

Intelligence Oversight in Indonesia: The Dilemma of Human Rights and National Security

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Keywords: <i>Intelligence Oversight, Dilemma, Human Rights, National Security</i>	Abstract <i>Democratic oversight of intelligence is an instrument to ensure that intelligence activities uphold the principles of human rights and protect liberties of civil society. Based on Law Number 17 of 2011 concerning State Intelligence, oversight is divided into two, internal and external. Internally it is carried out by each state intelligence administrator and externally through the Intelligence Oversight Team of House of Representative. Intelligence oversight has several problems, ranging from regulatory factors, conflicts of interest (political factors) to the weak capacity of oversight actors in assessing alleged violations and considerations of political stability and national security. This paper attempts to constructively analyze the regulation of intelligence oversight in Indonesia and various contemporary problems that surround it. This paper uses a normative juridical research method, with a concept and legislation approach. This research found that the attachment of oversight actors to the limits of intelligence secrets makes it all in a dilemma so that it is impossible to open up allegations of human rights violations of state intelligence to the public holistically. The existence of conflict of interest, void and unclear regulations, until threats to the members of State Intelligence Oversight Team is also a separate inhibiting factor in conducting oversight.</i>		
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A. INTRODUCTION

Intelligence in the context of state administration is the spearhead in conducting early detection of any information that has the potential to disrupt the stability of national security.¹ Therefore, the state intelligence agency, as a forum that is given the task and authority by the state to carry out intelligence functions and activities, must always improve its capabilities and develop systems and supporting equipment to maintain national security.

The development of intelligence institutions in Indonesia began with the birth of the Special Agency since Indonesia's independence until after the reform with the formation of State Intelligence Agency or *Badan Intelijen Negara* (BIN), experienced

¹ Wisnu Utomo, "Optimalisasi Kinerja Kontra Intelijen Dalam Pengamanan Rahasia Negara," *Jurnal Ketahanan Nasional* 15, no. 2 (2010): 17–29, <https://doi.org/https://doi.org/10.22146/jkn.22342>.

so many dynamics in its intelligence practices. State intelligence agencies experienced various upheavals in their intelligence practices during the Sukarno administration, ranging from institutional/personnel rivalry to the influence of political actors and users (the president), unclear intelligence management, and the dynamics of the international, regional, and local strategic environments.²

After Sukarno, the practice of Indonesian intelligence in the New Order era was better known as “black intelligence”, where the focus of intelligence operations at that time was to minimize all forms of threats to Suharto's rule.³ Therefore, in the New Order era, there were frequent deviations in intelligence practices, such as in military operations in Aceh, East Timor, and Papua, the incident of January 15, 1974 (*Malari-Malapetaka Lima Belas Januari*), the Tanjung Priok incident in 1984, the Talangsari case in Lampung 1989, the mysterious shooting case (*Petrus-Penembakan Misterius*) in the 1980s, and the last case was the disappearance of activists in 1997-1998.⁴

The intelligence agency, after the collapse of the New Order regime, underwent several reforms after previously being used as an instrument of perpetuating power, which symbolizes the totality of the role of intelligence in the country's political system.⁵ The rollout of reforms accompanied by demands to reform the security sector, including the intelligence sector, has not yet been fully achieved. The inhibiting factor for the reform process is the presence of military threats faced by Indonesia. This threat stymies political pressure to implement reforms because it interferes with the operational security requirements of military operations.⁶

Political intelligence or security intelligence tended to dominate intelligence relations with the state at the beginning of reform. In its development, the relationship that occurs is more inclined towards security intelligence, not because of the creation of an effective democratic political oversight of the intelligence services but because of the weakening of the intelligence services' interference in the political system.⁷

The issuance of Presidential Instruction Number 5 of 2002 concerning the granting of authority to the BIN to carry out the intelligence coordination function as well as the mechanism of a working meeting with Commission I of the House of Representative (DPR) marked the start of the reform process within the intelligence agency. BIN has become a milestone in the process of transforming intelligence into modern security intelligence in a democratic political system. This interaction may only strengthen intelligence differentiation and eliminate the character of the

² Ikrar Nusa Bhakti, Diandra Megaputri Mengko, and Sarah Nuraini Siregar, *Intelijen Dan Politik Era Sukarno* (Jakarta: LIPI Press, 2018).

³ Andi Widjajanto and Artanti Wardhani, *Hubungan Intelijen-Negara 1945-2004* (Jakarta: Pacivis UI dan Friedrich Ebert Stiftung, 2008).

⁴ Widjajanto and Wardhani.

⁵ Widjajanto and Wardhani.

⁶ Widjajanto and Wardhani.

⁷ Widjajanto and Wardhani.

intelligence state as in the New Order era if the intelligence reform process can be carried out consistently.⁸

Reform does not always result in the disclosure of prior instances of state intelligence agencies being involved in human rights violations. Post-reform human rights violations allegedly involving BIN are still happening, one of which is human rights activist Munir Said Thalib. Munir was killed by Polycarpus using arsenic poison in his tea. Munir died on September 7, 2004, aboard a Garuda flight on his way to the Netherlands to pursue his studies.

The incident that happened to Munir shows that intelligence agencies have not completely changed the pattern of operations in the past. The assassination gave the impression that Munir was an enemy of the state and had to be eliminated before he could write a thesis on humanitarian law in war. The irritation of several TNI officials towards Munir's efforts to expose human rights violations and corruption by TNI personnel in the past shows that there is a hidden relationship between BIN intelligence and these elements.⁹

It is undeniable that the public's suspicions are getting stronger that BIN and a few parties who have hidden relations with BIN were the actors behind Munir's murder. According to Hariyadi Wirawan, suspicions that arise like this show that "experience has taught how in the past the intelligence service has become a tool for beating up the opposition and parties who are not in line with the authorities or are considered to endanger the interests of the authorities".¹⁰ Rulers in the New Order used intelligence agencies to eradicate the movement supporting democracy and make it a solid pillar of support for authoritarianism.

