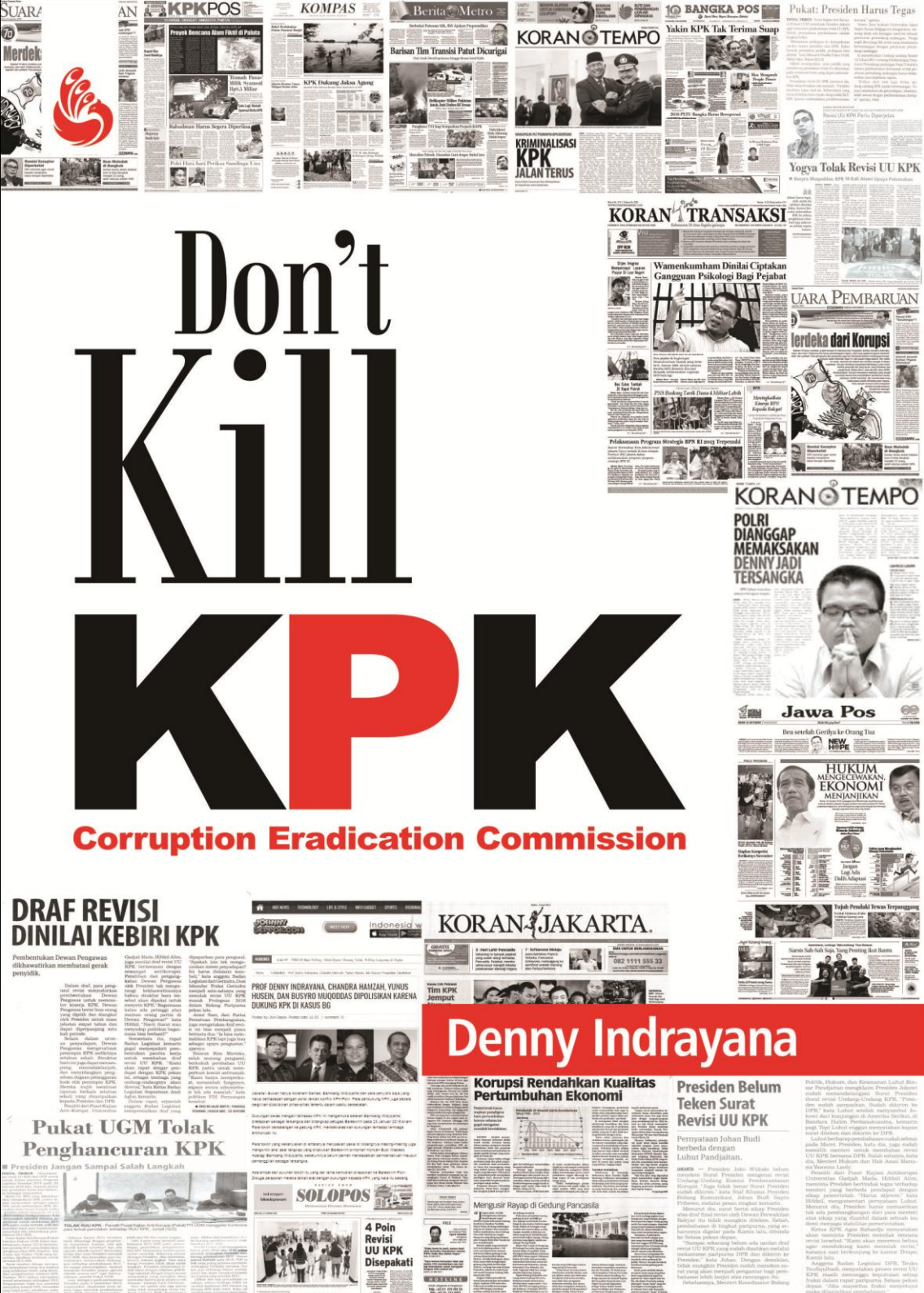
Don't
Kill
KPK
Corruption Eradication Commission
KPK POS
KOMPAS
Berita Metro
KORAN TEMPO
BANGKA POS
Yakin KPK Tak Terima Suap
Pukat: Presiden Harus Tegas
Yogya Tolak Revisi UU KPK
KORAN TRANSAKSI
Wamenkumham Dinilai Ciptakan Gangguan Psikologi Bagi Pejabat
UARA PEMBARUAN
Merdeka dari Korupsi
KORAN TEMPO
POLRI DIANGGAP MEMAKSAKAN DENNY JADI TERSANGKA
Jawa Pos
HUKUM MENGECEWAKAN, EKONOMI MENJANJIKAN
DRAF REVISI DINILAI KEBIRI KPK
Pembentukan Dewan Pengawas dikhawatirkan membatasi gerak penyidik.
KORAN JAKARTA
PROF DENNY INDRAYANA, CHANDRA HAMZAH, YUNUS HUSEIN, DAN BUSYRO MUQODDAS DIPOLISIKAN KARENA DUKUNG KPK DI KASUS BG
Denny Indrayana
Pukat UGM Tolak Penghancuran KPK
Presiden Jangan Sampai Salah Langkah
SOLOPOS
4 Poin Revisi UU KPK Disepakati
Korupsi Rendahkan Kualitas Pertumbuhan Ekonomi
Presiden Belum Teken Surat Revisi UU KPK
Pernyataan Johan Budi berbeda dengan Luhut Pandjaitan.
Mengusir Rayap di Gedung Pancasila

Prof. Denny Indrayana, S.H., LL.M., Ph.D.

DON'T KILL KPK

A Constitutional Law Review on the Strengthening of the Corruption Eradication Commission

DON'T KILL KPK

A Constitutional Law Review on the Strengthening of the Corruption Eradication Commission

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PREFACE

This book was initially a study requested by Indonesia Corruption Watch (ICW). To welcome Corruption Eradication Commisson's (KPK) 12th tenure, ICW asked me to evaluate KPK's existence and performance. The evaluation was conducted from the perspective of constitutional law, the area I have been mastering. For sure, a request from a reputable organization like ICW, which the credibility and capacity have been recognized not only nationally but also internationally in 2015, ICW was nominated for the Allard Prize for International Integrity is an honor for me.

Even though it was intended to be a short study, I deem that evaluating the KPK is too important to be delivered perfunctorily. Thus, even though only two weeks were given, author decided to perform a rather serious study which eventually resulted in a 135-page article titled "Strengthening KPK's Organizational Design", with the perspective of constitutional law. It already deviates from the initial plan to write a short study but I deem it necessary to enhance the article for ICW and serve it in a more comprehensive form: book. There was the birth of this book. Its publishing momentum, taking place amidst the plan to amend the KPK Law, is hoped to provide a more academic input, on top of the practical one, on the existence of the KPK. The latest development, during the consultancy meeting between the President and the House of Representatives, it was agreed that the deliberation of the bill on the amendment of the KPK Law was temporarily suspended, but not terminated. Discussions to raise people's awareness will be organized before the plan to amend the law could continue. Therefore, a book containing arguments as to how KPK's empowerment should be done becomes more relevant to exist. Hopefully, this book could be a reference guide so the KPK, as agreed even by those who support the Law's amendment, can be strengthened, rather than weakened, or even killed.

In the process of writing this book, I was assisted by colleagues at the KPK, including its commissioners who granted access to existing data. I'd like to express my highest appreciation to them. The valuable data would mean nothing if it was not processed into a more compact presentation, which was dense and attractive, especially in the form of a table. For that process, I was assisted by Zamrony, SH, M.Kn., who of course also deserve my appreciation because he was always ready to be troubled by assisting my research works. Finally, I was also aided by my beloved wife, Ida Rosyidah, S.S., M.P.A., in the search for

more complete data related to the budgets of anti-corruption commissions in several countries. *Bunda Os* has also with painstaking and meticulous helped me to tidy the format of this book make it more aesthetic to read and enjoy. To Bunda, my gratitude is certainly not enough. So, also uttered is my prayer to *Illahi Robbi* so we can continue our journey of life endowed with blessings and happiness. Also, I wish that our lives may continue to be more useful for as many people as possible, including through the little knowledge we share through this book. Amen.

Lastly, I hope this short book can fill the spaces of discussion with more data, not just words. With more logic and not just rhetoric. Because, efforts to eradicate corruption not only requires not-doing-nothing; but also constant-movement. Further, efforts to eradicate corruption must also be intelligent and qualified to face a variety of subterfuge and trickery corruptors who are relentlessly eagering to cripple anti-corruption agenda, including anti-corruption institutions. Let's save the KPK, let's save Indonesia. Having Indonesia free from corruption is a necessity. Freedom from corruption, or die.

Hopefully this book is useful. Happy reading!

Yogyakarta-Bogor-Melbourne, July 2016

Denny Indrayana
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Never Give Up Fighting Corruption!

Abraham Samad (KPK Chairman 2011-2015)

As prominent anti-corruption in this country, I know the author of this book, Prof. Denny Indrayana, not only as an academic, but also as an anti-corruption activist who has long been a consistent champion on issues of anti-corruption. Nowadays, it is quite difficult to find academics who is outspoken and courageous in fighting for anti-corruption like those carried out by Denny et al. Most academics just sit comfortably in campus, enjoy salaries and benefits, but are ignorant to the condition of the nation and the state. There is a gap of awareness within our academics today, between the naive awareness and spiritual consciousness. In their naive awareness, they believe corruption as a serious crime, a crime against humanity that must be confronted and eradicated. In classrooms, they vehemently condemned the corruption, but when asked to involve in joint movement to fight corruption, they gradually backed off. These are typical mechanical intellectuals, and not progressive ones like Prof. Denny et al.

When I was asked to say a few words for this book, turmoil arose in my mind. I positioned myself not as an observer, who only observed from outside and did not feel how hard and heavy challenges faced by an anti-corruption activist were. I, Mr. Widjojanto, Prof Denny and other anti-corruption activists have already felt how hard and challenging such struggles are. Starting from being put into the intelligence's list, terrorized and intimidated, to criminalization like what had been put to me, Mr. Widjojanto, Prof Denny, as well as other activist friends. Fighting for anti-corruption by encouraging good and clean governance, which is also one of the aims of this country, was instead rewarded with criminalization. Good intention is not always appreciated. When the voices to fight for anti-corruption issue were already up to the front door, even inside the house, prevailed was the resistance of the corruptors and their accomplices (corruptor fight back). If terror and intimidation were considered no longer powerful, criminalization was the weapon used to silence the voices. But still, the freedom and independency to voice thoughts as constitutional rights, as human nature, can never be turned off. They cannot be silenced by terror, intimidation, criminalization, and even weapons. We will continue to fight until corruption extinct in *Bumi Pertiwi* (motherland).

Perhaps that's the message Prof Denny would like to convey to the audience through this book. By making the Corruption Eradication Commission (KPK) as a symbol of anti-corruption struggle of anti-corruption defenders. We choose the KPK as a symbol of the struggle, because, of all law enforcement agencies in the country which hold the function of combating corruption, the Commission is clearly the only institution trusted by the public. KPK accommodates the hopes of hundreds of millions of people in Indonesia who dream of Indonesia as a country that is clean and free from corruption.

When I was sworn in as KPK chairman, along with four other commissioners in 2011, I had confidence that corruption in Indonesia could be eradicated down to the roots. This was supported by at least a couple of reasons. First, the success of Hong Kong's anti-corruption agency ICAC (Independent Commission Against Corruption) in combating proliferating corruption. In my discussion with former ICAC commissioner, Bertrand de Speville, in 2012, he said that Indonesia has a resemblance to the state of Hong Kong about four decades ago. ICAC itself was a reference in the establishment of the KPK in 2002.

ICAC was established in 1974. Corruption in Hong Kong was very massive at that time. Bertrand said ICAC's task was like 'mission impossible'. Because ICAC dealt with corrupt culture and system that had proliferated for years. Skeptical and pessimistic feelings accompanied the birth of ICAC. But the commissioners, who was supported by dedication and loyalty of its personnel, makes ICAC successfully got through those various obstacles.

ICAC's consistency carried positive impact. Gradually, corruption in Hong Kong decreased. Corruption Perception Index (CPI) Hong Kong even showed a significant improvement. This happens because the ICAC has the political and budgetary supports from the government. Also, thanks to the ICAC, the eradication of corruption in Hong Kong correlates positively with economic growth. Investors actively invest without worrying about extortion by culprits within government officials and law enforcement officers.

Secondly, we have had a number of laws and regulations which are quite capable to deal with the crimes of corruption. At the level of prevention, Law No. 28 of 1999 on State Organizer which is Clean and Free from Corruption becomes the instrument to encourage the establishment of good government and clean governance. Law No. 30 of 2014 on Government Administration also sets up a system to prevent conflicts of interest among state-apparatus officials, and carries penalties for noncompliance. Various Presidential Regulations and Instructions on National Strategy of Corruption Eradication Programs are issued to encourage

the prevention and eradication of corruption. The birth of Law No. 7 of 2006, through the ratification of the United Nations Convention Against Corruption (UNCAC), also reinforces the concept of mitigation and prosecution of corruption offenses. This ratification morally and legally binds Indonesia to undertake measures to prevent and eradicate corruption. As part of international law, UNCAC provides the obligations to the state to support the anti-corruption agenda.

At the level of enforcement, Law No. 31 of 1999 as amended by Law No. 20 of 2001 on Corruption Eradication sets a range of offenses that qualify as corruption. Even in certain circumstances, death penalty can be imposed. Similarly, the Law on the Eradication of Money Laundering No. 8 of 2010 regulates on money laundering crimes that the source can also be derived from the crime of corruption. The presence of the KPK as an independent agency adds to the works to eradicate corruption.

How about Indonesia? Although its CPI in 2015 showed an increase, but in the reality, massive corruption still occurs. The CPI score also did not represent significant improvement. Indonesia's CPI in 2015 was 36 and it ranked 88th out of 168 countries measured. Indonesia's score rose 2 points and jumped 19 position from the previous year. But it was not yet able to match scores and rankings of Malaysia (50), and Singapore (85), and slightly below Thailand (38). Indonesia is better than the Philippines (35), Vietnam (31), and well above the Myanmar (22).

Indonesia's CPI score in 2014 was 34 and it ranked 107 out of 175 countries measured (TII: 2014). The year before, 2013, Indonesia was ranked 114 with 32 points (TII: 2013). Indonesia was still far below Singapore (86), Hong Kong (75), Taiwan (61), South Korea (55), and China (40). In ASEAN, Indonesia's score is far below Brunei (60) and Malaysia (50). Indonesia was slightly below the Philippines (36) and Thailand (35).

In contrast to Hong Kong, which has successfully combated corruption. Corruption Eradication efforts intensively conducted by the KPK and civil society groups struggle amid the state's weak political will in supporting of anti-corruption movement. This assumption is supported by at least some facts. First, the amendment of KPK Law does not support the strengthening of KPK as an institution, instead, it could lead to weaker KPK. From the beginning, the KPK decisively rejects the revision because our examinations showed that a number of articles were potentially weakening, not strengthening, the Commission.

A number of articles in the amendment do not contain strong legal reason (*ratio legis*). Such a legal document should have been duly supported by strong legal reasoning. In addition to the absence of supporting academic texts, these

articles are also contradictory to the principles and legal dogma. For example, wiretapping permission from a Chief if District Court contradicts the principle of confidentiality, fidelity and accuracy. It could be possible that a corruption investigation stopped in the middle of the road because the wiretapping plan was leaked. As a result, not only the investigation could be stalled, the article also has the potential to drag the Chief of District Court into a criminal case should it turn out that the leak was intentional or due to the Chief's negligence. This should also become the attention of the Supreme Court as the leading judiciary body.

The proposal to establish the Honorary Board and the Executive Board in the amendment of the KPK Law is also contrast to the organizational theory of independent state commission. When referring to the theories of William F. Funk, Richard H. Seamon, and William F. Fox, Jr. on independent state commission, an independent state commission leadership is collective collegial. Collective collegial leadership here means that KPK's leadership is not held by one person, but several people in a single entity called "KPK Leaders". There should be no leadership dualism due to interpretation of "owned by several people in different bodies", ie the Honorary Board and the Executive Board in one organization (KPK). The KPK is an Independent State Commission, which is different to other State Commissions that serve as extension of the executive (executive agencies). As an Independent State Commission, the highest decision falls into the collective collegial leadership, whose authority cannot be shared with other bodies or other similar units.

Moreover, having the KPK as an ad hoc institution where the lifetime is limited to 12 years only, does not have a strong legal footing. Even Singapore as the country with the highest level of corruption perception index in Asia alone still has an anti-corruption agency, Corrupt Practices Investigation Bureau (CPIB) which has been established since 1952. Or look at Hong Kong's anti-corruption agency ICAC which has existed since 1974. Doesn't Singapore have Police and Prosecutors? It does. But the governments of Singapore and Hong Kong are aware that tackling corruption must be done by an independent agency which is not affiliated with other institutions.

The House of Representatives' vehement spirit to revise KPK Law has fallen into the public's anxiety over the fate of the amendment bills of the Criminal Code and Criminal Code Procedure which are already in limbo. The House should have first completed the revisions of Criminal Code and Criminal Code Procedure as parent documents before deliberating a more derivative bill should it be deemed necessary. Like building a house, it should start from its foundation first followed by the frames and other structures. Criminal Code-Criminal Procedure Code bills are the foundation of the legal proceedings and material law.

The whole presentation by Prof. Denny in this book, in my opinion, could be a reference, as well as logical arguments of the views of those who reject the weakening of the KPK whereas the KPK should have been instead given more power so that the commission's movement to combat corruption can be more massive!

I'd like to congratulate on the publication of this book, especially to Prof Denny, let's keep fighting for the clean Indonesia.

Wassalam,

Abraham Samad

Why don't kill the KPK?

Bambang Widjojanto (KPK Deputy Chairman 2011-2015)

Amid the tempest to "destroy" efforts to combat corruption, this book was born. The title is very provocative "DON'T KILL KPK". Therefore, this book becomes relevant material and finds the "right" momentum to reach wider reader audience who wants to understand topics related to anti-corruption institutional history in Indonesia. Moreover, the other reason is that this book also suggests what should be the future design of anti-corruption agency after evaluation of various contemporary conditions over on-going corruption eradication circumstances.

On the other hand, this book seems to represent the concerns of some people who are very worried that the terrifying power of corruptors who have found a power base that is so perfect and continued to very seriously, systematically, and earnestly to delegitimize the KPK and at the same time managed to deconstruct all the efforts to combat corruption launched by some governments who are still "sane" together with the KPK and civil society groups.

Historically speaking on the experience of attempted "murder" of anti-corruption institutions in Indonesia, there have been about 12 times when anti-corruption agencies ever created was finally "killed, left to die, die alone or die" before it develops. The facts of this experience confirm, "murdering and killing" anti-corruption agency is not something that is "taboo" and has become "regular" in the eras of law enforcement in Indonesia.

At this point, we can take a hypothesis, one of the reasons why all efforts to realize the ideals of the proclamation aimed at educating the nation, the welfare and social justice cannot be done thoroughly and consistently because the efforts to eradicate corruption has never been conducted in complete, structured and involving massive public participation.

In the Old Order era, there were about 5 (five) institutions, ranging from: Inspectors Coordinating Agency (1957), State Apparatus Activity Supervisory Body (1959), Retooling State Apparatus Committee (1960), Operation Budi (1953), Retooling Apparatus Revolution Command (1964).

Likewise, during the New Order era, there were about 4 (four) institutions which included: Corruption Eradication Commission (1967), the Commission 4 (1970), Clean Operations (1977), Corruption Eradication Team (1982). Sadly, in

Reform Order era has also ever been established the State Officials' Wealth Audit Commission (1999), the Joint Team for Corruption Eradication (2000) and the Coordinating Team for the Eradication of Corruption (2005), which were eventually "killed" by the authority.

Based on the above experiences, it is not impossible if the Corruption Eradication Commission (KPK) ended up to the same fate as other anti-corruption agencies. Corruptors through their hands within the power has an extremely professional skill given their "track records" in "finishing-off" anti-corruption institutions, including institutions like the KPK. This is one of the reasons why the book *Don't Kill KPK* becomes relevant for publication.

It is no joke that corruptors have been utilizing all their resources "at all cost" to "hit" the KPK under various pretexts and the Commission is coming closer to the edge of its abyss of death. Some have even said, the power of "death's door" continues to lurk and threaten the existence of the KPK because the power of darkness has managed to consolidate perfectly.

Basically, there are various efforts aimed at deconstructing the existence of KPK. Such efforts can be categorized as follows: First, "disabling" capacity and "destructing" the credibility of its human resources, among others, such as: a. KPK leaders and their composition is not the best figures resulting from KPK commissioners' selection process; b. It is the only State agency where the Chairman is selected by the Parliament whereas institutions such as the Supreme Court, the Constitutional Court, the Supreme Audit Agency (*Badan Pemeriksa Keuangan*—BPK) and Judicial Commission (*Komisi Yudisial*-KY) choose their own chairmen; c. the institution cannot recruit its own investigators and prosecutors freely based on its interest and needs; d. The fact of criminalization and legal engineering against its leaders or functional and structural officials; e. intimidation in the form of violence in their duties and/or random withdrawal of functional human resources by their institutions of origin.

Second, "destroying" its institutional existence. There are various ways, such as: a. the discourse to dissolve the KPK with the argument that the Commission is an ad hoc institution is continuously built; b. "legislation attack" is constantly launched by proposing amendments of laws with the aim to delegitimize the existence and scope of the authority of the KPK; c. There have been more than 15 times the KPK Law was challenged through judicial review at the Constitutional Court; d. Applying bureaucratization over the institution's authorities so that it loses its freedom in performing their rights and obligations; e. Rejecting KPK's budget proposal by the House of Representatives in connection with the construction of KPK Regional Branches as mandated by the KPK Law. Let's compare with the

Ombudsman Commission which already has its offices existing in all provinces, the National Narcotics Agency which also exists in most of regencies/municipalities and the BNPT which already has offices in some provinces; and.

Third, "sabotage" corruption eradication program. There are various ways, among other things: a. The unavailability of adequate budget for KPK programs which directly relate to the development of public awareness to encourage anti-corruption social movement; b. The indication of intervention in the handling of cases under investigation through hearings between the KPK and the House of Representatives (e.g. during a hearing, the KPK was asked by legislators to handle the case of North Sumatra governor and officials in Papua); c. Attempt to obstruct the proceedings of cases handled by the KPK (for example, a number of legislators questioned the transfer of the trial of Semarang Mayor Soemarmo to the Jakarta Corruption Court); c. The "annexation" efforts towards corruption cases that will or are being investigated by the KPK for example in the corruption case surrounding in the procurement of driving simulator.

In the above description, it seems that, there are various attempts systematically carried out by various interests that aim to "kill" the KPK to prevent it from being able to build programs and encourage more systematic, structured and massive anti-corruption social movement. Various actions above are done in parallel, so that the KPK is so "overwhelmed" to cope with all the pressures, threats and intimidation. That is why, the book *Don't Kill KPK* is relevant and substantial because the attempts to "kill" the Commission are indeed real, factual and concrete.

What is interesting to analyze, now, is that, there is highly-alleged that oligarchy power and political cartels have consolidated and synergized various interests that want the KPK to be "collapsed and helpless" and put it "on the brink of the abyss". These forces are building arguments with various justifications that look "sensible" as if they are aimed at a noble purpose that is to strengthen the capacity, competence and institutionality of the KPK. These forces, partly, allegedly, have metamorphozed into part of the power and perform their efforts in a way that seems "legal" but is actually not legitimate, for example: proposing the amendment of the KPK Law.

ICW has recorded that, there are at least three (3) amendment drafts of the KPK ever appeared: in 2012, October 2015 and February 2016. The three differ from one to another. In addition, the amendments of Criminal Code and Criminal Code Procedure are still in limbo. Not to mention that, about 4 (four) years ago, there was also a revision deliberation of the Anti-Corruption Law but the development of the process has remained unclear. All of them have something to do with anti-corruption regulation.

On February 1, 2016, amendment of the KPK Law was once again discussed in a harmonization meeting at the House of Representatives' Legislation Body. There were about 45 legislators from 6 (six) factions that became the proposer of the amendment. The six factions were PDI-P, Nasdem Party, PPP, Hanura Party, PKB and Golkar Party. Most of the factions, or 5 (five), turned out to be factions that support the government, regardless the President's different opinion to the proposer of the amendment. The academic text of this amendment proposal was absurd and never went through public discourse and did not obtain clear purpose and fundamental interests.

Possibly, the amendment was just on the interest of the oligarchy power and political cartel which did have a desire to deconstruct and delegitimize the KPK and all the efforts to combat corruption. This indication becomes justified when taking into account, for example, one proposal in the amendment bill to establish the Supervisory Board.

Provisions on the Supervisory Board defined in articles 37A, 37B and 37D of the amendment draft. This formulation explicitly violates the principle of the independence of law enforcement agencies. Supervisory Board, which is a non-structural institution, selected and appointed by the President to oversee the duties and authority of the KPK. This article has the potential to violate the principle of independence because a law enforcement agency must be independent so it cannot be supervised by other state institutions. Prosecutorial Commission, Police Commission, including the Judicial Commission, have no authority to supervise the prosecutorial power of the Supreme Prosecutors, investigative authority of the police nor the judges' authority to judge in trials.

The above explanation is just another justification why this *Don't Kill KPK* book is substantial and relevant in today's context. There is a terrifying force that plans to "destroy" the KPK's credibility. While making such an institution effective and efficient requires certain preconditions, this book proposes and analyze them even though it does not touch "the real enemies" yet.

Hopefully this book will not merely add to the treasury of books and become another study for various circles to debate about, but also provide more effective and efficient direction and guidance to the corruption eradication efforts. Congratulations, colleague Prof. Denny Indrayana. He has endowed another knowledge alms.

Salam Takzim,
Bambang Widjojanto

Eradication of (Anti) Corruption

Zainal Arifin Mochtar

Law Faculty Lecturer at Gadjah Mada University, Yogyakarta, Chairman of Center for Anti-Corruption Studies (PuKAT Korupsi FH UGM)

"Corruptors Fight Back" in this republic seems to be more than just a figment. It has even flourished in the veins of corruption eradication per se. Amidst the intensifying corruption eradication, facts have it that corruptors are prepared to launch various attempts to escape charges. In fact, it is more than that, they also try to destroy corruption eradication itself. Using Michael Cerres' (1990) term of virus-the anti virus utilized, the corruptors have also been gearing up *anti-body* against corruption eradication movement. The vigorous corruption virus is being tackled by anti-virus corruption eradication, but virus does not give up in empowering itself to cope with the corruption eradication anti virus.

There are many ways. Kill the anti-corruption law or the anti-corruption body. A simple way which is often effective. Just take it to the Constitutional Court (MK), whenever the justices' judgement is weak, multiplied by their limited *cognitive talent*, it is very possible that the law gets melted down by the gavel.

Another way, attack the corruption eradication commissioners. Get them charged with any crime even just a tiny offense. This has been quite effective in disturbing KPK's corruption eradication efforts. There are so many names to mention just to refresh our memory about the efforts to disable KPK commissioners.

This has not been uniquely in this republic. Many countries are also confronted by similar experience. To name one, Nigeria. This country shares similar corruption eradication problems with Indonesia. Its *corruption perception index* is also not far different. Nigeria introduces Nuhu Ribadu to us, a police hero with bright career and outstanding capabilities to combat corruption when he served as chairman Nigeria's *Economic and Financial Crimes Commission* (EFCC) in 2003. His track record was astonishing. Numerous bribery attempts were combated and even utilized to uncover many big corruption scandals. But, it ended in misery. After his attempt to charge a senior, powerful, and influential politician with corruption, he was removed from his position due to a number of alleged crimes. He was even once a target of attempted murder, which forced him to

'flee' to the United Kingdom in early 2009. Nuhu Ribadu should remind our simple memory about the similar-but-not-the-same experiences faced by Indonesia's anti-corruption commissioners.

Another tactic is by weakening the corruption eradication sub-system. Good corruption eradication is supported by at least three big pillars; state support, public support, and good supporting system. Speaking about state support, there is no need to re-analyze for us to conclude that it is: weak! It seems that the state never gives up in trying to modify corruption eradication regulations. Of course, modify in negative context. It wants to weaken the law, to be more precise.

A good support system was also damaged. KPK is a corruption eradication trident together with the Police and the Prosecutors. In fact, KPK's life has close links with the Prosecutor and the Police. Simply put, there is no need to directly kill the KPK, damaging the Prosecutors and the Police is enough to affect the KPK. Hence, strengthening corruption eradication seems impossible without empowering the Prosecutors and the Police. Still in the system, hinder the strengthening of the KPK. The chance for the KPK to have regional offices was also "prevented" in a variety of pretexts.

Public support was also killed by a simple tactical move. Scare the public. Create a clear segregation, for example, by saying that KPK supporters are people who do not support the Prosecutor and the Police. This terror a la apparatus is spreading rapidly and even becomes a tool of mass destruction of the public's spirit and passion to defend corruption eradication. Defame civil society organizations that work in combating corruption. For the activists, threaten them with various offenses and minor mistakes that can be used to hit back. Examples of this can be put in a quite-long list. The author of this book himself is also experiencing it.

These common attempts are analyzed in this book. Therefore, not needing to talk further, I will let you read this book. The problem is, again, will we simply give up and just hope? Working unyieldingly is the important part to aggregate resistance.

Eradicate Corruption or Anti-corruption?

Back to Michael Cerres' proverbs above, protecting the body from virus is not a one-day job. It is even impossible to kill virus thoroughly. What is feasible is developing antibody system to establish virus protection and prevent the virus from evolving into more complex and gnawing the body.

This means that intensifying corruption eradication will at the same time also intensify the fight against anti-corruption. Anti-corruption is not like flicking

the finger. The efforts require processes, cultural work which is not like a stone falling from the sky, quoting Pramoedya Ananta Toer. Collective efforts that require sustainable spirit, strong stamina and excessively-spurred power.

Strengthening anti-corruption programs like the spirit of Klitgaard (1991) in *"Controlling Corruption"*, as to the works to develop anti-corruption system and institution is an inevitability within. In various corruption eradication perspectives analyzed by Gillespie and Okruhlik (1991), there are four strategies that can be done, namely (1) strategy related to the people; (2) strategy related to law; (3) strategy related to the market; and (4) strategy related to politics.

Similar to the fight-back concept by corruptors, the strategy to strengthen anti-corruption can possibly be extended towards various analysis that can counter the corruption banal. The biggest distinction is on the strong intention and spirit to fight corruption. In this republic, these seem sluggish. Speaking about *ability*, we seem to have enough. Many can develop system and empower corruption eradication efforts. What is weak is *willingness*. When *unable* and *unwilling* meet, usually disaster prevails. Strong figures who are willing and capable to mobilize movement are needed. Figures who understand and are able to foresee potential fight back are required.

Lastly, of course, just like what has been mentioned above, struggle requires process and therefore durability and persistence become important. We need *istiqomah* characters, who are consistent regardless the changes of circumstances and not easily manipulated by situation. There, prevail does the hope for strong corruption eradication movement, and not eradication of anti-corruption. And these are what this book offers. Happy reading!

Zainal Arifin Mochtar
Chairman of Center for Anti-Corruption Studies
(PuKAT Korupsi FH UGM)

Never Again Kill the KPK

Adnan Topan Husodo (ICW Coordinator)

The book in your hand is another form of study conducted by Professor Denny Indrayana, Professor of Constitutional Law UGM, who was awarded Ph.D. by the University of Melbourne, Australia, as an integral part of the cooperation between him and ICW. The book examines the institutionality of the anti-corruption commission with historical approach and international comparison, which is guided by the constitutional theories. Applied practices in many countries are used as comparison data, to view and analyze the differences, as well as weaknesses and comparative advantages with one another. While the central study is the Corruption Eradication Commission (KPK), which recently installed new commissioners.

The qualifications of the author are certainly undeniable. He is a complete personal, both as an academic who has been so seriously engaged in various kinds of researches, studies and dialectics in the anti-corruption agenda in Indonesia, as a former state official, the Deputy Minister of Justice and Human Rights in the era of the second period of President SBY when his efforts to improve the governance of correctional facilities, especially for perpetrators of corruption, improvement of passport services, and others, as well as anti-corruption activist who has been directly involved in advocating on a wide range of public policies for the purpose of combating corruption. PUKAT (Anti-corruption Study Center) at UGM is one of the in-campus organizations he founded with the purpose to actively participate in eradicating corruption in Indonesia.

This study on the KPK's institutionality aims to provide a strong perspective to the public at large about the importance of an independent anti-corruption commission. At the same time, it also offers valuable input to the ruling regime or government in power which has often claimed to be serious in fighting against corruption. This study is also a necessary reading to the members of Parliament and elites of political parties who have been persistence in proposing a revision of the KPK Law which was aimed at spaying the anti-corruption body, particularly through the reduction of its main authorities.

Historically, the fight against corruption in Indonesia often ended because the political will did not have long breath. Corruption itself already became common before independence, when the country of Indonesia did not have a name yet,

comprising independent kingdoms. Each Order in Indonesia, since the Old Order, New Order to Reform Order, has its own traces of history about combating corruption. Nevertheless, various attempts, which were also examined in detail in this study, were powerless in reducing corruption. This was caused by the regime sentiment, with a variety of influences from its networks, the people around its circles, as well as the business people who do not like progressive steps against corruption, to stop and delegitimize it.

The various initiatives by the State to combat corruption that were or have been launched during the Old Order era, such as PARAN (Committee for State Apparatus Retooling), Budhi and Kotrar Operations (Supreme Command of the Revolution Apparatus Retooling) stopped because the prestige of the president could not be disturbed. Moving on to the New Order, various attempts were also taken, such as the establishment of TPK (Corruption Eradication Team) chaired by the Attorney General and Clean Operation (Opstib) that quickly evaporated without much result because they could not touch corruption at the elite level. Political unwillingness was the obstacle.

During the Reform Era too, especially in the early generations, Indonesia was once again hitting the drums of war against corruption, starting with the formation of KPKPN, KPPU and the Ombudsman, followed by the Joint Team for the Eradication of Corruption (TGPTPK) in the Gus Dur era. In the end, KPKPN transformed into the KPK, and TGPTPK was dissolved by the Supreme Court through a judicial review.

Perhaps, the KPK has the longer breath. This institution has reached the age of 12 years, an achievement that is best among corruption eradication organizations or institutions ever established before. From the institution point of view too, the KPK is better than the previous bodies. Perhaps it is because the commission was established in different historical circumstance, where the reform atmosphere helped influence the government's perspective in designing the KPK's institution, even though the Commission was in the end seen as a serious threat to those in power. It was proved later on with the attempts to fight back the KPK, such as through Judicial Reviews (JR) at the Constitutional Court (MK), which has been done several times by different parties, through the criminalization of its Commissioners that weaken the internal body of the Commission this has occurred periodically, or through legislation mechanism, namely the revision of the KPK Law. Of all the proposed revisions to the Law, none was aimed at strengthening the Commission.

Meanwhile, if we reflect on other countries, which are also alluded to in this study, one of the main factors of success in combating corruption is a serious

political will of the ruling regime. For example, Singapore and Hong Kong, two city-states that have brilliant achievements in combating corruption. Singapore and Hong Kong are in the top order on the list of countries with least corruption according to the Corruption Perception Index (CPI) by the Transparency International (TI), for many years, until now. Singapore has a similar institution to the KPK, namely the CPIB (Corruption Practices Investigation Bureau), while Hong Kong has the ICAC (Independent Commission Against Corruption). The CPIB, for instance, has also undertaken three changes in its law, but the regime did them for the purpose of empowerment, for example, to enable the anti-corruption agency delve into the private sector, particularly banking financial institutions.

