



## **Institutional Design of the Corruption Eradication Commission (KPK) Post-Constitutional Court Decisions Number 70/PUU-XVII/2019 and Number 79/PUU-VII/2019**

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### **Abstract**

Following the ratification of Law Number 19 of 2019 concerning the Corruption Eradication Commission, many parties were disappointed with the institutional design constructed in that law. Therefore, a judicial review was filed against the law with the Constitutional Court. This article aims to understand the institutional design of the Corruption Eradication Commission after the issuance of Constitutional Court Decisions Number 70/PUU-XVII/2019 and Number 79/PUU-VII/2019. In case Number 70/PUU-XVII/2019, the petitioner not only submitted a request for material testing but also a formal request, while in case number 79/PUU-VII/2019, the petitioner only submitted a request for material testing. This paper seeks to answer two important questions: what are the legal consequences of Constitutional Court Decisions Number 70/PUU-XVII/2019 and Number 79/PUU-VII/2019? And what is the institutional design of the Corruption Eradication Commission following the issuance of Constitutional Court Decisions Numbers 70/PUU-XVII/2019 and Number 79/PUU-VII/2019? The study concludes that the consequences of these Constitutional Court decisions, including wiretapping, searches, and/or seizures carried out by the Corruption Eradication Commission, do not require permission from the Supervisory Board. The transition process of the Corruption Eradication Commission's employee status should not disadvantage anyone, and the two-year time calculation in case of investigation termination starts from the issuance of the Investigation Initiation Letter (SPDP). The institutional design of the Corruption Eradication Commission established after this decision includes the position of the Corruption Eradication Commission in the state institutional structure, the position of the Corruption Eradication Commission's employees, and the authority of the Corruption Eradication Commission's Supervisory Board.

Keywords: Constitutional Court Decision, KPK Institutional Structure, KPK Law



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## Introduction

Despite receiving widespread rejection from the public, Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 on the Corruption Eradication Commission (KPK Law) was enacted by the House of Representatives (DPR).<sup>1</sup> Nevertheless, this does not mean that the rejection ceased; even after endorsement, various responses of rejection towards the KPK Law continued. This resistance was a manifestation of discontent towards the KPK Law changes that seemed forced and were not part of the annual national legislative priority programme.<sup>2</sup>

Opposition came from various quarters, including demonstrations that arose in various regions. These protests objected to the KPK Law amendments passed by the DPR in conjunction with the government. The government was asked to refuse the endorsement. Furthermore, students organised under the BEM alliance throughout Indonesia demanded that the president issue a Government Regulation in Lieu of Law (Perppu) for the KPK Law. Further resistance came from within the KPK itself, where several employees resigned as a sign of disagreement with the ratified KPK Law.<sup>3</sup>

The resistance to the KPK Law was not baseless. The reason for this rejection was that the KPK Law passed by the DPR was far from the spirit of strengthening the Corruption Eradication Commission (KPK); instead, it tended to weaken and constrain it.<sup>4</sup> The controversial articles perceived to

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<sup>1</sup> Muhamad Rajab Fadli dkk., "Legal Politic of Corruption Eradication After the Prevail of the Amendment Act of Corruption Eradication Commission," *Unram Law Review* 6, no. 1 (30 April 2022), <https://doi.org/10.29303/ulrev.v6i1.217>.

<sup>2</sup> Nehru Asyikin dan Adam Setiawan, "Kedudukan KPK dalam Sistem Ketatanegaraan Pasca Diterbitkannya Revisi Undang-Undang KPK," *JUSTITIA JURNAL HUKUM* 4, no. 1 (22 April 2020), <http://dx.doi.org/10.30651/justitia.v4i1.3736>.

<sup>3</sup> "Jadi Saksi Ahli, BM: Sejak UU KPK Disahkan, 30 Pegawai Pilih Mundur," <https://www.suara.com/news/2020/02/12/154128/jadi-saksi-ahli-bm-sejak-uu-kpk-disahkan-30-pegawai-pilih-mundur>.

<sup>4</sup> Abdil Mughis Mudhoffir, "The limits of civil society activism in Indonesia: the case of the weakening of the KPK," *Critical Asian Studies* 55, no. 1 (2 Januari 2023): 62–82, <https://doi.org/10.1080/14672715.2022.2123019>.

weaken the KPK include Articles 3 and 24, related to the KPK's independence and the status of its employees becoming civil servants (ASN). Articles 37A and 37B, detailing the Supervisory Board, and Article 47 concerning the KPK's authority for searches and seizures will be more bureaucratic, as will Article 40 regarding the SP3 authority. The revised article explains that the KPK can stop investigations and prosecutions against corruption suspects that are not completed within a maximum period of 2 year.<sup>5</sup>

It was this array of articles that prompted various groups to continue calling for the rejection of the KPK Law until now. Originating from these problems, the KPK Law was proposed for a Judicial Review to the Constitutional Court (MK) as a form of constitutional effort to guard the eradication of corruption in Indonesia. At least there were two cases of law testing submitted to the MK, namely case Number 70/PUU-XVII/2019 on November 13, 2019, and case Number 70/PUU-XVII/2019 on November 26, 2019.