Indonesia's early democratic transition to reform has not yet been followed by optimal reform of state institutions in the field of defense and security, especially intelligence agencies. Intelligence agencies seem to be out of date in the midst of rapid democracy. Munir's death is an indication that intelligence agencies are still empty of reform.¹¹

After the heartbreaking tragedy that befell Munir, efforts to reform and enhance the state intelligence agency, especially BIN, proceeded. The process of improvement is to realize professional intelligence with integrity, and the presence of strong accountability mechanism and outstanding oversight mechanism with clearly established arrangements.¹²

Through Presidential Regulation Number 34 of 2010 concerning the State Intelligence Agency, the BIN organization was revitalized and further refined with the aim of adapting to the development of the strategic environment and increasing the effectiveness and efficiency of BIN's duties and functions. Not long after, on November 7, 2011, the President passed Law Number 17 on State Intelligence (State

⁸ Widjajanto and Wardhani.

⁹ Ikrar Nusa Bhakti, "Reformasi Intelijen" (Jakarta, 2008).

¹⁰ Teguh Santosa et al., *Komisi 1: Senjata Satelit Diplomasi* (Jakarta: Suara Harapan Bangsa, 2009).

¹¹ Santosa et al.

¹² Widjajanto and Wardhani, *Hubungan Intelijen-Negara 1945-2004*.

Intelligence Law). The Law on State Intelligence is the legal umbrella for intelligence administrators in carrying out their duties and functions. In the Law on State Intelligence, the differentiation of intelligence has been stated, although it is not perfect. Also included are intelligence secrets, mechanisms for overseeing intelligence functions and activities, protection for intelligence agents, special powers in BIN, intelligence coordination, organizational financing and intelligence activities, and criminal provisions.¹³

Efforts to improve BIN did not stop after the promulgation of the State Intelligence Law. Improvements to the structure and institutions continue to be carried out with the repeal of Presidential Regulation Number 34 of 2010 and replaced by Presidential Regulation Number 90 of 2012, which has been amended twice, the last time with Presidential Regulation Number 79 of 2020.

Various improvements in terms of regulations and institutions as a consequence, state intelligence administrators, apart from being oriented towards early prevention of potential threats in accordance with their respective fields, must also uphold human rights and the constitutional rights of citizens.¹⁴ Layered and participatory intelligence overseeing is absolutely necessary to ensure that state intelligence administration upholds human rights. This is reflected in the administration of intelligence in the previous era, which tended to be political-centric and prone to abuses of authority that led to human rights violations.¹⁵

Based on the State Intelligence Law, intelligence overseeing is carried out in two ways, namely internally by each state intelligence administrator and externally. The responsibility for internal oversight rests with the leadership of each state intelligence administrator, while external oversight is carried out by the House of Representatives (DPR) through Commission 1, which handles the intelligence sector.

It is not easy to oversight the state intelligence agencies and their personnel. If we look at the case of Munir's death, only one person later became a suspect and the sole convict, namely Pollycarpus. Meanwhile, Muchdi PR, who was Deputy V of BIN at that time, was free from all legal entanglements in court.¹⁶ Sadly, the Fact-Finding Team's report on Munir's death disappeared before it could be made public.¹⁷

Oversight of state intelligence is indeed a dilemma for oversight actors. For example, the external oversight carried out by the DPR through the Intelligence Oversight Team, where DPR members are members of political parties, and the President, as *the end-user* of state intelligence agencies, is also a member of political parties. Meanwhile, most political parties have consolidated into strong supporters

¹³ Fitri Atur Arum, "Reposisi Intelijen Dalam Badan Intelijen Negara Pasca Lahirnya Undang-Undang No. 17 Tahun 2011 Tentang Intelijen Negara" (Universitas Islam Indonesia, 2016).

¹⁴ Andi Widjajanto, *Negara, Intel Dan Ketakutan* (Jakarta: Pacivis UI, 2006).

¹⁵ Tim Kajian Keamanan Nasional, "Menguak Kabut Pengawasan Intelijen Di Indonesia" (Jakarta, 2021).

¹⁶ Inggried Dwi Wedhaswary, "Muchdi Divonis Bebas," Kompas, 2008, <https://lifestyle.kompas.com/read/2008/12/31/10550014/~Nasional>.

¹⁷ Dewi Nurita, "Perjalanan Kasus Hilangnya Dokumen TPF Munir," Tempo, 2019, <https://nasional.tempo.co/read/1268805/perjalanan-kasus-hilangnya-dokumen-tpf-munir>.

of the government. If there were operational deviations from state intelligence institutions at the time that resulted in gross human rights violations, the oversight actors faced a dilemma, would they continue to provide transparent and open reports to the public, despite the limits of intelligence secrets and considerations of political stability and national security.

The oversight actor's dilemma, especially the DPR's State Intelligence Oversight Team as an external overseer, can certainly be understood as a problem that must be resolved. As the bearer of the people's sovereignty, the DPR must have the courage to oversight state intelligence institutions closely, including if there are of human allegations rights violations committed by state intelligence personnel, even if it drags executive officials or members of political parties. The people, as the holders of sovereignty as well as those who finance state intelligence agencies through the taxes they pay, of course, want to get clear information through their representatives in parliament.

Various studies have been conducted regarding intelligence oversight in Indonesia, none of which have discussed the dilemma between human rights and national security. For example, the research conducted by Yeni Handayani in a journal entitled Formation of the State Intelligence Oversight Team as Mandate of Law Number 17 of 2011 Concerning State Intelligence. This research only describes the functions, duties, authorities, rights, obligations, fulfillment, work mechanisms of the DPR oversight team.¹⁸

Furthermore, Sri Yanuarti in her journal entitled Democratic Intelligence Supervision as Instruments Prevention of Violation of Human Rights focused her research on the mechanism of democratic intelligence oversight in Indonesia and efforts to prevent human rights violations. In her research, Sri Yanuarti concluded that intelligence oversight can only run effectively if democratically elected authorities assign tasks (assignments) to intelligence. This tasking authority is followed by the development of a periodic or regular reporting system.¹⁹

This paper tries to answer two problems, first, how is the regulation of intelligence oversight in Indonesia and the various contemporary problems that surround it? Second, what is the DPR's dilemma as an external overseer when overseeing state intelligence?