Indonesia's KPK itself is a combination of various international best practices, although according to the author's note, the level of independency of the KPK is considered the most ideal, compared to similar commissions in other countries. However, to enable the KPK to work more effectively, the authors suggest a few things that need to be done. First, the Commission needs to be used as a constitutional organ, which, with its new position, the KPK is not prone to be dissolved. There are already about 30 countries around the world that have put their anti-corruption commissions as constitutional organs. Second, KPK commissioners and employees must have a temporary immunity to avoid potential criminalization which has often occurred. This immunity would not apply if they are engaging in corruption, or caught red-handed committing other crimes. Third, the mechanism of the election or selection of KPK commissioners needs to be improved, particularly to reduce transactional politics that hold KPK commissioners politically hostage since they were selected. Fourth, the Commission needs to have independent employees, both at the levels of investigator and prosecutor. This is to avoid unnecessary paralysis if the Commission is dealing with corruption in other law enforcement agencies. Fifth, the powerful authority of the Commission must be retained, such as the authority to conduct wiretaps, no Letter of Cessation (SP3), and so forth.

Lastly, with various given privileges, the KPK must have adequate accountability and transparency systems. However, the control system must also be ensured not to open gap for interventions that could disrupt its independence. Therefore, the selection and recruitment of commissioners and employees of the Commission should be able to guarantee that the chosen ones are those with high integrity. Similarly, the codes of conduct and the enforcement of the codes of conduct need to be strengthened so that every form of perversion, albeit small, can be detected and prevented early. While from the approach of external control, the Commission needs to be monitored by the various parties, namely the BPK which supervises

its financial management, the Communication and Information Technology Ministry for the practice of wiretapping, and the Corruption Court on its law enforcement authorities. External monitoring should be complemented with a strong public control so the KPK can carry out the anti-corruption roles effectively.

Jakarta, April 3, 2016

Adnan Topan Husodo
ICW Coordinator

PUBLISHER'S FOREWORD

As long as the suffering comes from a human, it is not a natural disaster, it therefore can certainly be resisted by humans

(Pramoedya Ananta Toer, Child of All Nations)

The book titled "DON'T KILL THE KPK" was published in the midst of the attempts to undermine the Corruption Eradication Commission (KPK), which seemed to never end. As it has been widely known, many efforts to weaken the KPK have often been launched, such as through the process of criminalizing its commissioners (Antasari Azhar, Bibit Samat Riyanto, Chandra Hamzah, Bambang Widjoyanto, Abraham Samad) and investigator (Novel Baswedan) or through the political process in the legislation (revision of the Law on KPK). Lastly, there is also the view that the KPK has been weakened from within. Although the latter has been denied by various parties, it is obvious that there is yet clear sign that the weakening efforts will end.

At the same time, corruption as an enemy of the nation as increasingly difficult to eradicate. Although it has long been stated as extraordinary crime and must be eradicated by means of extraordinary too, news over high-ranking officials arrested for are on the media every day. These circumstances lead to conclusion that fighting corruption cannot be expected only in the law enforcement officers, prosecutors, the police, and courts. Required is a special and sturdy anti-corruption institution and social movement to combat crime which is highly destructive.

The book of a young professor, genuine activists, who had served as Justice and Human Rights Deputy Minister is written seriously. Indeed, the title may suggest a work of pastiche, but it is actually not. This text is an academic study conducted by the author seriously. The substance is Strengthening KPK's Institutional Design in the midst of threats to weaken it through the revision of the KPK which has at the moment been halted but will be resumed.

In Chapter I, KPK: REPEATED MURDER, Denny explains the life and death of anti-corruption institutions. Anti-corruption institutions in the days of the Old Order, New Order until the Reformation Era are discussed here. Including the birth of the Anti-Corruption Law and the legal-politics surrounding the establishment of the KPK. Then, with the title EFFECTIVE ANTI-CORRUPTION COMMISSION,

Chapter II outlines why such an independent state commission is needed and comparisons of Anti-Corruption Commissions in Several Countries. From the study, Denny subsequently conducts EVALUATION & THE KPK'S FUTURE DESIGN in Chapter III. Here, Denny breaks down the evaluation of institutionality and performance of the Commission over the years, what is the Effective Anti-Corruption Commission Formula, as well as the future design of KPK. All was done to strengthen the guarantee of the independence and authority of the KPK in the face of the threats to dismiss anti-corruption movement.

This book should be read by law scholars, anti-corruption activists, and anyone who wants that corruption will no longer haunt the future of the country. Happy reading!

GLOSSARY

Bapekan: Badan Pengawas Kerja Aparatur Negara (Monitoring Body for State Apparatus' Works)

BB: Bandung Bergerak (Bandung Moves)

BPKN: Badan Penyelamat Kekayaan Negara (State Property Rescue Agency)

BPKP: Badan Pemeriksa Keuangan dan Pembangunan (Development and Finance Comptroller)

DPR-GR: Dewan Perwakilan Rakyat Gotong Royong (Gotong Royong House of Representative)

GOLKAR: Golongan Karya (Functional Groups Party)

Jampidsus: Jaksa Agung Muda Tindak Pidana Khusus (Deputy Attorney General for Special Crimes)

KAK: Komisi Anti-Korupsi (Anti-Corruption Commission)

Kaskopkamtib: Kepala Staf Komando Operasi Pemulihan Keamanan dan Ketertiban (Security and Order Restoration Command Chief of Staff)

Kopkamtib: Komando Operasi Pemulihan Keamanan dan Ketertiban (Security and Order Restoration Command)

Kotrar: Komando Tertinggi Retooling Aparat Revolusi (Supreme Command of the Revolution Apparatus Retooling)

KPKPN: Komisi Penyelidik Kekayaan Penyelenggara Negara (State Officials' Wealth Audit Commission)

KPU: Komisi Pemilihan Umum (Commission of Election)

KY: Komisi Yudisial (Judicial Commission)

Laksusda: Pelaksana Khusus Daerah (Regional Military and Defense Command)

LAN: Lembaga Administrasi Negara (State Administration Institute)

LHKPN: Laporan Harta Kekayaan Penyelenggara Negara (Official Wealth Report)

LHPKKN: Laporan Hasil Penghitungan Kerugian Keuangan Negara (Report on the Calculation of State Loss)

MPRS: Majelis Permusyawaratan Rakyat Sementara (Temporary People's Consultative Assembly)

NU: Nahdlatul Ulama (One of the Biggest Islamic Social-Religious Organization in Indonesia)

OPSTIB: Operasi Tertib (Clean Operation)

P3RI: Persatuan Pegawai Polisi Republik Indonesia (The Union of Indonesian National Police Employees)

Paran: Panitia Retooling Aparat Negara (State Apparatus Retooling Committee)

Partai HANURA: Partai Hati Nurani Rakyat (People Conscience Party)

PDIP: Partai Demokrasi Indonesia Perjuangan (Indonesian Democratic Party of Struggle)

Perppu: Peraturan Pemerintah Pengganti Undang-Undang (Government Regulation in Lieu of Law)

PKB: Partai Kebangkitan Bangsa (National Awakening Party)

PKI: Partai Komunis Indonesia (Indonesia Communist Party)

PNI: Partai Nasional Indonesia (Indonesia National Party)

PSHK: Pusat Studi Hukum dan Kebijakan (Centre for Legal and Policy Studies)

SP3: Surat Perintah Penghentian Penyidikan (Letter of Order to Stop Investigation)

TGTPK: Tim Gabungan Tindak Pidana Korupsi (Joint Team for the Eradication of Corruption)

Timtastipikor: Tim Pemberantasan Tindak Pidana Korupsi (Coordinating Team for the Eradication of Corruption)

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CHAPTER I
KPK: REPEATED MURDER

It is not necessary to re-emphasize it, corruption has been a major problem of our nation. Of course, there are many other problems. But corruption is the root problem. Then our independence is usurped by criminals. The country has enjoyed independence, but the effects of development have not been felt by many citizens due to the massive corruption. Education is corrupted. Health is corrupted. Hajj funds are corrupted. Food supplies are corrupted. There is no single area that is free from corruption.

Supposedly, corruption can be prevented and eradicated. Prevented with honesty, eradicated by effective law enforcement. However, our education on honesty itself is already corrupt. Lying, cheating, manipulating are parts of the behavior we hear a lot on the news. On the other hand, the corruption eradication pillars are also powerless. Corruption has also viciously plagued within the law enforcement profession.

On April 30, 2000, the author with some fellow activists in Yogyakarta founded a Non-Governmental Organization, Indonesian Court Monitoring (ICM). The vision is clear, to participate in promoting law enforcement that is clean from judiciary mafia. It is no longer secret that judiciary is transactional, justice is tradable. Culprits of judges, prosecutors, police officers, lawyers, clerks and all the elements involved in the law enforcement sector including academics who become “expert witness”, but fell into the puddle of judicial mafia practices.

Money politics destroy the political world. Boodles damage the business world. But what damaging the most is bribe, which destroys judiciary system and kills justice. When judiciary becomes a commodity, when justice becomes goods, then the sky collapses. Dirty politicians, unscrupulous businessmen can supposedly be eroded through deterring law enforcement. However, when law enforcers themselves are corrupt, then vanished be the hope to establish orderly and peaceful society. Corruptive law enforcement is the death knell for a just human civilization.

Thus, amidst the damages of ordinary legal institutions, then the sensible solution is by presenting extraordinary legal institutions. That is the reasoning

and significance behind the birth of the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or KPK). KPK is an institutional serum presented to eradicate corruption extraordinarily, especially when the law enforcement agencies that were supposed to do became part of corruption mafia practices.

This book will describe how the KPK was born; how the theories and practices of anti-corruption commissions in some countries were, how is the evaluation of the performance of the KPK over its 12-year tenure from 2003 to 2015; and how its future design will be[1]. That today the plan to amend the KPK Law is intensified (again), which by many is considered would instead weaken—even kill the KPK, is actually not new in the legal-politics of corruption eradication in the country. History is indeed often repeated. Establishment of special institutions with more powers to combat corruption, but is then undermined or even abolished, is not the first time in Indonesia. However, before discussing matters related to anti-corruption institutions, the following is a discussion concerning the difficulties in pushing forward the anti-corruption law per se.

A. The Struggle for an Anti-corruption Law

The problem of corruption has existed even since before the Republic was founded, although perhaps with different terminologies. At the beginning of Indonesia's independence, corruption was not yet a national issue. But it does not mean that at that time corruptive actions did not exist yet. Understandably, the nation's energy was still focused on the struggle to defend the independence[2].

However, eventually, it did not take long for the newly-born Republic to see corruption as a problem that should receive serious attention. A decade since the independence, on August 20, 1955, to be more precise, or nine days after cabinet was formed, Prime Minister Burhanuddin Harahap said, "Many people who suddenly become rich have the burden to prove that they are not corrupt."[3] Therefore, in addition to the preparation for the successful 1955 elections, eradication of corruption was one of the priorities of Burhanuddin's cabinet. Finance Minister Sumitro Djojohadikusomo through his letter numbered 728/M.K dated October 8, 1955,

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[1] This book was originally a study conducted to fulfill the tasks assigned by the Indonesian Corruption Watch (ICW), in order to evaluate the 12 years of the KPK. The study, which was submitted to ICW in November 2015, was further improved and refined to become this book.

[2] Development Finance Comptroller, the National Anti-Corruption Strategy (1999), p. 316-31

[3] Hendri F. Isnaeni, Keadaan Darurat Korupsi (Corruption Emergency Situation), http://historia.id/modern/keadaandarurat-korupsi accessed February 23, 2016

asking for improvement of existing regulations as part of the efforts to eradicate corruption.[4]

Beginning in the era of that Burhanuddin Cabinet, the plan to have special regulations concerning corruption was initiated. But the journey was binding and not easy. Numerous rejections and opposition kept coming, due to various reasons and interests. History has recorded that only five years later, in 1960, after 15 years of independence, Indonesia has a specific law on anti-corruption.

The day after the 1955 Election, after a prolonged debate, the Cabinet decided to propose an Emergency Law concerning corruption.[5] Under Article 96 of the 1950 Provisional Constitution, an Emergency Law has similar power as a Law.[6] In the current state administration, an Emergency Law is very similar to Government Regulation in Lieu of Law (Perppu), which is also equal to a Law and published due to "forceful crisis" circumstance to regulate important and urgent issues, before it is then sought the approval from the Parliament. Also similar to Perppu, an Emergency Law immediately became effective before it was subsequently brought to the Parliament for deliberation.[7] The plan to enact the Emergency Law showed how serious the degree of the danger of corruption already was in the first decade of the Republic, which unfortunately continues to this day.

According to Justice Minister at that time, Lukman Wiriadinata, the bill of the Emergency Law on corruption contained progressive provisions, such as the reversed burden of proof, retroactive enforcement, the establishment of corruption special courts (planned in Jakarta, Surabaya, Medan, and Makassar), and granting additional powers to the Attorney General to eradicate corruption more effectively.[8] The bill is a proof that the concepts of combating corruption has extraordinarily existed since the beginning of the Republic, and ironically, it is still a repeated polemic until today. The issue of reversed burden of proof, for example,

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[4] Nurlis E. Meuko and Arry Anggadha, Operasi Budhi Mengusik Soekarno (Operation of Budhi Pesters Soekarno), http://politik.news.viva.co.id/news/read/1427-kandasnya_operasi_budhi, accessed on February 26, 2016.

[5] Ibid.

[6] Article 96 1950 Provisional Constitution, 1) *Pemerintah berhak atas kuasa dan tanggung-djawab sendiri menetapkan undang-undang darurat untuk mengatur hal-hal penjelenggaraan pemerintahan jang karena keadaan-keadaan jang mendesak perlu diatur dengan segera* (The government has rights for powers and responsibilities to decide emergency laws to regulate matters of government implementation due to urgent conditions need to be regulated immediately); 2) *Undang-undang darurat mempunjai kekuasaan dan deradjat undang-undang; ketentuan ini tidak mengurangi jang diPermanentkan dalam pasal jang berikut* (Emergency law has the power and the degree of Law, this provision does not decrease specified things in the following Article.)

[7] Article 97 1950 Provisional Constitution

[8] Isnaeni, http://historia.id/modern/keadaan-darurat-korupsi, accessed February 23, 2016

is still controversial and yet not fully utilized in the latest legislations. Similarly, the existence of the Corruption Court which was hotly debated, before its firm existence is finally decided by the Constitutional Court in 2006, and further strengthened by Law No. 46 of 2009 on the Corruption Court.

Surely, the debates over corruption eradication efforts, are not just happening presently. From the beginning, every idea related to the eradication of corruption always causes contradictions and political struggle. Similarly, the idea of the Emergency Law, which was initiated by Burhanuddin's Cabinet, also drew rejections from then opposition parties, namely the PNI and the PKI. Despite supports from government coalition parties-the PSI, the Catholic Party and the Labor Party-the plan to Emergency Law was finally dropped.[9] One of the reasons was because the lack of supports from the *Nahdlatul Ulama* (NU), whose members were reported by the media to be involved in corruption. NU considered the bill to be motivated by non-judiciary basis, but was instead aimed at attacking political opponents in the 1955 elections especially because the bill also proposed that a person could be arrested without trial. To NU, such a process contradicted the principles of Islamic law in addition to the view that it was also not in line with the principle of presumption of innocence.[10]

Despite Prime Minister Burhanuddin's insistence to seek President's Soekarno signature on the bill, he finally failed to realize what could be the first Law on corruption eradication in the Republic's history. The President refused to sign the emergency bill, and proposed the normal legislative process through parliamentary deliberation.[11] Herbert Feith suspects that the bill still could have been issued through Vice President Mohammad Hatta who is believed to be willing to sign it when the President was out of town. But, the wariness over the absence of military support had made the option dropped. The Cabinet finally succumbed to the wish of the President to submit the anti-corruption bill through the normal process to the Parliament on November 8, 1955. As expected, the bill was ultimately never deliberated.[12]

Instead of success, Burhanuddin Harahap's Cabinet fell on March 3, 1956, and he returned the mandate to the President. They lost the support of the coalition, especially with the resignation of two ministers from NU-Religious Affairs Minister

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[9] Ibid.

[10] Masdar F. Masudi and Syafiq Hasyim, K.H. Mohammad Iljas: *Pengembangan Kementerian Agama* (K.H. Mohammad Iljas: Development of the Ministry of Religious Affairs) in Azyumardi Azra and Saiful Umam (editor), *Menteri-menteri Agama RI: Biografi Sosial Politik* (Ministers of Religious Affairs: Social and Political Biographies) (1998), p. 162-163.

[11] Isnaeni, http://historia.id/modern/keadaan-darurat-korupsi, accessed February 23, 2016

[12] Ibid.

K.H. Mohammad Iljas and Interior Minister Sunarjo-in early January 1956, as a consequence to the persistence of the Cabinet to establish an Anti-corruption Law.[13]

Regardless the underlying reason behind NU's rejection against the anti-corruption bill, the resignation of the two ministers from NU which were decided because they had different political stance with the policy line of the prime minister certainly deserved appreciation. Such a political decision is exemplary. Simply put, a fair political attitude is, be in the government if supporting, and be outside it if having different view. Being an opposition is also respectable, to balance and execute control functions to the ruling government. Moreover, it is certainly not wise if staying in the government merely for maintaining position while the political view is no longer in line with the government. In that context, the interesting attitude of the NU to withdraw its two cadres from the cabinet is worth a respect, and should be used as a model for political parties and politicians today.

Still related to the struggle to establish an anti-corruption law, the second Sastroamidjojo Ali Cabinet, which replaced Burhanuddin's Cabinet, luckily still perceived that the existence of the law is important. Initiated by Moeljatno, then Minister of Justice who was also Professor of Criminal Law at UGM Yogyakarta, the second attempt to pass an Anti-Corruption Law was launched. However, this second attempt also ultimately failed.

Initially, the proposed Anti-corruption bill had split the cabinet. One of the reasons was due to the alleged corruption surrounding the procurement of election ballots by state printing which dragged Foreign Minister Ruslan Abdoelgani.[14] The proposal nearly failed to reach the parliament. However, thanks to the persistence of Prof. Moeljatno, who also threatened to resign from his position as Justice Minister, the agreement was finally reached within the cabinet and the bill was officially submitted to the parliament in October 1956.[15]

Although the bill made it to the Parliament, once again, it failed to become law. This time the history has recorded that the strong rejection came from the

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[13] Ibid.

[14] Between 1951 - 1956, corruption began to be intensely reported by the Indonesia Raya newspaper which was led by Mochtar Lubis and Rosihan Anwar. News reports over the alleged corruption of Ruslan Abdoelgani-then Foreign Minister-led to the closure of the newspaper. By the intervention of Prime Minister Ali Sastroamidjoyo, the Military Police failed to arrest Ruslan Abdoelgani. Previously, Lie Hok Thay claimed to have given one and a half million Rupiahs to Ruslan which he spared from the fee he had got from the printing of ballot cards. In this case, former Minister of Information in Burhanuddin Harahap's Cabinet, Syamsudin Sutan Makmur, and State Printing Director Pieter de Queljoe, were arrested. On the other hand, Mochtar Lubis and Rosihan Anwar were subsequently jailed in 1961 because they were considered as political opponents of Soekarno. See, Corruption in Indonesia, https://id.wikipedia.org/wiki/Korupsi_di_Indonesia accessed on February 22, 2016

[15] Isnaeni, http://historia.id/modern/keadaan-darurat-korupsi, accessed February 23, 2016

judiciary sector, i.e. prosecutors and police. The Prosecutors Association rejected the bill because it was deemed to position the Attorney General as subordinate of the Minister of Justice. The police, on the other hand, objected to the prosecution control held by Minister of Justice over the repressive and preventive works of the force. The Union of Indonesian National Police Employees (P3RI) even threatened to strike if the Cabinet did not want to discuss the bill with them. The strong resistance from prosecutors and police was one of the reasons behind the second failure of the birth of an anti-corruption law in the country. As part of the aftermath, the Ali Sastroamidjojo II Cabinet also only lasted for one year and ended in March 1957.[16]

On one hand, the second failure was certainly regrettable, because Indonesia clearly needed the law. However, on the other hand, the history found its own way out. On March 14, 1957, one and a half hours after the Ali Sastroamidjojo Cabinet was dissolved, President Soekarno declared the country in a state of war and emergency (*SOB = Staat van Oorlag en Beleg*).[17] With the Martial Law took effect, the military became authorized to enter into civil matters and open another chance for the embryo of Anti-corruption Law.[18]

It was General AH Nasution, then Army Chief of Staff, who took the initiative to issue a positive anti-corruption law. Finally, the history has recorded, the term "corruption" first appeared as a juridical term in 1957-twelve years after independence, when the issuance of Military Authorities Regulation No. PRT/PM/06/1957 on Corruption Eradication.[19] The Regulation was made by the Army and Navy to combat corruption that was starting to be rampant. The Military Authorities Regulation was then complemented with the Military Authorities Regulation No. PRT/PM/08/1957 on Ownership of Assets and Military Authorities Regulation No. PRT/PM/011/1957 on Seizure and Confiscation of Assets. Both regulations were also aimed at ensuring that the eradication of corruption can be more effective.[20] Namely, by investigating to seizing assets of individual or body whose wealth increased dramatically, and therefore suspicious.

A year later, in 1958, the anti-corruption regulation was extended to national level and became the Central War Authority Army Chief of Staff Regulation (Peperpu) on April 16, 1958 No. Prt/Peperpu/013/1958 and its implementor regulations; as well Central War Authority Navy Chief of Staff Regulation No. Prt/ZI/1/7 dated

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[16] Ibid.

[17] The history of Indonesian Presidential Institutions, https://id.wikipedia.org/wiki/Sejarah_lembaga_kepresidenan_Indonesia#Periode_1950.E2.80.931959 accessed on February 24, 2016

[18] Isnaeni, http://historia.id/modern/keadaan-darurat-korupsi, accessed February 23, 2016

[19] Development Finance Comptroller, p. 316 - 317

[20] Ibid.

April 17, 1958. The regulations were intended to combat corruption which became widespread at the time, and continued to undermine the authority.[21]

On June 9, 1960, the government revoked the two 1958 Peperpus and replace them with Government Regulation in Lieu of Law (Perppu) No. 24 of 1960 on Investigation, Prosecution and Questioning of Corruption Crimes. Article 5 of the Perppu requires each suspect to convey information about all the assets possessed by him and his family members, if requested by prosecutor. The regulation has also regulated that the concept of banking secrecy may be ignored in case the prosecutor requests financial statements of a suspect.[22]

Both Peperpus later became the embryo of Government Regulation in Lieu of Law No. 24 of 1960 on Investigation, Prosecution and Questioning of Corruption Crimes (Law No. 24 Prp. 1960), which was later replaced by Law No. 3 of 1971 on the Eradication of Corruption Crimes, which served as the material law on corruption in the New Order era.

After enduring almost three decades in the New Order era, it was not until the beginning of the reform era in 1999 when Law No. 3 of 1971 was replaced by Law No. 31 of 1999 on the Eradication of the Corruption, which was later amended by Law No. 20 of 2001. As of this book being written, the latest law passed was Law No. 7 of 2006 on the Ratification of the United Nations Convention against Corruption, 2003.[23]

From the journey of national history described above, there are some interesting things worth noting. First, the fight against corruptors, always face tough challenges. The fight is not always physical but also extended to the opposition of ideas when it comes to regulations on anti-corruption. From the early history of independence until the era of the Old Order, it can be seen that opposition groups managed to thwart-at least twice-the birth of an Anti-Corruption Law. Second, the bill and laws on Anti-Corruption in the early independence to the Old Order had adopted progressive anti-corruption ruling formulation, such as the reversed burden of proof, confiscation of assets, retroactive enforcement, to the setting aside of banking secrecy rules-all of which are dedicated to a more effective corruption eradication. Third, one critical factor that could determine the success of anti-corruption legislation process during those times was the roles of the

[21] Ibid 317.

[22] Isnaeni, http://historia.id/modern/keadaan-darurat-korupsi, accessed February 23, 2016

[23] This book chose to further elaborate on the history of anti-corruption legislation from the beginning of independence to the Old Order, which has not been reviewed by a lot of books. While the following eras, namely the New Order era and the Reform era, are not discussed in more detail because there are many other books reviewing it.

military leaders who were clean and deemed corruption very dangerous and hence must be eradicated.

Following the failures of the two Prime Ministers (Burhanuddin Harahap and Sastroamidjojo), the door was finally opened by the military. Without the contributions and awareness of military leaders (such as General AH Nasution), the anti-corruption legislation process could have face another dead end. On the other hand, the military leaders promoted it on the basis of their awareness that corruption had, not only endangered the nation, but also damaged the professionalism of soldiers. It is noteworthy, the corruption that plagued the state apparatus-especially those who hold guns-would be very dangerous. Without the awareness of the force itself to eradicate it, corruption within the military could have been extremely difficult to eradicate.

With these notes, the history of anti-corruption legislation-especially in the early days of independence until the Old Order era, ended. Next, this book will return to its original focus which is to discuss anti-corruption special institutionality, which has actually been started since the Old Order up until the Reform Era.

B. Lives and Deaths on Anti-corruption Institution

As a partner of the Anti-Corruption Law, the legal-political history of corruption eradication also brings a special anti-corruption agency. All of the regimes, from the Old Order, New Order up to the Reform Era, has historical records over institutional anti-corruption. Below are more detailed description.

1. Anti-corruption Institutions in the Old Order Era

In line with the development of statehood, corruption plague also began to enter the bureaucracy in the country. Not too long, only a decade since independence, corruption had started to become a national issue. Thus, in addition to the efforts to push for the birth of an anti-corruption law, promotion about an institution with special authority to combat corruption has also started to appear.

a. Asset Inspector Coordinating Body

As explained before, one of the earliest efforts to eradicate corruption included the one carried out by the Army Chief of Staff as the Military Administrator of Dominion Army by issuing Regulation No. PRT/PM/06/1957 on Corruption Eradication. As the implementor of the regulation, also issued was Army War Authority Regulation

No. Prt/Peperpu 013/1958 dated April 16, 1958 on Corruption Eradication Regulation, which was complemented with the establishment of the Asset Inspector Coordinating Body, which regulates:[24]

- In each High Court jurisdiction an Asset Inspector Coordinating Body is established, hereinafter called the Coordinating Board, which is led by Chief Supervisor of local Prosecutor Offices and Provincial District Courts and who has the rights to conduct surveillance of assets of every person or body, should there be strong indication, that assets were acquired by way described in article 3 (ways of corruption).
- Chapter IV regulates the power of the Asset Inspector Coordinating Body to confiscate assets, etc. Possessions that can be seized, among others:
  a. Assets of an individual or body which are intentionally not explained by him or its board members.
  b. Assets of an individual whose wealth, after being assessed, is considered disproportionate to his occupation.
- Chapter V regulates on Assets Examination by High Court, which is an attempt to recover state losses that can be done through civil lawsuits, such as:
  a. Asset Inspector Body secures the rights to delve into possessions of every individual or body, if there is a strong indication that it was obtained from corruption.
  b. Asset Inspectors may seize and confiscate possessions of an individual whose wealth, after being assessed, is considered disproportionate to the income generated from his occupation.

The Asset Inspector Coordinating Body is the first institution in the history of the republic which has powers that include anti-corruption efforts. This indicates that the concept of wealth reporting by state officials, as is the one falls under the authority of the KPK today, is not a new idea. That system has been around for a long time, and continues to evolve until now as one of the mechanisms to prevent corruption.

b. State Apparatus Activity Supervisory Body (Bapekan) (1959 – 1962)

Initially, anti-corruption agency was focused more on preventive measures, especially in the bureaucratic environment. During the Ali Sastroamidjojo II Cabinet, or in

[24] https://soejonokarni.wordpress.com/category/12-perkembangan-korupsi-dan-pemberantasan-korupsi-di-indonesia/, accessed on March 8, 2016

1957 to be more precise, curbing bureaucratic corruption became one of the main concerns. For the sake of controlling, organizing, and empowering the state apparatus, the Ministerial Organization Committee (PANOK) was formed. In addition, also born was the Institute for Public Administration (LAN) under Government Regulation No. 30 of 1957. The two agencies that regulate the state apparatus are directly subordinate and accountable to the Prime Menteri.[25]

Furthermore, on the basis Martial Law, which allowed the military to enter into civilian matters, especially corruption eradication, General Nasution as the holder of SOB command, sought to carry out law and discipline enforcement efforts as well as cleaning both civilian and military government organizations.[26] His initial breakthrough was launching investigations in civil service corps. Nasution then proposed to President Soekarno to form a body which would specifically oversee the performance of state apparatus. The President approved the proposal and asked Nasution to formulate the organization, until eventually the State Apparatus Activity Supervisory Body (Bapekan) was formed under Indonesian Presidential Regulation No. 1 of 1959.[27] Bapekan was tasked to monitor, investigate, and submit recommendation to the president over activities of state apparatus.[28] This body also accepted and resolved complaints against state apparatus activities considered improper. Bapekan held responsibility to the President.[29]

Also on the proposal of Nasution, as Chairman of Bapekan, President Soekarno entrusted the position to Sultan Hamengkubuwono IX, who was given position the same level of a minister. Soekarno also promoted Samadikoen (also as vice-chairman), Semaun, Arnold Mononutu and Lt. Col. Soedirgo as members under Presidential Decree No. 177 of 1959. Subsequently, to help Bapekan carrying out its duties, the President issued Presidential Decree No. 230 of 1959 on the Bapekan Secretariat which also served as the basis to appoint Selo Soemardjan as Bapekan Secretary.

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[25] *Jejak Langkah & Kiprah Pengabdian Kementerian PAN RB* (Footprints & Track Records of PAN RB Ministry's Service) http: //www.menpan. go.id/tentang-kami/tentang-kami/kiprah-pengabdian-kementerian-panrb accessed on February 22, 2016

[26] Saifulloh Ramdani, *Pola Pelemahan Badan Pemberantasan Korupsi dari Masa ke Masa* (Patterns of the Weakening of Anti-Corruption Agencies from Time to Time), https:// www.selasar.com/budaya/pelemahan-badan-pemberantasan-korupsidari-masa-ke-masa#, accessed February 26, 2016.

[27] Interestingly, more details about Bapekan were stipulated in Government Regulation No. 48 Year 1959 on the Implementation of Tasks of State Apparatus Activity Supervisory Body, dated September 28, 1958. It is interesting because, in the present circumstances, a Government Regulation falls below Presidential Decree

[28] A.H Nasution, *Memenuhi Panggilan Tugas, Jilid 5: Kenangan Masa Orde Lama* (Fulfilling Duty Calls, Volume 5: Memories of the Old Order Era) (1989), p. 256

[29] Ibid.

In the Presidential Regulation No. 1 of 1959 on Bapekan, no single word "corruption" was mentioned. Reading through the regulation, the impression arisen is that Bapekan is more of President Soekarno's attempt to control the bureaucracy. However, in practice, Bapekan was authorized to receive complaints from anyone over irregularities in state apparatus.[30] Although there were also complaints not related to corruption, eventually the majority of complaints Bapekan received were through PO Box No. 8. Among the reported corruption cases were irregular wealth, misconducts in military institutions, and the abuse of power by a governor in the Kalimantan although, regarding this report on the governor, there was no follow up even from the complainant himself.[31]

In its journey, Bapekan gained public trust. A year since its creation, which was at the end of July 1960, Bapekan received 912 complaints from the public. Of that number, 402 complaints were resolved. As stated in Bapekan's Confidential Report to the President July 20, 1960, the province which sent the most complaints was East Java. Whereas provinces which recorded to never send any complaint were East Kalimantan and West Irian, without explanation why. The complaints which kept coming showed that the people recognized Bapekan's existence and had trust in it.[32] However, public trust was not enough, in the end, Bapekan was dissolved by President Soekarno. It was started with Presidential Decree No. 166 of 1962 that dismiss with respect Hamengkubuwo IX, Samadikun, and Semaun on May 4, 1962; a day later, under Presidential Decree No. 3 of 1962, the Bapekan was officially disbanded.[33] Bapekan's age was under three years old.

It is unclear what caused Bapekan to be dissolved. As chairman, Sri Sultan Hamengkubuwono was not aware of the dissolution of the institution he led. Sultan was abroad when the dissolution was done, and he later learned about it when he was back to Indonesia. President Soekarno did not discuss the plan to dissolve it with Bapekan at all.[34]

Earlier, when its prestige began to climb, Soekarno also did not consult the Bapekan when the President approved the establishment of the State Apparatus Retooling Committee (Paran) formed by General A.H. Nasution. Bapekan and Paran were almost involved in institutional conflicts, especially when the Paran stated

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[30] Ibid.

[31] Hendaru Tri Hanggoro, *Kirim Pengaduan ke Tromol No. 8* (Send Complaints to Tromol No. 8), http://historia.id/modern/ tell-complaint-to-drum-no-8, accessed on February 25, 2016

[32] Hendaru Tri Hanggoro, *Gesekan dengan Paran* (Friction with Paran), http://historia.id/modern/gesekan-dengan-paran, accessed on February 25, 2016

[33] Ibid.

[34] Ibid.

that the Bapekan would be disbanded. Finally, through discussions between Sultan as Bapekan Chairman and Nasution as Paran Chairman, both agreed to distribute work priorities. Friction between the two institutions eventually ended, noting that in fact Bapekan was first formed, and its chairman was elected, at the proposal of Nasution.[35]

However, that did not mean that the existence of Bapekan was secured. In 1962, in the preparation to host Asian Games, the construction of Senayan Stadium Bung Karno Sports Complex, was begun. Reports over alleged corruption surrounding the stadium construction were intensely flowing to Bapekan. Amidst its intense investigation into the alleged corruption, Bapekan was dissolved.[36] Did it have any correlation? Was Bapekan attacked back by corruptors? There is no hard evidence that could serve as the basis to answer these critical questions. However, that an anti-corruption agency had done its job well, earned the public's trust, but later was dissolved, are historic facts, concerning the birth, and finally death of Bapekan.

c. Committee for State Apparatus Retooling (Paran) I (1960–1963)

Although it was initially said there was no plan to disband the Bapekan, at the end of the day, the absence of Bapekan opened wider space for the Paran to perform. This institution was formed in 1960, when Bapekan still existed.[37] Paran was established under Presidential Decree No. 10 of 1960.[38] Paran was led by A.H. Nasution and assisted by two members namely Prof. M. Yamin and Roeslan Abdulgani. One Paran's outcomes was Presidential Decree No. 5 of 1962 on the Order of Conducts of Highest Level State Apparatus.[39]

In its letter to the some Heads of State, dated September 9, 1960, Paran outlined some terminology meanings related to the institution. The word 'retooling' was defined as, "the dismantling of inefficient equipment organization with replacement

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[35] Ibid.

[36] Ibid.

[37] Ibid. There are other studies saying that Paran was formed in as early as 1957. Information related to the earlier formation of the Paran also suggested that, due to its rejection against data collection of state officials' wealth, Paran returned the mandate the Djuanda Cabinet which ruled between April 9, 1957 and July 10, 1959. See, for example, http://www.antikorupsi.org/id/content/korupsi-dari-dulu-hingga-kini accessed on February 25, 2016, Febri Diansyah, Membunuh KPK (Killing the KPK), Kompas, October 3, 2012.

[38] Related the institution's formation decree, also published was Presidential Decree No. 184 of 1962 on the Appointment of Dr. H. Roeslan Abdulgani as Committee Head of Revolution Soul Adviser and Retooling Committee Member.

[39] Birokrasi di Indonsia (Bureaucracy in Indonesia), https://id.wikipedia.org/wiki/Birokrasi_di_Indonesia, accessed on February 22, 2016.

of equipment arrangement. It is a "New Ordening" and new "herordening", with the purpose that the short-term and long-term goals of our Revolution can be achieved".[40] Furthermore, 'State Apparatus Retooling' was defined as, "The efforts to hold a reform in Soul, Structure and Working Procedures, and Individuals from all State Organs in the fields of legislative, executive, and other courts, at the Central as well as in Regions to be adjusted with the Political Manifesto and USDEK in order to efficiently achieve the objectives of the State in both short and long terms".[41] Given such descriptions, it is actually not really clear what Paran's role in the anti-corruption agenda was, at least when compared to Bapekan which it had replaced.