In case Number 70/PUU-XVII/2019, the petitioner requested a formal and substantive review of the Corruption Eradication Commission Law (KPK Law). In the formal review, the petitioner alleged that there was a formal (procedural) defect in the formation process of the KPK Law that violated the provisions of Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia and Article 5 letter e, Article 5 letter g, Article 23 paragraph (2), Article 44 paragraph (1) and paragraph (2), Article 88, and Article 89 of Law Number 12 of 2011 Concerning the Formation of Legislation. Article 163 paragraph (2) and Article 173 paragraph (1) of Law Number 17 of 2014 Concerning the People's Consultative Assembly, the

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<sup>5</sup> "Pasal-pasal Kontroversial UU KPK Baru: Geledah dan Menyita Harus Minta Izin," *suara.com*, 18 September 2019, <https://www.suara.com/news/2019/09/18/192433/pasal-pasal-kontroversial-uu-kpk-baru-geledah-dan-menyita-harus-minta-izin>.

House of Representatives, the Regional Representative Council, and the Regional House of Representatives.<sup>6</sup>

Meanwhile, material testing was conducted on Articles 1 number 3, 3, 12B, 24, 37B paragraph (1) letter b, 40 paragraph (1), 45A paragraph (3) letter a, and 47 of the KPK Law, which the petitioner deemed contradictory to Articles 24, 27 paragraph (1), 28C, and 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

Next, in the case of testing Number 79/PUU-VII/2019, the petitioner only requested formal testing of the KPK Law, meaning testing against the procedure for establishing the second amendment to the KPK Law. According to the petitioner, the KPK Bill discussion process was rushed and seemed hurried to be approved, and this quick discussion process was the cause of the formal defect. Based on this, according to the petitioner, the formation of the second amendment to the KPK Law violated Article 22A of the 1945 Constitution, which was derived into Articles 16, 20, 23 paragraph (1), and 45 of Law Number 12 of 2011, in conjunction with Law Number 115 of 2019.

Regarding the application of case Number 70/PUU-XVII/2019, based on the decision issued by the Court, in formal testing, the Court did not accept the application in its entirety, whereas in material testing, the Court partially accepted the application. As for case Number 79/PUU-XVII/2019, the Court rejected the applicants' request in its entirety. This means the procedure for establishing the KPK Law under the second amendment does not contradict the 1945 Constitution of the Republic of Indonesia.<sup>7</sup>

Research on the KPK has been widely reviewed, among others, about the KPK's position in the state administration system by Ismail Aris<sup>8</sup>; Yopa

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<sup>6</sup> "Constitutional Court Decisions Number 70/PUU-XVII/2019," t.t., 4-5.

<sup>7</sup> Tim Penyusun Hukum Acara Mahkamah Konstitusi, *Hukum Acara Mahkamah Konstitusi* (Jakarta: Sekretariat Jenderal dan Kepaniteraan MKRI, 2010), 138.

<sup>8</sup> Ismail Aris, "Kedudukan KPK dalam Sistem Ketatanegaraan dalam Perspektif Teori The New Separation Of Power (Kritik Atas Putusan Mahkamah Konstitusi No. 36/Puu-Xv/2017 Dan No. 40/Puu-Xv/2017)," *Jurisprudentie : Jurusan Ilmu Hukum Fakultas*

Puspita<sup>9</sup>; Nehru Asikin, and Adam Setiawan<sup>10</sup>; the KPK as an independent state institution by Mellysa Febriani<sup>11</sup>; Moh. Rizaldi<sup>12</sup>; Happy Trizna<sup>13</sup>; the KPK's right of inquiry by Ismail Aris, Irfan Amir & Septian Amrianto<sup>14</sup>; the KPK's authority by Yasmirah Mandasari Saragih & Teguh Prasetyo<sup>15</sup>; Oly Viana Agustine dkk<sup>16</sup>; I Made Artha Rimbawa<sup>17</sup>; The role of KPK in eradicating corruption.<sup>18</sup> Unlike the research above, this study examines the institutional design that includes the authority and position of the KPK post-MK decision Number 79/PUU-XVII/2019. Thus, it can be said that the difference between this research and previous research is that this research focuses on studying MK decisions and their implications.

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*Syariah dan Hukum* 5, no. 1 (8 Juni 2018): 98-114, <https://doi.org/10.24252/jurisprudentie.v5i2.5433>.

<sup>9</sup> Yopa Puspitasari, "Kedudukan Komisi Pemberantasan Korupsi (KPK) Dalam Struktur Ketatanegaraan Indonesia Ditinjau Dari Hukum Islam," *AL IMARAH: JURNAL PEMERINTAHAN DAN POLITIK ISLAM* 4, no. 2 (8 Desember 2019): 163-76, <https://doi.org/10.29300/imr.v4i2.2830>.

<sup>10</sup> Nehru Asyikin dan Adam Setiawan, "Kedudukan KPK dalam Sistem Ketatanegaraan Pasca Diterbitkannya Revisi Undang-Undang KPK," *Justitia Jurnal Hukum* 4, no. 1 (22 April 2020), <http://dx.doi.org/10.30651/justitia.v4i1.3736>.

