The role of the corruption eradication commission supervisory board within the Indonesian constitutional structure

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Abstract: A Supervisory Board was created to oversee the performance of the leadership of the Corruption Eradication Commission or Komisi Pemberantasan Korupsi (KPK) after almost 20 years of existence based on Law No. 19/2019, a second amendment to Law No. 30/2002 on Corruption Eradication Commission. To enhance public services, the government thought that the creation of KPK Supervisory Board was necessary as an adjustment step to the development of Indonesia's constitutional structure despite the commission not being mentioned in the 1945 Constitution. While the establishment of the board is appreciated by some Indonesians, many show concern as they believe that its existence hinders/weakens the fight against corruption. This study discusses the fight against corruption in Indonesia by investigating the autonomy of KPK as an independent institution after the creation of the Supervisory Board. This is a normative juridical study drawing on both a statutory approach and conceptual approach, and a descriptive analysis. The study reveals that even though the Constitutional Court decision No. 36/PUU-XV/2017 stipulates that KPK is a part of the executive branch, its Supervisory Board is

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PUBLIC INTEREST STATEMENT
This paper explains how important it is for a state institution fighting corruption to be independent in order to fight corruption effectively in Indonesia. The study argues that amendment to Law No. 30/2002 on Corruption Eradication Commission or Komisi Pemberantasan Korupsi (KPK). i.e., Law No. 19/2019 should not regulate the supervision of the commission's work in such a way that raises suspicion over the government's good faith in eradicating corruption in Indonesia. Due to the limited sample involved in this research, future large-scale empirical studies on the implementation of the work of the KPK based on the new law are needed to determine how much independence KPK has in eradicating corruption.
not independent because its members are directly selected and appointed by the President as prescribed in Article 3 of the latest KPK Law.

Subjects: Criminal Law & Practice; Criminology - Law; Popular Culture & Law; Public Law

Keywords: Corruption eradication commission; KPK supervisory board; Indonesian constitutional structure; The 1945 constitution

1. Introduction

Since its establishment in 2002, KPK has been positioned as one of the independent state institutions,\(^1\) which allows it to freely carry out the fight against corruption without serious interference from any party including the government. The commission was established because of the corrupt culture that has spread in various lines of state administration, including the Police and the Prosecutor’s Office. This has led many leading legal scholars and activists to believe that corruption has taken root and has become entrenched in Indonesia.\(^2\) Given that a great majority of the public believes the Indonesian Police (POLRI) and the Public Prosecutor’s Office have not been able to fight corruption properly, KPK was born under Law No. 30/2002 to fight corruption like never before.\(^3\) The passing of this legislation has put the investigation of corruption into the hands of three institutions i.e., the Police, the Prosecutor’s Office, and KPK\(^4\) to strengthen the fight against corruption.\(^5\)

In September 2019, the House of Representatives of the Republic of Indonesia hereinafter referred to as the DPR-RI, ratified Law No. 19/2019 on the revision of the KPK Law No. 30/2002. This ratification was carried out in the Plenary Meeting chaired by the Deputy Chairman on 17 September 2019. The Law contains several articles regarding the establishment of a Supervisory Board to KPK. Although discussions on the supervisory board began in 2016, it was not until 2019 that it was created under articles 37A-F of Law No. 19/2019 that put forth the duties and authorities of the board. However, the establishment of this supervisory board has given rise to pros and cons among the Indonesian population.

The establishment of the Supervisory Board has been a crucial issue as it is considered by many to be narrowing the independence and authority of KPK.\(^6\) This new reform prescribes that the Supervisory Board may oversee the implementation of the duties and authorities of KPK before granting any permits for wiretapping, searches, and confiscations. The reform allows the board to establish a code of ethics for the leadership of KPK by examining and hearing any allegations of violations of these codes of ethics. The board may evaluate the performance of the leadership of KPK and receive public reports on alleged violations of the ethics of KPK leadership.\(^7\) Once a year, the Supervisory Board will make a performance report and submit it to the President. This is believed by many to be a serious threat to KPK as an institution, especially knowing that the Supervisory Board is selected and appointed directly by the President.