However, Paran's task that sparked controversies was the data collection of state officials' wealth. Officials were required to fill out provided wealth forms. In its development, the obligation to fill the forms resulted in resistance from officials. The officials who declined it argued that there was no legal basis to report to Paran. Their responsibility is to the top leaders, therefore, according to these officials, it was improper to submit the forms to Paran, but should be directly to the President. The rejections managed to make barren the Paran which was eventually disbanded.[42] Or, to be more precise, Paran was later renamed into Operation Budi.

d. Paran II/Operation Budi (1963 – 1967)

In 1963, through Presidential Decree No. 277 of 1963, the efforts to eradicate corruption were reinforced. Through the decree, Paran was introduced with new term "Operation Budi". General A.H. Nasution, then serving as Coordinating Defense and Security Minister/Kasab, was re-appointed as chairman, this time aided by Wiryono Prodjodikusumo. Their tasks were heavier, namely getting the corruption cases to courts.[43]

Previously, Operation Budi was only regulated under First Deputy Minister of Defense/Security Decree No. M/A/271 of 1962. Based on Presidential Decree 277, Operation Budi Working Group is tasked to "help Coordinating Defense/ Security Compartment Minister/State Apparatus Retooling Committee Head in

[40] Paran Letter No. 18998/60 dated September 9, 1960. Writing spelling has been adapted to Enhanced Spelling.

[41] Ibid.

[42] http://www.antikorupsi.org/id/content/korupsi-dari-dulu-hingga-kini, accessed on February 25, 2016.

[43] Ibid.

providing security and control over the implementation of food and clothing programs and Planned Universe Development, particularly in the prevention and eradication of the abuses of the economy and corruption".[44]

Operation Budi's work targets were state enterprises and other state institutions that were considered vulnerable to corruption and collusion. However, Operation Budi did not perform smoothly. For example, to avoid scrutiny, General Director of Pertamina extended a request to the President for an overseas duty-which was strangely granted by President Soekarno. While other Pertamina directors also refused to be scrutinized arguing that they did not obtain permission from their superior.[45] Similar tactic was commonly heard today when it comes to individuals implicated in corruption.

Despite many challenges it faced, within 3 months, about Rp 11 billion in state funds could be saved, an amount that was enormous based on the standards at the time. However, such a success once again did not guarantee the sustainability anti-corruption institution. On the contrary, the more successful an anti-corruption institution was, the more vulnerable to disbandment it could become. The same applied to Operation Budi, its success was regarded as disturbance to the prestige of President Soekarno.[46]

There are records that suggest that Operation Budi was ultimately dismissed because, among others, it disturbed State Trading Company Director Harsono Reksoatmodjo, who was probed for abusing his authority to set up his private company. Harsono who was known as President Soekarno's inner circle had allegedly cost the state hundreds of millions of rupiah. When Harsono was arrested, Paran Chairman General Nasution and his deputy, Wiryono Prodjodikoro (Supreme Court), were summoned to the presidential palace in Bogor. Deputy Premier Soebandrio preached to both of them, "the fuss was not at all important".[47]

Another problem was the political rivalry between the Army and the PKI at the national level, which contributed to the weakening of Paran/Operation Budi. Nasution's political enemies whispered to President Soekarno that Operation Budi was Nasution's vehicle to mobilize power to compete with the president. Finally, given all these issues, in May 1964, Soebandrio announced the dissolution

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[44] Second Section, Presidential Decree No 277 of 1963

[45] http://www.antikorupsi.org/id/content/korupsi-dari-dulu-hingga-kini, accessed on February 25, 2016.

[46] Ibid.

[47] MF. Mukthi, Jaksa Priyatna Pernah Tantang Jenderal Duel Pistol (Prosecutor Priyatna Once Challenged A General Gun Duel), http://historia.id/modern/jaksa-priyatna-pernah-tantang-jenderal-duel-pistol, accessed on February 26, 2016

of Operation Budi. Prior to that, President Soekarno had prepared a successor organization, namely, the Supreme Command of the Revolution Apparatus Retooling (Kotrar).[48]

e. Supreme Command of the Revolution Apparatus Retooling (Kotrar) (1964–1967)

Even before Paran/Operation Budi was formally dissolved, the President had established a new agency in charge of implementing the Paran's duties. On April 27, 1964, under Presidential Decree No. 98 of 1964 established was the Supreme Command of the Revolution Apparatus Retooling (Kotrar). Only after Kotrar was born on May 12, 1964, the President officially disbanded Paran/ Operation Budi under Presidential Decree No. 117 of 1964. Although based on the Presidential Decree on its formation (No. 98 of 1964) Kotrar was not explicitly stated as an anti-corruption agency, but the decree on the dissolution of Paran/ Operation Budi (No. 117 of 1964), in its second part, it was clearly stipulated that, all of Paran's unfinished works were handed over to the President as the Supreme Commander of Kotrar. Thus, the regulation clearly mandated Kotrar to carry out Paran's anti-corruption duties.[49]

Different to previous anti-corruption agencies, Presidential Decree on Kotrar stipulates that the leader of this anti-corruption agency was the President himself, who was later assisted by Soebandrio, Ahmad Yani, and Wiriadinata.[50] It can be argued the President's position as Kotrar leader correlated the reasons behind the dissolution of Paran, which, due to its anti-corruption tasks, was considered overshadowing the President's prestige. Unfortunately, descriptions of Kotrar's duties did not explicitly set out corruption eradication. In Presidential Decree No. 98 of 1964, Kotrar was just tasked to, "foster, nurture and cultivate in order to make the means of revolution obtaining outcomes as efficient and as effective as possible in its activities to reach the goals of our revolution".[51] Kotrar's task and organizations were further described in Article II of Presidential Decree No. 240 of 1964. In addition to the provided before, Kotrar also had the duty to, "Supervise and guide existing/future bodies in the fields of Revolution Tools retooling in all sectors".

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[48] Ibid.

[49] Moreover, matters regarding Paran's task being continued by Kotrar were also corroborated by Presidential Decree No. 301 of 1964 on the Transfer of Works of State Apparatus Retooling Committee to Lieutenant General Achmad Yani.

[50] Presidential Decree No. 125 of 1964. More details about the personnel of Kotrar is regulated by Presidential Decree No. 221 of 1964.

[51] Article 1 of Presidential Decree No. 98 of 1964.

In my view, not to mention other issues, due to the poor clarity in the descriptions of Kotrar's tasks, it is not surprising to see that Kotrar failed to reach its anti-corruption objectives. History has even recorded that corruption eradication during those times reached a plateau.[52] Wikipedia notes that Kotrar's retooling works, "had more political nuance with the removal of bureaucrats who were dissident to the ruling party or are deemed to be inconsistent with government policies".[53]

Kotrar is an institution that was originally intended to continue the task of Paran/Operation Budi to combat corruption, but ultimately had no track record of fighting corruption. To be more complete, in the history of independence, especially up until the end Old Order, the rise and fall of anti-corruption institutions such as Bapekan, Paran, Paran known as "Operation Budi" and Kotrar were recorded. Unfortunately, despite some recorded success in combating corruption, especially in the era of Bapekan to Operations Budi-but not in the era of Kotrar, the anti-corruption institutions ultimately succumbed in the battles against corruption. The resistance of the parties disturbed by the presence of the anti-corruption institutions finally managed to have Bapekan up to Operation Budi dissolved. The formation of a new institution to replace old anti-corruption agency which had started to become stronger and more effective in combating corruption, was the method used to weaken even dissolve anti-corruption agencies in the Old Order era. What about the fate of anti-corruption agencies in the New Order era? Here's the breakdown.

2. Anti-corruption Institution in the New Order Era

Similar to what happened in the Old Order era, anti-corruption agencies in the New Order era were also facing opposition and challenges in carrying out their duties. History has recorded that various anti-corruption agencies lived and then died, in the fight to eradicate corruption-something that also occurred in the Old Order era.

a. Corruption Eradication Team

In 1967, soon after the birth of the New Order, an agency tasked with combating corruption was formed. Started by his State address on August 16, 1967, Soeharto

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[52] http://www.antikorupsi.org/id/content/korupsi-dari-dulu-hingga-kini, accessed on February 25, 2016.

[53] Birokrasi di Indonsia (Bureaucracy in Indonesia), https://id.wikipedia.org/wiki/Birokrasi_di_Indonesia, accessed on February 22, 2016.

openly criticized the Old Order, which he considered not able to eradicate corruption. The speech was then followed up with the establishment of the Corruption Eradication Team (TPK) through Presidential Decree No. 228 of 1967 dated December 2.[54] Although it was just born in the end of 1967, the history related to the establishment of the Corruption Eradication Team stretched back to 1960 with the birth of Law No. 24 Prp. of 1960 on Investigation, Prosecution and Questioning of Corruption Crimes. One of the efforts launched was "Operation Budi", which was particularly aimed at investigating employees of the Republic of Indonesia Armed Forces (ABRI) who were considered corrupt. At that time several Dutch companies were taken over and transformed into SOE led by ABRI high-ranking officers.[55]

Corruption Eradication Team consists of the Attorney General as chairman, with an advisory team comprising the Minister of Justice, as well as Commanders of the Army, Navy, Air Force and National Police Chief.[56] Its task was not only limited to prevention, but also enforcement. According to the wordings used in the Presidential Decree, the Team's task is: "to assist the government in combating acts of corruption as quickly as possible and as orderly as possible, conducted in ways of: a) Repressive, which is to perform legal acts quickly and decisively in accordance with legal regulations in force, b) Preventive, which is by providing suggestions to the government on administrative actions and other measures that should be taken by governments to prevent or reduce the possibility of corruption.[57]

Not only covering prevention and repression, the Corruption Eradication Team also has the authority to "lead, coordinate and supervise" all civilian and military law enforcement officers who carry out examination, investigation and prosecution of corruption cases, whether committed by civilian or ABRI.[58] Furthermore, while the KPK today is still reviewing the possibility to have branch offices, the idea of having nationwide work coverage was proposed by the Corruption Eradication Team. Attorney General as Team chairman had the authority to form task forces in both central and regional levels, who were assigned to conduct the examination,

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[54] Ganjar Krisdiyan, Elite, Selalu Menggagalkan Upaya Pemberantasan Korupsi (Elites, Always Thwart Corruption Eradication Efforts), https://koranpembebasan.wordpress.com/2011/10/15/elite-selalu-menggagalkanupaya-pemberantasan-korupsi/ accessed on February 26, 2016.

[55] The Indonesian Center for Police & Security Studies, Sejarah Penegakan Hukum Tindak Pidana Korupsi di Indonesia (History of Law Enforcement on Corruption Crimes), 15 Maret 2011 https://polmas.wordpress. com/2011/03/15/ accessed on February 22, 2016

[56] Commissioners of the Corruption Eradication Team were complemented by Presidential Decree No. 243 of 1967, Presidential Decree No. 264 of 1967 related to the team members appointed by the Defence-Security Minister, and Presidential Decree No. 30 of 1968 concerning the appointment of Cokropranolo as the Corruption Eradication Team member.

[57] Article 2 Presidential Decree No. 228 of 1967

[58] Article 3 Presidential Decree No. 228 of 1967

investigation and prosecution which the composition can be a combination of civilian and ABRI.[59]

Based on the mandate on the Decree, it appears that the Corruption Eradication Team has a similar mandate to that of the KPK, which includes the prevention and enforcement, as well as supervision other law enforcement bodies-including the authority to examine, investigate and prosecute: things attached to the KPK today which often targeted by its critics. In fact, the Corruption Eradication Team that preceded the KPK, already had such authorities, and therefore, this should no longer be questioned. Moreover, the Corruption Eradication Team had a wider range of coverage than the KPK. Primarily when it comes to alleged corruption involving military. Regarding corruption by military personnel, the KPK does not have a clear mandate yet. Opinions of legal experts are still divided, whether the Commission is authorized for that or not.

Another distinctive aspect and-could have been the part that was eventually corrected into the format of KPK, is that Corruption Eradication Team membership jointly comprised law enforcement officials and the military. Today, KPK leaders are commissioners who are prohibited from having double job, selected and inaugurated through a separate process involving the President and the people, through a separate process involving the President and the people through fit and proper test at the House of Representatives.

With such a strong power, it is no surprise that the Corruption Eradication Team's quantitative record is quite convincing. Two years after formation, the team claimed that they had investigated 177 corruption cases, 144 of cases had been completed and handed over to courts, while the other 37 cases were still in the stages before trial.[60] Among the cases are:

a. Corruption case worth Rp 4.8 Billion committed by Lieutenant General Siswadji former National Police Chief Deputy in the 1970s;
b. Corruption case worth Rp 7.6 Billion committed by Budiadji former Kalimantan Logistic Depot (DOLOG) head; and
c. Corruption case worth Rp 14 Billion committed by Endang Widjaja, executive of PT Jawa Building.[61]

But the claims of success by the Corruption Eradication Team itself would have to be scrutinized. The main criticism of the performance of the team-as

[59] Article 9 Presidential Decree No. 228 of 1967

[60] Koran Merdeka, January 4, 1970

[61] Development Finance Comptroller, the National Anti-Corruption Strategy (1999), p. 331

commonly of existing anti-corruption agency once again, is the courage to uncover big cases, especially those having proximity to those in power. The team was deemed powerless when it came to investigating large-scale corruption cases in Pertamina and bimas fertilizer (Coopa). Opinion arisen that the lack of courage was because the alleged corruption involved high-ranking state officials close to President Soeharto.[62]

The Team's powerlessness in uncovering major corruption cases was indicated as a result of its institutional design which was not ideal, because it consisted of elements that were not independent. Structurally, the Corruption Eradication Team was positioned below the Attorney General's Office, with the Attorney General himself as the Team's leader. Whereas, the scope of work of the Attorney General's Office was already enormous. The sphere of work of the Attorney General's Office such as investigations into smuggling, manipulation, and other non-corruption crimes that harmful to state finances, must also be resolved by the Attorney General.[63]

At the end of the day, Corruption Eradication Team's duties imposed to the Attorney General were not running optimally. The team which had been expected to move progressively and quickly, was instead very slow.[64] That there were obstacles was indeed acknowledged by Attorney General Soegiharto. More difficulties arose because corruption had already been very widespread, including those committed by individuals who had played important role in the struggle for independence and the establishment of the New Order. As a result, law enforcement became difficult, because if it was done without exception then many important figures would have to be arrested, including some unscrupulous generals who had been their own comrades.[65]

Eventually, even with considerably strong authorities, with such a non-independent institutional design, the Team's performance was still not optimal. The team's future became unclear. More than a decade later, in 1982, the Corruption Eradication Team was revived, without a new underlying Presidential Decree.

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[62] https://www.selasar.com/budaya/pelemahan-badan-pemberantasan-korupsi-darimasa-ke-masa# accessed on February 28, 2016. Others historical records suggested, in the eyes of the public, government support towards the uncovering of major corruption allegations in State Logistics Agency, Pertamina, and Forestry Ministry was vague. See Arry Anggadha, Korupsi Meningkat di Jaman Soeharto (Corruption Rises during Soeharto Era), http://politik.news.viva.co.id/ news/read/13650-korupsi_meningkat_di_jaman_soeharto, accessed on February 26, 2016

[63] https://www.selasar.com/budaya/pelemahan-badan-pemberantasan-korupsi-darimasa-ke-masa#, accessed on February 28, 2016.

[64] Ibid.

[65] Development Finance Comptroller, the National Anti-Corruption Strategy (1999), p. 331

b. Commission 4 (1970)

Responding to a wave of protests to the Corruption Eradication Team, President Soeharto launched a new anti-corruption team. On January 31, 1970, Presidential Decree No. 12 of 1970 on the Commission 4 was issued. The team was chaired by Wilopo with IJ Kasimo, Johannes, Anwar Tjokroaminoto, as members, with addition Dr. Moh. Hatta as advisor.[66]

However, differently to the Corruption Eradication Team, based on the third dictum of Presidential Decree No. 12 of 1970, the Commission 4 was only tasked to "a) conduct research and assessment of policies and outcomes that have been achieved in the fight against corruption; b) provide advice to the Government on necessary policies in corruption eradication". Such normative tasks indicate that the Commission 4 was nothing more than a team of thinkers, not law enforcers, which should have been continued to be undertaken by the Corruption Eradication Team-which was in fact not dissolved.

After five months, the Commission 4 presented its work outcomes in the form of advices to accelerate corruption eradication to President Soeharto. Those advices are:[67]

- The causes and the possibility of wide spreading corruption. Commission 4 suggested that factors that cause widespread corruption are: 1) inadequate income or salary, 2) abuse of opportunity for self-enrichment and abuse of power for self-enrichment. In addition, the Commission 4 also stated that the possibility of widespread corruption was correlated with the increase in economic development activities such as the expansion of credit, foreign aid, foreign investment etc.
- Responsiveness of law enforcement (repression). Committee 4 recommends: 1) public prosecutors to act responsively in combating corruption, 2) the body of Corruption Eradication Team to be enhanced, and 3) cases of COOPA, CV Waringin, PT Mantrust, Religious Affairs Ministry, and PN Telkom to be prioritized.
- Preventive measures to eradicate corruption. Committee 4 suggested a number of steps to be taken to prevent corruption which includes: 1) improvement of the structure and procedures of the state administration, 2) improvement of procedures and supervision of procurement by the government, 3) prohibition of acceptance of returns fees, 4) inventory of state assets, 5) preventive and

[66] Hatta's appointment as an adviser to the President included to give advice to the Commission on 4 under Presidential Decree No. 13 of 1970.

[67] State Address of the President of the Republic of Indonesia on August 16, 1970 before the House of Representatives.

repressive supervision to be truly implemented, 6) re-regulating matters of the sales of official houses and prohibiting renting out state assets, 7) obligation for officials/officers to save foreign exchange earnings in domestic state banks and declare the deposits, 8) the necessity of tighter scrutiny of the activities of Customs and Taxation, and 9) controlling deposits of state money.

- Special issues. In special issues, Commission 4 has given opinion and consideration for the handling of problems surrounding 1) PN PERTAMINA, 2) matters related to timber, and 3) Bulog.

After the Commission conveyed its advice, President Soeharto believed that the Commission 4 had accomplished its duties, so, on July 4, 1970 the Commission was dissolved under Presidential Decree No. 50 of 1970. The Commission 4 only lasted less than 7 (seven) months. While the fate of the inputs given by the Commission 4, expectedly, was not considered by the government. The government has never responded to the findings over corruption in the Religious Affairs Ministry, Bulog, CV Waringin, PT Mantrust, Telkom, and Pertamina.[68] Commission 4's advice 4 to enhance the composition of the Corruption Eradication Team, which, if implemented could have enabled the team to be more effective in carrying out its duties, was also ignored.

It is noteworthy, that in 1970 too, at the grassroot level, especially students, anti-corruption movement also gained pace. Anti-corruption movement and action in Jakarta, under the name Students Challenge, was pioneered by Arief Budiman.[69] While in Bandung, anti-corruption movement called itself Bandung Moves (BB). The Anti-Corruption Commission (KAK) and BB were quite well known for their variety of actions which were widely publicized by the mass media during those times.[70]

With wider scale of anti-corruption movement, in 1970, youth and students subsequently took the initiative to form the Anti-Corruption Commission (KAK). The formation of KAK can be seen as a reaction of disappointment of students over the teams formed by the government, ranging from the Corruption Eradication Team to the Commission 4.[71] KAK members consist of exponent 66 student

[68] http://politik.news.viva.co.id/news/read/13650-korupsi_meningkat_di_jaman_ soeharto, accessed on February 26, 2016.

[69] Wilis Windar Astri, Dinamika Gerakan Mahasiswa dalam Bingkai Sejarah: Atas Nama Rakyat Indonesia (The dynamics of Student Movements in the Frame of History of: On Behalf of the People of Indonesia), http://pusgerakbemui.blogdetik.com/2010/04/18/dinamikagerakan-mahasiswa-dalam-bingkai-sejarah-%E2%80%9Catas-nama-rakyatindonesia%E2%80%9D/, accessed on February 27, 2016.

[70] Development Finance Comptroller, p. 318

[71] Wilis Windar Astri, Dinamika Gerakan Mahasiswa dalam Bingkai Sejarah: Atas Nama Rakyat Indonesia (The dynamics of Student Movements in the Frame of History of: On Behalf of the People of Indonesia), http://pusgerakbemui.blogdetik.com/2010/04/18/dinamikagerakan-mahasiswa-dalam-bingkai-sejarah-%E2%80%9Catas-nama-rakyatindonesia%E2%80%9D/, accessed on February 27, 2016.

activists.[72] KAK held many discussions with leaders of political parties and even met the President. However, before real outcomes could be seen, the Commission was dissolved on August 15, 1970 or just two months since its formation.[73]

c. Clean Operation (1977-1981)

After the Commission 4 was disbanded at the end of 1970, the institutionalization of anti-corruption ceased. The fate of the Corruption Eradication Team was also unclear. It was not until 1977, under Presidential Instruction No. 9, President Suharto launched Clean Operation (Opstib). Although only lasted for 4 (four) years, compared to other anti-corruption programs, Opstib lasted for quite a long time.

What needs to be emphasized, Opstib is not an institution. As the name implies, it is a form of operation aimed at curbing misconducts, in particular the illegal extortion by rogue state apparatus. However, since extortion is clearly a form of corruption, Opstib can be considered an ad hoc anti-corruption effort implemented in the New Order era. Therefore, Presidential Instruction 9/1977, referring to the Anti-Corruption Law No. 3 of 1971, in addition to Law No. 8 of 1974 on the Fundamentals of Civil Service, made misconducts by civil servants the main target of this operation.

Interestingly, President Soeharto, besides assigning the State Apparatus Control Minister, also ordered Kaskopkamtib (Security and Order Restoration Command Chief of Staff) to help Opstib. Regardless the regulations and law enforcement agencies authorized to prosecute corruptors, the government still felt the need to deploy Kopkamtib and Laksusda (Kopkamtib Special Executor, namely Regional Military Command) to carry out "Clean Operation" and combat corruption, manipulation and extortion. Clean Operation engaged with Kopkamtib Intelligence Task Force network.

In its four (4) years of implementation, Opstib claimed to have saved Rp 200 billion in state funds, with data of different cases. One source claimed that about 6,000 employees were penalized.[74] Another source suggested, during Opstib

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[72] KAK members were Akbar Tandjung, Mishael Setiawan, Thoby Mutis, Jacob Kendang, Imam Waluyo, Tutu TW Soerowijono, Agus Jun Batuta, M Surachman, Alwi Nurdin, Lucas Luntungan, Asmara Nababan, Sjahrir, Amir Karamoy, E Pesik, Vitue, Mengadang Napitupulu, dan Chaidir Makarim.

[73] There is no sufficient data to analyze why the Anti-Corruption Commission which comprised of students who should have been militants, was ultimately only short-lived. It was very likely that, the founding students could not go along with the rulers at that time.

[74] Sejarah Penegakan Hukum Tindak Pidana Korupsi di Indonesia (The History of Corruption Law Enforcement in Indonesia), https://polmas. wordpress.com/ 2011/03/15/ accessed on February 29, 2016. Data regarding how many of the cases handled by the operation had been handed over to courts was not found.

operation (1977-1981) 5,285 cases were handled with 8,026 people given administrative punishments, 920 people given legal enforcement and 240 people given other measures.[75] Several major corruption cases surfaced due to Opstib are: Corruption in the National Police Headquarters with money being embezzled amounting Rp 4.8 billion; the Pluit case with suspect Endang Wijaya, who embezzled Rp 22 billion of state funds; and the Arthaloka case known to be dated August 11, 1978, concerning land irregularities and misuse of the money earmarked for the construction of the Arthaloka building amounting Rp 957,193,129 by PT MRE, a real estate company.[76]

d. Corruption Eradication Team (1982)

In 1982, President Soeharto revived the Corruption Eradication Team (TPK), a name that had previously existed in 1967, in the early days of the New Order. It is unclear what eventually happened to the first generation of the Corruption Eradication Team. What is certain is that, in 1982, without underlying Presidential Decree, like when the first generation TPK was established, President Soeharto formed a team with the same name, comprising then officials, namely: State Apparatus Utilization Minister JB Sumarlin, Kopkamtib Commander Sudomo, Supreme Court Chief Justice Mudjono, Justice Minister Ali Said, Attorney General Ismail Saleh, National Police Chief Gen. Awaludin Djamin.

However, the fate of the second generation of the Corruption Eradication Team even ended up worse than its predecessor. Without a legal basis for its formation, then its life became uncertain, not being heard what had been its track records. There is also no data regarding the works of this Corruption Eradication Team.

3. Anti-corruption Institution in the Reform Era

In the Reform Era, the demand over corruption eradication or often reworded as KKN: corruption, collusion and nepotism voiced louder. Together with the amendment of the 1945 Constitution and the abolition of military's dual function, corruption eradication is the mandate of the reform movement. In this era, Law No. 3 of

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[75] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&cad=rja&uact=8&vcd=0ahUKEwjfrZPS6pzLAhVBRI4KHYrqBpAQFgheMAk&url=http%3A%2F%2Fwww.bappenas.go.id%2Findex.php%2Fdownload_file%2Fview%2F9287%2F1763%2F&usg=AFQjCNGiTtrWPGuMOpbRY4LMqtzVsvmt2w, accessed on February 29, 2016. Other source said that during its tenure Opstib handled 1,127 cases involving 8,026 suspects where some of them were categorized as big cases, see "Jalan Panjang Pemburu Koruptor (The Long Journey of Corruptor Hunter)" http://www.antikorupsi.org/en/content/jalan-panjang-pemburu-koruptor, accessed on March 1, 2016.

[76] http://makalah-hukum.blogspot.co.id/2007/08/beberapa-tim-antikorupsi-yangpernah.html, accessed on March 1, 2016.

1971 was replaced by Law No. 31 of 1999 on the Eradication of the Corruption, as amended by Act 20 of 2001, and was further complemented by the ratification of the United Nations Convention against Corruption through Law No. 7 of 2006. In addition to those material laws on corruption, the Reform Era also witnessed new anti-corruption institutions which also experienced ups and downs, of lives and deaths. These institutions are:

a. State Officials' Wealth Audit Commission (KPKPN) (1999)
b. Joint Team for the Eradication of Corruption (TGTPK) (2000-2001)
c. Corruption Eradication Commission (KPK) (2002-today)
d. Coordinating Team for the Eradication of Corruption (Timtastipikor) (2005-2008)

KPKPN will be discussed together with the KPK, because its life was brief, its duties were then continued by the KPK. The KPK itself is the core of this book, so it will not be discussed in this section alone, but in this book as a whole. So, what will be elaborated in this section is TGTPK and Timtastipikor.

a. Joint Team for the Eradication of Corruption (TGTPK)

To response to very strong public's aspirations on anti-corruption agenda, President Abdurrahman Wahid decided to establish an ad hoc institution later known as the Joint Team for the Eradication of Corruption (TGTPK). TGTPK was established based on Government Regulation No. 19 of 2000 on TGTPK, April 5, 2000. The Regulation states that TGTPK is coordinated by the Attorney General, which then was Marzuki Darusman. Subsequently, under Attorney General Decree dated May 23, 2000, TGPTPK was officiated with 25 members, consisting of representatives from the police, prosecutors and the public. The team was headed by former Deputy Chief of the Supreme Court (MA) Adi Andojo Soetjipto.

As mandated in Article 1 in its formation Government Regulation, TGTPK was intended as a team that has more power to uncover the corruption that was difficult to prove. However, the arduous task was not complemented by an adequate legal basis. Then, right on that legal basis weakness TGTPK was attacked by three justices who filed a judicial review to the Supreme Court. The request filed by the three justices who had been investigated by TGTPK was finally granted by the Supreme Court through its decision No. 03P/HUM/2000, and led to TGTPK's dissolution in 2001. The reasons raised by Paulus Effendi Lotulung, the presiding judge in the judicial review, some of the matters set out in the Regulation that

should have been regulated in a statue (act). Thus, the Government Regulation was considered beyond its jurisdiction.[77]

TGTPK's experience was another lesson that, fighting the perpetrators of corruption is never easy. What are faced is not only physical threats, but also legal attack through judicial review on legal norms related to anti-corruption. Thus, any substantive legal norms and the legal basis on the establishment of an anti-corruption body should be very well formulated, because there surely will be attempts to annul it through forums such as judicial review-like what has been faced by the Corruption Eradication Commission a dozens of times.

Surely, after TGTPK was disbanded, Indonesia managed to establish the KPK with a law as its underlying legal basis, which is certainly more powerful than a Government Regulation such as the one underlying TGTPK. However, history has showed again that the Commission too was facing various attacks, in addition to dozens of attempts to assess the constitutionality of the KPK Law, also other efforts such as to weaken the KPK through amendment of the Law.

b. Coordinating Team for the Eradication of Corruption (Timtastipikor)

Because anti-corruption agenda is so important, any of the President in the Reform Era has various efforts to fight corruption. After President Abdurrahman Wahid with his TGTPK, President Megawati with her KPK, then President SBY also once formed Timtastipikor, to make efforts to eradicate corruption more effective.

Timtastipikor was established under Presidential Decree No. 11 of 2005 on May 2, 2005. There were two main tasks attached to the Team chaired by Hendarman Supandji, then Deputy Attorney General for Special Crimes (*Jaksa Agung Muda Tindak Pidana Khusus* Jampidsus). First, conduct examination, investigation and prosecution in accordance with applicable laws to cases and / or indications of corruption. Second, search and arrest alleged perpetrators and trace their assets for the sake of optimizing recovery of state losses. The tenure of this 48-member team, which consisted of police officers, prosecutors and the Development Finance Comptroller (*Badan Pemeriksa Keuangan dan Pembangunan* BPKP), is two years and may be extended. This team is responsible directly to the President. Every three months, Timtastipikor reports its progress to the President.

[77] Pembatalan PP tentang TGPTPK, Iskandar Kamil: Baca Dulu Pertimbangan Hukumnya (Annulment of Government Regulation on TGPTPK, Iskandar Kamil: Read First the Legal Considerations), http://www.hukumonline.com/berita/baca/hol2321/font-size1-colorff0000bpembatalanpp-tentang-tgptpkbfontbriskandar-kamil-baca-dulu-pertimbangan-hukumnya, accessed on March 1, 2016

In contrast to the Corruption Eradication Commission which has determined the criteria of corruption cases that can be immediately handled by the commission, the Presidential Decree No. 11 of 2005 which served as the legal basis of Timtastipikor did not mention the criteria of cases under its authority. Surely, Presidential Decree 11 of 2005 explicitly states that in carrying out its duties, Timtastipikor cooperate and / or coordinate with the Supreme Audit Agency, the Corruption Eradication Commission, the Financial Transaction Analysis and Report Center, the National Ombudsman Commission, and other government agencies in law enforcement efforts and recovery of losses of state finance as a result of the criminal act of corruption.[78]

Two years later, in late May 2007, President SBY decided not to extend the tenure of Timtastipikor and chose dissolve it by issuing Presidential Decree No. 10 of 2007 on the Task Termination and Dissolution of Timtastipikor.

In its two-year term, Timtastipikor was recorded to have spent Rp 25 billion from the allocated Rp 41.2 billion, which was used to handle 280 cases, i.e. 45 alleged corruption cases of deriving from complaints of of the Cabinet Secretary, two cases from the State Ministry of State Enterprises, and 233 cases from public complaints. The Corruption Eradication Team handled 72 of the cases from public complaint. Of the handled cases, the court has issued verdicts on seven cases, two cases were still under appeal and cassation, 11 cases had still been in prosecution process, 13 under investigation and 39 cases were still being examined. The team also supervised 208 public complaints in regions. Regarding case handling, Hendarman claimed that around Rp 3.946 trillion of state funds could be saved. In regions, Rp 4.105 billion in assets and money could be saved. The team used a budget of Rp 25 billion. Among the cases handled by Timtastipikor include the Endowment Fund case at the Ministry of Religious Affairs, the corruption surrounding the transfer of the Rights to Build of Hilton Hotel in Senayan area which was an asset of the State Secretariat, the corruption of allowances of directors of PT Pupuk Kaltim, and PT Jamsostek's corruption.[79] It is not surprising if the claim of Timtastipikor's performance was questioned, such as by ICW which considered the Team's claim of success was vague, and would therefore prefer that the team be disbanded, and fully allow the KPK to deal with the job of corruption eradication.[80]

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[78] Fourth dictum of Presidential Decree No. 11 of 2005.

[79] Timtastipikor Akan Ekspose Hasil Kerja kepada Presiden (Timtastipikor will Expose Work Outcomes to the President), http://www.antaranews. com/print/62448/ tim-tastipikor-akan-ekspose-hasil-kerja-kepada-presiden, accessed on March 1, 2016.

[80] Presiden Bubarkan Tim Pemberantasan Korupsi (President Disbands Corruption Eradication Team), Kompas, June 12, 2007.

For anti-corruption activists-such as ICW, Timtastipikor's existence instead obstructed the anti-corruption agenda. This was because of skepticism that always comes over any initiative of the state in establishing anti-corruption institutions, especially given that by the time Timtastipikor was established, the KPK had actually been existed. So, to them, it was the KPK that was supposed to be supported and strengthened instead of forming another ad hoc team, which become competitor to the KPK.

C. Legal-Politics surrounding Establishment of the KPK

Legal politics surrounding KPK's establishment first occurred in one breath with the efforts to eradicate KKN (Corruption, Collusion, and Nepotism), which was one of the mandates of reform movement after the fall of the New Order regime. It was started with the enactment of People's Consultative Assembly (MPR) Decree No. XI/MPR/1998 on Clean State Administration that is Free from Corruption, Collusion, and Nepotism. The decree mandates tough corruption eradication, as can be seen in Article 4, "Efforts to combat corruption, collusion and nepotism must be undertaken resolutely with regard to anyone, be them state officials, former state officials, their families and cronies, as well as the private sector/ conglomerates, including former President Soeharto, with acknowledgement of the principle of presumed innocence and human rights."

It was also formulated in this decree the norms on the reporting of assets of state officials, which was initially under the authority of KPKPN (State Officials' Wealth Inspector Commission), whose existence and authority as an independent institution were further regulated in Law No 28 of 1999 on State Administration that is Clean and Free from Corruption, Collusion and Nepotism. History then noted that the age of the independent KPKPN was just like a corn crop it was then dispersed, although its authorities are then still overseen by the KPK which was formed later.

On the dissolution of KPKPN, I think it happened because, among others, the commission's activities were starting to annoy some political elites, including members of parliament. Although there is no firm evidence that shows KPKPN was liquidated because of that matter, but the indications are strong enough. Professor Saldi Isra noted in his column noted, KPKPN's focus on requesting wealth reports from legislators became one of the triggers towards the idea to disband KPKPN.[81] Moreover, KPKPN also disturbed other high state officials. To name one-MA

[81] Saldi Isra, Persekongkolan Eksekutif-Legislatif: Likuidasi KPKPN (Executive-Legislative Conspiracy: Liquidation of KPPN), Kompas, December 14, 2002

Rahman MA, then Attorney General, who reportedly did not report his house in Cinere and deposits worth Rp 800 million. Later, Rahman argued he did not report his house in Cinere to KPKPN because it had been granted to his daughter. For Saldi Isra, the liquidation of KPKPN is evidence of a conspiracy between the President and Parliament, which found a momentum when there was a deliberation of the bill on Corruption Eradication Commission (KPK).[82]

Liquidation of KPKPN through the enactment of KPK Law in 2003 is proof that legislation process can be an entry point to weaken anti-corruption agenda-although in this event, anti-corruption institution subsequently born is stronger and better. More than a decade later, will the history repeat itself? On the pretext that KPK Law needed to be revised to strengthen the Commission, will the House of Representatives and the President will re-conspire to weaken the KPK instead? By the time this book was being written, revision of the KPK Law has been put back into national legislation agenda. The rejection against the plan to amend the law was again intensely voiced by anti-corruption activists. However, on the reflection of KPKPN's liquidation, weakening the KPK through legislative process is no impossible.