<sup>11</sup> Mellysa Febriani Wardojo, "Kedudukan Komisi Pemberantasan Korupsi Sebagai Lembaga Negara," *Legal Standing: Jurnal Ilmu Hukum* 2, no. 1 (5 Juli 2018): 73-83, <https://doi.org/10.24269/lis.v2i1.1008>.

<sup>12</sup> Moh Rizaldi, "Komisi Pemberantasan Korupsi sebagai Lembaga Negara Independen?," *Logika: Jurnal Penelitian Universitas Kuningan* 12, no. 01 (27 Januari 2021): 21-32, <https://doi.org/10.25134/logika.v12i01.3754>.

<sup>13</sup> Happy Trizna Wijaya, "Tinjauan Yuridis Terhadap Kedudukan KPK dan Kejaksaan Sebagai Lembaga Independen dalam Perspektif Hukum Tata Negara: Lembaga Independen, Kedudukan, Kejaksaan, KPK." 10, no. 1 (1 Juni 2021): 25-30, <https://doi.org/10.55129/jph.v10i1.1432>.

<sup>14</sup> Ismail Aris, Irfan Amir, dan Septian Amrianto, "Konstitusionalitas Hak Angket Dewan Perwakilan Rakyat (DPR) Terhadap Komisi Pemberantasan Korupsi (KPK)," *Al-Adalah: Jurnal Hukum Dan Politik Islam* 4, no. 2 (10 Oktober 2019): 135-58, <https://doi.org/10.35673/ajmpi.v4i2.436>.

<sup>15</sup> Yasmirah Mandasari Saragih dan Teguh Prasetyo dan Jawade Hafidz, "Analisis Yuridis Kewenangan Komisi Pemberantasan Korupsi (KPK) Sebagai Penuntut Pelaku Tindak Pidana Korupsi," *UNIFIKASI: Jurnal Ilmu Hukum* 5, no. 1 (22 Maret 2018): 33-44, <https://doi.org/10.25134/unifikasi.v5i1.763>.

<sup>16</sup> Oly Viana Agustine, Erlina Maria Christin Sinaga, dan Rizkisyabana Yulistyaputri, "Politik Hukum Penguatan Kewenangan Komisi Pemberantasan Korupsi Dalam Sistem Ketatanegaraan," *Jurnal Konstitusi* 16, no. 2 (11 Juli 2019): 313-38, <https://doi.org/10.31078/jk1626>.

<sup>17</sup> I. Made Artha Rimbawa, "Kewenangan KPK Dalam Memberantas Tindak Pidana Korupsi," *Jurnal Yustitia* 15, no. 2 (31 Desember 2021): 87-93.

<sup>18</sup> Salma Aulia Farahdina Ariani dan Nanik Prasetyoningsih, "Fighting Corruption Post Revision of the Act of the Corruption Eradication Commission," *Media of Law and Sharia* 3, no. 3 (7 Juli 2022): 235-54, <https://doi.org/10.18196/mls.v3i3.13232>.

Departing from the aforementioned problems, the author is interested in analysing Constitutional Court Decision Number 70/PUU-XVII/2019 and Constitutional Court Decision Number 79/PUU-VII/2019. In light of the limitations of the problems in this study, the author focuses on two issues: first, what are the legal consequences of Constitutional Court Decisions 70/PUU-XVII/2019 and 79/PUU-VII/2019? And second, how is the institutional design of the KPK following the Constitutional

### **Research Method**

This research is a normative study, which is a study focused on examining the application of rules or norms in positive law to concrete cases. Because the object of research is a court decision, namely Constitutional Court Decision Number 79/PUU-VII/2019, a case approach is used. The main focus of the approach is the ratio decidendi, or reasoning, which is the court's consideration to arrive at a decision. In addition, a legislative approach (the statute approach) is also used. This legal approach is carried out by examining all laws and regulations related to the legal issue being researched.

The data used are secondary data consisting of primary legal materials, namely the Constitutional Court Decision Number 79/PUU-VII/2019; secondary legal materials, such as literature books, law journals, and research results related to the problem being researched; and tertiary legal materials, such as the Great Indonesian Language Dictionary (KBBI), a law dictionary, an encyclopaedia, and others.

The technique of collecting legal materials in this study is through literature study and document study, which involves the collection of legal materials by examining, reviewing, and studying journals, legal research results, and various official institutional documents in the form of legislation, minutes of meetings, and literature related to research problems.

## A General Review of the Corruption Eradication Commission

Collusion, corruption, and nepotism are nothing more than a legacy problem left by the New Order. This issue was a strong catalyst for the downfall of the New Order government, leading to the reformation.<sup>19</sup> It was the ferocity of corruption that led to the idea of forming the Corruption Eradication Commission (KPK). This is balanced by the decay of law enforcement institutions, from the prosecution, police, and judiciary at various levels.<sup>20</sup>

Through Law Number 30 of 2002, which was ratified on February 27, 2002, by Megawati Soekarno Putri, the KPK institution was officially established.<sup>21</sup> Based on Article 3 of Law Number 30 of 2002, which was then changed to Law Number 9 of 2019, what is meant by the Corruption Eradication Commission is a state institution that, when carrying out its duties and authority, is independent from the influence of any power.