However, what has been left out or ignored by those advocating either the repeal of Law No. 19/2029 on Corruption Eradication Commission or the dissolution of its newly formed supervisory board is that unlimited power concentrated in the hands of a group of individuals or a single body may lead to tyranny, abuse of power/authority and serious violations of human rights and dignity. Previous studies in favor of the fight against corruption led by KPK have only focused on the need to expand its authority and independence to better deal with the ever-growing corruption and other misuses of public assets in Indonesia. However, countless cases have shown that in carrying their duty, many KPK investigators have engaged in practices and conducts that exceed their authority. This is not only an abuse of power but also and more importantly a violation of the law that should not go unpunished. Previous studies have failed to point out that power needs to be controlled and that unlimited or uncontrolled power may lead to the destruction of democracy and the rule of law. Corruption is one of the biggest threats faced by Indonesia today and this study...
supports a complete independence of any institution fighting it. However, the study argues the need for the creation of a supervisory board is justified to allow for checks and balances, accountability in public services, and good governance. We believe that this remains one of the major challenges in the fight against corruption in Indonesia.

2. Research methods
The method used in this study is the normative juridical research method drawing on a statutory and conceptual approach carried out by examining laws and regulations related to the authority of the Corruption Eradication Commission under the new Supervisory Board. This research is a descriptive analysis to discuss the position of the KPK Supervisory Board in terms of the Constitutional Structure of the Republic of Indonesia. This study also uses primary data consisting of surveys and interviews conducted with several parties to strengthen the results of the research. This includes interviews with prominent legal and political scholars and activists, politicians, and members of the parliament. Interview questions include among others whether KPK has been effective in the fight against corruption before the enactment of Law No. 19/2019 on the Corruption Eradication Commission, which is an amendment to the law that created the commission i.e., Law No. 30/2002. Respondents were also asked whether or not the creation of the Supervisory Board by the amendment to Law No. 30/2002 weakens KPK in the fight against corruption in Indonesia. The study also relies on secondary sources such as court decisions and publications, scientific legal publications to find relevant laws, regulations, and policy regarding KPK and the Supervisory Board.

3. Position of KPK Supervisory board within the Indonesian constitutional structure
The position of an anti-corruption institution in the constitutional structure will greatly determine the independence of the institution in carrying out its duties and functions. Anti-corruption institutions that are subordinate to the government (executive power holders) will tend not to be independent because it is very easy to get caught in a conflict of interest. The new KPK Law turns the Supervisory Council into an internal supervision organ although its position is not well formulated in the institutional structure of Indonesia. Consequently, the existence of the Supervisory Council impacts the Institutional and functional independence of KPK. The revision of the KPK Law that has been passed is suspected of having formal defects, such as the absence of a public examination, a closed process and not being included in the 2019 national legislation program (Prolegnas). The division of institutional functions in the classical trias politica theory which classifies the state into legislative, executive, and judicial functions is no longer seen as usable in analyzing power relations between state institutions. This was then used as the rationale for the need for state aid agencies. The consequences of the amendment to the 1945 Constitution of the Republic of Indonesia have implications for the tendency to form new state institutions. The Constitutional Court stated that the formation of state institutions in various forms is a logical impact due to internal pressure in Indonesia in the form of strong political, legal, and social reforms that have led to the deconcentration of state power and repositioning or restructuring in the state administration system.

As part of KPK structure, the Supervisory Board can be categorized as a model of internal control. This model is carried out by establishing a supervisory unit as one of the work divisions within an institution to be supervised, namely KPK. One of the focal points is the appointment of KPK Supervisory Board by the President through a selection committee that has prerogative rights. According to ICW researcher, Lalola Easter, the position of the KPK Supervisory Board in the constitutional structure of the Republic of Indonesia remains unclear and therefore the Supervisory Board acts as KPK commissioner but has supervisory power.