Not to mention, on the perspective of constitutional law procedure, changing legal-politics of corruption eradication is something that is not necessarily contrary to the constitution. Thus, establishing and eliminating KPKPN is an open legal policy. Similarly, revising the KPK Law-or even eliminating the KPK, might be argued as an open legal policy, and therefore does not violate the constitution.

Although, supposedly, serious matters such as corruption eradication is not seen in terms of constitutional law procedures only. Instead, what should be considered deeper is mainly the substance of corruption eradication per se. Given such a constitutional morality approach, undermining-let alone disbandment, of the KPK, can be considered as an act that is, not only in violation of the constitution, but also contradictory to the spirit of the August 17, 1945 Proclamation. The Proclamation of Independence does not only concern Indonesia's freedom from colonial rule, but further also reflects Indonesia's independence from any form of despotism including the criminal act of corruption which is an extraordinary crime. In this context, the Proclamation is the underlying legal basis of the formation of the state of Indonesia. As a legal source, the Proclamation has existed since before the constitution existed. So, imaginably, if the weakening of the KPK is contradictory to the Proclamation, then it is very appropriate to say that weakening-let alone dissolving-the KPK is also contradictory to the 1945 Constitution. For the Proclamation and Constitution share similar and congruent spirit of legal morality.

[82] Ibid.

However, such a substantial approach let alone constitutional morality has still been very rarely used. Approaches that are textual, based on the texts of referred articles, are still the "safest" method hence often used. That was the case when KPKPN was disbanded, whose authorities were ultimately handed over to the KPK. The legality of the policy to disband KPKPN was once tested against the Constitution in a judicial review at the Constitutional Court (MK). KPKPN members argued that it contradicted the 1945 Constitution, because they believed KPKPN could be more effective in performing their tasks compared to the KPK. On such arguments, MK states:

"Regarding which way is better in the eradication of corruption, whether by maintaining KPKPN alongside the KPK, or dissolving KPKPN and transferring its functions to the KPK, the matter is something that relates to the effectiveness of a law that was predictive. The effectiveness of a law does not only depend on the substance contained in it, but also to other matters, such as human factors or facilities and infrastructure needed to implement the law; The Constitutional Court may not declare a law is contradictory to the Constitution only because the law was considered less effective in achieving the mandate given by the Constitution"[83]

Although there were strong indications that KPKPN was liquidated because it disturbed the "comfort" of some culprits within the ruling elite, but its function to collect wealth reports still exist and handled by the KPK. It would have been a problem had the reporting of wealth of the state officials been also eliminated. If that was the case, the MK should have had constitutional basis to declare that the dissolution KPKPN (and its functions) was contradictory to the 1945 Constitution. However, because the wealth reporting function was subsequently handed over to the KPK, and that the petitioner's arguments presented before the MK was focused on the effectiveness of a law-as quoted above-the author believes that the decision made by the MK cannot be considered wrong.

That even today the author thinks the wealth reporting function has not been an effective entry point to more optimal corruption eradication efforts by the KPK cannot be used as an excuse to claim that the shortcomings surrounding the institutional design of state official's wealth reporting is a constitutional issue. The author agrees with the MK, the effectivity of the implementation of the function is a matter of how the law is applied and not an issue of violation of constitutional norms.

Still related to MK's decision over the "dissolution" of KPKPN, it is interesting to read Refly Harun's article which basically commented on the petition filed by KPKPN members. One of their mistakes was that the petition was not just focused

[83] MK Decision No. 006/PUU-I/2003, p. 100 - 101.

on reviewing the constitutionality KPKPN's dissolution, but also extended to questioning the constitutionality of the KPK. KPKPN's request was seen as aiming to have the KPK Law annulled, as apparent in their request for judicial review of KPK Law. Such a request was instead deemed contrary to the anti-corruption agenda per se. Not to mention the fact that some KPKPN members were also applying to become commissioners of KPK-which the constitutionality was at the same time also questioned by them.[84]

Not only that, KPKPN's petition also questioned provisions that were not linked to the existence of their institutions. For example, Article 40 which states that the KPK is not authorized to issue Letter of Order to Stop Investigation (SP3), Article 12 paragraph (1) letter a which allows the KPK to conduct wiretapping and record conversations in investigating corruption cases, and Article 12 paragraph (1) letter i which states that the KPK is authorized to request assistance from the Police or other relevant institutions to conduct arrests, confinements, raids, and confiscations. These provisions were claimed by KPKPN to be not in line with human rights-related articles in the 1945 Constitution. Refly suspects, the request to annul those articles seems to be "tucked in" by KPKPN lawyers who had track records of defending corruption suspects.[85]

Surely, after MPR Decree No. XI of 1998 on combating corruption indiscriminately, before the birth of the KPK Law, the legal politics surrounding corruption eradication was moved on by the birth of Law No. 31 of 1999 on the Eradication of the Criminal Act of Corruption, with Article 43 which expressly sets the mandate to establish the KPK. To be more clear, let's cite Article 43, namely paragraphs:

(1) Within a maximum period of 2 (two) years since this Law takes effect, the Corruption Eradication Commission is set up.

(2) The commission as referred to in paragraph (1) has the duties and authority to establish coordination and 'supervision activities, including conducting indictments, interrogations and prosecutions against corrupt acts in accordance to existing legislations.

(3) The members of the Commission as referred to in paragraph (1) comprise elements of the government and the public.

(4) The provision on its establishment, organization structure, management, accountability, duties and authority as well as the membership of the Commission as referred to paragraphs 1, 2 and 3 shall be governed by law.

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[84] Refly Harun, Putusan MK Balada KPKPN (MK Decision KPKPN Ballads), Kompas, April 3, 2004.
[85] Ibid.

At the end of the day, based on the mandate of Article 43 Law No. 31 of 1999, enacted was Law No. 30 of 2002 on Corruption Eradication Commission, albeit later than the deadline no later than 2 (two) years since the promulgation of Law 31/ 1999 on August 16, 1999.

Using the date of the enactment of Law No. 30 of 2002 on December 27, 2002, as of this writing was made book, the KPK should have been 13 (thirteen) years old. But because the first KPK leadership was just formed a year later (2003), for the 2003-2007 tenure period, the effective existence of the KPK has only been 12 (twelve) years. The period of time is sufficient to carry out institutional evaluation of the Commission, and consider how the more effective design of the KPK in the future should be. Nowadays, discourses over different institutional scenarios of the future KPK are growing. First, KPK as it is today; second, KPK with more limited authorities, or with a certain time span before it is dissolved; third, KPK which the existence continues to be needed, hence strengthened.

D. Conclusion: Lives & Deaths of Anti-corruption Institutions

Looking at the history of anti-corruption institutions in the country, we can easily conclude that the fight against corruption is never easy. Efforts to form a special body to eradicate corruption, with special authorities, were often immediately confronted by efforts to weaken the institution launched by those who feel threatened by the presence of such institutions.

Initially, anti-corruption institution is focused on efforts to clean up the state apparatus. Corruption has been since the beginning infecting our bureaucracy. Therefore, it is not surprising that any effort to reform the bureaucracy, more specifically efforts to combat corruption within the bureaucracy, is always confronted with thick wall of resistance. Furthermore, the anti-corruption institutions live and die and are dealing with various modes of counter attacks, among them are: 1) the effort is attenuated by establishing a new body that weakens the old anti-corruption institution that has existed for a period of time; 2) the anti-corruption institution is formally dissolved; 3) no formal dissolution, but, as time goes by, the anti-corruption institutions' roles fade and finally disappear; 4) the effort is attenuated by annulling the institution's underlying legal basis, for example by challenging the legal basis to court.

Along the way, the modus operandi to weaken anti-corruption institution continues to evolve, in the present context, not only the legal basis of the Corruption Eradication Commission (KPK) is challenged at the Constitutional Court, but the KPK Law also continues to face the revision threat-which tends to undermine in

the legislation process at the parliament. Beyond that, "criminalization" of commissioners and employees of the KPK is another modus operandi to continue disturbing KPK's efforts to combat corruption, which of course are very significant in weakening performance of the Commission. Nonetheless, KPK is the longest anti-corruption institution ever last, which is still alive until today and continues to make efforts to eradicate corruption in the country.

Since officially established with the KPK Law in 2002, the Commission has existed for more than 13 years. The longest lifetime ever had by an anti-corruption institution where previously it could even only last for less than a year. KPK's ability to survive must be due to the internal strength within KPK itself, like its legal basis in the law which is clearer, its performance is indeed worth appreciation; and external support from stakeholders who want Indonesia to be cleaner from corruption-primarily the people of Indonesia-people who never stop giving real supports during moments when the KPK is facing counter attacks from corruptors.

Given the experience and awareness that anti-corruption institution is always going to deal with the various modes to weaken it, then there is no other way but to continue to maintain the life of KPK-one of them by strengthening its presence, instead of undermining it. This book will address some of the institutional problems of the KPK, and recommends its empowerment for the future, instead of weakening it, let alone disbanding. The reason is simple, Indonesia today is not Indonesia that cannot be proud if faced with the problem of corruption. Indonesia today, is Indonesia that still has problems in its anti-corruption agenda. But that does not mean that the rampant corruption is an indication that the presence of KPK over the last 13 years is useless.

Instead, the presence of KPK over the last 13 years has brought a wave of improvements in the eradication of corruption. However, combating corruption will always be confronted with counter reaction from perpetrators of corruption. So, each of us who aspires Indonesia cleaner from corruption in the future must participate in making KPK a more effective institution, and guarding it from any counter attack that aims to weaken or dissolve it.

To guide you in understanding this book, below is description of its structure:

1. Part One, "Introduction", explores the background why this book is written, with a brief legal-politics history up until the birth of the KPK. Prior to that, the history of anti-corruption institutions that lived and died since the days of the Old Order, New Order, and the Reform Era is outlined.
2 Part Two, "The Parameters of an Effective Anti-Corruption Commission" is a literature review using four approaches to become a benchmark for the evaluation

of the KPK, namely: theory of independent state institutional; the principles of anti-corruption commissions based on practices formulated into "Jakarta Principles"; comparison of anti-corruption commissions in several countries; and the Constitutional Court's decisions related to the judicial reviews of KPK Law.

3. Part Three explores "Evaluation and Future Design of the KPK". It evaluates the performance and institutionality of the KPK, as well as proposes improvements to the design of the KPK in the future.
4. Part Four is "Closing" which outlines the conclusions and suggestions derived from this book.

Such a structure was chosen because this book is meant to have "dual function". This means that this book is not only meant to be a popular reading, but also as course material on constitutional law. The approach to make it as a popular reading and discussion is important because this book is also meant to be an actual advocacy materials in relation to the planned revision of the KPK Law. It is expected that the material in this book can be used to further strengthen the KPK-and not weaken it. While the scientific academic approach, through the study of literatures and the likes, was done so that the material of this book is qualified to be a constitutional law lecture materials, particularly in relation to the concept of independent state institution-which is characteristic of the KPK. At the same time, the academic-scientific studies also empower the material of this book for the advocacy agenda to strengthen the KPK, if the revision of the KPK Law at some point will be done-once again, not to weaken the KPK, let alone killing it.

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CHAPTER II
EFFECTIVE ANTI-CORRUPTION COMMISSION

After reviewing the history and legal-politics of anti-corruption regulations, anti-corruption institutions, until the birth of the KPK, in this section we will together explore the theory of the institution of anti-corruption commission, and the practices in some countries. The theory and practice are important to be understood as a basis to formulate a more effective institutional design for KPK in the future. The author intentionally choses the term "effective", instead of "ideal" let alone "perfect", because, no matter how good it is, an institutional design contains shortcomings, and thus never ideal nor perfect.

To formulate an effective anti-corruption commission, this section outlines four conceptual and practical parameters.[86] The four parameters are: theory on independent state commission, basic principles of independent state commission, comparison of anti-corruption commissions in some countries; and anti-corruption commissions based on Constitutional Court (MK) decisions. Why are these four parameters used as benchmark to create the ideal design of an anti-corruption commission? The following are the reasons and their explanations.

First, this book decides that anti-corruption commission must be an independent state institution. The author believes, with the heavy duties it faces, then there is no other choice for an anti-corruption commission other than resting on the conception of independent state institution. Without institutional independence, the capital and the main condition for a successful anti-corruption commission are not present from the outset, in other words, it will not succeed in carrying out its duties in combating corruption. So, what will be explained in this section are: what is an independent state institution? What is the history? What are the criteria that must be fulfilled by an independent state institution?

[86] The use of the term commission when it comes to anti-corruption is not intended for certain purposes. The option is based on the fact that a lot of independent state institutions are called "commission". Of course commission here has nothing to do with gift, in exchange for the success of a business transaction; it does not mean that the institution is only ad hoc or temporary either. To confirm this, the author alternately uses two terms, anti-corruption commission and anti-corruption institution, the similar thing is done to the term independent state institution which is also used alternately with independent state commission.

This first parameter is based on theory, so it is proper to categorize it as theoretical approach

Second, how should the ideal anti-corruption commission be in the perspective of the Jakarta Principle, which is an international agreement on the principles for the Anti-Corruption Commission? More precisely, it is stated in the Jakarta Statement on Principles for Anti-Corruption Agencies as the outcome of the International Conference in Jakarta on November 26 to 27, 2012 attended by anti-corruption agencies in several countries. These principles are used as parameters, because they have gone through studies, reviews and intense discussion involving anti-corruption institutions in the world. Of course, there may be a subjective side of the anti-corruption agencies that make up these principles, but from the author's point of view, the conceptors were fair enough in formulating these principles, so they deserve to be a reference. Moreover, the conceptors are representatives of the anti-corruption agencies, who discuss it not only on the theoretical level, but also based on direct experience with real problems on the ground.

The second parameter is based on practical experience of anti-corruption commission, so it is proper to be called practical approach

The third is the comparative approach of anti-corruption institutions in the world. I was lucky because, the KPK - together with the Centre for Legal and Policy Studies (PSHK) - has conducted a comparative study of anti-corruption commissions in several countries. Thus, the outcome of the study should certainly be fully utilized to combine the good sides anti-corruption institution in various countries, and formulate to ideal design of anti-corruption institution.

The third parameter is based on comparison of anti-corruption commissions in several countries so it is called comparative approach.

Fourth, is the anti-corruption institutional design parameters based on court decisions, in this case the Constitutional Court. As it has been known, KPK Law is one of the laws challenged at Court the most. What were requested by the petitioners were the constitutionality of KPK's institutionality and authorities. Therefore, MK decisions related to KPK Law are appropriate to be used as reference in designing the institution-in addition to authorities-of the KPK in the future, of course, that are in accordance with the 1945 Constitution. The legitimacy of MK decisions as a parameter is of course undoubtful, because they were products of one of the judiciary institutions that has the authority to examine the KPK Law, so it should be used as one measure of the institutional design of the future KPK.

The fourth parameter is based on MK decisions, therefore it is appropriate to call it judicial review approach.

By conducting this study using these four approaches, namely theoretical approach, practical approach, comparative approach; and judicial review approach, the parameters needed to formulate institutional design for the KPK in the future are supposed to be sufficient. The following are more detailed breakdown of the four parameters.

A. Theory on Independent State Commission[87]

As explained above, the author believes that one of the capital and key prerequisites for the success in dealing with the anti-corruption commission's heavy tasks is the institutional design that should be made independent, free from intervention by anyone, in any form and in any way. What does it mean? Why is it formed? And how is such an independent state institution? Here is the explanation.

1. Independent State Commission

Before discussing independent anti-corruption commission further, it is necessary to first review what state commission or state institution is. State commission are often called in several different terms, for example in the United States, it is known as administrative agencies.[88] The term difference is a separate issue, which shows that the understanding on the concepts of state institutions is not uniformed. According to Zainal Arifin Mochtar, citing Moh. Fajrul Falaakh, the differences indicate the unfinished business on the relationship of state institutions, primarily in Indonesia. Not to mention, the 1945 Constitution itself also provides different terminologies for state agencies, including those that are independent.[89]

About the difference in terminology, Zainal writes, "state institutions is not a concept that has a single and uniform terminology. English literature, for example, uses the term political institutions, while in the Dutch terminology it is known as staat organen. While in Bahasa Indonesia, political and state administrative experts often officially use the term "state institutions", "state bodies" or "state organs".[90]

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[87] This section is a reprocessing of a paper, Denny Indrayana, Komisi Negara Independen Evaluasi Kekinian dan Tantangan Masa Depan (Independent State Commission Evaluation of The Present and Future Challenges) (2008) which has continuously been updated and presented in various seminars; See to thesis of Zainal Arifin Mochtar, "Dinamika Lembaga Negara Independen: Perkembangan dan Urgensi Penataannya Kembali Pasca-Amandemen Konstitusi (The dynamics of Independent State Institutions: The Development and Urgency of Its Rearrangement Post-Constitution Amendment)" (2016).

[88] Terminologies for state commission vary, such as: administrative agencies, state auxiliary agencies which is often a dichotomy of state primary agencies or state fundamental agencies.

[89] Zainal Arifin Mochtar, Dinamika Lembaga Negara Independen: Perkembangan dan Urgensi Penataannya Kembali Pasca-Amandemen Konstitusi (The dynamics of Independent State Institutions: The Development and Urgency of Its Rearrangement Post-Constitution Amendment), p. 39

[90] Mochtar, p. 22

What is clear that Asimow defines state commission as units of government created by statute to carry out specific tasks in implementing the statute. Most administrative agencies fall in the executive branch, but some important agencies are independent.[91] This definition distinguishes two types of state commissions, namely state commission which the position is below executive (executive agencies) and state commission that is independent (independent agencies). To explain more, Asimow states, state commission is usually just part of executive and does not play important roles.[92] Asimow's opinion is echoed by the definition of Misiroglu who says that, independent state commission – in the United States - is a federal state institution which is not part of the branches of executive's authorities, and therefore it does not fall under the control of the President.[93]

Similar distinction is also expressed by Milakovich and Gordon, who argued the state commission can be divided into two, namely: Dependent Regulatory Agencies (DRAs) and Independent Regulatory Boards and Commissions (IRCs). DRAs or dependent commission is usually part of a certain department within the government, cabinet or other executive structures. Therefore, a commission like this cannot be independent, especially in matters related to the interests of the government per se. Instead IRCs is a state commission that is independent, not under any of the branches of power, nor the executive, so that in carrying out its duties it has more freedom and cannot be intervened.[94]

Differentiation of administrative agencies into independent and executive is also corroborated by the Wikipedia encyclopedia. In the context of the state administration in the United States, independent federal agencies are outside the executive branch and established based on Acts passed by Congress. The act provides the job authorities to the independent state commission, including the authority to make its own rules. In fact, regulations issued by the commission has the equivalent power of federal legislation.[95] The equivalence of independent state commission regulation with acts is necessarily accompanied by judicial review mechanism. Its arrangement is provided under the Administrative Procedure

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[91] Michael R. Asimow, Administrative Law (2002), p. 1.

[92] Ibid, p. 2

[93] Gina Misiroglu, The Handy Politics Answer Book (2003), p. 326.

[94] Michael E. Milakovich and George J. Gordon, Public Administration in America, Seventh Edition, (Boston: Wadsworth and Thomson Learning, 2001), p. 442

[95] Wikipedia, Independent Agencies of the United States Government, http://en.wikipedia.org/wiki/Independent_agencies_of_the_United_States_government, accessed July 3, 2007.

Act 1946 (APA).[96] The testing of regulations issued by independent commission is conducted by federal court and the appeal is with the Supreme Court.[97]

The notion that independent state commission is a state organ authorized to issue its own regulation (self-regulatory bodies) has been relatively accepted.[98] However, that the issued regulations are at equal power of laws, which commonly are products of the parliament with deliberations with executives, is still controversial. Generally, experts in constitutional law does not have such a view, and still put the legal products of independent state commission below the degree of law. One of the arguments, because a law is a legal product produced by people's representatives elected through electoral process. While independent state commission, despite playing strategic state function, is not elected by the people; so it becomes logical if its product is legally below law.

Independent state commission is a state organ which is ideally independent and hence outside the power branches of the executive, legislature and judiciary; but still contains a mixture of the function of the three.[99] Jimly Asshiddiqie calls independent state commissions as independent supervisory bodies, i.e. institutions that perform the mixture of "regulatory, administrative and punitive functions".[100] In the similar but not identical words, Funk and Seamon argue that independent commission often holds the power of "quasi-legislative", "executive power", and "quasi judicial".[101]

Some independent state commissions are also a constitutional organ, which means that its existence and functions are set out in the constitution; to name some, those in South Africa and Thailand. In South Africa, Article 181 paragraph (1) of its Constitution mentions Human Rights Commission says there; Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; Commission for Gender Equality, and the Electoral Commission. In Thailand, Article 75 of its constitution states that the state shall provide budget to independent state commission such as: Election Commission, Ombudsman,

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[96] Wikipedia, Administrative Procedure Act, http://en.wikipedia.org/wiki/Administrative_ Procedure_ Act#APA27s_standard_of_judicial_review, accessed July 3, 2007.

[97] Jimly Asshiddiqie, Perkembangan & Konsolidasi Lembaga Negara Pasca Reformasi (Post-Reform Development & Consolidation of State Institutions) (2006) p. 8.

[98] Ibid.

[99] Jimly Asshiddiqie, Struktur Ketatanegaraan Indonesia Setelah Perubahan Keempat UUD Tahun 1945 (Indonesia's State Administrative Structure after the Fourth Amendment of 1945 Constitution), a paper presented during the National Legal Development Seminar VIII, Denpasar, July 14-18, 2003

[100] Asshiddiqie, Perkembangan … p. 8

[101] William F. Funk and Richard H. Seamon, Administrative Law: Examples and Explanations (2001) p. 23 – 24.

National Human Rights Commission, the National Counter Corruption Commission and the State Audit Commission.

However, it does not mean that all of the independent state commissions must be stipulated in the constitution. For example, there are a lot of independent state commissions in the United States that are not stipulated in the constitution, among others: (1) Federal Communication Commission, (2) Securities and Exchange Commission, (3) Federal Trade Commission, (4), National Labour Relations Board, (5) Nuclear Regulatory Commission, (6) Federal Reserved Board, (7) Central Intelligence Agency, (8) Environmental Protection Agency, (9) Federal Emergency Management Agency, (10) Federal Reserve Board, (11) General Reserve Administration, (12) Immigration and Naturalization Service, (13) National Aeronautics and Space Administration, (14) National Archives and Records Administration, (15) National Science Foundation, (16) Office of Personnel Management, (17) Peace Corps, (18) Small Business Administration, (19) Social Security Administration (20) United States Agency for International Development, and (21) United States Postal Services.[102]

Beside the United States, independent state commission is also the phenomenon of the modern state administration in many developed countries such as France, the United Kingdom, Italy and Germany. In France, examples independent state commission is Commission des Operations de Bourse, Commission de la Communication and Conseil Superiur de l'Audiovisuel. In the UK, with regulatory and consultative authorities, several independent state commissions play strategic roles, among others: Monopolies and Mergers Commission, Commission for Racial Equality and Civil Aviation Authority. In Italy, regulatory and monitoring authority are attached to independent state commission that oversee the performance of the stock exchanges. In Germany, a similar institution is even authorized to regulate business combination (merger).[103]

The main issue surrounding independent state commission is the meaning of the independence per se. Should be emphasized that the independence is not without supervision. Within the conception of independence, exist does accountability system which should be strengthened. The independence is not without control. Instead, within the independence, the best internal control mechanism should be developed, so that the external monitoring model-albeit necessary to be retained-can be minimized. Self-Control is the key to control independent state institutions, which enables the institution to reducing the element of external supervision,

[102] Ibid 6 – 7. Misiroglu, p. 326 – 327

[103] Asshiddiqie, Perkembangan … p. 10

which, if used under incorrect degree or with wrong mechanism, can become a form of intervention, and hence prohibited in relation to independent state commission.

Therefore, albeit independent, independent state commission remains subject to the theory of limitation of power. The commission remains subject to relationship with other state agencies based on mutual relations and mutual balance (checks and balances), primarily with the main state institutions which are constitutional organs.

2. Why Independent State Commission Exists

One reason behind the establishment of independent state institutions is the unsatisfactory performance of the state institutions that have existed before. In fact, the legitimacy of the old institutions tends to be questionable, due to, among others, rampant corruption, collusion and nepotism within the institutions.[104] Issues surrounding the shrinking of public trust (public distrust) to conventional state agencies are also what Susan D. Baer thinks triggered the establishment of the independent state commissions in the United States. Independent state institution is expected to perform their duties better and more accountable.[105]

Meanwhile, according to Asshiddiqie, the birth of so many independent state institutions reflects the need to deconcentrate power from the bureaucracy or conventional organs of government, where the power was previously concentrated. This occurs as a result of the increasingly complex and cumbersome state power management, while the administration of power that is bureaucratic, centralized and concentrated is unreliable in resolving these complexities. Therefore, waves of deregulation, de-bureaucratization, privatization, decentralization and deconcentration, emerge, which at the end of the day will see independent state commission as the answer to the complexity of the modern state administration.[106]

In response to the complexity of the modern state administration, Bruce Ackerman explains that the structure of the branches of power in the administration of the United States is no longer just a three or four branches, but five branches of power, namely the House of Representatives, Senate, President as chief of executive, Supreme Court, and Independent Agencies.[107] Bruce wants to emphasize

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[104] Firmansyah Arifin, et al, Lembaga Negara dan Sengketa Kewenangan Antar Lembaga Negara (State Institutions and Authority Disputes between State Institutions), (Jakarta: National Law Reform Consortium, 2005), p. 54.

[105] Susan D. Baer, The Public Trust Doctrine – A Tool to Make Federal Administrative Agencies Increase Protection of Public Law and Its Resources, in Boston College Environmental Affairs Law Review vol. 15 (1988), p. 382

[106] Asshiddiqie, Perkembangan … p. 23

[107] Bruce Ackerman, The New Separation of Powers, Harvard Law Review, Volume 113, 2003, p. 728

that the separation model à la Montesquieu which only consists of three branches of power is outdated, and cannot answer the complexities of the modern state administration.

Echoing Bruce, Cindy Skach finds the separation of powers model, in a semi-presidential administration system is a form of 'newest separation of powers'. The system put six branches of power where each of them is independent and reserves their respective authorities, namely the House of Representatives, Senate, President as head of state, Prime Minister as head of the executive, Judiciary, and Independent Agencies, as six branches of power that exist in the mixed government systems in ex-communist countries in Eastern Europe such as Russia and France.[108]

Another reason of the wave of birth of independent state commissions is a consequence of the transition to democracy that occurred in some parts of the world. The birth of these state commissions, whether they are independent or just executive bodies, once again demonstrate the incapacitated trias politica idea when it comes to stopping the emerged authoritarian regimes. Bruce Ackerman explicitly says, the birth of independent state commissions is a rejection to the separation of powers model à la Montesquieu and Madison used in the United States.[109]

Echoing Ackerman's opinion, Lehoucq states, the establishment of election commission that is independent from the executive and legislative has significantly contributed to the strengthening of constitutional democracy in Latin America. The success in innovation in the formation of new institution, which is free from intervention of the executive and legislative, is then used as reference and adopted by many countries in the world.[110] As an impact, in recent decades, there was extraordinary growth in the number of independent state agencies in any part of the world. Among the emerging independent state agencies are electoral institutions, anti-corruption institution, judicial supervision agencies, and maladministration-handling institutions such as ombudsman.

In addition, constitutional reform in many countries, also beginning to be adopted were regulations on independent state institutions in new constitution.[111] John C.

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[108] Cindy Skach, The Newest Separation of Powers, Oxford Journal Vol. 5, Nr. I, 2007, p. 93–121.

[109] Ackerman, p. 633

[110] Fabrice E. Lehoucq, Can Parties Police Themselves? Electoral Governance and Democratization, in Journal International Political Science Review, 2002, Vol. 23, No. 1, p. 29–46

[111] Further readings can be seen in Umit Sonmez, Independent Regulatory Agencies: The World Experience Case and The Turkish Case, Thesis on The Graduate School of Social Sciences of Middle East Technical University, September 2004. Also see: Adam Preworski, "The State and Citizen", seminar paper "Society and The Reform of The State", Sao Paulo, Brazil, March 1998. Also can be

Ackerman's research, which was also quoted by Zainal Arifin Mochtar in his thesis, shows that there are 81 countries which include independent agencies in their constitutions. Of the 81 countries, not less than 248 independent state institutions that were explicitly mentioned in the constitutions in four continents; Africa, Europe, America, and Asia.[112]

Table 1
Independent State Institutions (ISI) based on their Geographical location [113]

Region	Number of ISI
Africa	89
Europe	59
America	51
Asia	49
TOTAL	248

In addition, according to John C. Ackerman, who is also quoted by Zainal Arifin Mochtar, recent amendments of constitutions increasingly tend to treat independent state institution as constitutional organ. At least, there are 20 countries that includes more than four independent state institutions in their constitutions.[114]

Table 2
Countries with four or more Independent State Institutions in Constitution[115]

Country	Number of Institutions
Chile	4
Greece	4
Afganistan	5
Philipines	5
Hungary	5

used as comparison Fabricio Gillardi, Delegation in the Regulatory State, (London: Edward Elgar Publishing Limited, 2008).

[112] Mochtar, p. 26

[113] Ibid.

[114] Ibid pages 26-27.

[115] Ibid

All of the above examples reinforce that modern power design has adopted new power branches outside the three classic branches: executive, legislative and judicial. The new branch of power is, independent state agency. Furthermore, it has been common that independent state agency is considered a constitutional organ, and hence its existence and authority are stipulated in constitution. It is important to underline this summary, because at the next phases, this will be the basis for the author to recommend the strengthening of the independence of the KPK in the future, including-but not limited to-making the Commission a constitutional organ. This means that regulations and legal basis concerning the KPK is put and strengthened within the1945 Constitution.

3. Characteristics of Independent State Commissions

Based on the types and administrative functions, independent state commission can be divided into three types, namely (1) the regulatory and supervisory agencies; (2) public services monitoring agencies; and (3) bodies involved in productive activities; which control and supervise only on the national level or the federal government, as those in the United States where they are also called the headless fourth branch of the government.[116]

According to Milakovich and Gordon, there are six (6) characteristics of an independent state commissions, namely: (i) this commission has collegial leadership, so decisions are taken collectively; (ii) the commissioners of this institution does not serve the desires of the president as if they were other positions appointed by the president; (iii) the commissioners' tenure is relatively long, for example, 14 years for the tenure period of the Federal Reserve Board in the United States; (iv) the filling of the commissioner positions is usually done in stages (staggered). That means, the commissioner could be replaced every year and therefore, a president cannot fully control the leadership of the institution because the tenure is not in line with the political presidential periodization; (v) the number of members or commissioners are odd and decisions are taken by majority vote; and (vi) the institution's membership is typically maintain the balance of partisan representation.[117]

Almost similarly, Funk and Seamon believe that characteristics of an independent state agency are: First, headed by collective leadership. Second, it shall not be controlled by simple majority by certain parties. Third, the commissioners have a fixed tenure by means of tiered election (staggered terms), which means that they

[116] Yves Meny dan Andrew Knapp, Government and Politics in Western Europe: Britain, France, Italy, Germany, 3rd edition (1998) page 280.

[117] Milakovich and Gordon, page 443.

do not end their term simultaneously. Fourth, members can only be removed from office according to what is specified in the regulation, not in the manner prescribed by the President as in executive branches. This is to assert and maintain the independence of the state commission.[118]

Regarding independence, the author disagrees with the sixth criteria set out by Milakovich and Gordon, or the second criteria of Funk and Seamon. Both of these criteria stress the need to balance the leadership of an independent state institution that is partisan or affiliated by political parties. I do not understand why these thinkers include balance criteria of such partisan elements. For the author, the principle of independence should reject partisan leadership elements, especially from a political party. The principle of independence also contains the meaning of impartiality. This will definitely be very difficult-if not impossible-to be realized by the partisan elements of leadership, let alone political party cadres. Therefore, although I agree to many of the criteria suggested by the four thinkers, specifically on the balance of the partisan element, I do not agree, because it is contrary to the principle of independence, as one of the main characteristics of independent state institution.

Regarding independence, William F. Fox, Jr. also suggests that state commission is independent if it is explicitly stated in the legislation concerned the commission, which is created by the Congress. It is intended to prevent the president's discretionary decision on the dismissal of the leadership of the state commission.[119] Fox' opinion is, automatically, influenced by the constitutional system of the United States. But the essence is the same, that the legal basis of independence should be set in the regulation concerning the establishment of the institutions, and at least the level of national law. Thus, any intervention of any branches of power is prohibited, even from the executive leader. This is unlike executive agencies which are essentially "subordinate" of the president as the leader of the executive, so that the appointment and/or dismissal of its members is the prerogative of the president.

Still related to the restriction of dismissal of leaders of state anti-corruption institutions, citing the US Supreme Court decision in the case of Humphrey's Executor v. United States, Asimow believes that that the definition of independence is closely linked to the dismissal of members of the commission which can only be done based on reasons stipulated in the law concerning the establishment of the commission, unlike typical regular state commission where the commissioners can at any time be dismissed by the president, because they are obviously are part

[118] Funk and Seamon, page 7.

[119] William F. Fox, Jr., Understanding Administrative Law, (Danvers: Lexis Publishing, 2000), page 56.

of the executive.[120] This is also why, in 1935, when Franklin D. Rossevelt dismissed one of the commissioners of the Federal Trade commission - one of the independent state commissions - the Supreme Court ruled such a measure is void.[121]

Zainal Arifin Mochtar in his thesis formulates 8 (eight) characters of an independent state commission, namely: First, an institution that is established and positioned not as part of the existing branches of power, although at the same time it becomes an independent institution that is dealing with the tasks formerly overseen by the government.

Second, the election is through selection process and not by a political appointee, or in the special rules not through the monopoly of certain branches of power, but involving other state agencies within the framework of checks and balances. It could also be left entirely to the certain segmentation in public to choose their representatives, which basically avoids the involvement of political power.

Third, the process of selection and dismissal can only be done based on the mechanism determined by the underlying regulation.

Fourth, despite holding power as a tool of the state, but the deliberation process is very strong, so the membership, the selection process and performance reporting will be brought closer to the people as the sovereignty holder of the nation, either directly to the public or indirectly through parliament.

Fifth, the leadership is collegial and collective in making any institutional decisions related to its duties and functions.

Sixth, it is not a primary state institution which the existence is essential to the operational of the state. But that does not mean that its existence is unimportant. Its existence remains important to cope with the challenges in the transition period as well as the needs of an increasingly complex state structure.

Seventh, it reserves more devolutive authorities which are self-regulated in the sense that it can issue its own rules that also apply in general.

Eighth, it has underlying legitimacy in regulations of both the constitution and/or legislation. This means, existence of the base legitimacy prevails, although, for the institutions stipulated in the constitution, it was later established only under a law, and for institutions stipulated in law, only under government regulations. Based on eight of the above characteristics, Zainal names independent state institutions in Indonesia:

1. National Commission on Human Rights (Komnas HAM)
2. Press Council (Dewan Pers)

[120] Fox, Jr., page 20.

[121] Misiroglu, page 298.