From the above definition, two essential elements of the KPK can be identified. First, the state institution This means that if we refer to the provisions written by Hans Kelsen that the state acts through its organs,<sup>22</sup> it can be said that the KPK is a state institution or state organ that acts on behalf of the state to eradicate corruption. The establishment of the KPK through the law provides legitimacy for it to act on behalf of the state. As Hans Kelsen said, "Whoever fulfils a function determined by the legal order is an organ Furthermore, in its explanation, it is stated that a state institution

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<sup>19</sup> Ahmad Khoirul Umam dkk., "Addressing Corruption in Post-Soeharto Indonesia: The Role of the Corruption Eradication Commission," *Journal of Contemporary Asia* 50, no. 1 (1 Januari 2020): 125–43, <https://doi.org/10.1080/00472336.2018.1552983>.

<sup>20</sup> Zainal Arifin Mochtar, *Lembaga Negara Independen, Dinamika Perkembangan dan Urgensi Penataannya Kembali Pasca-Amendemen Konstitusi* (Jakarta: Raja Grafindo Persada, 2016), 83.

<sup>21</sup> Sidik Sunaryo dan Asrul Ibrahim Nur, "Legal Policy of Anti-Corruption Supervisor Design: A New Anti-Corruption Model in Indonesia," *BESTUUR* 10, no. 2 (15 Desember 2022): 137–58, <https://doi.org/10.20961/bestuur.v10i2.65105>.

<sup>22</sup> Hans Kelsen, *Teori Umum Tentang Hukum dan Negara, Judul Asli, General Theory of Law and State, Terj. Raisul Muttaqien* (Bandung: Nusa Media, 2006), 279.

refers to institutions like the State Auxiliary State, which falls within executive power..

The second element is independence and freedom from any power. Independence means standing alone or unaffected by anything. In the explanation of Article 3 above, it is stated that "any power" means the power to influence the duties and authority of the KPK or individual Commission members from executive, judicial, legislative, or other parties related to corruption crimes.

Nowadays, the growth of state institutions is increasingly fertile. State institutions are said to be growing because, in addition to the three state institutions known in the Trias Politika theory, namely the Executive, legislative, and judicial branches, new state institutions have grown. These state institutions grow as a primary state organ (main state organ) or as a supporting institution (auxiliary state organ). However, most of the institutions that grow as auxiliary state organs grow under various names like commissions, agencies, or institutions.

Some argue that the emergence of institutions or independent institutions that mostly act as performance monitors for existing institutions is a form of distrust of existing institutions. This is part of a crisis of confidence in all law enforcement institutions, starting from the Attorney General's Office, the Supreme Court, and the Indonesian National Police.<sup>23</sup>

Globally, state apparatus in the form of state auxiliaries or independent bodies exists because: (i) there are state tasks that are complex enough to require good independence for their implementation. (ii) There are efforts to empower the duties of existing state organs by creating new, more specific organs. The institutionalisation of the state commission in this constitutional system provides a footing for further regulation of state

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<sup>23</sup> Ni'matul Huda, *Lembaga Negara dalam Masa Transisi Demokrasi* (Yogyakarta: UII Press, 2007), 197.



institutions that appear as new complements, especially for the formation of efficient and effective state and governance structures.<sup>24</sup>

In such a context, the Corruption Eradication Commission is only placed as a supporting institution (state auxiliaries). This is because, in the policy of implementing Law No. 30 of 2002, which can be seen in the explanation, the Corruption Eradication Commission serves as a trigger and empowerment of the existing constitution in eradicating corruption (trigger mechanism).

### **Legal Implications of the Constitutional Court Decisions No. 70/PUU-XVII/2019 and No. 79/PUU-VII/2019**

The case number 70/PUU-XVII/2019 was submitted by the petitioners to the Constitutional Court (MK), received by the Court Registrar on November 7, 2019, and registered in the Constitutional Case Registry Book on November 13, 2019. In the submission of this case, the petitioners proposed a formal and material test of the Corruption Eradication Commission Law (UU KPK). However, the formal test in this case was rejected by the Court in its explanation of its decision, so it will not be further discussed in this article. Similarly, in decision number 79/PUU-VII/2019 filed by the petitioners represented by the KPK Law Advocacy Team<sup>25</sup>, which asked for a formal test and where the Court rejected the petitioners' request, it will not be further described in this article.

The petitioners in the material test tested Article 1 number 3, Article 3, Article 12B, Article 24, Article 37B paragraph (1) letter b, Article 40 paragraph (1), Article 45A paragraph (3) letter a, and Article 47 of the KPK Law, which, according to the petitioners, contradicted Article 24, Article 27 paragraph (1), Article 28C, and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Regarding the provisions of this

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<sup>24</sup> Huda, 15.