B. METHOD

This piece uses normative juridical law research.²⁰ The approaches used in this study include a conceptual approach and a statutory approach. The collection of legal materials is carried out by searching for and collecting primary legal materials;

¹⁸ Yeni Handayani, "Pembentukan Tim Pengawas Intelijen Negara Sebagai Amanat Undang-Undang Nomor 17 Tahun 2011 Tentang Intelijen Negara," *Jurnal Rechtsvinding Online*, 2014, 1–5.

¹⁹ Sri Yanuarti, "Pengawasan Intelijen Demokratik Sebagai Instrumen Pencegahan Pelanggaran HAM," *Jurnal Penelitian Politik* 14, no. 2 (2017): 127–47, <https://doi.org/https://doi.org/10.14203/jpp.v14i2.722>.

²⁰ Peter Mahmud Marzuki, *Penelitian Hukum (Edisi Revisi)* (Jakarta: Kencana Prenada, 2005).

conducting library searches for secondary legal materials; and non-legal materials. The legal materials used consist of primary, secondary, and non-legal legal materials. Primary legal materials consist of the 1945 Constitution of the Republic of Indonesia, the Law Number 17 of 2011 concerning State Intelligence, the Law Number 17 of 2014 concerning MD3, and the DPR Regulation Number 2 of 2014 concerning the State Intelligence Oversight Team. Secondary legal materials are books, journals, and legal scientific papers. Non-legal materials in the form of books, journals, non-legal research reports, and information accessed through the internet. The legal material analysis technique used to analyze the problem in this paper is prescriptive analytic.

C. DISCUSSION

1. Intelligence Oversight in Indonesia

The exercise of government power must be limited and properly oversight. This oversight aims to ensure that the administration of government does not lead to authoritarianism, which reduces the rights of citizens. This includes oversight of state intelligence administrators. This is not without reason, considering that in the past, many cases of violence and crimes that led to human rights violations were strongly suspected of involving state intelligence agencies.²¹

There are several cases of human rights violations associated with intelligence work, including the cases of military operations in Aceh, East Timor, and Papua, the incident of January 15, 1974 (Malari), the Tanjung Priok incident in 1984, the Talangsari case in Lampung, the mysterious shooting case (Petrus) in the 1980s, the Marsinah case, the disappearance of activists in 1997-1998, and the Munir murder case.²²

The oversight of intelligence institutions is very important for six reasons, namely:²³ (1) The principle of intelligence work confidentiality, which contradicts the principle of transparent and accountable democratic oversight, this principle becomes a demand against all government institutions funded by the state budget, including intelligence agencies; (2) Intelligence agencies have special capabilities for information that is not known to others, so that this privilege has the potential to violate human rights. (3) The world's intelligence community underwent shifting after the 9/11 incident for new security threats; (4) Intelligence agencies have the potential to deviate as a result of self-assessment of threats; (5) Intelligence has been a tool of repression of leaders against society in authoritarian regimes; and, (6) Democratic states need control over intelligence because regulations allow them to operate secretly.

²¹ Sabit Irfani, Ricky Santoso Muharam, and Sunarso Sunarso, "Keadilan Hak Asasi Manusia Dalam Aksi Kamisan Di Indonesia," *Jurnal HAM* 13, no. 1 (2022): 81–96, <https://doi.org/http://dx.doi.org/10.30641/ham.2022.13.81-96>.

²² Widjajanto and Wardhani, *Hubungan Intelijen-Negara 1945-2004*.

²³ Aidan Wills, *Understanding Intelligence Oversight* (Geneva: Geneva Centre for Democratic Control of Armed Forces, 2010).

Intelligence oversight came in line with the enactment of the Law Number 17 of 2011 concerning State Intelligence. There are at least four oversight actors for state intelligence, namely the President (Executive), DPR (Legislative), District Court (Judicial), and the head of each intelligence agency (Internal).²⁴ In addition to the four oversight actors in the State Intelligence Law, the role of intelligence oversight can also be carried out by independent state institutions, civil society organizations, academics, and the press through the mass media.²⁵

Independent state institutions can act as intelligence overseeing actors because they have closely related duties and functions. A simple example is when the Supreme Audit Agency (BPK) has the task of overseeing the accountability of state financial management, including the intelligence agency itself. Likewise, with the Corruption Eradication Commission (KPK) in the field of corruption, the National Human Rights Commission (Komnas HAM) in the field of human rights, and the Ombudsman in the administrative field.²⁶ The role of intelligence surveillance by civil society organizations, academia, and the press through the mass media is equally important. This contribution can be seen when public pressure is represented by the three actors, starting from the process of reforming the TNI-Polri regulations to the formation of the State Intelligence Law. Civil society organizations, academia, and the press become effective oversight forces because they are able to accommodate broad public aspirations.²⁷

The existence of the State Intelligence Law has become an instrument for limiting what can be done and what cannot be done by state intelligence agencies. Internal and external oversight can be carried out effectively after the promulgation of the State Intelligence Law. This is because if there are activities or programs related to intelligence issues, action can be taken in accordance with existing provisions. Likewise, the sanction mechanism can be implemented if intelligence performance is deemed to deviate from the existing law.²⁸

The issuance of the Law on State Intelligence at the same time separates the function of intelligence in law enforcement. This can be seen from the limitation of BIN's performance as stipulated in Article 34 paragraph (1) the Law Number 17 of 2011 concerning State Intelligence, which is only directed at information gathering and early detection with the abolition of intelligence authority to conduct arrests and interrogations. In practice, the abolition of the authority to make arrests and interrogations is often not fully supported by existing members of the intelligence agency.²⁹

²⁴ Tim Kajian Keamanan Nasional, "Menguak Kabut Pengawasan Intelijen Di Indonesia."

²⁵ Tim Kajian Keamanan Nasional.

²⁶ Tim Kajian Keamanan Nasional.