3. Corruption Eradication Commission (KPK)
4. Indonesian Broadcasting Commission (KPI)
5. Judicial Commission (KY)
6. General Elections Commission (KPU)
7. Ombudsman of the Republic of Indonesia (ORI)

In the case of Indonesia, the Constitutional Court (MK) formulated the concept of independent state institutions in its Decision No. 005 / PUU-IV / 2006, concerning the judicial review of Judicial Commission Law. Although, the term used for KY is not "independent", but "autonomous" (mandiri), but the author believes the meaning of both terms is basically the same. In its decision concerning the KY Law, when it comes to independence, the Court states:

The Constitutional Court will further consider the definition of "autonomous" in Article 24B paragraph (1) of the 1945 Constitution which reads, "There shall be an autonomous Judicial Commission which shall possess the authority to propose candidates for appointment as justices of the Supreme Court and shall possess further authority to maintain and ensure the honour, dignity and behavior of judges".

The question that must be answered in this respect is what interpretation that must be given on the condition that the Judicial Commission is independent which is subsequently defined in the Law on the Judicial Commission as a condition that the Judicial Commission in the implementation of its authorities is free from intervention or influence of other powers (see Article 2 of the Law on the Judicial Commission). The Constitutional Court is of the opinion that the definition that "the Judicial Commission in the implementation of its duties is free from interference or influence of other power" must be understood as the independence of the institution in making decision not the independence of individual members of the Judicial Commission. It means that the independence of the Judicial Commission must be defined as the independence from interference and influence of other parties in making decisions in the implementation of its authority to propose prospective supreme court justices or in the context of implementation of other authorities pursuant to the 1945 Constitution. Therefore, the Judicial Commission cannot be said of not independent or in other words there is interference from outsiders or other powers, because of the reason that the decision making is based on the facts obtained through cooperation or coordination with the actor of judicial authorities, in this case, the Supreme Court. In accordance with the fact universally, the composition of the judicial commission does not only consist of former judges, law practitioners, academicians, and community members as stated above, but also supreme court justices. Even generally the judicial commission or those referred

to under different names in the world, ex-officio is chaired by the chief justice of the Supreme Court.[122] (*Bold Printing by the Author*).

The Decision of the Constitutional Court confirms that the independence of independent state commission is the independence of an institutional nature and not to personal liberty (individual). It is also importantly to remember that the Court provides guidance that the principle of independence does not forbid coordination, synergy or collaboration with other institutions. Thus such a Constitutional Court ruling is important to underscore the constitutional basis of the presence of an independent state institution (independent agencies) in Indonesia. Although, in the same decision, the Court gives the position of the Judicial Commission as a supporting organ and the Supreme Court and the Constitutional Court as the main organ, that can be interpreted as MK positioning independent institution such as KY below primary state institution in constitution such as MA and MK. Such a view is a long fight between the conventional constitution institutions and newer constitution institutions which is usually represented by independent state institution.

In the future, because independent state institution is an integral part of the mechanism of checks and balances that runs within a country, then the relationship between the independent state institutions and primary constitution organ has to be defined more clearly. I have my own view that, the nature of the independence of state institutions does not mean they are free from controls, including the major organs of the constitution, can be controlled by an independent state agency-of course in the context of its scope of duties. For example, the Judicial Commission can monitor the behavior of judges; the KPU controls the selection of members of the legislative and executive; the KPK should be a law enforcer body that enforce the eradication of corruption-certainly not to the main constitution organs per se-but to the members of the constitutional organs.

The pattern of relations between the independent state institutions, and other state organs, including the main constitution organ must be able to be well formulated. Therefore, the pattern of relations, including mutual control and mutual monitoring in-between state institutions can go along better understanding. An understanding that I think is different from the system defined by Montesquieu which should be seen as a form of separation of powers in its new format and formulation, according to the complexity and needs of a modern state administration.

4. KPK as Independent State Commission

Based on description above, it is clear that KPK should be further emphasized as an independent state commission. Strengthening institutional legal basis, as the

[122] MK Decision No. 005/PUU-IV/2006 on the Judicial Review of KY Law, page 192.

characteristics of an independent state institution, including the appointment and dismissal mechanisms commissioners, should strengthen the Commission's characteristics as an independent state institution. Furthermore, not only the institution of KPK whose independence must be guarded, but its authority must also be strengthened, and with no less important, its accountability and integrity must be maintained at a level of quality that is beyond reproach.

It should be noted that, a strong institution independence, without authority which is also powerful, will not produce an effective KPK in carrying out its duties. Furthermore, although the institutional independence has already been guaranteed, plus granted strong authorities, but without the accountability and integrity that is beyond reproach, then the work of the Commission would also not be effective. Without integrity, an independent state institution would fall into a commission tempted to abuse their authority.

Thus, in relation to the importance of having systems that ensure accountability and institutional integrity, the following are the basic principles that should be of a state anti-corruption commission.

B. Fundamental Principles of Anti-Corruption State Commission

The KPK is not the only anti-corruption commission in the world. Because corruption has become the world's problem, the establishment of anti-corruption commissions as efforts to eradicate corruption is also done in many countries. International cooperation in fighting corruption has also been formulated in the form of the UNCAC, United Nations Convention Against Corruption. One form of cooperation that is the formulation of basic principles that should be owned by in the heart of every anti-corruption commission, known as Jakarta Statement on Principles for Anti-Corruption Agencies. Jakarta's Principles on anti-corruption commissions are the outcome of the International Conference in Jakarta on November 26-27, 2012.

Direct quotes from the Jakarta's Principles are:

1. **MANDATE**: ACAs shall have clear mandates to tackle corruption through prevention, education, awareness raising, investigation and prosecution, either through one agency or multiple coordinated agencies;
2. **COLLABORATION**: ACAs shall not operate in isolation. They shall foster good working relations with state agencies, civil society, the private sector and other stakeholders, including international cooperation;
3. **PERMANENCE**: ACAs shall, in accordance with the basic legal principles of their countries, be established by proper and stable legal framework, such as the Constitution or a special law to ensure continuity of the ACA;

4. **APPOINTMENT**: ACA heads shall be appointed through a process that ensures his or her apolitical stance, impartiality, neutrality, integrity and competence;
5. **CONTINUITY**: In the event of suspension, dismissal, resignation, retirement or end of tenure, all powers of the ACA head shall be delegated by law to an appropriate official in the ACA within a reasonable period of time until the appointment of the new ACA head;
6. **REMOVAL**: ACA heads shall have security of tenure and shall be removed only through a legally established procedure equivalent to the procedure for the removal of a key independent authority specially protected by law (such as the Chief Justice);
7. **ETHICAL CONDUCT**: ACAs shall adopt codes of conduct requiring the highest standards of ethical conduct from their staff and a strong compliance regime;
8. **IMMUNITY**: ACA heads and employees shall have immunity from civil and criminal proceedings for acts committed within the performance of their mandate. ACA heads and employees shall be protected from malicious civil and criminal proceedings.
9. **REMUNERATION**: ACA employees shall be remunerated at a level that would allow for the employment of sufficient number of qualified staff;
10. **AUTHORITY OVER HUMAN RESOURCES**: ACAs shall have the power to recruit and dismiss their own staff according to internal clear and transparent procedures;
11. **ADEQUATE AND RELIABLE RESOURCES**: ACAs shall have sufficient financial resources to carry out their tasks, taking into account the country's budgetary resources, population size and land area. ACAs shall be entitled to timely, planned, reliable and adequate resources for the gradual capacity development and improvement of the ACA's operations and fulfillment of the ACA's mandate;
12. **FINANCIAL AUTONOMY**: ACAs shall receive a budgetary allocation over which ACAs have full management and control without prejudice to the appropriate accounting standards and auditing requirements;
13. **INTERNAL ACCOUNTABILITY**: ACAs shall develop and establish clear rules and standard operating procedures, including monitoring and disciplinary mechanisms, to minimize any misconduct and abuse of power by ACAs;
14. **EXTERNAL ACCOUNTABILITY**: ACAs shall strictly adhere to the rule of law and be accountable to mechanisms established to prevent any abuse of power;
15. **PUBLIC REPORTING**: ACAs shall formally report at least annually on their activities to the public. **PUBLIC COMMUNICATION AND ENGAGEMENT**:

ACAs shall communicate and engage with the public regularly in order to ensure public confidence in its independence, fairness and effectiveness.

Based on the 15 (fifteen) principles, it is clear that the principles that must be owned by the anti-corruption commission includes aspects of: 1) institutional independence including sufficient budgets and resources; 2) accountability and integrity that is beyond reproach; 3) as well as comprehensive authorities in combating corruption.

In connection to institutionalities, Jakarta's Principles emphasizes that:

(1) Anti-corruption commission is permanent, not temporary strengthened by its formation legal basis stipulated in the constitution, or at least a law;

(2) The recruitment process of the commissioners should be arranged so that the chosen ones are truly individuals of integrity, competent, impartial and non-partisan;

(3) The process of dismissal of commissioners should also be designed through a not-easy legal process, just as the difficulties surrounding dismissal high-ranking officials in other legal fields, such as Supreme Court Chief Justice.

(4) The sustainability of the commission's existence must be guaranteed, in the case of, for example, vacant leadership due to one reason or another, e.g. dismissal, the duties of the commission should be able to continue to be carried out by the highest available officials in the commission, until a new definite commissioner is installed.

(5) The commissioners and employees of the commission should be protected from criminal or civil legal prosecution while carrying out their duties in accordance with legal regulations. Included are commissioners and employees of the commission who must also be protected from attacks of "criminalization" of legal cases; and

(6) In order to maintain its independence too, the commission must get budget guarantee, human resources and adequate payroll compensation

Whereas in relation to accountability and integrity, anti-corruption commission should:

(1) Have the best system in maintaining ethics of the commissioners and employees;

(2) Have internal control system with clear rules and SOP including personnel discipline system to minimize the possibility of misconduct and / or abuse of power;

(3) Have external monitoring system in accordance to the rule of law in order to avoid the possibility of abuse of power; and

(4) Have a good public reporting system, including communication model that is capable to maintain public trust.

Lastly, regarding authority, anti-corruption commission should:

(1) Have a comprehensive authority in the field of prevention and prosecution; and

(2) Have good cooperation and collaboration with other state institutions in combating corruption, including with international institutions and other countries.

Explained above are some of the essential principles that should be owned by anti-corruption commission to be able to work effectively according to the outcomes of the international conference which formulated Jakarta's Principles. Some of these principles can certainly be used as a cornerstone for future institutional improvements the KPK. However, before we discuss how to make a better KPK, here we will see first comparison of anti-corruption commissions in several countries. Of course, this is to combine the good experiences on how to design the ideal anti-corruption commission, based on the institutional format in those countries.

C. Comparisons of Anti-Corruption Commissions in Several Countries

In this section the author will use the method of comparison of regulation and implementation of the Anti-Corruption Commission in some countries, to be used to evaluate and design the future of the KPK.

It can be easily concluded that corruption is one of the most fundamental issues faced by many countries in the world. According to John S.T. Quah there are three approaches Asian countries use in combating corruption. The first is eradication by implementing anti-corruption laws, without forming a special agency to do so. This model is adopted by Mongolia that imposed Anti-Corruption Law in 1996, whereas the enforcement is carried out together by the police, prosecutors and courts.[123]

The second pattern, is to involve some special institutions to implement anti-corruption legislation. This model is implemented in India, that has Prevention of Anti-Corruption Law enforced by the Central Bureau of Investigation (CBI), Central Vigilance Commission (CVC), and anti-corruption agencies and the supervisory commissions at the state level.[124] Similarly, the Philippines has 18 anti-corruption agencies to implement its anti-corruption law.

The third pattern is to form a special anti-corruption agency. This model was first made by Singapore which in October 1952 formed the Corrupt Practices Investigation Bureau (CPIB) to implement the Prevention of Corruption Ordinance

(POCO). Malaysia followed the Singaporean model by establishing the Anti-Corruption Agency (ACA) in October 1967.[125] Then, Hong Kong is the third country that adopted the establishment of a special anti-corruption when in February 1974 it established the Independent Commission Against Corruption (ICAC).[126] In February 1975, Thailand formed Counter Corruption Commission but it was not effective and was subsequently replaced by the National Counter Corruption Commission (NCCC) in November 1999. Then in January 2002, South Korea established the Korea Independent Commission Against Commission (KICAC).[127] Finally, Indonesia followed this third pattern by forming the KPK in December 2003.[128] In the end, this third pattern is the most popular and most widely adopted in Asian countries. However, not all countries which formed special anti-corruption commission succeeded in eradicating corruption.[129]

Almost similar to Quah, John R. Heilbrunn (2006) identifies four types of anti-corruption agencies, namely:

1. Universal Model, which is a special anti-corruption commission that has the function of investigation, prevention and coordination as applied by the ICAC in Hong Kong;
2. Investigative Model, which is a small and centralized anti-corruption commission as applied by CPIB in Singapore;
3. Parliamentary Model, which is the special commission that reports its work performance to the parliament, and independent from the executive and judicial branches. This model is adopted in Australia, namely the New South Wales Independent Commission Against Corruption;
4. Multi-Agent Model, which is a special commission consisting of several agencies, each of which is independent, but jointly carry out the task of fighting corruption. This model is applied in the United States, namely the United States Office of Government Ethics that carries out the function of prevention; and the Department of Justice that performs the function of enforcement, and both serves the duty to eradicate corruption.[130]

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[123] John S.T. Quah, Anti-Corruption Agencies in Four Asian Countries: A Comparative Analysis, International Public Management Review, Volume 8 Issue 2 (2007), page 44.

[124] Quah, page 73.

[125] Ibid 74.

[126] Ibid.

[127] Ibid.

[128] Ibid. KPK Law has been effective since 2002, but Quah considers that the KPK has only been effective since 2003, when the first KPK leadership for the 2003-2007 period began to perform.

[129] Ibid page 74.

[130] Ibid page 74 – 75.

Whatever the model chosen by each country, the strategy to combat corruption cannot be separated from the anti-corruption institutional format. Whether single or multiple anti-corruption agencies, special or general, will depend on the needs and conditions of each country. Given corruption that is getting worse, then I am of the view that a single institution, special, independent with strong authority, will be more appropriate to be adopted.

1. Comparison of Four Countries according to Quah

By comparing the experiences of anti-corruption commission in four countries, namely Singapore, Thailand, Hong Kong and South Korea, Jon S.T. Quah identifies six elements that must be held by a special anti-corruption institution in order to be successful in carrying out its duties, namely: (1) they must be incorruptible; (2) they must be independent from the police and from political control; (3) there must be comprehensive anti-corruption legislation; (4) they must be adequately staffed and funded; (5) they must enforce the anti-corruption laws impartially; and (6) their governments must be committed to curbing corruption in their countries.[131] Below are explanations of the six elements.

a. Anti-corruption Commission Must Be Free from Corruption

The main requirement for special anti-corruption commission is, the institutions themselves must be free of corruption. Quah says there are two main reasons why the anti-corruption commission should be clean, namely: first, if the personnel of the anti-corruption commission itself are corrupt, then the institution will lose legitimacy. Two, corruption within the anti-corruption agency would not only discredit the institution per se, but will certainly also hinder their performance in order to effectively eradicate corruption.[132]

The experience of Thailand is one bad example. Its first anti-corruption commission was disbanded because five commissioners of the commission were convicted of corruption. Subsequently, in May 2005, all nine NCCC commissioners resigned. They were found guilty by the Supreme Court of Thailand for abuse of power in August 2004, when they issued a decision which raised their salaries by 45,000 baht (US$ 1,125).[133] The integrity of anti-corruption commission personnel must be ensured at the unquestionable level. They are honest people, competent

[131] Ibid page 82 – 90.
[132] Ibid page 82.
[133] Ibid.

and selected through a rigorous process. Excess amounts of staff should be avoided, as well as the adequacy of the number of staff must be met. Every anti-corruption commission personnel known of violations, especially corruption, the punishment should be enforced decisively, dismissal should be done. Furthermore, the criminal prosecution should be completed. Not only that, the details of the punishment imposed to the corrupt employees should be widely publicized in the mass media, to create a deterrent effect for other officers, as well as to demonstrate the level of integrity and credibility of anti-corruption commissions that are kept high before the public.[134]

In Singapore, when one senior CPIB official was caught colluding with a businessman, in 1997, Chua Cher Yak, CPIB Director immediately ordered polygraph test to all employees, including himself, to prove their integrity is trustworthy. The efforts managed to maintain public confidence in Singapore, mainly because Director Chua and all CPIB employees successfully passed the polygraph test.[135]

b. Anti-corruption Commission Must Be Independent, Especially from the Police and Political Control

Anti-corruption commission must be independent of all influences and interests, except the interests of combating corruption itself. More specifically, Quah explicitly mentions the involvement of the police and political control in the work of anti-corruption. The experience in Singapore and Hong Kong, Quah believes, shows the importance not to involve the police in the works of anti-corruption commission, especially if there are still many corrupt police officers. Quah states:

> the police was the biggest obstacle to curbing corruption in Singapore and Hong Kong before the establishment of the CPIB in October 1952 and the ICAC in February 1974 because of the prevalence of police corruption in both city-states. Accordingly, the success of the CPIB and ICAC in combating corruption has confirmed that the first best practice in curbing corruption is: do not let the police handle the task of controlling corruption as this would be like giving candy to a child and expecting him or her not to eat it. Singapore has taken 15 years (1937-1952) while Hong Kong has taken 26 years (1948-1974) to learn this important lesson. Unfortunately, many Asian countries (India, Japan and Mongolia) have still not learnt this lesson yet as they continue to rely on the police to curb corruption.[136]

[134] Ibid.
[135] Ibid.
[136] Ibid.

Besides independence from the influence of the police, Quah requires anti-corruption commission to be free from the influence of political leaders in carrying its daily duties. Because, the commission should be able to perform proper legal process against anyone, without exception, including political leaders and senior government officials, without feeling threatened or fearful at all.[137]

In relation to independence, the institutional position of anti-corruption commission is important to note. CPIB's experience in Singapore demonstrates how institutional positioning is very important. Since its establishment in October 1952, CPIB has been constantly changing its position, first under the Attorney General (1952-1959). In 1959 - 1962, CPIB was placed under the Interior Ministry. Furthermore, in 1963 - 1965 CPIB shifted to the Prime Minister before returning under the Attorney General in 1965 - 1968, then it is back under the office of Prime Minister from 1969 until today.[138]

Due to CPIB Director's obligation to report the results of its work to the Prime Minister, the anti-corruption commission's independence was questionable. There is always a concern that CPIB can be abused by the prime minister - or even the President - to fight the opposition political parties in Singapore. The experience in Malaysia shows how the Anti-corruption Commission in the neighboring country, which is under the Prime Minister, is allegedly used to attach the corruption charges against then Deputy Prime Minister Anwar Ibrahim in 1998.[139]

Facing the doubts over the independence of the CPIB, Article 22G Singaporean Constitution regulates, in case the Director of CPIB does not get approval from the Prime Minister to prosecute ministers or senior government officials, the CPIB can still continue the legal process after getting approval from the President.[140] The same mechanism applies if the one to be prosecuted by the CPIB is the Prime Minister himself.[141]

Although there is a mechanism through the approval of the President, the independence of anti-corruption commission in Singapore remains questionable. Similar problems are faced by the ICAC of Hong Kong that gives its report to

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[137] Ibid page 83.

[138] Ibid.

[139] Ibid.

[140] Singaporean Constitution Article 22G. stipulates "Notwithstanding that the Prime Minister has refused to give his consent to the Director of the Corrupt Practices Investigation Bureau to make any inquiries or to carry out any investigation into any information received by the Director touching upon the conduct of any person or any allegation or complaint made against any person, the Director may make such inquiries or carry out investigation into such information, allegation or complaint if the President, acting in his discretion, concurs therewith".

[141] Quah, page 84.

Chief Executive. Although the CE did not intervene in the daily tasks of ICAC, it will still be difficult for Hong Kong's anti-corruption commission if it wants to probe allegations of corruption made by the Chief of Executive.[142]

In Thailand, the anti-corruption commission was changed from its initial position which was under, and reporting its works to the Prime Minister, to reporting to the Senate, under the Constitution of the People 1997. Nine commissioners of the NCCC Thailand are appointed by the King, on the recommendation of 15 (fifteen) members of a Selection Committee. The committee is composed of three judges, seven academics, and five representatives of political parties. The tenure of NCCC commissioners is nine years, and they cannot be reelected. However, the obligation to report to the Senate remains an issue with regards to the independence of the NCCC. In the case of Prime Minister Thaksin Shinawatra, NCCC's independence from political intervention was put into a real test. In the midst of the limitations of its independence, the NCCC still managed to carry out their duties in investigating the corruption case of Thaksin, who ended up being dismissed by the Constitutional Court of Thailand, although with split decision, 8 agreed, and 7 disagreed with the dismissal.[143]

c. Comprehensive Anti-Corruption Regulations Must Be Supported

Comprehensive anti-corruption regulations are the main prerequisites for an effective anti-corruption agenda. According to Quah, Anti-corruption Law must: 1) clearly define corruption and its types; 2) clearly state the jurisdiction of the anti-corruption commission.[144] On this comprehensive rules, in my opinion, they should include reversing the burden of proof and money laundering in the material laws. As for the anti-corruption agencies per se, they shall hold the authority to examine, investigate, and prosecute. Also included is the authority to conduct wiretaps and other modern investigative methods. More about this will be reviewed when we explore the authority of the KPK as well as the comparison of similar commission's authorities in some countries.

d. Anti-corruption Commission Must Have Adequate Financing and Human Resources

Corruption eradication agenda is no cheap job. Hence, human resources and budgetary supports from the state is a must.

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[142] Ibid.

[143] Ibid page 85.

[144] Ibid page 86.

Among the four countries, in terms of personnel, ICAC Hong Kong is on top with 1,194 employees; followed by NCCC Thailand with 701 employees; KICAC South Korea with 205 employees and CPIB Singapore with 82 employees. Whereas in terms of funding, the ICAC remained the best with a budget of US$ 85 million, or US$ 12.32 per capita; followed by CPIB which, with only US$ 7.7 million, but it is equivalent to US$ 1.71 per capita; KICAC actually has the second largest budget with US$ 17.8 million, but it is only equivalent to US$ 0.37 per capita; and finally the NCCC, which the total budget is ranked third with US$ 8.55 million, but the per-capita number is the lowest because it is only equivalent to US$ 0.13.[145]

In short, ICAC and CPIB enjoy more adequate funds and human resources supports than KICAC and NCCC. These two factors have contributed to the more effective anti-corruption works of ICAC and CPIB.

e. Anti-corruption Commission Must Enforce Regulation without Exception

If the anti-corruption commission is seen as making exceptions in enforcing anti-corruption laws and regulations, the commission's credibility will be destroyed. Conversely, if anti-corruption commission can effectively catch the "big fishes" then public trust will improve. CPIB gains credibility because it managed to prosecute high-ranking government officials. Something similar happened with ICAC that gained credibility because it follows up all complaints from the public, even if they only report petty corruption.[146] In Quah's terms, "In sum, there must be impartial and not selective enforcement of the anti-corruption laws by the ACA".[147]

f. Political Supports Are Crucial in Corruption Eradication

According to Quah, "Political will is perhaps the most important precondition for the effectiveness of an ACA".[148]

Political will is the commitment of political leaders to combat corruption. Quah believes that commitment can be present only if the following three conditions are realized, which are: 1) the existence of comprehensive anti-corruption rules; 2) the existence of an independent anti-corruption commission, supported with

[145] Ibid page 87.
[146] Ibid page 88.
[147] Ibid page 89.
[148] Ibid.

adequate financial and human resources; and 3) anti-corruption rules can be enforced indiscriminately by the anti-corruption commission.[149]

The author agrees with the view of Quah. In fact, no matter how strong an anti-corruption commission is, be it in terms of regulation, authority, and so forth, it will become meaningless if in reality the country's leaders do not support the work of combating corruption.

2. KPK's Study on Anti-Corruption Commission in Several Countries

Furthermore, still related to the comparison of anti-corruption commissions, I was helped by the anti-corruption commission comparative studies in several countries conducted by the KPK, in cooperation with PSHK, which concluded that, "The effectiveness of an anti-corruption institution can be assessed from, among others, its budget, its position in the state administrative structure, the underlying legal basis on its establishment, its institutional authorities, its organizational structure, the status its investigators and prosecutors, and the existence of its regional offices."[150]

KPK's study, which was conducted in cooperation with the PSHK, has been very comprehensive. Anti-Corruption Commissions in twenty-three countries were discussed thoroughly, while seventy-eight countries are described based on certain issues. The twenty-three countries are chosen based on three considerations, which are close to Indonesia, especially in the Southeast Asia region; have ratified the United Nations Conventions Against Corruption; and the availability of data in Indonesian or English.[151] The seventy-six anti-corruption commissions, are also to indicate how vast any anti-corruption agencies are in the world, written in the table below.

[149] Ibid.

[150] Corruption Eradication Commission, Profil Lembaga Antikorupsi di Berbagai Negara: Dasar Hukum Pembentukan, Kewenangan, Anggaran, SDM, Struktur Organisasi, Kantor Perwakilan, Gedung, Kontak Informasi (Profiles of Anti-corruption Institutions in Various Countries: The Legal Basis of Establishment, Authorities, Budget, Human Resources, Organizational Structure, Representative Offices, Building, Contact of Information) (2014) page 9

[151] KPK, page 14.

Table 3
Anti-corruption Commissions in Some Countries[152]

NO	COUNTRY	ANTI-CORRUPTION INSTITUTION
1	Afganistan	High Office of Oversight and Anti Corruption
2	Albania	Department of Internal Control and Anti-corruption
3	Argentina	Oficina Anti-Corruption
4	Australia (New South Wales)	Independent Commission Against Corruption
5	Austria	Federal Bureau of Anti-Corruption
6	Banglades	Anti Corruption Commision
7	Barbados	Department of Public Prosecutions Inland revenue and ombudsman
8	Bhutan	Anti-Corruption Commission
9	Bosnia and Herzegovina	Department for Combating Organized Crime and Corruption
10	Botswana	Directorate on Corruption and Economic Crime – DCEC
11	Brazil	Office of the Controller General
12	Brunei Darussalam	Anti-Corruption Bureau (ACB) / Badan Mencegah Rasuah (BMR)
13	Bulgaria	Commission for Prevention and Counteracting Corruption (CPCC) replacing Commission for Coordinating the Activity for Combating Corruption (CCAC)
14	Burkina Faso	Autorité Supérieure de Contrôle d'Etat / Superior Authority of State Oversight
15	Cameroun	National Anti-Corruption Commission
16	Costa Rica	General Attorney's Office Of The Republic
17	Czech Republik	Police of the Czech Republic Unit Combating Corruption and Financial Crimes
18	Ethiopia	Federal Ethics and Anti-Corruption Commission of Ethiopia
19	Fiji	FICAC (Fiji Independent Commission Against Corruption)
20	Filipina	Office of the Ombudsman
21	Guatemala	Transparency and Fighting Corruption Commission of the Guatemala

[152] KPK, page 10-13

22	Haiti	Anti-Corruption Unit
23	Hong Kong	Independent Commission Against Corruption (ICAC)
24	Hungaria	Protective Service of Law Enforcement Agencies
25	Indonesia	Komisi Pemberantasan Korupsi (KPK)
26	Jamaica	Office of the Director of Public Prosecution The Public Service Commission
27	Kamboja	ACU (Anti Corruption Unit)
28	Kenya	Kenya Anti-Corruption Commission
29	Kingdom of Morocco	Instance Centrale de Prévention De la Corruption (ICPC)
30	Kosovo	Anti Corruption Agency
31	Laos	Government Inspection and Anti Corruption Authority
32	Latvia	Corruption Prevention and Combating Bureau (KNAB)
33	Lesotho	Directorate on Corruption & Economic Offence
34	Madagaskar	Independent Anti-corruption Bureau
35	Maladewa	Anti-Corruption Commission
36	Malawi	Anti-Corruption Bureau
37	Malaysia	Malaysian Anti-Corruption Commission (MACC) / Suruhan Jaya Pencegahan Rasuah Malaysia (SPRM)
38	Mauritius	Independent Commission Against Corruption
39	Meksiko	Procuraduría General de la República / Procuraduría General de la República/Procuraduría Locales / Secretaría de la Función Pública / Auditoría Superior de la Federación
40	Mongolia	Independent Authority against Corruption
41	Montenegro	Directorate For Anti Corruption Initiative
42	Mozambique	Gabinete Central de Combate Corruption – GCCC
43	Myanmar	Bureau of Special Investigation
44	Namibia	Anti Corruption Commission
45	Nepal	Commission for the Investigation of Abuse of Authority (CIAA)

46	Nigeria	EFCC (Economic Finance Crimes Commission)
47	Pakistan	National Accountability Bureau
48	Peru	Comisión de Alto Nivel Anticorrupción
49	Poland	Central Anti-Corruption Bureau
50	Republic of India	Karnataka Lokayukta (Central Bureau of Investigation)
51	Republic of Korea (South Korea)	Anti Corruption and Civil Rights Commission
52	Republic of Macedonia	State Commission for Prevention of Corruption (SCPC)
53	Republic of Moldova	Center for Combating Economic Crimes and Corruption
54	Romania	The National Anti Corruption Directorate
55	Rwanda	Office of the Ombudsman of Rwanda Corruption and Maladministration
56	Senegal	Commission Nationale de Lutte Contre la Non-Transparence / la Corruption et La Concussion
57	Serbia	Anti-Corruption Agency
58	Sierra Leone	Anti-Corruption Commission (ACC)
59	Singapura	CPIB (Corrupt Practices Investigation Bureau)
60	Slovenia	Commission for the Prevention of Corruption
61	Spain	Oficina Antifrau de Catalunya (Anti-Fraud Office of Catalonia)
62	Sri Lanka	Commission to Investigate Allegations of Bribery or Corruption
63	Tajikistan	The National Anti Corruption Council of The Republic of Tajikistan
64	Tanzania	Prevention and Combating of Corruption Bureau (PCCB)
65	Thailand	NACC (National Anti Corruption Commission)
66	The Hashemite Kingdom of Jordan	Anti-Corruption Commission
67	The Kingdom of Swaziland	Swaziland Anti-Corruption Commission
68	The Republic of Croatia	Anti-Corruption Department, Ministry of Justice

69	The Republic of Estonia	The Prosecutor`s Office
70	Timor Leste	Comissao Anti-Corrupcao (CAC) / Anti-Corruption Commission of Timor-Leste
71	Togo	National Commission for Fighting Corruption and Economic Crime
72	Uganda	Inspectorate of Government
73	United Kingdom (England)	Serious Fraud Office
74	Vietnam	Government Inspectorate of Vietnam (GIV)
75	Yaman	Supreme National Authority for Combating Corruption, (SNACC)
76	Zambia	Anti-Corruption Commission

KPK composes its study with: budget, position in the state administrative structure, legal basis for the establishment, authorities, status of investigators / prosecutors, and representative offices.[153] All of the factors are certainly important, but I opt to sum it up with following arrangement:

1. Position in the state administrative structure
2. Underlying legal basis
3. Authorities
4. Budget
5. Status of investigators and prosecutors
6. Representative Offices.

Such arrangement may have been influenced by the field of constitutional law that the author has been studying. For me, the independence of anti-corruption commission is the main pillar aka spirit that determines its life and death, as well as the effectiveness of the performance of an anti-corruption agency. Therefore, how it is positioned in the state administrative structure and what the formation legal basis is become very crucial. Furthermore, the extent of the authority of the anti-corruption agency would affect the effectiveness of the institutions. Then comes technical matters such as the budget, the status of the investigator and / or prosecutor, as well as the existence of the representative offices which are the next determining factors to consider.

The author's further comment, it is unfortunate that the KPK's study is focused on the independence of anti-corruption institutions, but not to review the accounta-

[153] KPK, page 17-34.

bility or responsibility side of the anti-corruption agency. Whereas, independence must be complemented by the aspects of accountability and supervision. Of course, how accountability and supervision are conducted against the institution or the institution's work is also important for the success of an anti-corruption commission.

Below are descriptions of each of the six factors above:

a. Independent Anti-Corruption Commission

Where the anti-corruption commission is positioned in the constitutional structure will determine the independence and effectiveness of the anti-corruption agency. There is no other choice, due to its super-heavy tasks, where prosecuting corrupt state leader cannot be ruled out, then there is no other way, the state anti-corruption commission must be given independent status and is not placed on one of the branches of power, either under the executive, legislative, or judicial. Definition of an independent state commission can be seen in the early part of this chapter that reviews that matter.

Putting it on one of the branches of power are likely to make the anti-corruption agency not independent, and can further impact on the professional works of the corruption eradication institution. If it was not independent, it would be prone to intervention, and conflict of interest would be a major obstacle of the institution's work.[154]

Independence also means that the anti-corruption commission has no obligation to report its works to one of the branches of power. If there is anything to report, it is not a report as if the institution is inferior, but it is merely as information as a form of performance responsibility. For example, in the form of published Annual Reports, or in the form of a coordination meeting with the parliament.

Therefore, when the KPK's study puts the anti-corruption agencies in Hong Kong and Singapore as an independent institution, the author needs to provide the following notes. In Singapore, the CPIB is placed under the office of Prime Minister.[155] CPIB Director reports to the Prime Minister. It raises questions over the independence of the CPIB. In Quah's terms, "As the CPIB's Director reports to the prime minister in Singapore, policy-makers who are interested in Adopting the CPIB models are concerned with the CPIB's independence".[156] Similar problems are faced by the ICAC in Hong Kong, which reports to the Chief Executive of

[154] KPK, page 21.
[155] Quah, page 83.
[156] Ibid.

Hong Kong, making ICAC not fully independent and free from the possibility of political intervention.[157] In Thailand, anti-corruption agency NCCC reports its works to the Senate. The author did not find the reporting arrangements in the 1997 Constitution of the People, but Quah, citing Borwornsak, questions the independence of the NCCC because of that matter.[158]

When it comes of the position in Indonesia's state administrative structure, the KPK is more fortunate because it is declared as an independent state institution.

Table 4
Independent Anti-corruption Commission[159]

No	Country
1	Afganistan
2	Albania
3	Argentina
4	Australia
5	Austria
6	Bangladesh
7	Barbados
8	Bhutan
9	Bosnia
10	Botswana
11	Brunei Darussalam
12	Bulgaria
13	Burkina Faso
14	Ethiopia
15	Fiji
16	Filipina
17	Guatemala
18	Haiti
19	Hong Kong
20	**Indonesia**
21	Inggris
22	Kamboja
23	Kamerun
24	Kenya
25	Korea Selatan
26	Kosovo
27	Kroasia
28	Latvia
29	Lesotho
30	Macedonia
31	Madagaskar
32	Maladewa
33	Malawi
34	Malaysia
35	Maroko
36	Mauritius
37	Moldova
38	Mongolia
39	Montenegro
40	Mozambique
41	Namibia
42	Nepal
43	Nigeria
44	Pakistan
45	Peru
46	Polandia
47	Republik Ceko
48	Romania
49	Rwanda
50	Senegal
51	Serbia
52	Sierra Leone
53	Singapura
54	Slovenia
55	Spanyol
56	Sri Lanka
57	Tanzania
58	Thailand
59	Timor Leste
60	Togo
61	Yaman
62	Yordania
63	Zambia

[157] Ibid page 85.
[158] Ibid.
[159] Ibid.

b. Anti-Corruption Commission Legal Basis

The formation of anti-corruption institutions must certainly be based on legislation. The format of the legal basis on the establishment of an anti-corruption agency represents the importance of the institution and the country's commitment in fighting corruption. The higher the legal basis of the establishment means that corruption eradication is considered more important, and therefore it demonstrates a greater commitment of state leader in the anti-corruption agenda.

There are at least three types of legal basis for corruption eradication, namely Constitution, Law, and regulations lower than law. The establishment under the Constitution indicates the most powerful legal basis for the establishment, because the constitution is the basic law. While the establishment under law still leaves room for political interference through the legislation process that may be aimed at weakening the anti-corruption institution.[160]

Of the 77 countries reviewed by the KPK, the majority establish anti-corruption commissions under a law, i.e. 47 countries; and the other 30 countries base the establishment of anti-corruption institutions under the Constitution. Here is a list of the countries and their respective legal basis for the formation of anti-corruption commission.