<sup>25</sup> "Constitutional Court Decisions Number 79/PUU-VII/2019," t.t.

test request, the petitioners' requests essentially relate to several important and strategic aspects related to the KPK, including four things: KPK institutional independence, the authority of the supervisory board (DEWAS), employee status, and granting authority to stop investigations and prosecutions.<sup>26</sup>

For Article 1 paragraph (3) and Article 3 of the KPK Law, the Court stated in its legal considerations that the word "prevention" written in Article 1 number 3 of the KPK Law is a formulation that essentially reduces the essence of the meaning of eradication itself. Moreover, if Article 1 Number 3 of the KPK Law remains under the provisions of Article 1 (General Provisions), then its material description should be in accordance with Article 3 of the KPK Law, which affirms that the KPK is a state institution under executive power that is "independent and free from the influence of any power". This means the provision is defective because it does not comply with the provisions in Article 3 of the KPK Law, specifically without emphasising the tasks and authority of corruption eradication and the affirmation of independence and freedom from any institution. The lack of substance is an essential part of corruption eradication and can cause legal uncertainty if left unchecked. Therefore, the Court declares Article 1 Number 3 of the KPK Law to be conditionally unconstitutional as long as it is not interpreted as "The Corruption Eradication Commission is a state institution in the executive branch of power that, in carrying out its task of eradicating corruption, is independent and free from the influence of any power".<sup>27</sup>

Furthermore, regarding the independence of the KPK, which questions the constitutionality of the phrase "in the executive power cluster" in the provisions of Article 3 of Law 19/2019, according to the Court, the enactment of the phrase "in the executive power cluster" in Article 3 of Law 19/2019 does not cause the implementation of tasks and powers of the KPK

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<sup>26</sup> "Constitutional Court Decisions Number 70/PUU-XVII/2019," 32.

<sup>27</sup> "Constitutional Court Decisions Number 70/PUU-XVII/2019," 329.

to be disturbed in its independence because the KPK is not accountable to the executive power holder. The Court also affirms that the KPK's independence has been affirmed in previous decisions, namely Decision 012-016-019/PUU-IV/2006 and Decision Number 36/PUU-XV/2017.

Regarding the requirement for KPK leaders to obtain permission first from DEWAS before carrying out wiretapping, according to the Court, this is not only a form of intervention by law enforcement officials by state organs carrying out tasks other than law enforcement but also a form of overlapping authorities, especially pro Justitia, which in essence only exists in law enforcement organs or apparatus. Furthermore, this is not in line with the criminal justice system, where countries that are referred to as rule of law do not open the possibility of the existence of extra-judicial ad hoc organisations even if given judicial or pro Justitia authority. Therefore, the Court explains that wiretapping by the KPK leader does not require DEWAS approval just by notifying Furthermore, because wiretapping no longer needs to ask for DEWAS approval, so do searches and/or seizures, which are also part of pro Justitia actions; searches and/or seizures also do not need approval from DEWAS. But just notifying.

Next, regarding the status of KPK employees based on the KPK Law, they will transition to become State Civil Apparatus (ASN) as outlined in Article 24 and Article 45 paragraph (3) letter a, which the petitioner believes will affect the independence of KPK employees and is feared to give rise to dual monitoring, namely monitoring by the Civil Service Commission (KASN) and by the KPK Supervisory Board, which could result in legal uncertainty and injustice. According to the Court, there is no connection regarding the ASN employee status with the supervision of the ASN by the KASN or the supervision conducted by the Supervisory Board because both can complement each other. Because the KASN was formed to evaluate and supervise the implementation of ASN policies and management, it can

guarantee the realisation of the merit system and monitor the application of principles, the code of ethics, and the ASN code of conduct.<sup>28</sup>

Then regarding the investigator's authority to stop unfinished investigations and prosecution within a maximum period of 2 (two) years as stipulated in Article 40, which according to the petitioner will cause legal uncertainty because there is no definite provision related to the calculation of the two-year period, according to the Court, the setting of a two-year deadline to carry out investigation and prosecution based on the provisions set forth in Article 40 paragraph (1) of the KPK Law is a privilege given to the KPK because the KPK is an extra ordinary institution that has the power to handle corruption known as extra ordinary crime. The power to stop an investigation and/or prosecution could be one of the reasons for the KPK to ensnare a suspect where they must have strong evidence; therefore, within reasonable reasoning, the two-year deadline is calculated since the issuance of the Investigation Start Notice (SPDP), and the two-year calculation is a form of accumulation that starts from the process of investigation and prosecution until it is handed over to the court. Therefore, if it has passed the two-year deadline, the case has not been handed over to the court, and the KPK does not issue a SP3, the suspect can file a pretrial motion.<sup>29</sup>

Furthermore, the petitioner's concern related to the uncertainty since when the issuance of SP3 as stipulated in Article 40 paragraph (1) of the KPK Law is legally justified as long as the phrase "not completed within a maximum period of two years" is not interpreted as "not completed within a maximum period of two years since the issuance of SPDP". As a judicial (pro Justitia) jurisdictional implication possessed by the KPK Leadership as has been considered above cannot be interfered with by DEWAS, then the phrase "must be reported to the Supervisory Board no later than one week" as contained in Article 40 paragraph (2) of the KPK Law must be declared

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<sup>28</sup> "Constitutional Court Decisions Number 70/PUU-XVII/2019," 337–41.