A former judge of the Constitutional Court who is now appointed as part of the Supervisory Board, Harjono rejects the idea that the Supervisory Board acts in a way that overlaps with the court in granting investigation permission. He claims that the Supervisory Board only grants wiretapping permission after the issuance of the investigation authorization. The Supervisory Board
also ensures that it will not hinder the performance of the KPK because it believes that KPK has its own investigating authority which the Supervisory Board cannot interfere with. According to him, one example of KPK’s independence is the Operation Catch-up Hand or Operasi Tangkap Tangan (OTT). Harjono emphasized that based on the Constitutional Court’s Decision No. 36/PUU-XV/2017 it was clear that the KPK was part of the executive branch, as well as the KPK supervisory board but still upholds its independence in carrying out its functions and duties.

Article 37E states that the appointment and determination of the Chairman and members of the KPK Supervisory Board are carried out directly by the President of the Republic of Indonesia by forming a selection committee. So it can clearly be said that the KPK Supervisory Board is a branch of executive power. However, Harjono emphasized that it was only the first time that the Chairman and members of the Supervisory Board were appointed directly by the President, for the next it must be based on a joint selection of the DPR-RI as well. In the context of supervising the implementation of the duties and authorities of the KPK, in the future, arrangements regarding requirements and appointments to become members of the Supervisory Board are needed so that there are clear boundaries for someone who will register as a candidate for the Supervisory Board member and produce competent and qualified members of the Supervisory Board. In addition, the selection process for the selection of members of the Supervisory Board can be more transparent, objective, accountable and involve public participation through a fit & proper test by the DPR-RI as well as the selection of candidate members for other state institutions.

4. Lawmakers’ views on the creation of KPK supervisory board

The creation of KPK is based on Article 43 of Law No. 31/1999 on the Eradication of Corruption Crimes. Based on this article, Law No. 30/2002 on the Corruption Eradication Commission was established. KPK is different from the Joint Corruption Eradication Team or Tim Gabungan Pemberantasan Tindak Pidana Korupsi (TGPTPK) which was formed based on Government Regulation No. 19/2000 on Corruption Eradication Team. TGPTPK was formed to handle difficult to prove corruption cases under the coordination of the Attorney General. A “difficult to prove corruption case” includes, among other things, corruption in banking, taxation, capital market, trade and industry, commodity futures, or in the financial monetary sector of a cross-sectoral nature; carried out with advanced technology; or carried out by a suspect/defendant with the status of a State Administrator that is Clean and Free from Corruption, Collusion, and Nepotism.15

KPK was formed because the main law enforcement agencies (Police and Prosecutors) were unable to carry out the function of eradicating corruption. This is implied in the preamble considering letter b of the KPK Law, which states that “government institutions that handle corruption cases have not functioned effectively and efficiently in eradicating corruption.”16 Within the constitutional system, the KPK is an auxiliary organ, which is an auxiliary institution that is activated to encourage the normal role of the Prosecutor’s Office and the Police. So if the Prosecutor’s Office and the Police can carry out the function of eradicating corruption properly and correctly, perhaps KPK is no longer needed.17

The formation of the Supervisory Board is expected to be one of the structural parts of KPK which will become an instrument of checks and balances with the agreement of the President of the Republic of Indonesia. The Supervisory Board is needed to minimize the potential for abuse of authority which in this case is aimed at the good KPK governance process. Mahfud M.D as part of the Government also supports the existence of the KPK Supervisory Board to improve the commission as many of its leaders do not understand hand arrest operations or OTT.18 Even though the OTT that has been intensified so far by KPK is considered by some to be very effective in disclosing various corruption scandals. The authority OTT is relevant and crucial given the widespread corruption in Indonesia and its devastating effect on the functioning of its government in providing basic and essential services to the population as well as the implementation of democracy and the rule law.19 In terms of democratic nations, Indonesia ranks 129, just above Ecuador, the West Bank, Gaza, and India, and is at the bottom of 183 countries as measured by the World Bank’s ease
of doing business ranking. Several colossal scandals have been exposed to the public since the establishment of OTT. One example is the mega corruption and money-laundering scandal that took place in the construction of the Hambalang Sports Training Center, a Rasuah OTT case at the Ministry of Sports involving the Chairman and Treasurer of one of the election-winning parties in Indonesia.