So far, I have not found a country where the establishment of anti-corruption institution is based on regulations lower than law, although it is theoretically possible. It is a good sign, because, although it is theoretically possible, using regulations lower than law could certainly result in weak position of anti-corruption agencies, as well as the lack of commitment from the state in terms of fighting corruption.

Related to Indonesia, since the KPK was formed under a law, thus opportunities are provided to improve the legal basis of its formation into a constitutional organ.

[160] KPK, page 23 – 24.

Table 5
Anti-corruption Commission based on Constitution[161]

No	Country
1	Afganistan
2	Albania
3	Argentina
4	Bangladesh
5	Bosnia and Herzegovina
6	Brazil
7	Brunei Darussalam
8	Bulgaria
9	Cameroun
10	Filipina
11	Guatemala
12	Hongkong
13	Kenya
14	Laos
15	Madagaskar
16	Malaysia
17	Montenegro
18	Nigeria
19	Republic of Macedonia
20	Republic of Moldova
21	Romania
22	Rwanda
23	Sierra Leone
24	Singapura
25	Tanzania
26	Thailand
27	The Kingdom of Swaziland
28	The Republic of Croatia
29	Timor Leste
30	Vietnam

As far as legal basis is concerned, all ASEAN countries have established anti-corruption institution except Myanmar. Among the nine countries that have anti-corruption agencies, only Indonesia where the legal basis is outside the Constitution. Indonesia becomes part of the forty-seven other countries, where the legal basis for anti-corruption commission is at the level of legislation.

Table 6
Anti-corruption Commission based on Law[162]

No	Country
1	Argentina
2	Australia New South Wales
3	Austria
4	Barbados
5	Botswana
6	Burkina Faso
7	Costa Rica
8	Czech Republik
9	Ethiopia
10	Fiji
11	Hong Kong
12	Hungaria
13	Indonesia
14	Jamaica
15	Kenya
16	Kingdom of Morocco
17	Kosovo
18	Latvia
19	Lesotho
20	Madagaskar
21	Maladewa
22	Malawi
23	Mauritius
24	Meksiko
25	Mongolia
26	Mozambique
27	Namibia
28	Nepal
29	Pakistan
30	Peru
31	Poland
32	Republic of India
33	Republic of Korea (South Korea)
34	Republic of Macedonia
35	Romania
36	Senegal
37	Serbia
38	Sierra Leone
39	Slovenia
40	Spain
41	Sri Lanka
42	The Hashemite Kingdom of Jordan
43	The Republic of Estonia
44	Togo
45	United Kingdom (England)
46	Yaman
47	Zambia

[161] KPK, page 24.
[162] KPK, page 25.

c. Anti-Corruption Commission's Authorities

The next thing that would affect the performance of anti-corruption agency is its authorities under legislation. In this case I agree with the way the classification made by the KPK namely the presence or absence of prevention authority on the one hand, and the prosecution authority on the other, particularly in terms of investigation and prosecution.

Of the 69 countries reviewed, all provide the authority of prevention to anti-corruption institutions, except two countries, namely Croatia and Estonia; all the 69 countries provide investigative authority. Whereas on the prosecution authority, it becomes more varied, the minority 28 countries authorize the prosecution power, and the other 41 countries do not give prosecution power to the anti-corruption agencies.

Indonesia's KPK is among the lucky ones to have all the three authorities, prevention, investigation and prosecution. These three powers are what certainly contribute to the success of its performance which recorded a 100% conviction rate, so that it should be retained and not undermined.[163]

In line with the opinion of Quah which requires strong authority for anti-corruption commission, the comprehensive authority held by the KPK which includes prevention and prosecution is right. Especially given the Constitutional Court's decision declaring that the authorities are not contrary to the 1945 Constitution. Further on the authorities being in line with the Constitution will be discussed in the next sub-section.

Table 7
Anti-corruption Commissions' Authorities[164]

No	COUNTRY	PREVENTION	INVESTIGATION	CONVICTION
1	Afganistan	Authorized	Authorized	Not Authorized
2	Albania	Authorized	Authorized	Not Authorized
3	Argentina	Authorized	Authorized	Authorized
4	Australia (New South Wales)	Authorized	Authorized	Not Authorized
5	Austria	Authorized	Authorized	Not Authorized
6	Banglades	Authorized	Authorized	Authorized
7	Barbados	Authorized	Authorized	Authorized
8	Bhutan	Authorized	Authorized	Not Authorized
9	Bosnia Herzegovina	Authorized	Authorized	Not Authorized
10	Botswana	Authorized	Authorized	Not Authorized

[163] KPK, page 30.
[164] KPK, page 27-29

11	Brazil	Authorized	Authorized	Not Authorized
12	Brunei Darussalam	Authorized	Authorized	Not Authorized
13	Bulgaria	Authorized	Authorized	Not Authorized
14	Burkina Faso	Authorized	Authorized	Authorized
15	Cameroun	Authorized	Authorized	Not Authorized
16	Costa Rica	Authorized	Authorized	Not Authorized
17	Czech Republic	Authorized	Authorized	Not Authorized
18	Ethiopia	Authorized	Authorized	Authorized
19	Fiji	Authorized	Authorized	Authorized
20	Filipina	Authorized	Authorized	Authorized
21	Guatemala	Authorized	Authorized	Not Authorized
22	Haiti	Authorized	Authorized	Not Authorized
23	Hong Kong	Authorized	Authorized	Not Authorized
24	Indonesia	Authorized	Authorized	Authorized
25	Jamaica	Authorized	Authorized	Authorized
26	Kamboja	Authorized	Authorized	Not Authorized
27	Kenya	Authorized	Authorized	Not Authorized
28	Kosovo	Authorized	Authorized	Not Authorized
29	Laos	Authorized	Authorized	Not Authorized
30	Latvia	Authorized	Authorized	Not Authorized
31	Lesotho	Authorized	Authorized	Authorized
32	Madagaskar	Authorized	Authorized	Not Authorized
33	Maladewa	Authorized	Authorized	Not Authorized
34	Malawi	Authorized	Authorized	Authorized
35	Malaysia	Authorized	Authorized	Authorized
36	Mauritius	Authorized	Authorized	Authorized
37	Meksiko	Authorized	Authorized	Authorized
38	Mongolia	Authorized	Authorized	Not Authorized
39	Mozambique	Authorized	Authorized	Not Authorized
40	Myanmar	Authorized	Authorized	Not Authorized
41	Namibia	Authorized	Authorized	Not Authorized
42	Nepal	Authorized	Authorized	Authorized
43	Nigeria	Authorized	Authorized	Authorized
44	Pakistan	Authorized	Authorized	Authorized
45	Peru	Authorized	Authorized	Not Authorized
46	Polandia	Authorized	Authorized	Not Authorized

47	Republic of India	Authorized	Authorized	Authorized
48	Republic of South Korea	Authorized	Authorized	Not Authorized
49	Republic Moldova	Authorized	Authorized	Not Authorized
50	Romania	Authorized	Authorized	Authorized
51	Rwanda	Authorized	Authorized	Authorized
52	Senegal	Authorized	Authorized	Not Authorized
53	Sierra Leone	Authorized	Authorized	Authorized
54	Singapore	Authorized	Authorized	Not Authorized
55	Spain	Authorized	Authorized	Not Authorized
56	Sri Lanka	Authorized	Authorized	Authorized
57	Tanzania	Authorized	Authorized	Authorized
58	Thailand	Authorized	Authorized	Not Authorized
59	The Hashemite Kingdom of Jordan	Authorized	Authorized	Not Authorized
60	The Kingdom of Swaziland	Authorized	Authorized	Not Authorized
61	The Republic of Croatia	Not Authorized	Authorized	Authorized
62	The Republic of Estonia	Not Authorized	Authorized	Authorized
63	Timor Leste	Authorized	Authorized	Not Authorized
64	Togo	Authorized	Authorized	Not Authorized
65	Uganda	Authorized	Authorized	Authorized
66	United Kingdom (England)	Authorized	Authorized	Authorized
67	Vietnam	Authorized	Authorized	Not Authorized
68	Yaman	Authorized	Authorized	Not Authorized
69	Zambia	Authorized	Authorized	Authorized

d. Anti-Corruption Commission's Budgets in Several Countries

Budget is certainly a matter that affects the performance of any institution, anti-corruption agency is no exception. Without adequate budgetary support, the heavy corruption eradication duties would certainly fail. Because most of the budgetary processes are through legislation in the parliament, then the size of the approved budget also shows the commitment and support of politicians and leaders of the country over the institution's work in combating corruption.

As far as the budget size is concerned, the KPK gets support that has increased every year from 2010 to 2013. In 2010 the Commission recorded a budget amounting to 39 million USD, then rose in the following year to 53 million USD, rose again in 2012 to 61 million USD and in 2013 it became 65 million USD. Although, the budget increases, were not only driven by organizational needs that continued to grow such as additional human resources, operational costs in the fields of prevention and prosecution of corruption, but also caused by inflation.[165]

Annual budget improvement for anti-corruption agency is also carried out in Malaysia. The neighboring country even increased the budget by 20 million USD from 2012 to 2013, from 63 million USD to 83 million USD. In terms of budget allocation, Malaysia's anti-corruption commission enjoyed higher budget than the KPK. Especially when compared to the Hong Kong's anti-corruption agency whose budget almost reached 900 million USD.[166]

Regarding budget, the approach taken by Quah is comparing the existing budget with the population, resulting in expenditure per capita. That way, when comparing Singapore, Hong Kong, Thailand and South Korea, Quah concludes that despite large budget, when divided by the population, NCCC Thailand only get budgetary support of US$ 0.13.[167]

Table 8
Comparative Analysis on the Number of Personnel and Budget of Four Anti-corruption Institutions in 2004-2005[168]

	CPIB	ICAC	NCCC	KICAC
Personnel	82	1,194	701	205
Budget	US$ 7.7 million	US$ 85 million	US$ 8.55 million	US$ 17.8 million
Population	4.5 million	6.9 million	63.5 million	48 million
Budget per Capita	US$ 1.71	US$ 12.32	US$ 0.13	US$ 0.37

Using the same method, with the KPK's budget of US$ 65 million in 2013, and the assumption of the Indonesian population was 235 million, then the Commission's budget per capita was US$ 0.276. It was only higher than Thailand's US$ 0.13 - but still much lower than Singapore, Hong Kong and South Korea. It should also be noted that the data for the four countries is the 2004-2005 budget.

[165] KPK, page 20.
[166] Ibid.
[167] Quah, page 87.
[168] Ibid.

If compared to the same year in 2013, it is very likely that KPK's budget per capita is by far the lowest.

Because, the data collected in KPK's study says, ICAC Hong Kong in 2005 got US$ 85 million, and in 2013 it was increased by more than 10-fold to US$ 875.5 million. KICAC South Korea in 2005 was US$ 48 million, and in 2011 rose to US$ 54 million. Unfortunately, no data is available for KICAC budget in 2013, or NCCC Thailand in 2013.[169]

Provided available data, only per capita budgets of Hong Kong's ICAC and Indonesia's KPK that are comparable, because both have the 2013 data. The assumption of Hong Kong population was 7,184 million according to a mid-2013 census.[170] Thus, ICAC's budget per capita in 2013 was US$ 121.87. That also means that the budget per capita of the ICAC of Hong Kong was 441.6 times as higher as the budget per capita of the KPK which was only US$ 0.276. Of course, the difference is too far, prompting us to clearly say that our budgetary politics are yet to be supportive to the KPK's very heavy duties. More about budgets, here are data in some countries.

Table 9
Anti-corruption Commission Budgets[171]

No	Country	Year (in USD)			
		2010	2011	2012	2013
1	Afganistan	N/a	N/a	N/a	21,000,000
2	Argentina	N/a	N/a	N/a	4,100,000
3	Australia (New South Wales)	18,072,000	27,107,000	27,107,000	22,590,000
4	Banglades	23,740,000	4,127,000	4,319,000	4,526,000
5	Barbados	N/a	1,368,871	1,424,466	1,000,000
6	Bhutan	N/a	N/a	N/a	1,430,000
7	Botswana	6,300,000	N/a	N/a	N/a
8	Brazil	37,200,000	N/a	N/a	N/a
9	Burkina Faso	N/a	N/a	N/a	2,083,000
10	Cameroun	N/a	4,000,000	N/a	N/a
11	Costa Rica	N/a	N/a	N/a	15,100,000
12	Ethiopia	N/a	N/a	N/a	2,000,000

[169] KPK, page 18-20

[170] See http://www.censtatd.gov.hk/press_release/pressReleaseDetail.jsp?pressRID= 3159 &charsetID=1 accessed on November 15, 2015

[171] KPK, page 18-20

13	Fiji	7,288,889	6,127,720	N/a	N/a
14	Filipina	N/a	N/a	31,900,000	N/a
15	Haiti	N/a	N/a	N/a	1,270,000
16	Hong Kong	814,000,000	824,000,000	857,155,000	875,500,000
17	Indonesia	39,765,008	53,772,288	61,829,738	65,886,440
18	Jamaica	N/a	244,001	257,827	268,000
19	Kamboja	N/a	N/a	N/a	N/a
20	Kenya	15,000,000	N/a	N/a	24,600,000
21	Kerajaan Maroko	N/a	N/a	N/a	1,787,472
22	Kosovo	N/a	639,000	N/a	N/a
23	Lesotho	12,700,000	N/a	N/a	N/a
24	Malawi	3,178,000	N/a	3,155,000	N/a
25	Malaysia	47,305,000	61,253,000	63,982,000	83,693,000
26	Mongolia	2,100,000	N/a	N/a	N/a
27	Montenegro	454,410	455,395	N/a	N/a
28	Mozambique	N/a	624,550	N/a	N/a
29	Namibia	3,200,000	N/a	N/a	N/a
30	Nigeria	56,664,000	86,885,000	68,627,000	58,553,000
31	Pakistan	5,800	8,443	17,280	N/a
32	Republic of Korea (South Korea)	N/a	54,000,000	N/a	N/a
33	Republic of Macedonia	343,601,89	N/a	N/a	N/a
34	Republic of Moldova	N/a	N/a	N/a	4,270,000
35	Romania	N/a	20,000,000	N/a	N/a
36	Rwanda	2,400,000	N/a	N/a	N/a
37	Sierra Leone	N/a	N/a	3.822.000	N/a
38	Singapura	15,650,000	34,000,000	23,475,000	34,000,000
39	Slovenia	2,138,400	N/a	2,317,490	2,322,836
40	Spain	6,326,400	6,871,500	6,684,900	N/a
41	Sri Lanka	61,606	N/a	N/a	N/a
42	The Kingdom of Swaziland	N/a	N/a	N/a	49,450,500
43	The Republic of Croatia	N/a	N/a	N/a	3,760,000
44	The Republic of Estonia	N/a	N/a	N/a	11,500,000
45	Timor Leste	1,045,000	2,079,000	1,442,000	1,500,000
46	Togo	1,645,400	1,645,400	N/a	N/a
47	Uganda	1,500,000	N/a	N/a	N/a
48	United Kingdom (England)	N/a	55,000,000	N/a	182,000,000
49	Zambia	3,000,000	N/a	N/a	N/a

e. Status of Anti-Corruption Commission Employees

In the table below, it can be seen that, of the 19 countries reviewed by the KPK, only one (1) that the anti-corruption institution's employees are not permanent, i.e. Sri Lanka. Only three (3) countries that the status of the employees are mixture of permanent and not permanent, namely Brazil, Nigeria and Indonesia. The remaining 15 (fifteen) countries adopt the concept of permanent employment. It is clear that the majority of the investigators and prosecutors on anti-corruption agencies in many countries are permanent employees. In regards to the importance of having permanent employees for the KPK, the Commission's study has well summarized it as follows:

> "The status of permanent employment for an institution like the KPK is very important. This matters will affect the independence, professionalism, as well as development of working and organization culture. The status of non-permanent employees, or seconded to the KPK, be them examiners, investigators, prosecutors or other functions, will affect the employees' independence and professionalism (double loyalty). This condition is prone to intervention of the institution of origin of the investigators and prosecutors, especially when the KPK handles corruption cases involving the employees' institutions of origin (conflict of interest). Regarding this matter, the KPK experienced withdrawal of employees, especially investigators, when the Commission were investigating corruption case in the employees' institution of origin. These efforts are clearly counterproductive against the corruption eradication efforts in Indonesia."[172]

Table 10
Anti-corruption Commission Investigator Status[173]

No	Country	Number of Employees	Status of Investigators and Prosecutors
1	Brazil	2380	Permanent dan Non-permanent
2	Brunei	91	Permanent
3	The Philipines	2146	Permanent
4	Hongkong	1300	Permanent
5	**Indonesia**	**672**	**Permanent dan Non-permanent**
6	Inggris	300	Permanent
7	Cameroon	50	Permanent
8	South Korea	476	Permanent
9	Kosovo	57	Permanent
10	Malaysia	7600	Permanent

[172] KPK, page 31.
[173] KPK, page 30-31.

11	Mongolia	113	Permanent
12	Nigeria	1077	Permanent dan Non-permanent
13	Pakistan	1395	Permanent
14	Rwanda	47	Permanent
15	Singapore	120	Permanent
16	Slovenia	39	n/a
17	Sri Lanka	227	Non-permanent
18	Tanzania	2225	Permanent
19	Thailand	1300	Permanent

From ASEAN countries recorded above, only Indonesia which the status of its anti-corruption commission is still a mixture of permanent and non-permanent. Other ASEAN countries, Brunei, the Philippines, Malaysia, Singapore, and Thailand, have permanent anti-corruption employee status. Thus, if the wish to strengthen the KPK is genuine, the status of all of its employees should be made permanent, including the investigators who should possibly be recruited by the KPK independently, instead of relying on investigators from the police and/or prosecutor's offices.

f. Anti-Corruption Commission Representative Offices

Of the 49 countries studied, the majority have representative institutions, i.e. 32 countries, while the remaining 17 countries do not have representative offices. Although, the 32 countries that have representative offices, not all of them have representatives in every region (province or state). Indonesia is among the countries which do not have representative offices in regions. Unfortunately, the KPK's study does not review how the presence of representative offices affect the effectiveness of the work of anti-corruption commission in its respective country. Therefore, there is not enough data available to conclude whether the existence of the representative office is empirically necessary.

Table 11
Representative Offices[174]

No	COUNTRY	REPRESENTATIVE OFFICE	NOTES
1	Albania	Do not exist	
2	Argentina	Do not exist	
3	Australia (New South Wales)	Do not exist	
4	Banglades	Exist	
5	Bhutan	Exist	
6	Bosnia and Herzegovina	Do not exist	
7	Brazil	Exist	
8	Brunei Darussalam	Exist	In Kuala Pelait and Anggerek Desa
9	Bulgaria	Do not exist	
10	Burkina Faso	Exist	
11	Cameroon	Exist	
12	Costa Rica	Do not exist	
13	Czech Republic	Exist	
14	Ethiopia	Exist	In every province
15	Fiji	Exist	In every state
16	The Phillipines	Exist	In every province
17	Guatemala	Do not exist	
18	Haiti	Exist	
19	Hongkong	Do not exist	
20	Indonesia	Do not exist	
21	Jamaica	Exist	
22	Cambodia	Exist	In every province
23	Kenya	Exist	In every district
24	Madagaskar	Exist	
25	Malaysia	Exist	In every state dan Cawangan (equivalent to Regency)

[174] KPK, page 32 – 34.

30	Peru	Exist	In every municipal government
31	Poland	Exist	In every region
32	Republic of Korea (South Korea)	Do not exist	
33	Republic of Macedonia	Do not exist	
34	Republic of Moldova	Exist	
35	Romania	Exist	In every territory
36	Rwanda	Exist	
37	Sierra Leone	Do not exist	
38	Singapore	Do not exist	
39	Slovenia	Do not exist	
40	Tanzania	Exist	In every region and district
41	Thailand	Exist	In every province dan regency
42	The Republic of Croatia	Exist	In every territory (equivalent to province)
43	The Republic of Estonia	Exist	In every district
44	Timor Leste	Do not exist	
45	Uganda	Exist	In every territory
46	United Kingdom (England)	Do not exist	
47	Vietnam	Exist	In every province
48	Yaman	Do not exist	
49	Zambia	Exist	In every state

From the table above, it can be seen that of all recorded ASEAN countries, only three do not have offices, namely Indonesia, Singapore and Timor Leste. It is normal that Singapore and Timor Leste have no representative offices, because they are a city state and a country with small area. While other ASEAN countries, namely Brunei, the Philippines, Cambodia, Thailand and Vietnam, all have representative offices.

So, if we really intend to strengthen the KPK, the establishment of representative offices of the KPK in provinces is one work that must be realized. Moreover, the opening of branch office was also made possible by the KPK Law, ready to be implemented. Given the very broad territory of Indonesia, having representative offices is one way to expand and further streamline the work of the KPK. Of course, it needs to consider readiness of institutional infrastructure, human resources and budget of the KPK-including better monitoring system, to control the work of the KPK that will be wider and bigger. Therefore, the opening of a representative offices, if implemented, should be done in phases starting in areas that have been studied to be in the need of KPK's presence the most.

On whether or not this representative office is necessary, the author uses the study conducted by the Center for Anti-Corruption Studies (PuKAT Korupsi) Faculty of Law, UGM, in 2009. Article 19 Law 30 of 2002 stipulates that, the KPK may set up representative offices in regions. However, in relation to institutional design, including the functions, duties and authorities of the KPK's representative offices, the law does not explain further. Thus, PuKAT Korupsi studies design of the KPK with or without representative offices, and finds four alternative with its variants, namely: 1) centralized model; 2) centralized model with deconcentration variant; 3) gradual deconcentration model; and 4) total deconcentration model. Certainly, each model has its advantages and shortcomings.[175]

Of the four alternative designs, the author agrees with PuKAT Korupsi that the wish to establish KPK Representations in 34 provinces in Indonesia simultaneously is not possible at this time. If it will be established, it should be done gradually. In the near future, the opening of representative offices is done based on priority. The gradual opening is also to provide a transition period, so that the representative offices will really be a solution, instead of creating new problems.[176]

PuKAT Korupsi believes there are some fundamental reasons that encourage the formation of KPK representation gradually in several provinces first, namely: First, the KPK's own internal capacity. Establishment of the KPK representation, with a variety of alternative institutional format, requires re-allocation and redistribution of human resources at the KPK to the representative offices. Given the limited human resources at the KPK today, it is impossible to do it simultaneously in all provinces in Indonesia. Even opening just several representative offices needs to be done carefully, and must be accompanied by efforts to increase human resources at the KPK itself.[177]

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[175] Center for Anti-Corruption Studies Faculty of Law, Policy Paper: Studi Kelayakan KPK Perwakilan (Feasibility Study on KPK Representation) (2009) page 87 – 115.

[176] Ibid page 88.

[177] Ibid 89.

Secondly, KPK representatives should support corruption eradication strategy more effectively, hence, it is necessary to consider the selection of regions using priority based on corruption cases that have broader economic and social effects. That is cases that cause huge material losses to the country and lead to high social costs in the society. The purpose is, the presence of KPK representatives will create shock therapy, and generate deterrent effects with multiplier effects spread across all regions in Indonesia.[178]

Based on such preliminary assessment, as well as field research, PuKAT recommends several areas that are feasible to become pioneer of KPK regional representatives, namely: Medan (North Sumatera), Makassar (South Sulawesi), Balikpapan (East Kalimantan), Surabaya (East Java), Jayapura (Papua), and Denpasar (Bali).[179]

According to PuKAT Korupsi, some basic arguments that reinforce the choice of these areas are: First, representation and strategic position in each region in Indonesia. Medan (North Sumatra) is a regional representation of Sumatra; Surabaya (East Java) is a regional representation of Java; Makassar (South Sulawesi) is a representation of Sulawesi; Balikpapan (East Kalimantan) is a representation of Kalimantan; Denpasar (Bali) is a representation of Bali-Nusa Tenggara, and Jayapura (Papua) is the regional representative of Maluku and Papua.

Furthermore, PuKAT Korupsi suggests, the selection of the location by these categories is not merely consideration of representation of each region but also an emphasis of the strategic position of each of those areas in respective region, both from the standpoint of geo-economic and geo-politics. Particularly for Papua province, in addition to its strategic position from the geo-economic and geo-political standpoints, it is a very important area for research because this province obtains a special autonomy status, with the enactment of Law No. 21 of 2001, which of course would also have implications to various aspects of politics, social and economy. The second is the frequency and distribution of corruption. Based on data from the KPK until 2009, each of the studied location is an area that has the highest frequency of corruption cases compared to other provinces in respective region.[180]

Thirdly, is the magnitude of corruption. Each of the studied areas shows not only a high frequency but also the magnitude of the pattern of corruption. This is not out of the level of complexity of the social and political structures as well as the acceleration of economic development in each of the researched areas. Most of the researched areas in this study, such as Medan, Surabaya, Balikpapan, Makassar, Denpasar, are the cities that are growing rapidly with market-driven pattern economy.[181]

[178] Ibid.
[179] Ibid 90.
[180] Ibid.

Whereas Papua is of particular concern in this study because of the scheme of Special Autonomy accompanied by the special autonomy fund scheme, which, according to the principle "money follow functions", potentially have extraordinary corruption. As we know, before special autonomy, public funds flowing into Papua province is relatively small, only about 400-800 billion. But after Special Autonomy in 2002, the general income and revenue of Papua Province become more varied.[182]

The author agrees with PuKAT Korupsi's consideration to open representative office in stages. While on the underlying considerations, to the author suggests that they need to be combined with a variety of factors, namely: the regional representations. According to the author, the arguments over regional representation described by PuKAT Korupsi above are correct. The next thing is the potential number of cases. Areas with greater potential of cases need to get priority to open a representative office.

Other factors, such as types and actors of corruption, should also be taken into consideration, in line with the grand strategy of corruption eradication. For example, anti-corruption efforts in the field of Natural Resources, for example, makes the provinces of East Kalimantan, Riau, East Nusa Tenggara, and Papua priority to get representative offices due to potential natural resources corruption in the respective region.

Finally, areas with special considerations, such as Papua because of management of its large local budget, can also be considered in determining why a province like Papua is eligible to have a representative office.

Another factor that the author wants to propose is, in opening a Representative Office, the KPK should also consider establishing cooperation with local universities. For example, if it will open a representative office in Papua, then it should cooperate with the Cendrawasih University to conduct studies on anti-corruption related to natural resources. Similarly, it can be done with other KPK representatives, for example with the USU (Universitas Sumatera Utara/University of Sumatera Utara) in North Sumatra; with Unmul (University of Mulawarman) in East Kalimantan; with UNHAS (University of Hasanudin) in South Sulawesi; with Udayana University in Bali.

[181] Ibid page 91.
[182] Ibid page 95.

D. Constitutional Court Decisions related to KPK Law

Since promulgated on December 27, 2002, during the presidency of President Megawati Soekarnoputri, the KPK Law is one of the laws challenged in judicial review at the Constitutional Court (MK) the most. Starting from the year 2004 until October 2012, the KPK Law had been reviewed and decided 17 (seventeen) times.[183]

The high number of judicial reviews of the KPK Law indicate that many people who feel concerned or disturbed by the legal norms in the KPK Law. Although the majority of the petitions were not granted by the MK, which also shows that MK's constitutional politics support a strong and effective KPK, the amount of the petitions also shows that the efforts to eradicate corruption continue to get a variety of counter-attack, including through the constitutionality test against the KPK Law. Of course, such a form of resistance through the MK is appropriate, and essentially guaranteed by the 1945 Constitution. Such a fight is more respectable than other counter-attacks which are often in violation of law.[184]

That challenging the KPK Law before the MK is a matter that should be respected is affirmed by the Court in the decision of Case Number 012-016-019 / PUU-IV / 2006, which basically says:

> "…all parties, especially the Court, must be of the opinion that every law is constitutional until there is an evidence through judicial process before the Court that the related law is unconstitutional. Therefore, this is not in line with the democratic rule of law state principles if the parties feeling their constitutional rights are violated by the implementation of a law and filing a petition for judicial review on law before the Court, in an a priori manner is deemed as unethical manner. The 1945 Constitution guarantees their rights, and the 1945 Constitution also provides the facilities for defending such rights before the Court."[185]

Such opinion of the Court is thus appropriate in the context of a legal decision that is adhering to the norms of the law. The Court apparently felt the need to provide such affirmation on its position because during the judicial reviews of the KPK Law, there are many who criticized that such a move was a form of counter-attack against the Commission and the anti-corruption agenda. Of course, it should be emphasized by the Court that judicial review of a law is a constitutional right guaranteed by the constitution, so it cannot be prohibited, let alone labelled

[183] The seventeen MK decisions will be explored in this book. After 2012, there were several more judicial reviews against the KPK Law, because they had not been concluded, they do not become the main study, but they will be analyzed in one or two sections in this book.

[184] Another form of counter attack is legal attack against individuals among KPK leaders or anti-corruption activists (criminalization); and physical attack against anti-corruption campaigners.

[185] MK Decision No. 012-016-019/PUU-IV/2006 page 267.

as a corruptor's fight back. The Court's position like that is right. Although, I maintain the view that the language of advocacy-which is often not only based on normative legal text and also often based on the sociological legal reality, also has a logical reason to say that one of the counter-attacks against the existence of KPK is through judicial review before the MK- which is legally possible to do.

Whatever the reason behind the judicial review, since the Court is an institution that has the authority to interpret the constitutionality of norms contained in the KPK Law, the rulings that are final and binding-including their legal considerations-are certainly very suitable to be a benchmark of an ideal anti-corruption commission institutionality according to the constitution. Here are chronological summaries of the cases, the opinions and the Court's decisions on judicial reviews of the KPK Law:

a. Decision No. 006/PUU-1/2003 dated March 30, 2004

This case brought by two petitioners, namely the State Officials' Wealth Audit Commission (KPKPN) as the First Petitioner, and 32 (thirty-two) KPKN members as Second Petitioner. The Applicants essentially argue that the establishment of the KPK Law and the dissolution of the KPKPN are contrary to the 1945 Constitution.[186]

In its decision, the Court declares the First Petitioner's petition cannot be accepted because it has no legal standing, and rejects the petition of the Second Petitioner entirely because it is not proven that the establishment and the substance of the KPK Law was contrary to the 1945 Constitution. In this decision two constitutional justices expressed dissenting opinion i.e. justices Maruarar Siahaan and Sudarsono.

Despite the verdict, but it is still interesting to read MK considerations related to several judicially-reviewed articles, namely: Article 12 paragraph (1) letter a and i; Article 13 a; Article 69 paragraph (1) and (2); Article 26 paragraph (3) letter a; Article 40; and Article 71 paragraph (2) of the KPK Law. The Court states that none of the provisions are contrary to the 1945 Constitution. To be more precise, the Court's opinion on each of the articles are:

a. Article 13a

Article 13a sets the authority of the KPK to "construct lists and conduct checks on reports on the wealth of state officials"; The MK's view, "The content of the article is a logical consequence of Article 69 paragraph (1) which states that KPKPN will be part of the Prevention function of the KPK. Without Article 13a, the KPK

[186] MK Decision No. 006/PUU-I/2003 page 37.

would lose track in resolving the problems that had been handled by KPKPN. This chapter is also evidence that KPKPN as institution is put into the KPK."[187]

b. Article 69 paragraphs (1) and (2)

Article 69 paragraphs (1) and (2) set out:

(1) With the formation of the KPK the State Officials' Wealth Audit Commission (KPKPN) as defined in Law No. 28 of 1999 on state officials who are clean and free from Corruption, Collussion, and Nepotism (KKN) shall become a part of the Deputy of Prevention of the KPK.

(2) The KPKPN as outlined in paragraph (1) shall continue its duties, functions, and authority until the KPK commences to conduct its duties and authority based on this Law.

The Court is on the view that, "This article shows that the lawmakers in the efforts to eradicate KKN, as mandated by MPR Decree No. VIII / MPR / 2001 have chosen a policy instrument to establish the KPK and make the KPKPN as part of the KPK. The consideration underlying the decision making process to choose that alternative is of the authorities of the lawmakers. The Constitutional Court considers that the choice taken by the lawmakers regarding corruption eradication as mandated by the Constitution through MPR Decree No. VIII / MPR / 2001 does not conflict with the articles and the spirit embodied in the Constitution";[188]

> "The norms as stated in paragraph (2) of the mentioned article is a transitional provision to maintain the sustainability between KPKPN's functions when it was still an independent state institution and KPKPN's functions when it had been part of the KPK; so far, KPKPN's efforts in the efforts of prevention of corruption have been considerably successful and appreciated, not to mention supports from many parties. Therefore, such precious works of the KPKPN should be continued by the KPK. The mentioned transitional article is necessary to maintain sustainability"[189]

c. Article 71 paragraph (2)

Article 71 paragraph (2) stipulates that, when the KPK Law is passed, Article 27 of Law No. 31 of 1999 on the Eradication of Corruption as amended by Law No.

[187] MK Decision No. 006/PUU-I/2003 page 101.
[188] MK Decision No. 006/PUU-I/2003 page 101 – 102.
[189] Ibid

20 of 2001 shall be declared no longer valid. Article 27 itself, states, "In the event a corrupt act is detected that is very hard to prove, a joint team shall be set up under the coordination of the Attorney General".

On the review of Article 71 paragraph (2) of the KPK Law, the MK is of the view that the provision, "is intended to prevent overlapping between the KPK and the Attorney General in carrying out its duties to resolve corruption cases. The existence of this article is necessary to create legal certainty, especially for the KPK in the context of executing duties, authorities, and obligations."[190]

d. Article 12 paragraph (1) letter a and letter i

Article 12 paragraph (1) letters a and i regulates KPK's authorities to, "conduct wiretap and record conversation" as well as to, "request assistance from the Police or other relevant institutions to conduct arrests, confinements, raids, and confiscations in corruption cases currently under investigation"; which according to the petitioners were in contrary to Article 28G paragraph (1) Article 28D of the Constitution which concern the right of self-protection, wealth, honor, dignity and assets under his control, and the right to recognition, security, protection, and legal certainty. The Court is of the view that:

> "The rights stipulated in Article 28G paragraph (1) and Article 28D 1945 Constitution are not among non-derogable rights as stipulated in Article 28I 1945 Constitution. Therefore, those rights can be limited by law as regulated in provisions in Article 28J paragraph (2). **The limitation is necessary as extraordinary acts to tackle corruption which is extraordinary crime**. In addition, the limitation does not apply to everybody but only to those allegedly involved in corruption with state losses of at least Rp. 1,000,000,000 (one billion rupiahs) as stipulated in Article 11 letter C jo Article 12 paragraph (1) letter a Law No. 30 of 2002. However, **to prevent the possibility of abuse of the authority to wiretap and record conversation, the Constitutional Court is of the view that it is necessary to issue a regulation to regulate the requirements and mechanism of the wiretapping and recording**"[191]

e. Article 40

Article 40 stipulates, "The KPK is not authorized to issue Letter of Order to stop investigation and prosecutions of a corruption case" which according to the

[190] MK Decision No. 006/PUU-I/2003 page 103.
[191] Ibid page 103-104.

petitioners are in contrary to Article 28 letter g paragraph (1) and Article 28 letter d; the Court is on the view of:

> "In fact, the provisions intend to prevent the KPK from abusing its great authorities. As regulated, the KPK is authorized to conduct supervision to and take over examination, investigation, and prosecution of corruption cases from other law enforcement apparatus. Thus, if the KPK was authorized to issue a Letter of Order to Stop Investigation of a corruption case currently under investigation of other law enforcement apparatus, the authority could be misused."[192]

Furthermore the MK affirms the specialty of legal procedures at the KPK as lex specialis of KUHAP which is lex generalis. In the terms used by the Court:

> "Legal procedures contained in the Law No. 30 of 2002 are lex specialis of the Criminal Code Procedures as stipulated in Law No. 8 of 1981 on Criminal Code Procedures. As long as the provisions in Law No. 30 of 2002 does not specifically regulate, then the Criminal Code Procedures stipulated in Law No. 8 of 1981 as the general regulation applies. This is to prevent overlapping of authorities between law enforcement bodies which instead could detriment the interest of the suspect."[193]

Basically, the Court's decision in case number 006/2003 is already showing the position of the Court which is of the view that an anti-corruption commission which is independent and has extraordinary authority is necessary in the efforts to eradicate corruption in the country. Despite deciding that the petition cannot be accepted and thus rejected, the Court still considers that it is necessary to discuss the issues surrounding the authorities of the KPK to wiretap and record, and not to issue SP3, which in later times were several times requested to be reviewed by the MK again-or are even continuously used as the basis argument to amend the KPK Law. The Court properly argued, both in terms of wiretapping or related to the absence of the authority to issue SP3, the norms in the KPK Law are not contradictory to the 1945 Constitution.