<sup>29</sup> "Constitutional Court Decisions Number 70/PUU-XVII/2019," 344.

unconstitutional as long as it is not interpreted as "informed to the Supervisory Board no later than fourteen working days". Then, by declaring the norm of Article 1 number 3, Article 12B, the phrase "accountable to the Supervisory Board" in Article 12C paragraph (2), Article 37B paragraph (1) letter b, the phrase "not completed within a maximum period of 2 (two) years" in Article 40 paragraph (1), the phrase "must be reported to the Supervisory Board no later than 1 (one) week" in Article 40 paragraph (2), the phrase "with written permission from the Supervisory Board" in Article 47 paragraph (1), and Article 47 paragraph (2) UU 19/2019 above, according to the Court, as a legal consequence then in the event that there is an "Explanation" for the a quo articles, it must also be declared unconstitutional as long as it is not adjusted to the a quo decision.<sup>30</sup> Starting from the consideration foundation above, the verdict concerning the material test states that it grants the petitioners' petition in part.

In line with the nature of the MK's decision as stipulated in the 1945 Constitution, the decision is final and binding. Final means that there is no further legal remedy, and binding means that it is enforced generally. The MK's decision should be followed up by amending the law by the DPR, but in reality, some of the MK's decisions can be implemented by the addressee of the MK's decision through the regulation process, so there is no need to wait for the amendment of the law, which can also take over the MK's decision to be accommodated in the amendment or creation of new legislation.<sup>31</sup> That way, the MK's decision can be implemented immediately after being pronounced in court.<sup>32</sup>

Even though this decision is considered not to meet expectations by the parties and has received sharp criticism from various circles, both from

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<sup>30</sup> "Constitutional Court Decisions Number 70/PUU-XVII/2019," 345–46.

<sup>31</sup> Moh. Mahrus Ali, dkk. "Tindak Lanjut Putusan Mahkamah Konstitusi yang Bersifat Konstitusional Bersyarat Serta Memuat Norma Baru", *Jurnal Konstitusi*, Vol 12, Nomor 3, September 2015, h. 635-636

<sup>32</sup> Yuswanto dan M. Yasin al Arif, "Diskursus Pembatalan Perda Pasca No. 137/PUU-XIII/2015 and No. 56 / PUU-XIV / 2016", *Jurnal Konstitusi*, Vol. 15 No. 4 Desember 2018, h. 723

academia, anti-corruption activists, and community organisations, this decision has implications for the administration of the KPK's organisation, namely, among others, that the process of wiretapping, search, and/or seizure carried out by the KPK does not need approval from DEWAS but only needs to inform the Supervisory Board.<sup>33</sup>

Second, related to the transition of KPK employees to become ASN, in this case, the transition of KPK employees should not harm KPK employees. In relation to this, the court has affirmed that because of the change of status of KPK employees to ASN as the mechanism has been determined in line with the purpose of the Transitional Provision of the KPK Law, the rights of KPK employees to be made ASN for any reason other than those already determined should not be harmed. Because the KPK employees have been serving the KPK, their dedication to eradicating corruption is unquestionable.

Third, the calculation of the two-year period is clarified in the case of issuing a Discontinuation Order for Investigation (SP3), which is calculated since the issuance of SPDP. The two-year calculation is a form of accumulation that starts the process of investigation and prosecution until it is given to the court. Therefore, the suspect can file a pretrial motion if the case has passed two years without being given to the court and the KPK does not issue a SP3.

### **Institutional Design of the KPK Post-Constitutional Court Decision**

The existence of the KPK as a state institution with a specialty in combating corruption in this country often sparks public attention. This is none other than because the discourse of corruption itself, which is the object of this institution's authority, is a very fundamental national problem

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<sup>33</sup> Taufiqurrohman Syahuri, Gazalba Saleh, dan Mayang Abrilianti, "The role of the corruption eradication commission supervisory board within the Indonesian constitutional structure," *Cogent Social Sciences* 8, no. 1 (31 Desember 2022): 2035913, <https://doi.org/10.1080/23311886.2022.2035913>.

and can target anyone. Therefore, it is not surprising if the KPK is always dealing with corrupt officials in the executive, judiciary, or legislative environments.

Because of this role, resistance to the weakening of the KPK often comes when investigating cases involving high state officials, ranging from criminalization of KPK leaders, threats of dissolution, brutal actions against KPK investigators, to changes to the KPK Law. The amendment of the KPK Law by the legislature cannot be denied; the new KPK Law has been ratified. Not long after the KPK Law was ratified, it was submitted to the Constitutional Court for constitutional testing. Although after the amendment of the law there were changes to the organisational institution of the KPK, with the testing of the KPK Law and after the decision of the testing request, there are several changes that influence and reinforce the institutional design of the KPK, among which are

#### **1. The Position of the KPK in the state institutional structure.**

In the provisions of Law No. 19 of 2019 concerning the Second Amendment to Law No. 30 of 2002 concerning the Corruption Eradication Commission, the position of the KPK is stated in Article 1 point 3 and Article 3. Article 1 point 3 of Law 19/2019 is in principle part of the General Provisions that regulate the definition of the KPK, which fully states "The Corruption Eradication Commission, hereinafter referred to as the Corruption Eradication Commission, is a state institution in the executive power cluster that carries out the task of preventing and eradicating Corruption Crimes in accordance with this Law". Meanwhile, Article 3 states, "The Corruption Eradication Commission is a state institution in the executive power cluster that, in carrying out its duties and authorities, is independent and free from the influence of any power.