The OTT processes carried out so far by KPK are made possible wiretapping, which many rights activists consider a violation of human rights, namely the right to privacy in communication. In fact, the Human Rights Law prescribes that everyone has the right to freedom and confidentiality in correspondence, including communication through electronic means, which implies the right not to be disturbed, except by order of a judge or other legitimate power based on the provisions of the legislation. However, some articles of this law and Article 28 J paragraph (2) of the 1945 Constitution of the Republic of Indonesia say that the state may impose restrictions on secret communication for law enforcement purposes. The regulated restriction is in the form of wiretapping which can only be carried out based on the authority given and regulated by law.

There are many criticisms from the public who consider that KPK has a super body authority, so that it has great potential for abuse of authority, in addition to causing conflict between KPK and other law enforcement institutions, causing turmoil and attempts to bring this institution down. As for the abuse of authority by the KPK, as in the case of Novel Baswedan, it can be seen from the director of investigators (Dirdik) of KPK who answered questions from members in an open KPK inquiry committee session. There are several other matters related to the abuse of authority by the KPK, namely the violation of Article 66 of KPK Law which regulates the prohibition of investigators or KPK leaders from dealing directly or indirectly with suspects or other parties concerned.

This issue of authority needs to be clarified because the enforcement of criminal law in cases of corruption is closely related to human rights, so if an institution has the authority in terms of law enforcement, it must be regulated in a limited manner, this is because in criminal law it adheres to the Legality Principle which in essence is about space. the application of criminal law according to the time and source/legal basis (legislation basis) can result in an action being punished. Another consideration that it is necessary to establish a Supervisory Board due to ethical and legal violations by KPK commissioners which resulted in the weakening of the performance of the super body institution is factored in the role of KPK's authority which is so broad that the anti-racism institution becomes an abuse of power. As well as considering the violation of the code of ethics by KPK itself. So in this case it is considered detrimental to the good name of the institution because several elements of KPK leadership have been entangled in legal and ethical cases. It is important to note that the establishment of the Supervisory Board not only strengthens the work of KPK but also creates good governance as it allows a system of checks and balances because power without any limits is very likely to be abused by individuals in the government.

5. Analysis of the second amendment to law No. 30/2002 on KPK
The analysis of the Draft Law on the Amendment to Law No. 30/2002 on the Corruption Eradication Commission revolves around philosophical, sociological, and juridical foundations.

5.1. Philosophical foundation
Philosophically, the creation of the Corruption Eradication Commission (KPK) was based on the idea that the reform era required a total change to law enforcement, socio-economic conditions, as a result of the legacy of the New Order government which was viewed by the public at that time as being full of corruption, collusion, and nepotism. Meanwhile, the Prosecutor’s Office and the Police at that time were very vulnerable and even became instruments of power and could not be separated from KKN. Therefore, KPK was formed based on Law No. 30/2002. However, now, it has been more than 17 years since the existence of KPK, there are still many criminal acts of corruption, even giving rise to mutual shackles among state administrators regarding corruptive actions that have been carried out and have even further hampered the eradication of corruption
in Indonesia. All efforts to eradicate corruption that have occurred so far have not been able to be carried out optimally and professionally, intensively, and sustainably, so it is appropriate to improve regulations so that the eradication of corruption committed by KPK is effective and efficient.