Of course it should also be underlined that, in terms of the implementation of the wiretapping and recording, which indeed is limiting our rights, the Court affirms that such authorities must also be accountable. Hence, the Court suggests that a set of regulations governing the terms and procedures for interception and recording in question should be issued.

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[192] Ibid page 104-105.
[193] Ibid

b. Decision No. 069/PUU-II/2004 dated February 15, 2005

This case was petitioned by Bram H.D. Manoppo, Executive Director of P.T. Putra Pobiagan Mandiri. The petitioner was at that time a suspect on the corruption case surrounding the procurement of MI-2 helicopters made by Russia's Rustov along with former Nanggroe Aceh Darussalam Governor Abdullah Puteh.

The petitioner argues that Article 68 of the KPK Law governing, "All investigations, indictments, and prosecutions against corruption for which the legal processes have not been finished by the time the KPK is formed could be taken over by the KPK based on the rules outlined in Article 9" is on the retroactive element and thus contradictory to Article 28I paragraph (1) 1945 Constitution. In its decision the Court rejects the petitioner's petition because he could not prove his argument legally and convincingly.[194]

In the Court's opinion, to avoid uncertainty in the implementation, as well as for the sake of legal certainty, on the constitutionality of Article 68 KPK Law, "the Court is of the opinion that Article 68 of the a quo law does not contain any retroactivity principle, even though KPK may take over pre-investigation, investigation, and prosecution for the criminal act committed after the enactment of the KPK Law".[195] Thus, Article 68 KPK Law must be understood as not contradictory to the 1945 Constitution.

This ruling once again confirms the position of the Court that affirms the legal politics of corruption eradication extraordinarily through the KPK. Moreover, the reviewed article theoretically, as decided by the Court, does not contain retroactive principle.

c. Decision No. 010/PUU-IV/2006 dated July 19, 2006

The petitioner in this case is Wakil Kamal as the director of the Law Society of Indonesia (MHI). The petitioned provisions are the "Considering" section letter b, "Considering" letter c, Article 1 paragraph (3), Article 2, Article 3, Article 4, Article 6, Article 7, Article 8, Article 9, Article 10 , Article 11, Article 14, Article 20, Article 21 paragraph (4), Article 26, Article 38, Article 39, Article 41, Article 42, Article 43, Article 44, Article 45, Article 46, Article 47, Article 48, Article 49, Article 50, Article 51, Article 52, and Article 53, Article 54, Article 55, Article 56, Article 57, Article 58, Article 59, Article 60, Article 61, Article 62 and 63 of the KPK Law. The Court declares the petitioners' petition cannot be accepted (niet

[194] Case Number 069/PUU-II/2004 page 74.

[195] Ibid page 73

ontvankelijk verklaard) due to non-fulfillment of the requirements of Article 51 paragraph (1) of the MK Law in relation to legal standing of the petitioner in the a quo petition.

Although it was not accepted, given the petition that requested review of so many articles in the KPK Law, it can be argued that this petition was intended not only to paralyze the KPK- but even dissolve the KPK if granted. Because, in addition to the quantity of the petitioned articles, the quality of the petitioned articles can also be classified as the "heart" of the KPK which, if granted, could cause the death of the KPK. Let's say Articles 2, 3 and 4 which is core articles of KPK's existence.

d. Decision No. 012-016-019/PUU-IV/2006 dated December 19, 2006

The first case number 012 was filed by Mulyana Wira Kusumah, a former member of the KPU; The second case number 016 was filed by KPU commissioners Nazaruddin Sjamsuddin, Ramlan Surbakti, Rusadi Kantaprawira, Daan Dimara, Chusnul Mariyah, Valina Singka Subekti and three staff of the Secretary General of the Commission; The third case number 019 was filed by Capt.Tarcisius Walla, a retired civil servant. These three petitions questioned KPK's strategic institutionality and authorities.

In its decision, the Court only partly granted the petition. Article 53 KPK Law is declared contrary to the 1945 Constitution, but still has binding legal power until an amendment is made no later than three (3) years from the pronouncement of this decision. In this ruling, constitution justice M. Laica Marzuki expressed dissenting opinion. Here are the articles that were reviewed and the opinion of the Court.

a. Article 2 juncto Article 20

Article 2 KPK Law stipulates, "With this Law a Commission for the Eradication of Corruption shall be formed, henceforth to be called the Commission for the Eradication of Corruption (KPK)."

Article 20 KPK Law stipulates, "(1) The KPK is held responsible to the public to perform its duties. The KPK is also obliged to convey reports transparently and regularly to the President, the Parliament, and the State Auditor. (2) Responsibility to the public as outlined in the previous sub-article (1) is to be expressed in these manners: a. an obligation to audit KPK's own synergy and financial responsibility, in accordance to the KPK's work program; b. provide annual reports; c. open access to information."

Petitioners argued that Article 2 and Article 20 of Law Commission violates the principles and concepts of a law state that is contrary to Article 1 Paragraph (3) of the 1945 Constitution because, according to the Petitioner, both conditions have messed up the state administrative system.

On the Petitioners' argument, the Court is of the view:

> "whereas in current development of state administration system, as reflected in the provisions of the positive state administration law in many countries, particularly since the 20th Century, **the existence of state commissions such as KPK has become a common practice**. The classic doctrine regarding segregation of state power into three branches has now been far developed, among others, as indicated by the adoption of state commission institutionalization which in some countries are in the form of quasi state institutions having the authorities to perform state authorities functions. On the contrary, the provision of Article 20 of the KPK Law, which was argued as unconstitutional provisions by the Petitioner II, generally reflects the characteristics of such state commissions. **On the one hand, the existence of a state institution, in order to qualify as a state institution must not always be established under the order or must be stated in the constitution, but may also be established upon the order of a law or even subordinate rules and regulations** (please refer to Decision of the Constitutional Court Number 005/PUU-I/2003 regarding Petition for Judicial Review on Law of The Republic of Indonesia Number 32 Year 2002 regarding Broadcasting). On the other hand, **mentioning or regulating a state institution in the constitution does not always indicate legal qualifications that the state institution has more important position than the other state institutions established by other than a constitutional order**. Furthermore, just **because a state institution is regulated or mentioned in the constitution, it does not automatically indicate that such state institution is equal to other state institutions which are also regulated or mentioned in the constitution** (please refer to Decision of the Constitutional Court Number 005/PUU-IV/2006 in a petition for Judicial Review on Law of The Republic of Indonesia Number 22 Year 2004 concerning Judicial Commission and Law of The Republic of Indonesia Number 4 Year 2004 regarding Judicial Authorities); (Bold Printing by the Author).

The Court further emphasizes legal politics basis of KPK's existence, where, according to the MK, corruption eradication by existing institutions were not yet optimal. Therefore the KPK was established in accordance to the need to make corruption eradication more effective and efficient. To be more precise, the MK is of the view:

> whereas the KPK was established in the context of creating a fair, prosperous, and safe society based on Pancasila and the 1945 Constitution of the Republic of Indonesia, **as the eradication of corruption has not been performed optimally**. Therefore, the eradication of corruption needs to be improved in a professional, intensive, and sustainable manner because corruption has inflicted losses to the state finance, state economy, and has also disrupted the national development. Meanwhile, the institution handling corruption cases has not functioned effectively and efficiently in eradicating the corruption, **so that the establishment of institution such as KPK can be deemed constitutionally important** and such institution can be classified as a state institution, the function of which relates to the judicial authorities as intended in Article 24 Paragraph (3) of the 1945 Constitution;

The MK's legal opinion above demonstrates how the Court has followed the development of the modern state administration, that the concept of a constitutional state can no longer be based on the classic separation of powers a la Montesquieu, as argued by the applicant. The Court correctly states, a modern state administration has presented state commissions that contribute in building the new system of separation of powers and checks and balances in the system of the state. The Court's opinion does thus not only strengthen the basis of the constitutionality of the existence of independent state institutions such as the KPK, but also confirms the role of the Court that participates in the strengthening of democratic and constitutional state in the country.[196]

b. Article 3

Article 3 stipulates, "The KPK is a State institution that will perform its duties and authority independently, free from any and all influence." The petitioner argued that the phrase "independently, free from any and all influence" in Article 3 KPK Law showed that the KPK held absolute power, hence contradictory to the 1945 Constitution. On the petitioner's argument, the Court is of the view:

"whereas the formulation of Article 3 of the KPK Law has eliminated the possibility of other interpretation than the one formulated in the provisions of the article, namely that KPK independency and **freedom from the influence of any branch of power shall be in performing its duties and authorities.** There is no constitutionality issue in the formulation of Article 3 of the KPK Law;

[196] There are many theses that study the role of the MK in promoting Indonesia as a democratic nation, one of whom is Pan Mohammad Faiz Kusuma Wijaya, The Role of the Constitutional Court in Securing Constitutional Government in Indonesia, University of Queensland, 2016.

- Whereas the **confirmation regarding the KPK independency and freedom from the influence of any branch in performing its duties and authorities is important in order to prevent doubts among the KPK officers**. This is because pursuant to the provisions of Article 11 of the KPK Law, the most potential parties to be investigated, inquired, or prosecuted by the KPK for corruption are particularly law enforcers or state administrators. In other words, **the most potential parties to be investigated, examined, or prosecuted by the KPK in relation to corruption are the parties holding or executing state authorities**."

The Court's opinion above-which confirms that the KPK must be independent-is very important, and in line with the theory of independent state institutions, as described in the previous section. Independence is the capital and the main prerequisite for the independent state commission to be not prone to intervention when investigating corruption case, especially when it comes to elite or high-level state officials. Therefore, the Court's opinion is very strategic to justify the existence of the KPK, as well as to fend off attacks against the Commission that it is not uncommon to come from the other branches of state power, which, with their authorities, intend to amend the KPK Law, or even restrict the KPK's existence. All of these are closely correlated with the principle of independence of the KPK that needs to be maintained, as one of the main pillars that must be held strongly in the expectation that the KPK is successful in carrying out its mandate to combat corruption.

c. Article 6 letter c

Article 6 letter c says, "Corruption Eradication Commission has the duties: a…; b…; c… perform examination, investigation, and prosecution of the criminal act of corruption."

The provision of Article 6 letter c of the KPK Law, according to the petitioner has made the KPK a superbody. Therefore, according to the Petitioners, Article 6 letter c of KPK Law has violated his constitutional right to legal certainty. On the Petitioners' argument, the Court believes the KPK is not a superbody. Because, in carrying out its duties, the KPK remains limited and adhering to the principle of due process of law, including those contained in the KUHAP, as provided in Article 38 Paragraphs (1) and (2) of the KPK Law.[197]

[197] MK Decision No. 012-016-019/PUU-IV/2006, page 271.

The Court's Opinion broke a lot of the arguments saying that the KPK has become an institution without any control, so that the authority should be limited or reduced. The Court has pointed out that, the KPK remains controlled by laws and regulations such as KUHAP hence subject to the principle of due process of law. Furthermore, the author would like to emphasize that the works of the KPK are indeed monitored depending on the type of the authority. For example, the wiretapping authority is audited by the Ministry of Communications and Information Technology; financial matters are audited by the BPK; public accountability is coordinated with the House of Representatives through coordination meetings; and law enforcement powers are controlled by the judicial system, through the decisions of the judges. Not to mention the KPK commissionersrecruitment processes which involve the president and the House of Representatives and is another form of control on the KPK.

All of these show that it is not correct to argue that the KPK can not be controlled and thus transformed into a superbody. While it is true that the Commission has comprehensive authorities that cover prevention and repression, all of which are intended that the anti-corruption agenda can be carried out in an extraordinary way by the KPK. Thus such legal politics has been affirmed repeatedly by the Court as legitimate, and not contradictory to the 1945 Constitution.

d. Article 11 letter b

Article 11 says, "In performing its tasks as outlined in Article 6 (c), the KPK is authorized to conduct investigations, indictments, and prosecutions against corruption cases that: a. …; b. have attracted the attention and the dismay of the general public; and/or c. …". According to the petitioner, such norm created uncertainty and unfairness due to the absence of exact measurement of "the dismay of the general public" in Article 11 letter b of the KPK Law so it was prone to misuse.

On the petitioner's argument, the Court says:

"Whereas legal norms formulated in writing into the articles or paragraphs of a law principally are proposition or statement consisting of a series of concepts or understanding. Therefore, a legal statement can only be understood correctly if there is a prior correct comprehension of the concepts or understanding forming that statement. The problem is that a concept or understanding which is in the world of ideas (wollen, sollen) cannot create definition that can represent overall concept desired when they are verbalized into words. Therefore, statement or proposition made is then difficult to be understood. Of course, we cannot draw a conclusion that if this is the case that understanding or concept should not exist or would be better if it is eliminated with reason that it creates legal uncertainty.

In legal context, such situation has become common practice instead of new matter. That is the reason of expanding study of legal interpretation. Therefore, in relation to the a quo petition, non-existent – or more exactly, difficulty – in determining standards regarding a matter, or circumstances, or action, or situation "causing public unrest" cannot be interpreted that the matter, circumstances, action, or situation causing such public unrest would become non-existent or be better if it is eliminated, or be declared unconstitutional. If this argumentation is adopted, the terms "public interests", "public order", "state interests", and many more, which cannot be legally standardized, must be deemed non existent or be better if they are eliminated and declared unconstitutional, because all of the aforementioned terms are vulnerable to abuse so that it creates uncertainty and injustice. The Court is not of the same opinion with this way of thinking. Because, the difficulty of seeking for standards or legal definition of something "causing public unrest" does not eliminate the fact about the existence of such unrest.

Whereas, the Court does not have any intention to deny that difficulty in determining standards regarding matter, circumstances, action, or situation "causing public unrest" may potentially be abused. The Court's intention is that this argument is not adequate to declare that provision of Article 11 sub-article b of the KPK Law is contradictory

to the 1945 Constitution. If Article 11 of the KPK Law is read completely, it reads, "In performing the duties as referred to in Article 6 sub-article c, the Commission for the Eradication of Corruption shall have the authority to conduct investigation, inquiry, and prosecution on corruption which:

a. involving legal enforcers apparatus, state administrators, and other person having relation to the corruption conducted by legal enforces apparatus or state administrators;

b. attracting attention causing public unrest; and/or

c. related to state losses at least Rp. 1,000,000,000 (one billion Rupiah)",

therefore it is very obvious that the existent of words "and/or" after sentence "attract attention posing unrest for public" must be interpreted as requirement which cannot be eliminated in order to provide authorities to the KPK in conducting investigation, inquiry, and prosecution of corruption set forth in Article 11 sub-article a which is accumulated with sub-article b or c or both (b and c). In other words, requirements set forth in sub-article a is absolute, while requirements set forth in sub-article b and sub article c may be fulfilled either one or both. Meanwhile, if only sub article b or sub-article c is fulfilled, or sub-article b and sub-article c, but requirements set forth in sub-article a is not exist then the CEC does have authorities to conduct investigation, let alone inquiry and prosecution."

In the consideration related to the phrase "causing public unrest", once again the Court makes an interpretation that strengthens the authority of the KPK in order to tackle more corruption in the society. Interestingly, the Constitutional Court, in its opinion above, provides a clear argument that there is a formulation of legal norms that lead to multiple interpretations, or not single. However, the difference of interpretation was not necessarily a reason to say that legal uncertainty was clearly present, and therefore should be eliminated because it was contrary to the constitution. The author agrees with the Court that, it is often that a formula should be left open (open clause) and allowed to be interpreted differently, because the openness was in fact necessary so that legal norms do not become inflexible, which can actually make the laws unable to adapt to the changing needs and conditions of the society. This is where the sensitivity and the ability of lawmakers should be strengthened when it comes to distinguish when a legal norm should be formulated clearly, so the meaning tends to be single, and when an open legal

norm should be formulated, so the interpretations can vary-because of the needs. Even further, in fact, when a condition needs to be regulated as a legal norm, and when a legal fact does not need to be regulated at all, and left as a matter that has been running well, without the need of interpretation into written law, which could even lead to regulation inflation.

In the case of the phrase "causing public unrest", the Court was right to give its classification as an open norm that opens to multiple meanings, and not necessarily lead to legal uncertainty, and is not automatically contrary to the 1945 Constitution. With such an open interpretation with various understanding, the Court has actually affirmed the extraordinary legal politics of corruption eradication, which allows the KPK to handle a case, as long as it disturbs the society, despite the losses that is below 1 billion rupiah-with the main condition that Article 6 a on the subject of the crime of corruption is fulfilled as an actor who is covered in the authority of the KPK.

e. Article 12 paragraph (1) letter a

Article 12 paragraph (1) reads, "In performing its examination, investigation, and prosecution tasks as outlined in Article 6 letter c, the KPK is authorized to: a. tap into communication lines and record conversations…" The petitioner argued that Article 12 paragraph (1) letter a KPK Law contradicts the 1945 Constitution. On such an argument, the Court emphasizes:

> "whereas Decision of the Constitutional Court Number 006/PUU-I/2003, as mentioned above, in its legal considerations for deciding upon a petition for judicial review on Article 12 Paragraph (1) sub-article a of the KPK Law stated, among others," .... in order to prevent potential abuse of authorities to wiretap and record the Constitutional Court is of the opinion that it is necessary to stipulate a regulation providing terms and procedures of wire-tapping and recording". The aforementioned legal consideration of the Court is in accordance with provisions of Article 32 of Law Number 39 Year 1999 regarding Human Rights which reads, "Freedom and secret in correspon-dence including communication through electronic facilities may not be interrupted, unless by the order of judges or other legal authorities in accordance with the provisions of rules and regulations. "The Court deems necessary to remind back the legal consideration of the Court in the aforementioned Decision Number 006/PUU-I/2003 as tapping and recording of the conversation constitute restriction of human rights, where **such restriction can only be done by the law, as stipulated by Article 28J Paragraph (2) of the 1945 Constitution**. The intended Law which should describe, among others, who has the authority to issue an order for wiretapping and recording of conversations

> and whether the order of wiretapping and recording of conversations may only be issued after adequate initial evidence are obtained, which means that wiretapping and recording of conversations is aimed to gather more evidence, or whether the wiretapping and recording of conversations may be performed to seek for adequate initial evidence. **In accordance with provisions of Article 28J Paragraph (2) of the 1945 Constitution, all of them must be regulated by law in order to prevent abuse for authorities violating human rights; be it under the amended KPK Law or other laws**"[198]

The Court's consideration related to Article on interception affirms the Court's previous decision, that it is indeed the matter of wiretapping should be governed by a law. However, as the Court remains of the view, wiretapping authority held by the KPK is not contrary to the 1945 Constitution. The Court's opinion which is clear, and relatively repeatable, because the petition to review this interception Article also has also remained repeated, should be crystal clear serving as the basic standpoint when it comes to the wiretapping authority by the KPK.

Clearly, the debate over wiretapping by the KPK which argued as contrary to human rights, and therefore contrary to the 1945 Constitution, has finished, as the Court decisively rejects such an argument. Although, of course it is fair to underline the Court's opinion saying that the wiretapping matter needs to be more clearly regulated on the degree of legislation.

I myself agrees with the Court's opinion. Restrictions on human rights must be at the level of legislation. Regarding wiretapping, as one of forceful measures of law enforcement, it is common to require approval from judges, as in the case of a search, for example. However, I am of the view, the rule of law cannot only be applied as it is without considering the situation and the condition of the society where the law will be applied. Thus, although normally interception should be controlled through the approval of a judge as common in many countries, it is not necessarily that such mechanism should also be applied in Indonesia, regardless of the situation of law enforcement, particularly the mental readiness of judicial apparatus in accepting such an authority.

Surely, a further study is needed to reach a conclusion on whether our judges are ready to accept the authority of approval regarding wiretapping. However, before such a research is conducted, given the numerous cases of corruption involving judges as the actors, and the rampant judicial mafia practices, then it is not yet appropriate to grant the authority to the judge. In addition to a potential conflict of interest among judges, the potential of leakage of information regarding interception,

[198] Ibid page 276

which is one of KPK's most effective powers in arresting the perpetrators of corruption red-handed, should also be seriously considered. It must be remembered, the KPK without the authority to wiretap-or with the authority to wiretap but leaked-would become an anti-corruption agency that is barren in performing their duties.

It is necessary to explain that, unlike the KPK's authority to search which still requires permission from a judge, wiretapping have different characters. The degree of confidentiality of wiretapping is the distinctive factor. Wiretapping needs to be maintained vacuum, restricted and secret, known only by very few authorized persons. Therefore, a search with a lower degree of confidentiality may be required to seek approval from a judge, but that is not the case with wiretapping. Even if the perpetrator wants to eliminate the evidence to be searched, it can be anticipated through proper and more confidential wiretapping techniques.

f. Article 40

Article 40 stipulates, "The KPK is not authorized to issue a letter of order to stop investigations and prosecutions of a corruption case." The petitioner argued that Article 40 KPK Law is contradictory to the 1945 Constitution because it violates the principle of presumption of innocence, the principle of equality before the law, as well as creates legal uncertainty and is discriminative. On the petitioner's argument, the Court is of the view:

> "whereas Article 40 of the KPK Law has already been petitioned for review and also been decided by the Court as set forth in Decision Number 006/PUU-I/2003 with a verdict stating that petition was denied, so that the legal considerations as described for the petition for judicial review of Article 12 Paragraph (1) sub-paragraph (a) shall also applicable mutatis mutandis for the petition for judicial review of Article 40 of the KPK Law filed by Petitioner;
>
> ... The problem is that what would happen if there is no crime as presumed and such matter is not known until the process has entered the investigation or prosecution stage, while the KPK has no authority to issue an Investigation/Prosecution Cessation Order. Will the investigators still refer the case to the prosecutors in the KPK, in the event that such situation is not known until the investigation stage? Or will the prosecutors in the KPK still be obligated to file the case in accordance with the initial indictment to the court, if such condition

is not known until the prosecution stage while it is actually not supported by sufficient evidence?

In such a situation the Court is of the opinion that the KPK prosecutor is still obligated to bring the defendant before the court by filing a request to release the defendant.

Such a case is better than giving the KPK the authority to issue an investigation/Prosecution Cessation Order, whether from the perspective of the defendant's interests, the public's interests, as well as the law enforcers' interests, in this case especially the investigators and the prosecutors of the KPK. From the perspective of the defendant's interests, he will obtain certainty of his innocence through the judge's decision, ... Meanwhile, from the perspective of public interests, the people can judge openly and objectively the reason of the request for the release of the defendant so that the people's sense of justice will also be protected. While from the perspective of the law enforcers, in casu the investigators and prosecutors of the KPK, such procedure will save them from the allegation of "gameplaying".

... with regard to the assumption ... treated discriminatively if compared to those that have been processed through conventional procedure (by investigators of the Indonesian National Police and the Public Prosecutor's Office), the Court has the opinion that even if such different treatment can be considered as a form of discrimination, the cause of the condition is not Article 40 of the KPK Law, but other provisions instead, which is assessed separately in other parts of this consideration. Article 40 is only a logical consequence of the specific characteristics of the corruption eradication procedure created by the lawmakers through the KPK Law;

In addition, it is inappropriate to make an issue of the lack of authority to issue an Investigation/Prosecution Cessation Order by the KPK based on the principle of presumption of innocence, because it is a principle that must be understood as an obligation for all parties not to treat a defendant as guilty insofar as the judge has not find him guilty. The burden of proof to prove the guilt of the defendant rests on the public prosecutor and the defendant is released from the burden to prove his innocence, unless if the principle of reverse authentification has been fully practiced. So long as there is no decision by the judge

finding a defendant guilty, then his right and standing as a person that has not been found guilty of committing a crime is guaranteed and protected. This principle is still in effect regardless of the existence or nonexistence of the provision in Article 40 of the KPK Law."

This ruling confirms MK's previous opinion in relation to the absence of KPK's authority to issue SP3. In this decision the Constitutional Court reiterates that the absence of SP3 authority is not contrary to the 1945 Constitution. The MK shows again its consistence in making interpretation that strengthens the authority of the KPK in a special way in the eradication of corruption, as a legal politics that is intended to combat corruption more effectively.

Once again, the Court's decision should therefore be used as a basis to end the political debates which often argue that the absence of the SP3 authority is wrong. The Constitutional Court which holds a clear mandate by the constitution has repeatedly ruled that such a thing is constitutional. Debating and questioning again the absence of the SP3 authority is therefore a form of harassment or disrespect some of the critics are state officials and executives against the Court's decision. Of course, disrespectful and disobedient to the Court's decision is not a good example, and therefore must be stopped. Including if the effort is done through the attempt to amend the KPK Law, by adding the SP3 authority, which is clearly stated by the MK as not mandatory.

Especially after the pretrial ruling of Budi Gunawan case, and the decision of the Constitutional Court related to the constitutionality of the judicial request by suspects, the urgency of the existence of SP3 at the KPK became increasingly less important.[199] Every suspect who feels that his suspect status is wrong and unlawful, can file a pre-trial, which can annul the suspect status. This judicial mechanism is better than giving the SP3 authority to the KPK.

On the argument saying that the Commission needs the authority to terminate an investigation where the suspect in the case dies or of permanent illness, the author thinks the legal basis for that is clear, even without further regulation. A person who dies is legally and factually impossible to appear before the court, and therefore the case is automatically disqualified. In such circumstances, the legal issue is finished, without us having to give the SP3 authority to the KPK.

What needs to be paid attention to is the proposed termination of the investigation due to permanent sickness. It is appropriate to seriously study why such

[199] MK Decision No. 21/PUU-XII/2014.

norm is hoped to be set as one of the conditions for the KPK to issue SP3. Again, the legal norms cannot be only considered by habit, but it is also necessary to see if the condition of the society is ready to accept such norm. In this case, we need to examine the possibility of misuse of expertise in health utilized to declare a suspect of suffering permanent illness, while his condition is actually capable and healthy to hold into account his actions before the law. So, in such case, to affirm the extraordinary legal politics, I am of the view that legal norms in the KPK Law do not open up chances and legal loopholes that can be used by offenders to escape punishment. Strictly speaking, we should resist any efforts to authorize the KPK to issue termination of an investigation or SP3, including on the grounds that the suspect has a permanent illness. As a way out, if necessary and supported by facts, termination can be done through a pre-trial decision.

g. Article 53 juncto Article 1 number 3

Article 1 number 3 KPK Law regulates, "The eradication of corruption would be in the form of a chain of actions with the purpose of preventing and eradicating corruption through coordinated efforts, supervision, monitoring, investigations, indictments, prosecutions, and checks at courts, all to be done with as much participation on the part of the general public as the Law allows."

Article 53 KPK Law reads, "Under this Law, the Court of Corruption has been formed, which will be tasked with and authorized to check and decide on corruption cases handed over by the KPK."

Whereas the Petitioner II argues that, if the provision of Article 1 number 3 is connected with Article 53 of the KPK Law and the preamble of the KPK Law letter b stating, "whereas the government institutions handling corruption crimes have not been functioning effectively and efficiently in eradicating corruption" therefore, the a quo law places the Anti-Corruption Court as a part of the corruption eradication function, which is an executive function, not as a part of the judicial power. Therefore, according to Petitioner, it is difficult to expect that The Anti-Corruption Court can conduct its functions freely, independently and impartially. If it is true that the Anti-Corruption Court is a part of the judicial power, it should be established by a law which is separated from the law providing for a certain state institution, as have been in effect so far.

On the arguments, the Court is of the view:

- whereas the implementer of the judicial power, according to Article 24 Paragraph (2) of the 1945 Constitution, is a Supreme Court (and courts within the four court jurisdictions existing under the Supreme Court) and a Constitutional Court;
- whereas the courts from the four court jurisdictions as intended by Article 24 Paragraph (2) of the 1945 Constitution are the courts existing under the Supreme Court.;
- whereas, and accordingly, the establishment of special courts so long as they are still under one of the four court jurisdictions as regulated in Article 24 Paragraph (2) of the 1945 Constitution, is possible;
- whereas furthermore, Article 24A Paragraph (5) 1945 Constitution states, "The structure, status, membership and legal procedure of the Supreme Court as well as courts under its supervision shall be regulated by law". The phrase "regulated by law" in the aforementioned Article 24A Paragraph (5) of the 1945 Constitution means that the establishment of a court under the Supreme Court must be conducted by law. This is also in line with the provision of Article 15 Paragraph (1) of Law Number 4 Year 2004 concerning Judicial Authority as the implementation of Article 24A Paragraph (5) of the 1945 Constitution. The aforementioned Article 15 Paragraph (1) reads, "Special courts can only be established within one of judicatures as intended in Article 10 which is regulated by a law". The elucidation of the aforementioned paragraph reads, "Referred to as "special courts" in this provision, among others, are child court, commercial court, human rights courts, Anti-Corruption Courts, industrial relation court which are within the Courts of General Jurisdiction, and tax court in the courts of state administrative jurisdiction". Although Law Number 4 Year 2004 concerning Judicial Authority was made after the KPK Law, similar provision has been included in article 10 Paragraph (1) (along with the Elucidation) of Law Number 14 Year 1970 concerning Principal Provisions of Judicial Authority. The provision of Article 10 Paragraph (1) reads, "Judicial Authority shall be implemented by Courts within: a. General Jurisdiction; b. Religious

Jurisdiction; c. Military Jurisdiction; d. State Administrative Jurisdiction". Meanwhile, the Elucidation reads, "This law differentiates between four court jurisdictions where each has a certain adjudication authority and consists of Courts at the first and appellate levels. Religious, Military and State Administrative Courts are special courts, because they hear specific cases or address specific groups of people, whereas Court of General Jurisdiction is a court for the people in general for both civil and criminal cases. The differences in these four court jurisdictions, do not eliminate the possibilities of differentiation/specialization in each jurisdiction, for example in Courts of General Jurisdiction, it is possible to make a specialization in the forms of Traffic Court, Child Court, Economic Court, etc. by a law."

- in addition, the phrase that reads "regulated by a law" in Article 24A Paragraph (5) of the 1945 Constitution also means that the structure, status, membership, and legal procedure of the Supreme Court as well as the courts under its supervision cannot be regulated by other forms of statutes except law;
- whereas Article 53 of the KPK Law reads, "A Criminal Case Court shall be established hereunder which shall have the duty and authority to examine and decide upon corruption based on the prosecution filed by the Commission for the Eradication of Corruption". The Anti-Corruption Court as intended in the aforementioned Article 53 of the KPK Law, according to Article 54 Paragraph (1) of the KPK Law, is under the Courts of General Jurisdiction. From the aspect of the lawmakers' intention to establish a Criminal Crime Court and place it in the jurisdiction of the Courts of General Jurisdiction, it is not contradictory to the 1945 Constitution. However, the problems are:
    - Whether or not Article 53 of the KPK Law which results in two judicial systems for handling corruption is contradictory to the 1945 Constitution;
    - Whether or not the establishment of such a court (in casu Anti Corruption Court) together in one law that regulates the formation of an institution that is not a judicial body (in casu The Commission for the Eradication of Corruption), as

regulated in Article 53 of the KPK Law, is contradictory to the 1945 Constitution;

- Considering whereas Anti-Corruption Court according to the General Elucidation of the KPK Law states,".... In addition, to improve the efficiency and effectivity of law enforcement towards the corruption, this Law provides for the establishment of Anti-Corruption Court within the courts of general jurisdiction, which for the first time is established within the jurisdiction of the District Court of Central Jakarta. The aforementioned Anti-Corruption Court has the duty and authority to examine and decide upon corruption which shall be implemented by a panel of judges consisting of 2 (two) district court judges and 3 (three) ad hoc judges...".

  Accordingly, Anti-Corruption Court is intended by lawmakers to be a special court, even though it is not stated explicitly in the KPK Law. However, if the Anti-Corruption Court is classified as a special court based only on the criteria that such Court specializes in handling corruption, in addition to a few other characteristics namely the structure of the panel of judges consisting of two district court judges and three ad hoc judges, that must complete the aforementioned criminal act of corruption case within a period of 90 (ninety) days as from the filing of the cases [Article 58 Paragraph (1) of the KPK Law]. With such a specialized criteria, there are two courts in the same court jurisdiction, but with different legal procedure and structure of the panel of judges as well as different obligations to make decisions within a specific period of time, while this involves an act committed by persons who are equally charged with a criminal act of corruption, which is criminally liable by the same law, that can result in an extremely different final decision.

  The reality occurring in practice in district courts and anti-corruption court so far proves that there is a double standard in the effort to eradicate corruption through two different judicial mechanisms.

  Seen from the aspects considered above, Article 53 of the KPK Law that establishes two different institutions, clearly contradicts the 1945 Constitution. However, the establishment of the Anti-Corruption Court in the KPK Law and not by a separate law,

> even though it is technically less than perfect, does not automatically contradict the 1945 Constitution as long as the norms regulated in it are substantially not contradictory to the 1945 Constitution and the implications do not cause matters that contradict the 1945 Constitution. Article 24A Paragraph (5) of the 1945 Constitution reads, "The structure, status, membership and legal procedure of the Supreme Court and the courts under its supervision shall be regulated by a law." From the aspect of legislative techniques, the phrase "regulated by law" means that it has to be regulated in certain law. The phrase "regulated by law" also means that the relevant matter must be regulated by statutes in the form of law, not in other forms of regulation;

The author agrees with the Court's considerations above. The Court has been clearly seen to have very thoroughly looked at the establishment of the Corruption Court based on the KPK Law has presented two judicial systems with different standards. The double standard causes the norm of article 53 KPK Law contrary to the 1945 Constitution. Furthermore, in the perspective of constitutional law, this is a clear reference for the establishment of a special court under the constitution. That the formation of this special court must be by law, so that there is no discriminatory treatment against same criminal offense.

Although, a little note of mine related to this special court, which the establishment has once been too widespread and hence should begin to be seriously reconsidered. Because the more special judiciaries, the more complex the judicial system can become and it is not in line with the principles of fast and cheap judiciary, which contains the concept of simple and easy justice system. The more the existence of the special courts, the less nature of the specialization could become. Also, they may lose its distinctive power. Thus, special court should be kept in very small number, so that its specialty as a special justice system will be maintained. One that should be there, as a form of extraordinary anti-corruption legal politics, and as the KPK's tandem in work, is of course the special corruption court.

Along the way, the Court's decision also encourages the presence of Law No. 46 of 2009 on the Corruption Court. In fact, on several occasions, President Susilo Bambang Yudhoyono also in his capacity as a presidential candidate before the 2009 presidential election affirmed his commitment to issue Perppu on Corruption Court, if the Law on the Corruption Court is not successfully reached by the deadline given by the decision of the MK, namely three years since the decision

was made on December 9, 2006. Law on Corruption Court itself was finally enacted on October 29, 2009, in the early days of the second period of President Yudhoyono's administration, and just before the expiration of deadline set by the Constitutional Court, which was December 9, 2009.