The substance of these two articles creates a contradiction due to the inconsistency of the KPK definition in Article 1 point 3 with Article 3. In the

description of Article 1, point 3, there is the word prevention," while in the description of Article 3, the word is not mentioned. The word "prevention" listed in Article 1, point 3, of the KPK Law is a description that essentially reduces the meaning of eradication itself. On the other hand, if Article 1 point 3 of the KPK Law remains in Article 1, then the material should be in accordance with Article 3 of the KPK Law, which emphasises that the KPK is a state organ that falls under executive power and whose duties and authorities are carried out "independently and free from the influence of any power". This means the provision is flawed because it is not in accordance with the provisions in Article 3 of the KPK Law, especially with the non-confirmation of the duties and authorities of corruption eradication and the affirmation of independence and freedom from any institution. The lack of this substance is an essential part of corruption eradication and can cause legal uncertainty if left unchecked. If Article 1 point 3 of the KPK Law is left without being aligned with the provisions of Article 3 of the KPK Law, it creates legal uncertainty in fully understanding the KPK as a law enforcement organ in carrying out its functions related to judicial authority as stipulated in Article 24 paragraph (3) of the 1945 Constitution..

Departing from this, the MK decision asserts that the provisions of Article Point 3 must be changed to "The Corruption Eradication Commission, hereinafter referred to as the Corruption Eradication Commission, is a state institution in the executive power cluster that carries out the task of eradicating Corruption Crimes independently and free from the influence of any power". This MK decision eliminates the contradiction between the provisions of the two articles that has the potential to cause legal uncertainty.

Looking at the content of the MK decision related to the position of the KPK, the MK does not question the position of the KPK as a state institution that falls into the category of executive institutions, meaning that the KPK is under the President as the highest leader in the executive. The inclusion of the phrase "state institution in the executive power cluster" into the



formulation of Article 3 is acknowledged by the lawmaker as a follow-up to Constitutional Court Decision Number 36/PUU-XV/2017 as described in the Explanation of Law No. 19 of 2019.<sup>34</sup>

The inclusion of the KPK within the executive realm, based on the Constitutional Court's decision, does not disrupt the KPK's independence in carrying out its duties and responsibilities. Regarding this matter, the Constitutional Court decision clarifies that the independence and freedom of the KPK from the influence of any power are in the execution of its duties and responsibilities, which cannot be based on influence, directions, or pressure from any party. This provision is in line with the previous Constitutional Court's decisions 012-016-019/PUU-IV/2006 and Constitutional Court Decision Number 36/PUU-XV/2017.

Furthermore, the phrase "in the executive power cluster" in Article 3 of Law 19/2019, according to the MK decision, does not cause the implementation of the KPK's duties and authorities to be disrupted because the KPK is not responsible to the executive power holder but to the public. This matter is stated in the provisions of Article 20 of Law 30/2002, namely, "The KPK is responsible to the public for the performance of its duties and submits its reports openly and regularly to the President, the DPR, and the BPK". The submission of reports to the President does not mean that the KPK is responsible to the President. This is one of the characteristics of the existence of an independent state institution, which does not have any relations in carrying out its duties and authorities with any power holder. Thus, it can be said that this MK decision provides affirmation of the KPK's position in the state's institutional.

Thus, it can be said that this Constitutional Court decision provides a firm affirmation of the KPK's position within the state institutional structure as an independent executive organ. The KPK's position within the executive is similar to that of the Indonesian National Police and the Indonesian

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<sup>34</sup> Rizaldi, "Komisi Pemberantasan Korupsi sebagai Lembaga Negara Independen?"

Prosecutor's Office, which are both within the executive institution's environment.

## 2. The Position of KPK Employees

Before the amendment to the employment provision as stipulated in Article 24 paragraph (2) of Law Number 30 of 2002, it was stated that "employees of the Corruption Eradication Commission referred to in Article 21 paragraph (1) letter c are Indonesian citizens who, due to their expertise, are appointed as employees at the Corruption Eradication Commission." After the amendment, as stated in Article 24 paragraph (2) of Law Number 19 of 2019, it is declared that "Employees of the Corruption Eradication Commission are members of the professional corps of the Republic of Indonesia's civil servant apparatus in accordance with the provisions of legislation."

Given this change, KPK employees<sup>35</sup> are now part of the Civil State Apparatus, who are not only subject to the KPK Law but also subject to the Civil State Apparatus Law. Besides, as a consequence, the mechanism for the transition of KPK employees from Non-ASN employees to ASN employees must be regulated. In this case, the Constitutional Court's decision provides several affirmations, firstly that the transition of the KPK employees' status to ASN should not harm the rights of KPK employees to be appointed as ASN for any reason, including KPK employees who have reached the age of 35 years..

Secondly, the position of KPK employees as ASN does not affect the independence of employees in carrying out their duties and does not eliminate the opportunity to associate and gather as long as it is done in accordance with statutory provisions and is intended solely to achieve the

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<sup>35</sup> Pujiyanto Zaenudin dan Aslam Mei Nur Widigdo, "The Effect of Independence and Competence on Performance of Employees with Integrity as Moderation (Case Study on the Corruption Eradication Commission in Indonesia)," *European Journal of Business and Management Research* 7, no. 2 (7 Maret 2022): 29, <https://doi.org/10.24018/ejbmr.2022.7.2.1312>.

