases of corruption that occurred in Indonesia seem to have become a habit that is difficult to leave and rooted in carried out by state administrators and civil servants or officials who are given the mandate. This shows that there is no leadership "integrity" that is used as the basic values in all aspects of the life of officials, civil servants, and state administrators. Therefore, human resources, policymakers officials and leaders (the Supervisory Council) associated with eradicating corruption play a very important role and determine the effectiveness or whether or not the eradication of corruption in Indonesia.

#### IV. CONCLUSION

The Law No. 19 of 2019 concerning KPK that has been enacted with various changes, one of which is the wiretapping issue which must be with the permission of the Supervisory Council are intended to provide a new style in the procedures for handling the process of administering justice in line to eradicate corruption. Besides, the existence of the new KPK Law is certainly intended to strengthen the KPK institution as a driving force in eradicating corruption. That is why the existence of KPK institutions must be independent and free from the influence of any power, so it needs to be strengthened the presence of the KPK to function effectively and efficiently in combating corruption.

Despite the shortcomings in the new KPK Law, we need to welcome the government's efforts to establish a supervisory council. With the duties and authorities of the Supervisory Council as stated in Article 37A paragraph (1) formed to oversee the implementation of the duties and authority of the KPK, of course, intended as an effort to strengthen the institution of the KPK. However, if the articles are seen in Law No.19 of 2019 and if it is related to the objectives to be achieved, it is not yet fully in line with the objectives intended to strengthen the KPK institution, but instead, the regulation reflects the weakening of the KPK institution.

The wiretapping is an integrated action with the investigation to find criminal acts, gathering evidence and finding the suspect. Therefore all forms of wiretap are arranged under the objectives of the investigation. This wiretapping permit from the Supervisory Council is different from the duties and authority of the Supervisory Council as stated in Article 37A paragraph (1) of Law No.19 of 2019 established to oversee the implementation of the duties and authority of the KPK. Therefore, the existence of a Supervisory Council will affect the performance of the KPK and hinder the law enforcement process because it has entered the pro-justitia field.

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