²⁷ Muhammad Haripin et al., "Intelijen Dan Keamanan Nasional Pasca Orde Baru" (Jakarta, 2019).

²⁸ Yanuarti, "Pengawasan Intelijen Demokratik Sebagai Instrumen Pencegahan Pelanggaran HAM."

²⁹ Yanuarti.

Given the enormous potential for human rights violations in intelligence activities, the Law on State Intelligence has regulated the mechanism for overseeing the policies and activities of state intelligence. Intelligence oversight in the State Intelligence Law is divided into two, namely, internal oversight by each state intelligence administrator and external oversight. The responsibility for internal oversight rests with the leadership of each state intelligence administrator, while external oversight is carried out by the House of Representatives (DPR) through Commission 1, which handles the intelligence sector.³⁰

Internal oversight at BIN is carried out by the Government Internal Supervisory Apparatus (APIP), in this case, the Main Inspectorate. As stipulated in Article 11 of Government Regulation Number 60 of 2008 concerning the Government Internal Control System, the effectiveness of the APIP's role must at least meet three requirements, namely: providing adequate confidence in obedience; economy, efficiency, and effectiveness in achieving the objectives of implementing the duties and functions of government agencies; providing warnings early and improving the effectiveness of risk management in the implementation of the duties and functions of government agencies; and maintaining and improving the quality of governance in the implementation of the duties and functions of government agencies.

The Main Inspectorate of BIN is led by a Principal Inspector who carries out internal control duties and reports directly to the Head of BIN. The main inspectorate of BIN consists of the performance inspectorate, personnel inspectorate, administrative inspectorate, and functional position groups. The functions of the Main Inspectorate of BIN are: preparing the formulation of internal control policies; implementing internal supervision of performance and finances through audits, reviews, evaluations, monitoring, and other supervisory activities; implementing supervision for certain purposes on the assignment of the Head of BIN; compiling reports on the results of supervision; and implementation of the Main Inspectorate administration.

The Main Inspectorate, as BIN's internal overseer, has a crucial and strategic role. The composition of the human resources of the Main Inspectorate is state intelligence personnel who are bound by the intelligence oath and intelligence code of ethics. The Main Inspectorate of BIN carries out two oversight roles at the same time, namely oversight of the implementation of good governance and oversight of the implementation of intelligence functions based on law, democratic values, and human rights.³¹

Oversight of good governance requires the Main Inspectorate to comply with statutory provisions and various provisions of APIP as the professional association of internal auditors. As an internal auditor, the Main Inspectorate carries out internal oversight in the form of audit, review, monitoring, evaluation, and other

³⁰ Rizky Ihsan, "Peran Militer Dalam Kontra-Terrorisme Di Indonesia," *Deviance: Jurnal Kriminologi* 3, no. 1 (2019): 54–68, <https://doi.org/https://doi.org/10.36080/djk.871>.

³¹ Wahyu Kuncoro, "Aparat Pengawas Intern Pemerintah: Perannya Dalam Pengawasan Intelijen Yang Akuntabel Di Badan Intelijen Negara," *Jurnal Ilmiah Ilmu Pemerintahan* 4, no. 2 (September 9, 2019): 155–68, <https://doi.org/10.14710/jiip.v4i2.5629>.

oversight activities.³² Meanwhile, his second role is to carry out intelligence surveillance to ensure that the implementation of the state intelligence function does not violate the laws and regulations and prevent potential human rights violations. Internal intelligence oversight is required to provide added value and improve the effectiveness of intelligence implementation in the context of prevention, deterrence, and countermeasures against any potential threats that threaten national interests and security.³³

In addition to internal oversight by the Main Inspectorate of BIN, internal oversight of BIN in the context of governance is in the hands of the President. The president has a unique and important position. On the one hand, he acts as an end-user, on the other hand also acts as a oversight actor. This position allows the President to carry out overall oversight of the orientation and work of intelligence, including before intelligence activities or operations are carried out by giving directions and reviewing work plans.³⁴

State intelligence personnel are also required to comply with the State Intelligence Code of Ethics (The Chief of BIN Regulation Number 7 of 2017) in acting, speaking, acting and behaving when carrying out their duties and interactions in daily life.³⁵ The State Intelligence Code of Ethics is a code of conduct for internal affairs, where enforcement is carried out by the State Intelligence Ethics Council which is formed by each state intelligence administrator and is *ad hoc*.

Oversight of the implementation of state intelligence is also carried out externally, namely by the DPR. Oversight of state intelligence cannot be separated from the function of the DPR as attributed in the 1945 Constitution of the Republic of Indonesia, namely the legislative function, supervisory function and budget function.³⁶ The attachment of the supervisory function to the DPR is nothing but to ensure that the implementation of the law runs as it should, including in the field of intelligence. The DPR in carrying out oversight in the field of intelligence has its own oversight team formed under the State Intelligence Law. The State Intelligence Oversight Team is a team formed by Commission I of the House of Representatives in charge of defense, foreign affairs, communications, and informatics as well as intelligence. The composition of the membership of the State Intelligence Oversight Team comes from one representative of the faction and the head of the commission in Commission I of the DPR.

Intelligence oversight by the DPR is carried out through two mechanisms, namely general and specific. The general mechanism is carried out through periodic meetings by Commission I of the DPR, while the special mechanism through the

³² Kuncoro.

³³ Kuncoro.

³⁴ Diandra Megaputri Mengko et al., "Mengintegrasikan Pengawasan Intelijen Di Indonesia" (Jakarta, 2022).

³⁵ Adi Ributu, "Pemberlakuan Ketentuan Pidana Terhadap Personel Intelijen Negara Menurut Undang-Undang Nomor 17 Tahun 2011 Tentang Intelijen Negara," *Lex Crimen* 8, no. 7 (2019): 49–56.

³⁶ Jimly Asshiddiqie, *Konstitusi Dan Konstitusionalisme Indonesia* (Jakarta: Sinar Grafika, 2010).