KPK's goal in the design of corruption eradication.

Thirdly, as a consequence of making KPK employees ASN, KPK employees will be supervised by the Civil Servants Commission (KASN). In this case, the Constitutional Court's decision provides affirmation that the supervision carried out by KASN is to monitor and evaluate the implementation of ASN policies and management so that the achievement of the merit system can be guaranteed, as well as supervise the application of principles, codes of ethics, and codes of conduct of ASN. The supervision conducted by KASN applies to all ASN employees in any institution, including state organs that carry out law enforcement functions.

### **3. Authority of the KPK Supervisory Board**

One result of the amendment to the KPK Law is the presence of a Supervisory Board as a new element in the KPK institutional structure. The introduction of the Supervisory Board as part of the KPK has generated new discourse and inevitably attracted various criticisms<sup>36</sup> because the powers granted to the Supervisory Board extend the process of handling corruption cases. Not a few observers assess that the presence of the Supervisory Board is a step back in eradicating corruption in Indonesia.

The existence of the Supervisory Board as an element in the KPK institutional structure is stipulated in Article 21 paragraph (1), which states that the Corruption Eradication Commission consists of a Supervisory Board consisting of five people, The Leadership of the Corruption Eradication Commission, which consists of five members of the Corruption Eradication Commission, and Employees of the Corruption Eradication Commission.

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<sup>36</sup> Asyikin dan Setiawan, "Kedudukan KPK dalam Sistem Ketatanegaraan Pasca Diterbitkannya Revisi Undang-Undang KPK," 22 April 2020.

Meanwhile, the duties and authority of the Supervisory Board are regulated in Article 37B, paragraph 1. The tasks given to the Supervisory Board include:

- a. supervising the implementation of the tasks and authorities of the Corruption Eradication Commission;
- b. granting or not granting permission for wiretapping, search, and/or seizure;
- c. preparing and establishing a code of ethics for the Leaders and Employees of the Corruption Eradication Commission;
- d. receiving and reporting from the community about the suspicion of violation of the code of ethics by the Leaders and Employees of the Corruption Eradication Commission or violation of the provisions in this Law;
- e. conducting a hearing to examine the suspicion of a violation of the code of ethics by the Leaders and Employees of the Corruption Eradication Commission; and f. evaluating the performance of the Leaders and Employees of the Corruption Eradication Commission regularly once a year.

Examining the construction narrated in Article 21 paragraph (1) and Article 37B paragraph (1), it appears that the position of the Supervisory Board is subordinate to the KPK Leadership. Regarding this, in this Constitutional Court decision, the Court changed the construction of the Supervisory Board's position so as not to appear subordinate to the KPK Leadership by reconstructing the authority held by the Supervisory Board. Among these are:

First, wiretapping conducted by investigators is no longer accountable to the Supervisory Board; investigators only notify the Supervisory Board about the wiretapping. Thus, the responsibility for wiretapping lies only with the KPK Leadership. This is a consequence of the phrase "accountable to the Supervisory Board" in Article 12C paragraph (2) of Law Number 19 of 2019, which contradicts the 1945 Indonesian Constitution and has no binding legal force as long as it does not mean "notified to the Supervisory Board."

Second, the Supervisory Board no longer has the authority to provide

written permission in cases where the investigator conducts a search and seizure, considering the phrase "with written permission from the Supervisory Board" in Article 47 paragraph (1) of Law Number 19 of 2019 is declared contrary to the 1945 Indonesian Constitution and has no binding legal force as long as it does not mean "by notifying the Supervisory Board." Therefore, investigators only need to notify the Supervisory Board about the search and seizure conducted.

Third, the termination of the investigation and prosecution does not have to be reported to the Supervisory Board but only needs to be notified to the Supervisory Board. This is because the phrase "must be reported to the Supervisory Board no later than 1 (one) week" in Article 40 paragraph (2) of Law Number 19 of 2019 contradicts the 1945 Indonesian Constitution and has no binding legal force as long as it does not mean "notified to the Supervisory Board no later than 14 (fourteen) working days." **Conclusion**

Based on the detailed explanation provided above, two conclusions can be drawn. First, the legal implications that affect the organisation of the KPK, including: (1) the process of wiretapping, searches, and/or seizures carried out by the KPK no longer require permission from the Supervisory Board but merely need to inform the Supervisory Board; (2) the transition of KPK employees to become civil servants; in this case, the transition should not disadvantage KPK employees; and (3) the clarification of the two-year calculation in issuing a Termination Order for Investigation (SP3), which is counted from the issuance of the Notice of Commencement of Investigation (SPDP). Second, the institutional design of the KPK built post-decision includes several things, (1) related to the position of the KPK in state institutions where the KPK's position is reaffirmed as part of the executive, (2) regarding the status of KPK employees where KPK employees are civil servants with the consequence of being supervised by the Civil Service Commission (KASN), as civil servants through its decision, the Constitutional Court guarantees that it will not affect their independence in carrying out their duties, (3) the KPK Supervisory Board

no longer has the authority to give permission in wiretapping, confiscation and/or searches, besides that, related to the termination of the investigation conducted by the investigator, the investigator merely informs the Supervisory Board and is no longer burdened with reporting.

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