5.2. Sociological foundation
The practice of corruption in Indonesia occurs in every corner of the power building down to the smallest corners of society. The public still doubts the seriousness of this nation and state in seriously eradicating corruption. The public’s doubts are because eradicating corruption gives the impression of “selective selection”, especially those involving political elites and former officials who are not touched, there are still legal officers who are indicated and caught in the act of corruption. Based on this situation, sociologically, the existence of KPK inherent in the leadership of KPK has become a symbol of people’s resistance to corrupt power. Facing the symbolization of KPK and its leaders as a symbol of justice in eradicating corruption, the law should not be viewed as an independent organism but should be viewed as an integral part of the social system.

The eradication of corruption is not only an aspiration of the wider community but an urgent need for the Indonesian people to prevent and eliminate corruption from this motherland. Law enforcement against corruption is expected to reduce and eliminate poverty. However, after 17 years since its establishment, KPK has not been able to eradicate the culture of corruption that has been a culture for decades. The public still considers that the eradication of corruption is not carried out comprehensively and is limited to the lower middle class and does not occur to the political elite and power holders, including law enforcers, the police, and the prosecutor’s office. It can even be said that there is almost no change in the culture of the people who like KKN. The practice of corruption continues with a more massive, sophisticated, and mass modus operandi, involving officials and former officials, as well as the political elite.

5.3. Juridical foundation
If it is associated with the Draft Law on Amendment to Law No. 30/2002 on Corruption Eradication Commission, then there are several provisions regarding KPK that are no longer in accordance with the development of the legal needs of society and the life of the state, for example, the provisions regarding the wiretapping authority that owned by KPK without the wiretapping procedure regulated in KPK Law, it is feared that it could violate human rights. In addition, the presence of KPK investigators from the Police and KPK prosecutors from the Prosecutor’s Office is feared to cause a conflict of interest in carrying out their duties. Based on these considerations, it is necessary to amend Law No. 30/2002 on KPK. In the juridical aspect, the Draft Law on Amendments to KPK Law illustrates that the regulation was established to address legal issues by taking into account the existing KPK Law. The draft law to amend KPK Law was made to ensure legal certainty and a sense of community justice while still basing it on the concepts contained in the "criminal justice system".

6. KPK supervisory board
The formation of the supervisory board in the new law on the Corruption Eradication Commission has caused a lot of polemics in the community as well as among experts on constitutional law. Regarding the position of the Supervisory Board itself in the organizational structure of KPK, it is still not regulated in detail in Law No. 19/2019, this is because the Supervisory Board is in authority above the position of the Chairperson of KPK since one of its duties is to supervise the Chair of KPK, but the structural organization of the Supervisory Board remains unclear.

The authority given to the Supervisory Board in article 37B shows that the Supervisory Board has a higher position than KPK leadership. This can be seen because every action taken by KPK which is the responsibility of KPK Leaders and KPK employees, is supervised and controlled by the Supervisory Board according to Law No. 19/2019. So it can be said that the Supervisory Board is in the highest position in KPK organizational structure which should be the Supervisory Board should lead the direction of KPK’s goals, while in reality those who carry out the task of directing
the direction of KPK’s goals are still given to KPK Chair. This raises the ambiguity of the position of the Supervisory Board within KPK in addition to the fact that the Supervisory Board has the right to dismiss or impose sanctions on KPK Leaders and KPK employees if they violate either a violation of the code of ethics or laws and regulations. Although this law only explains that the Supervisory Board has the authority to follow up on public reports in the form of hearings to examine alleged violations, it is actually at the President’s wish which can impose sanctions or even remove the leadership of KPK. Based on the decision of the Constitutional Court No. 70/PUU—XVII/2019 also emphasized that the Supervisory Board cannot interfere with the judicial authority (pro justicia), which in this case grants permission for investigation and prosecution.