State Intelligence Oversight Team which will carry out their duties in case of deviations in the implementation of the state intelligence functions.³⁷ The authority of the State Intelligence Oversight Team is regulated in DPR Regulation Number 2 of 2014 concerning the State Intelligence Oversight Team in the DPR. The two legal instruments serve as a strong basis for the DPR to carry out comprehensive oversight of the policies and activities of state intelligence administrators.

The State Intelligence Oversight Team has the function of overseeing state intelligence administrators if in the implementation of its functions there are deviations from the State Intelligence Law. This oversight function results in the State Intelligence Oversight Team having to work quickly, accurately, and accountably in investigating allegations of irregularities in the state intelligence function.³⁸

The working mechanism of the State Intelligence Oversight Team is carried out through meetings during the trial period or during recess if necessary. The meeting of the State Intelligence Oversight Team outlines two things, first, discussing deviations in the implementation of the state intelligence function and the DPR, secondly discussing the aspirations and/or complaints of the public to the DPR related to irregularities in the implementation of the state intelligence function. Participants in the meeting consist of the oversight team, state intelligence administrators, state intelligence personnel, and/or any person summoned by the oversight team. At the time of starting the oversight meeting, the leadership of the State Intelligence Oversight Team must state that the meeting is held in private and that the meeting materials as well as the results of the meeting are intelligence secrets.

To obtain in-depth information from various perspectives, the State Intelligence Oversight Team can bring experts in the intelligence field to be heard.³⁹ The implementation of the oversight meeting is also supported by the secretariat general of the DPR, therefore, every meeting participant, expert, or element of the secretariat general of the DPR is obliged by law to maintain the confidentiality of meeting materials and meeting results as intelligence secrets. Meeting materials and meeting results have a retention period of twenty-five years and can be extended after obtaining approval from the DPR. Meeting materials and the results of the meeting may be disclosed before the retention period ends only for the benefit of the court and is closed.

Prior to closing the meeting with state intelligence administrators and/or state intelligence personnel, the leadership of the oversight team with the agreement of

³⁷ Handayani, "Pembentukan Tim Pengawas Intelijen Negara Sebagai Amanat Undang-Undang Nomor 17 Tahun 2011 Tentang Intelijen Negara."

³⁸ Peter Gill, "Of Intelligence Oversight and the Challenge of Surveillance Corporatism," *Intelligence and National Security* 35, no. 7 (November 9, 2020): 970–89, <https://doi.org/10.1080/02684527.2020.1783875>.

³⁹ Catur Alfath Satriya, "Model Pengawasan Eksternal Terhadap Lembaga Otorita Ibukota Nusantara," *Majalah Hukum Nasional* 52, no. 1 (2022): 147–62, <https://doi.org/https://doi.org/10.33331/mhn.v52i1.182>.

the head of state intelligence organizers decides on the portion of the results of the meeting that can be known to everyone, and which will be reported to Commission I of the DPR. Reporting to Commission I of the DPR is carried out at least at the end of each year of trial. As for meetings with everyone other than state intelligence administrators and/or state intelligence personnel, decisions are taken by the leadership of the oversight team. The part of the results of the meeting that was agreed to be disclosed to the public was submitted by the spokesperson after consulting and receiving a mandate from the oversight team.

According to the report of the National Security Study Team of the National Research and Innovation Agency (BRIN), there are 55 intelligence oversight problems faced by all oversight actors. The intelligence oversight actor with the highest number of problems is the DPR with 14 issues.⁴⁰ Several problems related to intelligence oversight by the DPR can be briefly described as follows.

First, the oversight carried out by the State Intelligence Oversight Team can be said to be *ad hoc*, even though institutionally it is permanent. The oversight of the State Intelligence Oversight Team is more of a repressive oversight, that is, the oversight will only take place when it is suspected that there has been a deviation from the implementation of the state intelligence function.⁴¹ Second, the absence of clear benchmarks and boundaries regarding "intelligence deviations", has made the DPR as a formal intelligence oversight actor through Commission I of the DPR and the Intelligence Oversight Team, having difficulties in assessing whether the role of intelligence in mobilizing civil society is appropriate. with the mandate specified in the law and other regulations.⁴²

Third, related to investigations and access to information which are not regulated in detail to what level the investigation and access to intelligence information can be carried out and obtained by the State Intelligence Oversight Team.⁴³ Fourth, related to the limitation of the form of information that can be shared with the State Intelligence Oversight Team and the guarantee of security of intelligence information if the information is shared with the DPR. This is to ensure that members of the DPR who are involved in oversight do not easily reveal intelligence secrets to unauthorized parties.⁴⁴

The DPR as the mouthpiece of the people has a big responsibility in guarding and realizing a democratic government climate. The oversight function of the DPR plays an important role in preventing the abuse of power by the government

⁴⁰ Tim Kajian Keamanan Nasional, "Menguak Kabut Pengawasan Intelijen Di Indonesia."

⁴¹ Yanuarti, "Pengawasan Intelijen Demokratik Sebagai Instrumen Pencegahan Pelanggaran HAM."

⁴² Tim Kajian Keamanan Nasional, "Menguak Kabut Pengawasan Intelijen Di Indonesia."

⁴³ Yanuarti, "Pengawasan Intelijen Demokratik Sebagai Instrumen Pencegahan Pelanggaran HAM."

⁴⁴ Yanuarti.

through state intelligence agencies.⁴⁵ Efforts to strengthen the DPR's oversight function on state intelligence institutions must continue to be carried out to realize a democratic state intelligence. To resolve various issues surrounding the oversight of state intelligence by the DPR from a regulatory perspective, efforts to reorganize intelligence oversight regulations must be carried out comprehensively through harmonization and synchronization of laws and legal reforms by involving maximum public participation.

The capacity building of understanding in the field of intelligence for members of the DPR, especially Commission 1, including the State Intelligence Oversight Team, is a must. Members of the State Intelligence Oversight Team who do not have in-depth abilities in the field of intelligence will experience complex difficulties in assessing whether an intelligence activity or operation has occurred. Regular cooperation in the field of defense, security, and intelligence training with non-governmental organizations, university study centers, and the National Resilience Institute (LEMHANAS) can be an alternative to increase understanding for members of the DPR.

The use and improvement of the quality and quantity of research by the DPR's Expertise Board in the fields of defense, security, and intelligence is no less important. The Expertise Body that functions as a supporter of the performance of DPR members can become a *think tank* in updating the development of information and understanding for DPR members. As the United States Congress has a study center service, the Congressional Research Service is tasked with conducting in-depth studies related to the development of factual issues and forecasts of future conditions. The Congressional Research Service consists of experts in their fields.⁴⁶

2. The Dilemma of Human Rights and National Security

The need for security and the need for democracy is a dilemma in contemporary society. The fulfillment of the community's sense of security has consequences for the presence of restrictions on individual and community freedom by the state. In other words, the security factor is the main reason for the presence of the state. The need for security lies behind the justification for the state's monopoly on the legitimate use of force. On the other hand, the need for democracy has developed in such a way as to reach a phase where human security, including basic rights and freedoms of the people, has an honorable place in the regulation of shared life.⁴⁷

This dilemma can be understood because democracy is closely related to freedom and openness, which has consequences for decreasing the use of security

⁴⁵ Abraham Ferry Rosando, "Peran Dan Fungsi Partai Politik Di Indonesia Ditinjau Dari Undang-Undang Nomor 2 Tahun 2011," *Sapientia Et Virtus* 1, no. 1 (March 31, 2014): 103–18, <https://doi.org/10.37477/sev.v1i1.158>.

⁴⁶ Congressional Research Service, "Organizational Structure," crsreport, 2020, <https://crsreports.congress.gov/>.

⁴⁷ Andi Widjajanto, *Reformasi Intelijen Negara* (Jakarta: Pacivis UI dan Friedrich Ebert Stiftung, 2005).

methods in the public sector. Meanwhile, to achieve a security need, the approach used is very inversely proportional to the need for democracy.⁴⁸ This is like state intelligence, which is part of the national security function with a closed and secret way of working, while the supervision of intelligence, especially external oversight by parliament, is more of a public responsibility.⁴⁹

The parliamentary oversight function in Indonesia is carried out by the DPR as stipulated in Article 20A paragraph (1) of the 1945 Constitution of the Republic of Indonesia. The supervisory function is carried out through the right of interpellation, the right of inquiry, and the right to express opinions. In its development, the DPR's supervisory function is also carried out by forming a permanent or temporary oversight team to carry out oversight in specific fields, such as the State Intelligence Oversight Team. The oversight of state intelligence by the parliament is one of the mandatory requirements for the functioning of a democratic political system.

Oversight of state intelligence is not without problems. According to the working paper report of the BRIN National Security Study Team, there are at least six problems in overseeing state intelligence.⁵⁰ **First**, in terms of regulation, there are still void and unclear regulations regarding the definition of oversight as well as weak paradigms and argumentation construction. **Second**, in terms of transparency, namely the weak implementation of oversight where oversight actors tend to do it partially and secretly. **Third**, conflicts of interest, which are related to the politicization and low *political will* of the oversight actors, the omission of violations due to political factors and the friction of interests within and between oversight actors. **Fourth**, the weakness of the capacity of oversight actors. **Fifth**, intimidation and threats of violence against oversight actors. **Sixth**, the complexity of the threat, where oversight actors find it difficult to assess violations or alleged violations of intelligence because of the complexity of the security situation.

The DPR's oversight of state intelligence also faces the same dilemma as modern society. On the one hand, there is a need to ensure that oversight is carried out in a transparent and accountable manner so that human rights violations do not occur. On the other hand, there is a limit on secret intelligence *and* national security. In addition, the fact that is quite surprising is that until now, the State Intelligence Oversight Team has never worked. This is because until now there have been no public complaints related to alleged irregularities by state intelligence.⁵¹

The State Intelligence Oversight Team seems to be just a wall display without doing any work. This is understandable because Article 8 of DPR Regulation Number 2 of 2014 only mentions that the State Intelligence Oversight Team will oversee if there is a deviation from the state intelligence function against the State Intelligence Law. Therefore, if there are no complaints or "outrage" in the public regarding an

⁴⁸ Widjajanto.

⁴⁹ Hans Born, Loch K. Johnson, and Ian Leigh, *Who's Watching The Spies: Establishing Intelligence Service Accountability* (Washington D.C.: Potomac Books, 2005).

⁵⁰ Mengko et al., "Mengintegrasikan Pengawasan Intelijen Di Indonesia."

⁵¹ Mengko et al.

event that is suspected of involving state intelligence officials, the State Intelligence Oversight Team will not do anything. Article 8 of the DPR Regulation Number 2 of 2014 implies that the State Intelligence Oversight Team cannot carry out preventive oversight functions against state intelligence administrators.

Oversight by the State Intelligence Oversight Team is repressive in nature, namely supervision carried out after an intelligence deviation has occurred. With this oversight model, the opportunity for law violations and even human rights violations by state intelligence is wide open. The State Intelligence Oversight Team does not have regular access to information or certain materials related to intelligence activities or operations if there is no deviation from the state intelligence function.

The question that arises then is how the State Intelligence Oversight Team can map out and investigate certain incidents where there have been irregularities involving state intelligence personnel or not, while they themselves do not know for sure from the upstream. For example, if an intelligence operation is aimed at preventing and/or countering a threat by killing the target because it has the potential to threaten national security, how can the State Intelligence Oversight Team know that the event is just an ordinary crime or an operation that has been planned.

Of course, the intelligence personnel have thought about how the security operations they carry out can be executed “beautifully”. If the incident then became a scene in the public and linked it to intelligence work, the leadership and spokesperson for the state intelligence agency would deny it. Such denial includes an investigation conducted by the State Intelligence Oversight Team as well as leakers who deliberately disclose it in secret to the public.⁵² At that point, the State Intelligence Oversight Team will certainly have its own difficulties in assessing whether there has been a deviation or not.⁵³ Even if the State Intelligence Oversight Team holds oversight meeting and asks for information, materials, or files to prove whether the incident is related to intelligence work, of course the leadership will deny it and provide general files related to work programs and performance achievements that do not specifically mention *covert operations*.