To supervise the implementation of the duties and authorities of KPK, the government establishes a Supervisory Board consisting of five people with a term of office for four years and can be re-elected in the same position in the next 1 term of office. Members of the Supervisory Board consist of one member from the Government element, one member from the Supreme Court element, and three members from the community element. In Article 37B of Law No. 19/2019 it is clearly stated that KPK Supervisory Board has the task of supervising the implementation of the duties and authorities of KPK; granting permission or not giving permission for wiretapping, embezzlement, and/or confiscation; compiling and stipulating a code of ethics for KPK Leaders and Employees; receive and follow up on reports from the public regarding alleged violations of the code of ethics by KPK leaders and employees; convene a hearing to examine the alleged violation of the code of ethics by the leadership and employees of the Corruption Eradication Commission; evaluate the performance of KPK Leaders and Employees regularly once a year; make a report on the implementation of duties regularly once a year, and submit the report to the President and DPR-RI.

7. Supervisory agency at the prosecutor’s office
The Deputy Attorney General for Supervision or abbreviated as JamWas is an assistant position tasked to carry out the duties and authorities of the Prosecutor’s Office in the field of supervision with responsibility by the Attorney General led by the Deputy Attorney General for Supervision. In carrying out its daily tasks, JamWas is assisted by the Secretary to the Deputy Attorney General for Supervision, Inspector of Personnel and General Duties, Inspector of Finance, Equipment and Development projects, Inspector of Intelligence, Inspector of General Crimes, and Inspector of Special Crimes, Civil, and State Administration. JamWas has the task of supervising the implementation of the duties and development of all elements of the Prosecutor’s Office so that they are carried out in accordance with the laws and regulations, work plans and programs as well as policies set by the Attorney General.

JamWas’ functions include formulating technical supervision policies within the Prosecutor’s Office; planning, implementing, and controlling the observation, research, testing, and assessment as well as providing guidance, controlling the implementation of routine tasks of the Prosecutor’s Office, especially those regarding general administration, personnel, finance, equipment, development projects, intelligence, investigating general crimes, special crimes, examining reports, complaints, irregularities, abuse of position or authority and proposing actions against Prosecutors’ staff who are proven to have committed disgraceful or criminal acts. Monitoring in form of follow-up supervision within the Prosecutor’s Office includes fostering and enhancing the capabilities, skills, and personality integrity of the supervisory apparatus, fostering cooperation and implementing coordination with functional supervisory apparatus of other agencies regarding the implementation of supervision in general as well as technical safeguards on the implementation of the duties and authorities of the Prosecutor’s Office in the field of supervision based on laws, regulations, and policies determined by the Attorney General.

8. Conclusion
The Indonesian political, legal, and ultimately social environments have been shaken by much unrest in recent years. This is partly due to the increasing number of corruption cases, obstacles
faced by the Corruption Eradication Commission or Komisi Pemberantasan Korupsi in carrying out its duties as well as the consequences of the judicial review decision of the Constitutional Court concerning the amendment to Law No. 30/2002 on Corruption Eradication Commission. Ideally, these changes meant improving KPK Law to boost the fight against corruption by making KPK more effective. These changes include the establishment of KPK Supervisory Board which, according to the new law and the constitutional structure of the Republic of Indonesia, is under the direct authority of the executive branch. Although Article 3 of the new KPK law says that KPK remains independent and free from any influence with the establishment of the Supervisory Board, Article 37E of the same law prescribes that the Board’s Chairperson and members are selected and appointed directly by the President. This clearly places the Supervisory Board above KPK leadership. Therefore, the establishment of the Supervisory Board is not in accordance with the independent character of a state institution in general, because the supervisory board is subordinated to the President. As a new institution, the Supervisory Board is needed to minimize any potential abuse of authority by KPK leadership and members to allow for accountability and good governance. The justification of the legislators for the need to establish a Supervisory Board to KPK is to prevent abuse of authority, violations of the law by the commissioners of the institution, as well as violations of the code of ethics and law by KPK leadership. Based on experience, efforts to establish the Supervisory Board may bring about positive values to KPK and the community by creating good governance to implement a system of checks and balances, because power without any boundaries is very likely to be abused by individuals within the government.

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