This concern is well-founded, considering several incidents in the past, many of which allegedly involving intelligence agencies were declared by the courts to be individual cases. Thus, the defendants who were found guilty and then sentenced were only limited direct access to the perpetrators directly in the field with personal motives. Thus, the chain of command that shows the structure of superiors'

⁵² Peter Gill, “Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the ‘War on Terror,’” *Intelligence and National Security* 22, no. 1 (February 2007): 14–37, <https://doi.org/10.1080/02684520701200756>.

⁵³ Andhi Bahtiar, Agus Purwadianto, and Vishnu Juwono, “Analisa Kewenangan Badan Intelijen Negara (BIN) Dalam Penanganan Pandemi Covid-19,” *JiIP: Jurnal Ilmiah Ilmu Pemerintahan* 6, no. 2 (September 30, 2021): 178–92, <https://doi.org/10.14710/jiip.v6i2.11475>.

responsibilities in higher hierarchies is never touched.⁵⁴ This is a consequence of the compartmentalization principle in the administration of state intelligence whereby in carrying out its duties and functions, intelligence activities are separate from one another and only known by the unit concerned.

This is certainly a dilemma for the DPR, especially for the Intelligence Oversight Team. On the one hand, the public wants the oversight of state intelligence to be carried out optimally, including minimizing the potential for human rights violations in every intelligence activity or operation. Meanwhile, on the other hand, the State Intelligence Oversight Team collided with intelligence secrets, its oversight authority, and, of course, national security. Not only that, the existence of a conflict of interest in threats to members of the State Intelligence Oversight Team is also a separate inhibiting factor in carrying out oversight work.

The dividing line between the administration of “dirty” state intelligence and national security is often a debate in determining the declassification of various reports of intelligence activities and products. National security is often used as the main reason for restricting information to cover depravity and justify the interests of certain groups. Cornelis Lay said that oversight of state intelligence is a dilemma and described it as catching the shadows.⁵⁵ Only cases of spectacular intelligence irregularities that make the national news will get attention, the rest remain hidden in the shadows.

Facing potential obstacles to oversight in such a way is not an excuse for the DPR not to carry out its supervisory function.⁵⁶ Improvements to the supervisory authority of the State Intelligence Oversight Team through amendments of DPR regulations must be carried out. If at this time there is a deviation from state intelligence and state intelligence administrators through their officials are uncooperative and ignore the recommendations of the Intelligence Oversight Team, the DPR can ask the President to give administrative sanctions to the officials concerned. This is as stipulated in Article 74 paragraph (5) of Law Number 17 of 2014 concerning MD3.

The supervisory function of the DPR is not only related to the government's performance in implementing the provisions of laws or policies that have been determined but also related to the determination of the budget and the implementation of the budget of state revenues and expenditures that have been determined. Therefore, in the supervisory function, there is also an understanding of the budget function, which in Indonesia is usually referred to as a separate function.

⁵⁴ Yanuarti, “Pengawasan Intelijen Demokratik Sebagai Instrumen Pencegahan Pelanggaran HAM.”

⁵⁵ Widjajanto, *Reformasi Intelijen Negara*.

⁵⁶ Diandra Megaputri Mengko et al., “Problematika Peran Badan Intelijen Negara Dalam Penanganan Covid-19 Di Indonesia,” *Jurnal Penelitian Politik* 18, no. 1 (2021): 95–112, <https://doi.org/https://doi.org/10.14203/jpp.v18i1.1000>.

In fact, the budget function itself is a manifestation of the supervisory function, namely fiscal oversight.⁵⁷

The DPR can use its oversight function in the budgetary sector to “pressure” state intelligence administrators to carry out their duties and functions to promote democratic values and respect for law and human rights as a form of accountability for performance to the community, nation, and state.⁵⁸ Budget oversight can be a preventive measure for the DPR to control state intelligence. If there is an indication of *abuse of power*, the DPR can correct the amount of APBN allocation to state intelligence administrators for the following year. In addition, the DPR can request details of the budget for the procurement of goods and equipment related to intelligence operations from state intelligence officials.⁵⁹

The DPR can encourage efforts to declassify files related to intelligence activities and operations whose retention period has expired. This is intended to help avoid misinformation held by intelligence and its misuse.⁶⁰ However, the problem is whether files related to secret intelligence whose retention period has expired will be submitted to the public or will they be destroyed by the state. The next issue, the authority to disclose intelligence secrets whose retention period has expired to the public is the responsibility of who, each state intelligence administrator or the President. When referring to the highest authority of executive power, of course there is the President as user of state intelligence administrators. However, as the person in charge of operations, the state intelligence administrator is obliged to convey it to the public after consulting the President first.

The DPR can also refuse to extend the retention period for state intelligence secrets. The refusal of the extension by the DPR considering whether the file containing the intelligence information has bad implications for the conduciveness of the community or not. This is very reasonable, considering that until now there has not been a single file related to the activities or operations of state intelligence that has been opened to the public. The public should receive proper information regarding events involving state intelligence agencies, both before and after reform.

The people as the holder of the highest sovereignty certainly want the state intelligence agency, which is financed from people's taxes, to be more transparent regarding what they have been doing so far. In this way, state intelligence has proven to the people that the state intelligence reform agenda is not just nonsense.⁶¹ At the very least, state intelligence agencies can disclose files and/or information to

⁵⁷ Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara Jilid II* (Jakarta: : Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006).

⁵⁸ Ario Putra, “Interpretasi Hak Asasi Manusia Dalam Ideologi Pancasila Dan Implikasinya Terhadap Persatuan Dan Kesatuan Di Indonesia,” *Jurnal HAM* 13, no. 1 (April 27, 2022): 1–14, <https://doi.org/10.30641/ham.2022.13.1-14>.

⁵⁹ Andi Widjajanto, Cornelis Lay, and Makmur Keliat, *Intelijen: Velox et Exactus* (Jakarta: Pacivis UI dan Kemitraan, 2006).

⁶⁰ Widjajanto, *Reformasi Intelijen Negara*.

⁶¹ Widjajanto, Lay, and Keliat, *Intelijen: Velox et Exactus*.

the public, although with a few exceptions for the sake of national security, as has been done by the United States and several other countries in the world.

Article 14 of Law Number 39 of 1999 concerning Human Rights states that every person has the right to seek, obtain, possess, store, process, and convey information by using all types of available means. This is in line with Article 28F of the 1945 Constitution of the Republic of Indonesia which regulated the same provision. However, the right to information does not include rights that cannot be reduced under any circumstances. The exercise of the right to information may be limited by referring to the provisions of the existing laws and regulations.

Refer to Principle number ten of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, the limitations must be based on four things, namely:

- a. is based on one of the grounds justifying limitation recognized by the relevant article of the Covenant;
- b. responds to public pressure or social needs;
- c. pursues a legitimate aim; and
- d. In proportionate to that aim.

Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations of morality, religious values, security, and public order in a democratic society.⁶² In addition to being regulated in the constitution, provisions for limiting rights can also be found in Article 29 of the UDHR, Article 19 of the ICCPR, and Article 70 of the Human Rights Law.

Restrictions on the right to information can be carried out by considering aspects of national security as stated in the Johannesburg Principles, namely:

- a. Restrictions cannot be applied if the government cannot show validly that the restrictions are in accordance with legal provisions and are necessary in a democratic society to protect national security interests that arise. legitimate. Legal provisions governing the limitation of the right to information are important to protect these rights while at the same time guaranteeing legal certainty and preventing abuse of power.
- b. Restrictions must be defined by accessible, unambiguous, and carefully crafted laws that allow each individual to see whether an action is against the law or not.
- c. Restrictions must have a genuine purpose and demonstrate the effect of protecting legitimate national security. Governments must be able to demonstrate that restricted information poses a serious threat to legitimate national security interests.

⁶² Surwandono Surwandono, Ratih Herningtyas, and Dian Nursita, "Menakar Paradigma Keamanan Nasional Melalui Analisis Isi Terhadap Undang-Undang No. 17 Tahun 2011 Tentang Intelijen Negara," *Mandala: Jurnal Ilmu Hubungan Internasional* 1, no. 1 (June 30, 2018): 19–37, <https://doi.org/10.33822/mjih.v1i1.289>.

- d. A restriction is not valid if the real purpose or the resulting impact is to protect interests that have nothing to do with national security, including, for example, protecting a government from embarrassment due to mistakes made, disclosure of wrongdoings, concealing information about carrying out the functions of its public institutions, instilling a certain ideology, or suppressing industrial unrest.
- e. In a state of emergency, states may apply restrictions but only to the extent required by the situation and only when they do not conflict with the government's obligations under international law.
- f. Discrimination on any grounds shall not be used to limit the right to information.

However, restrictions on the right to information cannot be imposed arbitrarily. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.⁶³ In line with that, Article 5 (1) of the ICCPR explains that nothing in the present covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present covenant.

The same thing can be seen in the Siracusa Principles which states that limitations on rights must not endanger the essence of rights. All limitation clauses must be interpreted as expressly and intended to support rights.⁶⁴ In the Johannesburg Principles, limitations on the right to information for reasons of national security are not valid except to protect the existence of a state, its territorial integrity from the use or threat of violence or its capacity to react of threats of violence from external such as the military and from internal such as provocations to overthrow the government by violence.⁶⁵

Restricting the right to information to the public with consideration if the information is disclosed without any restrictions, it will endanger public interest and impact on national security. However, any confidential, secret, or top-secret files must be disclosed by the state to the public after the period of protection and secret storage has ended. This is state responsibility to the people as the holder of sovereignty.

D. CONCLUSION

The Law on State Intelligence has regulated the mechanism for overseeing the policies and activities of state intelligence. Intelligence oversight in the State

⁶³ UNODC, "Limitations Permitted by Human Rights Law," unodc.org, 2018, <https://www.unodc.org/e4j/zh/terrorism/module-7/key-issues/limitations-permitted-by-human-rights-law.html>.

⁶⁴ Victor Imanuel Nalle, "Asas Contarius Actus Pada Perpu Ormas: Kritik Dalam Perspektif Hukum Administrasi Negara Dan Hak Asasi Manusia," *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 4, no. 2 (October 23, 2017): 244–62, <https://doi.org/10.22304/pjih.v4n2.a2>.

⁶⁵ Diah Imaningrum Susanti, "Kebebasan Berekspresi Dan Ujaran Kebencian: Kajian Filsafat Hukum Terapan," *Sapientia Et Virtus* 7, no. 2 (October 4, 2022): 100–125, <https://doi.org/10.37477/sev.v7i2.363>.

Intelligence Law is divided into two, namely internal oversight by each state intelligence administrator and external oversight. The responsibility for internal oversight rests with the leadership of each state intelligence administrator, while external oversight is carried out by the House of Representatives (DPR) through Commission 1 which handles the intelligence sector. Oversight of state intelligence to date has left a dilemma for oversight actors, especially the DPR as an external overseer. Regulatory factors and the vulnerability of conflicts of interest (political factors) to the weak capacity of oversight actors in assessing alleged violations and considerations of political stability and national security certainly make intelligence oversight not optimal. On the one hand, the public wants the oversight of state intelligence to be carried out optimally, including minimizing the potential for human rights violations in every intelligence activity or operation. Meanwhile, on the other hand, the State Intelligence Oversight Team collided with intelligence secrets, its oversight authority and of course national security. Besides, the existence of a conflict of interest until threats to the members of State Intelligence Oversight Team is also a separate inhibiting factor in carrying out oversight work.

The author's recommendations are, first, encourage improvements to the oversight authority of the State Intelligence Oversight Team. Second, encourage the DPR together with the President to make changes to State Intelligence Law by detailing clear benchmarks and limits regarding "intelligence deviation" till authorities and procedures for classifying, safeguarding, and declassifying national security information. Third, encourage the President as the end user to conduct periodic evaluations of state intelligence agencies to ensure that intelligence activities uphold the principles of human rights, democracy and rule of law.

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