Furthermore, regarding Article 1 number 3 KPK Law which regulates the corruption prevention and eradication authorities, the Court is of the view:

- Whereas furthermore with regard to the petition of Petitioner that relates Article 53 with Article 1 sub-article 3 of the KPK Law, the formulation of which has been quoted above, saying that the provision contradicts the 1945 Constitution, the Court is of opinion that the argument of the Petitioner is unfounded. Article 1 Sub-article 3 of the KPK Law only contains the definition of the eradication of corruption that consists of both preventive and repressive aspects. Consequently, if we take a closer look on the definition contained in the aforementioned Article 1 Sub-article 3 of the KPK Law, we will find that the eradication of corruption consists of: a. preventive aspect, namely a series of action to prevent corruption, conducted through the efforts of coordination, supervision, and monitoring; and b. repressive aspect, namely a series of action to eradicate corruption, conducted through efforts of inquiries, investigations, prosecutions, and court examinations;
- whereas the definition set forth in the general provisions seems to be contradictory to the 1945 Constitution because the Petitioner only sees the repressive side of the provision and later relates it to Article 53 of the KPK Law in such a way that it seems that the Anti-Corruption Court is a part of the KPK. The substance contained in the repressive aspect from the definition of the eradication of corruption from Article 1 Sub-article 3 of the KPK Law above is a depiction of the process of a criminal court for corruption, not about the formation of anti-corruption courts;[200]

Opinion of the Court regarding Article 1 paragraph 3 of KPK Law is important as a basis that the authority of the Commission is comprehensive on two aspects, the prevention and prosecution, and are not contrary to the 1945 Constitution. Such an opinion, once again strengthens the legal politics of anti-corruption that provides strong authority to the Commission. Although it still needs to be underlined that, the Court confirms the special corruption courts are not part of the KPK and therefore needs to be regulated in a separate law. What is certain is that the KPK having the authority of prevention and prosecution is not a problem according

[200] Ibid page 284

to the Court, it is constitutional. Although, in one of the author's discussions in a leadership training at the State Administration Institute (*Lembaga Administrasi Negara* LAN), there was one interesting comment from a participant of the BPKP, which suggested that the KPK should focus just as law enforcement, or just concentrating on the field of repression. This is to be consistent with its name as a corruption eradication institution.

I consider this idea interesting for further discussion. It does not mean that the aspect of prevention is unimportant, but rather to make the KPK to be more focused, amidst the limited infrastructure, financial and human resources supports, the option to just take care of enforcement is one of the proposals that are in line with the idea of strengthening the KPK. What matters is, if the KPK was only directed to concentrate on the prevention side only, while the work of enforcement is removed, with arguments of returning to the police and prosecutors' offices. So, in contrast to the proposal to make KPK concentrating on enforcement that strengthens it, the proposal to make it concentrating on prevention only is more of efforts to weaken the KPK. However, in the midst of rampant corruption which yet to show signs of ending, a serious effort to eradicate corruption by a specially authorized agency is a necessity-still without negating the importance of prevention which needs to be carried out seriously too.

h. Article 72

Article 72 regulates, "This Law shall be in effect starting from the date it is passed." The petitioner argued that Article 72 KPK Law violates legal certainty as governed by Article 28D paragraph (1) 1945 Constitution. On the petitioner's argument, the MK is of the view:

> "whereas the provision of Article 72 of the KPK Law which by Petitioner is argued to be contradictory to the 1945 Constitution is **a closing provision that must exist in every law**. According to the Court**, the logical flow of the Petitioner is really odd** because if described it will be as follows: the existence of article 72 of the KPK Law above, according to the Petitioner, results in legal uncertainty so that it must be found contradictory to the 1945 Constitution and declared as not having a binding legal force. In other words, it means that if the Article doesn't exist then, according to the flow of logic of the Petitioner, there will be legal certainty. However, the situation that will occur if the Article does not exist will actually be that there's no legal certainty as we will not know when the aforementioned law (in casu the KPK Law) would come in effect. **In other words, there is a fallacy made by the Petitioner a quo**."[201]

[201] Ibid page 284

Court consideration above is correct, because testing closing provisions of the KPK Law is indeed very strange. It may have come from the incomprehension of the petitioner, or because of a strong desire to make the KPK Law void. Nonetheless, in this decision, the Court reaffirms the extraordinary legal politics of corruption eradication, while making corrections on Article 53 related to Corruption Court in order not to cause a double standard, that it is not understood as part of the KPK.

e. Decision No. 19/PUU-V/2007 dated November 13, 2007

Petitioner is Ravavi Wilson, Chairman of the State Property Rescue Agency (*Badan Penyelamat Kekayaan Negara* BPKN). He was concerned with the constitutionality of Article 29 paragraph d of KPK Law, which regulates "In order to be eligible to be appointed a KPK Commissioner, a candidate must have an undergraduate degree in Law, or other degrees of expertise as well as at least fifteen years of experience in areas of Law, Economics, Finance, or Banking". The petitioner was basically of the view that having undergraduate degree as a mandatory requirement to become a KPK commissioner is discriminative and limiting his constitutional right to have equal opportunity before the law to become a KPK commissioner. On such a view, the Court disagrees and rejects the argument.

> MK states, "Whereas the requirements provided by law to occupy a public position or even a certain occupation cannot be immediately considered as a violation of human rights or constitutional rights of a citizen, let alone to occupy a position or occupation which, due to its nature, demands certain expertise and/or skills. What is prohibited is devising requirements which are discriminatory and have no relationship whatsoever with the required necessity of filling a position or occupation. The definition of discrimination, in accordance with Article 1 Sub-Article 3 of Law Number 39 Year 1999 regarding Human Rights is as follows: "Discrimination is every restriction, harassment, or expulsion which is directly or indirectly based on the distinction of human beings on the basis of religion, nationality, race, ethnicity, group, level, social status, economic status, sex, language, political belief, which causes the reduction, deviation, or the elimination, recognition, implementation or utilization of human rights and basic freedom in life both individually and collectively in the fields of politics, economy, law, social, culture, and other aspects of life.""[202]

[202] MK Decision No. 19/PUU-V/2007 page 36

It is interesting to see that the Court once again utilized the petition to affirm its support to the KPK as the extraordinary legal politics of corruption eradication in the country. To elaborate further, MK's opinion is:

- "Whereas, as described by the House of Representatives and the Government, the systematically rampant corruption which have been committed in such a way that they dearly cost the state's finance, the state's economy, and hinder the national development, which therefore actually have violated the people's social and economic rights, can no longer be categorized as ordinary crimes, but they have become extraordinary crimes. In fact, the international community implicitly admits the extraordinary nature of corruption, as evident in the Preamble to the United Nations Convention against Corruption which states, among other things, "Concerned about the seriousness of problems and threats posed by corruption to stability and security of societies, undermining the institutions and values of democracy and the rule of law, Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering, Concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States, Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential...."

  The extraordinary nature of corruption has made legislators aware and admit that the existing institutions (prior to the establishment of the Commission for the Eradication of Corruption) have not been optimal in implementing their functions to eradicate corruption (vide Consideration Section item a and General Elucidation of the KPK Law).

  Therefore, the legislators deemed it necessary to establish a separate institution, namely the Commission for the Eradication of Corruption (KPK), which has been granted with a great authority and extensive duties in the context of preventing and eradicating corruption. By considering the extent of the intended authority and duties of KPK, the requirement of expertise and/or skills as well as professionalism is an absolute for any person to be granted with such authority and duties. Therefore, if the legislators then provided considerably strict requirements for filling the position as the Commissioner of KPK, such requirements can be accepted by logical reasoning;
- By observing the abovementioned authorities and duties of KPK, it can be said that the institutional nature of KPK is a law enforcement institution in

> the field of corruption. Meanwhile, as recognized both by the KPK Law and the United Nations Convention against Corruption, the crime or corruption are so complex that in order to eradicate them, skills and experience required are not only in the field of law, but also in other fields, mainly in the fields of economics, finance, and banking. Thus, the provision of Article 29 Sub-Article d of the KPK Law which requires a candidate of the Commissioner of KPK to be "a Graduate in law or other major with expertise and a minimum experience of 15 (fifteen) years in the fields of law, economics, finance, or banking" is a required necessity in accordance with the institutional nature of KPK as evident in its authority and duties. It is true indeed that a person's skills are not always reflected in his/her educational qualifications, but certain academic requirements have been generally accepted as an objective standard of skills required to perform duties in governmental positions. Therefore, it is groundless to state that the provision of Article 29 Sub-Article d of the KPK Law is contrary to Article 28D Paragraph (3) of the 1945 Constitution, as argued by the Petitioner."[203]

In this decision, what is important not only the Court's opinion that the fight against corruption does require high competence, so that the requirement to have a bachelor degree for KPK commissionersis not contradictory to the 1945 Constitution; but further than that, in its deliberations, the Court confirms that corruption has been highly destructive, complex problems, extraordinary crime, so it is not enough to simply let the existing law enforcement agencies to tackle the problem which turned out to be not optimal. But extraordinary legal politics is required to eradicate corruption, one of them is by the establishment of the KPK. Again, the Court has affirmed its support to the extraordinary legal politics in combating corruption. So the KPK with strong institutional and extraordinary authorities, including the heavier requirements for its commissioners, is declared not contrary to the 1945 Constitution.

f. Decision No. 133/PUU-VII/2009 dated October 29, 2009

Petitioners in this case were former KPK commissioners Bibit S. Rianto and Chandra M. Hamzah. Both requested review of Article 32 paragraph (1) letter c KPK Law that regulates, "A Commissioner shall leave office when … c. He/she becomes a defendant of a criminal act". Basically, petitioners were of the view that the norm is discriminative, against the principle of presumption of innocence, and hence contradictory to the 1945 Constitution.

[203] Ibid.

Before further discussing the Court's view on this petition, it is first necessary to explain the context of the filing of this petition, which was made during the conflict known as "Gecko vs Crocodile" (*cicak lawan buaya*). Where two KPK commissioners were named suspect in connection to the KPK's efforts to crack down on corruption cases involving high-ranking officials within the police. This case is what was the first test for the independence of the Commission whenever it comes to corruption within the Police. History has recorded, "Gecko vs Crocodile" has reappeared until the second episode in 2012, and the third in 2015. They all happened when the KPK sought to expose corruption cases allegedly linked to high-ranking police officials.

In that context, the Court's role as the guardian of the constitution, and protector of the constitution for the Commission become very strategic, and MK successfully carrying out this role properly through this decision. For example, with a progressive interpretation, the Court decided to play openly the conversation recording that eventually became evidence of the engineering of the case of Bibit and Chandra; or the Court granted provisional petition to delay the criminal proceedings, which is not regulated in the case of judicial review. All were conducted by the MK to assert their constitutional protection to the Commission which is mandated by law to perform the heavy duty to combat corruption. More specifically, the Court's opinion related to the protection of the KPK are as follows:

> "[3.16] Considering ... before expressing an opinion on the principal petition first needs to convey back the answer or consideration of the Court over questions or clarification from the Government proposed in the hearing on November 4, 2009, which essentially questioned the relevance of the playback of wiretap recording by the KPK on the conversation and the transcriptions before the Court;
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> ... According to the Court, based on Article 19 paragraph (1) Law No. 4 of 2004 on Judicial Authorities ... which reads, "Examination court hearing is open for public, except when laws state otherwise" and Article 31 paragraph (2) MK Law which reads "Petition application aforementioned in paragraph (1) shall be complemented with evidence that support the petition" as well as Article 40 paragraph (1) MK Law which reads, "MK hearings are open for public, except justices' consultative meetings."
>
> ... bearing in mind the position of the Court as judicial power executor which is independent to organize judiciary to enforce the law and

justice, the Court argued the playback of recordings from CDs (compact disc) is relevant to the judicial review case petitioned by the Petitioner. ... This is important to seek material truth and convince the justices ... ;

[3.17] ... Whereas based on the legal ideals of Pancasila and objectives of the state as the basis of legal politics, then each law must reflect the values of the legal ideals (rechtsidee);

Whereas one of the demands of the 1998 reform is the eradication of collusion, corruption and nepotism in the government and state administration, and the aspirations of the people in question and then responded to by all state administrators, and even translated into People's Consultative Assembly Decree No. XI / MPR / 1998;

Whereas the Preamble of the MPR Decree No. XI / MPR / 1998 on State Officials who are Clean and Free of Corruption, Collusion, and Nepotism is formulated as follows: "c that the demands of people's conscience call on state administrators to be able to perform their functions and duties seriously and responsibly so the development reform can be effective and efficient". Based on the reasons outlined in the Preamble, Article 3 of the a quo MPR Decree establishes the need to establish an institution whose membership consists of government and the society, and the eradication of corruption is carried out strictly by consistently implementing the Law Corruption Crime;

Whereas the MPR Decree No. XI / MPR / 1998 on State Officials who are Clean and Free of Corruption, Collusion, and Nepotism was subsequently followed by the enactment of Law No 28 of 1999 on State Officials who are Clean and Free of Corruption, Collusion, and Nepotism which also regulates on the State Officials' Wealth Audit Commission (KPKPN). Because corruption eradication efforts did not perform well, then the People's Consultative Assembly issued the MPR Decree No. VIII/MPR/2001 on the Recommendation on the Direction of the Policies on the Eradication and Prevention of Corruption, Collusion, and Nepotism, which in the Preamble states "that the issues of corruption, collusion, and nepotism in Indonesia has been very serious, and is an extraordinary crime that shakes the foundation of the state and the nation".

Based on the arguments in the Preamble, the MPR issued several policy directives on the eradication of corruption, collusion, and nepotism (among others) as follows:

a. speed up legal proceedings against government officials, especially law enforcers and state officials who are suspected of corruption, collusion and nepotism, and to do administrative actions to expedite the legal process;

b. take legal actions more seriously of all cases of corruption, including corruption that occurred in the past, and for those who are proven guilty to be punished as heavy as possible;

c. encourage broad community participation in monitoring and reporting to the appropriate authorities over alleged corruption, collusion, and nepotism committed by civil servants, state officials and members of the public;

d. revoke, amend, or replace all laws and decisions made by state officials indicated to protect or allow corruption, collusion, and nepotism;

e. revise all laws and regulations related to corruption so they are synchronized and consistent between the one and another;

f. forming a law and its implementative regulations which include the establishment of Corruption Eradication Commission;

Whereas based on the variety of reasons in both MPR decrees and the policy directions outlined in MPR Decree No. VIII / MPR / 2001 on the Recommendation of Directions of Policy on the Eradication and Prevention of Corruption, Collusion and Nepotism, has the spirit and explicitly states that corruption, collusion, and nepotism that swept the nation has been very serious and extraordinary crime so that the handling must be performed by an institution that is right and clean. Therefore, if the expected institution is then realized, surely its leaders and members are expected to meet certain requirements in order to achieve the objectives of the eradication of corruption, collusion and nepotism, so that the requirements for the positions can be different with the leaders and members of other institutions.

In this case, the establishment of the Corruption Eradication Commission is based on the strong spirit to eradicate the corruption that has been an extraordinary crime in Indonesia, so that the requirements

for the commissioners and members of the commission are established in accordance with the embodied hopes.

[3.18] ... Whereas in performing its extraordinary duties and authorities, KPK commissioners' extraordinary characters are also required, namely with integrity, honest, accountable, transparent, and highly uphold the law. This can be seen in the very tight selection of KPK commissioner candidates by a selection committee consisting of government representatives and independent members of the public ... for the sake of effectiveness of its duties, authorities, and responsibilities, the KPK is positioned by the Law as a state institution that is independent and free from any power ... The character as an independent institution enables the KPK to carry out function as "trigger mechanism", which is to trigger and empower existing institutions in corruption eradication, namely the police and prosecutors' offices.

Whereas based on philosophical, historical, sociological, teleological and political reasons as described above, Lawmakers mandate that the KPK commissioners are "perfect individuals" with a balance between punishment and reward that is zero tolerance against the any little misconduct. For the recruitment, extraor-dinary procedures are applied with different selection and appointment, dismissal, and sanctions requirements if compared to other heads of state institutions;

... authorities, obligations, and special treatment to KPK commissioners that are not held by other law enforcement institutions must be balanced with the principle of balance and based on the foundation of the proportionality principle, that is the punishment and reward principle (stick and carrot) which is special too;

... Law 30/2002 establishes restrictions and sanctions for Chair and Members of the KPK Commissioners (vide Article 36, Article 65, Article 66 andArticle 67 of Law 30/2002). Such sanctions are not found in the Police Law on Prosecutor Law or other law related to other state commissions. Law 30/2002 does not tolerate should the Chair and Members of the Commissioners commit criminal offense with sufficient initial evidence to be determined as suspect or a defendant, because KPK Commissioners should be a good example or role model, responsible, and with integrity;

... e. Whereas Article 32 paragraph (1) letter c of Law 30/2002, stating that in the event that KPK commissioners become a defendant in a criminal act is dismissed from his position, is a form of punishment or sanctions, whereas imposing sanctions or penalties must first go through the criminal justice ruling on the indicted case, in order to respect, protect and fulfill the constitutional rights of the Petitioners from the possibility of abusive action of state apparatus, such as police, prosecutors, judges and other government officials as well as members of the public. Thus the temporary dismissal of the KPK commissioners is a fair and proportional act for KPK commissioners who are named suspect, in order to provide a balance between ensuring a smooth implementation the duties and authority of the Commission and protection of human rights of citizens who become KPK commissioners. In the event of temporary dismissal of KPK commissioners who are named suspect, then Law 30/2002 should regulate the procedures for temporarily filling the vacant commissioners as interim commissioners to carry out tasks of the suspended commissioners. Article 32 paragraph (1) letter c of Law 30/2002 which adheres to the principle of presumption of guilt in expressis verbis abuse the principle of legal certainty guaranteed by Article 28D paragraph (1) 1945 Constitution, hence the arguments of the Petitioners is quite grounded and legally reasonable.

2. Whereas on the Petitioners' argument stating the provisions on permanent dismissal remained without a binding court decision violates the rights of the Petitioners on equality before the law and government. According to the Court, Article 32 paragraph (1) letter c of Law 30/2002 has given unequal legal treatment against KPK commissioners which has been named as defendant, associated with Law No. 11 Year 2005 on the Ratification of the International Covenant on the Rights of Economic, Social and Culture, especially the Elucidation of the Law (State Gazette Republic of Indonesia Year 2005 Number 118, and Additional State Gazette Republic of Indonesia Number 4557) Point 3 of Article 4 ...";

... Whereas due to the principle of presumption of innocence is absent in Article 32 paragraph (1) letter c then it is expressis verbis that the a quo article violates the norm of the 1945 Constitution, in fact, Article 32 paragraph (1) letter c has also negated the principle

of due process of law that expects the judiciary process that is honest, just and indiscriminatory;

Whereas the Court does not agree with the Government that argued that because corruption is extra ordinary crime, then the institution conducting the fight against corruption crime which is given extraordinary authority as a super body and it is natural that extraordinary model of punishment shall also be applied to KPK commissioners.

According to the Court, imposing extraordinary punishments to KPK commissio-ners would be very appropriate if the committed criminal act is corruption be-cause it is their authorities to eradicate corruption hence should be a role model and it has been specifically regulated in Article 67 of Law 30/2002 that reads, "Each Commissioner of the KPK who is charged with the criminal act of corruption shall find that his/her sentence shall be compounded with a third of a sentence from the core list of sentences," so that this special penalty punishment has been proportional and reflect the specialty nature of Law 30/2002;

3. Whereas on the Petitioners' argument stating the provisions on permanent dismissal without a binding court decision violates the principle of independence of the Commission and open up opportunities of interference from the power of executive against the KPK. According to the Court, the independence of the KPK is limited in scope of its duties and authorities. While regarding the mechanisms of appointment and dismissal of the commissioners of the Corruption Eradication Commission, administrative law is concerned, in this case it cannot be separated from the influence of other institutions in casu the Government;

... Therefore, according to the Court, Article 32 paragraph (1) letter c Law 30/2002 that reads "A KPK Commissioner shall leave office when: ... c. He/she becomes a defendant of a criminal act;" should be declared unconstitutional except it is understood as "A KPK commissioner resigns or is permanently dismissed after he/she is found guilty in a final and binding court decision".

[3.22] Whereas the Court has issued Injunction No. 133 / PUU-VII / 2009 on October 29, 2009 where the verdict states "Postpone the enactment of Article 32 paragraph (1) letter c and Article 32 paragraph (3) Law No. 30 Year 2002 on Corruption Eradication Commis-

sion, namely the dismissal of the Commissioners who has been named a defendant of a criminal act until there is a decision of the Court on the a quo petition." Because the Injunction is not contradictory to this final decision, then the Injunction is an integral part of this decision.

Based on the numerous Court's opinions above, it is clear how the Court has carried out its duty to guard the independence of the KPK so that it is not prone to intervention for example, by engineering a case against KPK commissioners in carrying out its great task to eradicate corruption. Although the Court also limits the independence of the Commission only to matters related to the implementation of the tasks and authority, while when it comes to the appointment and dismissal of the Commissioners it remains an area of administrative law that remains open to the involvement of other institutions, in casu the government, so it cannot be said to be a form of intervention towards KPK's independence.

Among many Court's decisions, the decision in this case is the one that attracts the most attention, one of the reasons is because it is related to the "criminalization" then two KPK commissioners Chandra M. Hamzah and Bibit Samad Rianto. The author himself was intensely involved, including to listen to the playback of the wiretapping recording of the KPK before the Court, in his capacity as the Secretary of the Independent Team for Fact Verification and Legal Processes on the Case of Chandra M. Hamzah and Bibit Samad Rianto, also known as Team 8. The recommendation of Team 8 stating there was insufficient evidence to proceed the case of both KPK commissioners to the next legal process which then became the basis of President SBY's policy, which then led to the issuance of deponeering by Attorney General Hendarman Supandji for both KPK commissioners. Historically, the "criminalization" was repeated in the next KPK commissioners, namely the legal case against Abraham Samad and Bambang Widjojanto, which was then also terminated by deponeering issued by Attorney General Prasetyo.

Surely, in its decision, the Court coherently explains the extraordinary legal politics of corruption eradication and why the Commission is required as an institution that is mandated to carry out corruption eradication. In this ruling, the Court once again plays its role not only as guardians of the constitution, but also specifically guards the KPK from counter attacks of corruptors. Based on the concept of judicial activism, the Court's justices managed to apply discretion that they have to keep Indonesia on track in extraordinarily eradicating corruption using the KPK that remains strong and effective. Furthermore, this Court's decision, though not explicitly, outlines the need of adequate legal protection for the KPK

Commissioners. This is something that I formulate in this book as a form of limited immunity for the commissioners and employees of the KPK, as adopted by many other anti corruption agencies in the world, also as formulated as one of the principles in Jakarta principles that have been described in the previous subsection.

g. Decision No. 138/PUU-VII/2009 dated February 1, 2010

The petitioner of this case is Saor Siagian, along with 12 other lawyers. Actually this case did not request a review on KPK Law but on Perppu No. 4 of 2009 on the Amendment of the KPK Law. In its decision, the Constitutional Court declared petitioners' request cannot be accepted. Because petitioners did not have legal standing. However, in consideration of the Court, it stated that the Court has the authority to examine Perppu against the 1945 Constitution. In this case, the Court does not elaborate on more substantial matters related to the institutionality of the KPK, so it is not relevant for further analysis related to the purpose of this book, which is intended to search for the ideal design of KPK's institutionality.

h. Decision No. 37-39/PUU-VIII/2010 dated October 15, 2010

Petitioners of this case were Farhat Abbas and O.C. Kaligis, both are advocates. They intended to have Article 29 numbers 4 and 5 of the KPK Law reviewed before the MK. Petitioners principally questioned the constitutionality of the phrase "experience of at least 15 (fifteen) years" as contained in Article 29 number 4 of the KPK Law and the minimum age of at least 40 years old and up to a maximum of 65 years as a condition for a person to be KPK commissioner as specified in Article 29 number 5 of KPK Law.

In its decision, the MK states the petitioners' petition is rejected entirely because the presented arguments do not have legal grounds. To be more clear, below is the Court's opinion:

[3.14] Considering such legal issues, the Court has considerations as follow:

Whereas the Corruption Eradication Commission is a state institution that is independent in carrying out its duties and authorities and is free of any power, the commissionersthat comprises of five (5) individuals who also serve as members consisting of representatives of the government and members of the public with the purpose that the control system by the public on the performance of the Corruption Eradication Commission in conducting examination, investigation, and prosecution of corruption cases remain attached to the Corruption Eradication Commission. In the KPK Law, specifically Article 29, requirements to be KPK commissioners are determined, namely:

1. Has an undergraduate degree in Law, or other degrees of expertise as well as at least 15 (fifteen) years of experience in areas of Law, Economics, Finance, or Banking;
2. Is at least forty years old and at most sixty-five years old during the year of selection;

Whereas the requirement "at least 15 (fifteen) years of experience", has to be read thoroughly that is, has an undergraduate degree in Law or other degrees who has expertise and at least 15 (fifteen) years of experience in areas of Law, Economics, Finance, or Banking. … The experience is important given the fact that the institution to be led it a state institution that is independent that in carrying its duties and authorities is free from any power. Therefore, the requirement of at least 15 (fifteen) years is a requirement that must be met by an individual who wishes to become a KPK commissioner. …

Whereas Article 29 paragraph 5 KPK Law is a requirement for public office position in casu the requirements to become Commissioner of the Corruption Eradication Commission. The fulfillment of the right to equal opportunities in government does not mean the state should not regulate and determine the requirements, as long as the requirements are objectively needed for the position or activity of the government office position in question and does not constitute discrimination. ... For that reason, the minimum age requirements for governmental position or activities are regulated differently in different laws and regulations in accordance with the characteristics of the needs of each office; ...

Whereas the requirement to hold a public office position in casu the requirements to become Commissioner of the Commission on Corruption Eradication is part of the civil and political rights that can not be mixed with the requirement to get a job (beroep), for the right to work and a decent living is part of the economic, social, and cultural rights.

[3.15] Considering that the experience requirement as well as age limitation is not something discriminative.[204]

The Court's decision related to experience and age requirements confirms the importance of individual competence for the commissioners, which is no less important than the institutional independence of the KPK. The combination of the two, institutional independence and competence and personal integrity, and let's not forget the strong authority, are the three elements necessary for

[204] MK Decision No. 37-39/PUU-VIII/2010 page 57-60

effective work of the KPK in eradicating corruption. On the requirements for KPK, it has been outlined in previous Court ruling, that because their job is indeed heavy, then it is reasonable that the requirements for KPK commissioners are higher than other state agencies (vide Decision No. 19 / PUU-V / 2007).

i. Decision No. 60/PUU-VIII/2010 dated January 20, 2011

The petitioner of this petition is Hengky Baramuli, former legislator. The reviewed article is Article 40, that regulates, "The KPK is not authorized to issue a letter of order to stop investigation and prosecution of a corruption case". In its decision, the MK states the petitioner's petition cannot be accepted due to ne bis in idem. Article 40 KPK Law has been decided by the MK in Decision No. 006/PUU-I/ 2003, dated March 30, 2004 and Decision No. 012-016-019/PUU-IV/2006, dated December 19, 2006. In this decision, the Court reiterates its legal considerations in both decisions, which has been described above, hence not necessary to be rewritten in this section. However, it should also be emphasized that, the attempt to weaken the KPK using argument related to the absence of SP3 authority is still launched. Although the Court has repeatedly decided it is not contrary to the constitution. In fact, as conceived together, the attempt to add the SP3 authority to the KPK has become the reason to amend the KPK Law, something which has repeatedly been decided to be not a problem, and decisively in line with the constitution, by the Court.

j. Decision No. 5/PUU-IX/2011 dated June 20, 2011

The petitioners of this petition are Feri Amsari, Ardisal, Teten Masduki and Zainal Arifin Mochtar Husein as first petitioners; and ICW as second petitioner. The reviewed provision was Article 34, that regulates, "The Commissioners of the KPK shall hold office for a term of 4 (four) years, and may be reappointed for one term only", so the principle issue that needs to be answered by the Court is:

> "Does term of office of commissioners of the Corruption Eradication Commission replacing the ones who have already quit under Article 34 of the Corruption Eradication Commission Law constitutionally only continue the term of office of the one replaced or gets a full term of office for four years?"[205] This petition was actually related to the tenure of M. Busyro Muqoddas who at that time replaced Antasari Azhar because the latter was permanently dismissed.

[205] MK Decision No. 5/PUU-IX/2011 page 69.

In its decision, the MK grants the petitioner's petition entirely. It states that Article 34 KPK Law contradicts the 1945 Constitution as long as it was not understood that KPK Commissioners, be them inaugurated simultaneously or installed to replace a commissioner who cannot complete his tenure, shall hold office for a term of 4 (four) years and may be reappointed for one term only. In this decision, justice M. Akil Mochtar expressed dissenting opinion. More on the Court's decision is as follows:

> [3.20] ... However, the provision of Article 34 of the Corruption Eradication Commission Law is a constitutional issue when the House of Representatives and the President interpret the provision of Article 34 of the Corruption Eradication Commission Law in such a manner that it does not apply to all commissioners of the Corruption Eradication Commission and only applies to the commissioners of the Corruption Eradication Commission namely the five persons appointed simultaneously since the beginning of the period, while for the substitute commissioners replacing the commissioners who quit during their term of office, only to continue the remaining term of office of the commissioners replaced.
>
> The House of Representatives and the President with their interpretation being based on the provision of Article 21 paragraph (5) of the Corruption Eradication Commission Law determine that the commissioners of the Corruption Eradication Commission has a collective nature, so the five commissioners of the Corruption Eradication Commission are interpreted collectively in serving one four-year period. In this case, according to the People's Legislative Assembly and the President, in the event that any member of the commissioners of the Corruption Eradication Commission who quits during his term of office will be replaced by a substitute commissioners who will only continue the remaining term of office of the commissioners being replaced.
>
> ... According to the Court, such difference in interpretation raises constitutional issues that must be assessed by the Court, namely the interpretation which is true according to the constitution in order to respect, protect and fulfill the principle of a fair legal certainty for the public, for the organizers of the state, for the Corruption Eradication Commission, as well as for the commissioners of the Corruption Eradication Commission duly elected as substitute commissioners of

the Corruption Eradication Commission to replace the commissioners of the Corruption Eradication Commission who have quit. In the event that the Court does not provide assurance as to the interpretation of the term of office of the commissioners of the Corruption Eradication Commission then the issue of replacement of the commissioners of the Corruption Eradication Commission who quit in the middle of the term of office will continue to be debatable during the replacement of the commissioners of the Corruption Eradication Commission in the future which is in fact inconsistent with the principle of fair legal certainty guaranteed by the Constitution;

[3.21] Whereas in order to test the constitutionality of the correct interpretation of the norms of the provision of Article 34 of the Law a quo, the Court relies on the general principles contained in the constitution namely the principle of fair legal certainty, the principle of equality and justice, the principle of legal expediency and the principle of public interest. These principles are the basic values embodied in the constitution and the spirit of the existence of a state based on the constitutional system. ...

[3.22] Whereas pursuant to the provision of Article 33 paragraph (2) of the Corruption Eradication Commission Law, the mechanism of selection of a substitute member of the commissioners of the Corruption Eradication Commission that quit during the term of office is similar to the mechanism of selection and appointment of the commissioners appointed simultaneously at the beginning of the period. This selection process takes a long time and the cost is quite high because at least it involves the formation of the selection committee, the registration process conducted in an open and transparent process involving the publication in the media, and after the names of candidates are determined, the selection process followed by the announcement to the public to obtain response and then delivered to the House of Representatives to be selected again by the House of Representatives through the mechanism of the fit and proper test. The rigorous and lengthy selection process is deemed necessary considering the importance of the commissioners of the Corruption Eradication Commission, especially when related to the urgency of the agenda of corruption eradication in Indonesia;

[3.23] Whereas the selection process and selection of such substitute commissioners of the Corruption Eradication Commission when viewed from the principle of justice in government administration namely justice for the people, then the appointment of substitute commissioners who hold the remaining term of office for only one year is something considered unfair to the public, because the state must spend very large cost and the administrators of the state performing the selection process have spent a relatively long time just to elect a replacement substitute member who holds the remaining term of one year. ... According to the Court, such interpretation also creates injustice to someone elected as a substitute member who has fought and spent a lot of energy, time, and cost for passing the selection and is elected to become KPK Commissioner replacement.

Elected substitute commissioners who just continue the remaining term of office of the commissioners replaced obtain different treatment from the commissioners elected simultaneously at the beginning of the full period of four years, while a substitute member has to undergo any selection process and under similar conditions, so that it violates the principle of equal treatment of all citizens before the law and government ... ;

[3.24] Whereas according to the Court, in the event that the substitute member of the commissioners of the Corruption Eradication Commission only hold the remaining term of office of the commissioners member replaced by him/her, it violates the principle of expediency which is the purpose of the law. ... According to the Court, if it is interpreted that the commissioners replacement is just to replace and finish the remaining term of office of the commissioners replaced, the replacement mechanism does not have to go through a long and complicated selection process with such large cost just like in the selection of five commi-ssioners of the Corruption Eradication Commission appointed simultaneously. It will be sufficient if the substitute commissioners replacing the commissioners during the term of office are just taken from the candidates of the commissioners of the Corruption Eradication Commission who participated in the previous selection obtaining the next highest rank, similar to the interim replacement of the members of the House of Representatives or Regional Representative Council which according to Article 217 paragraph (3) of Law Number

27 Year 2009 concerning the People's Consultative Assembly, House of Representatives and Regional People's Legislative Assembly ... which states, "The term of office of the interim replacement members of the People's Legislative Assembly shall continue the remaining term of office of the replaced members of the People's Legislative Assembly replaced" and Article 286 paragraph (3) which states, "The term of office for the interim replacement of the Regional Representative Council shall continue the remaining term of office of the replaced members of the Regional Representative Council". That is better meeting the principles of efficiency and fairness. Therefore, based on the provision of Article 33 paragraph (2) of the Corruption Eradication Commission Law which requires the filling of the replacement commissioners through the same selection process with the selection pro-cess of the five commissioners of the Corruption Eradication Commission appointted simultaneously, according to the Court, the replacement of the substitute commissioners is not the same as the interim replacement of members of the House of Representatives and the Regional Representative Council. The interim replacement of the members of the People's Legislative Assembly and the Regional Representative Council is not conducted through a new selection process and it is reaffirmed in the Law that they will only continue the remaining term of office of the members being replaced. The Corruption Eradication Commission Law confirms that the replacement of the commissioners of the Corruption Eradication Commission is done through a new selection process and the law does not determine that the replacement commissioners only continues the remaining term of office of the replaced commissioners. According to the Court, this indicates that the term of office of the substitute commissioners of the Corruption Eradication Commission cannot be interpreted the same as the interim replacement for the members of the People's Legislative Assembly and the Regional Representative Council. Thus, the term of office of the commissioners of the Corruption Eradication Commission specified in Article 34 of the Corruption Eradication Commission Law cannot be interpreted in any other way, except for four years, for both commissioners appointed simultaneously from the beginning as well as the substitute commis-sioners. Reducing the meaning of Article 34 of the Corruption Eradication Commission Law

by not applying the service term of four years to be held by the substitute commissioners of the Corruption Eradication Commission is a violation of the principle of legal certainty guaranteed by the constitution;

[3.25] Whereas in addition, according to the Court, the Corruption Eradication Commission is an independent state agency given specific tasks and powers, namely among others, to carry out most functions associated with judicial power to conduct investigation, inquiry, and prosecution as well as to supervise the handling of corruption cases by other state institutions. To achieve the purpose and objective of the establishment of the Corruption Eradication Commission as a special state institution to eradicate corruption, then in carrying out the duties and authority effectively, the Corruption Eradication Commission is required to work in a professional, independent and sustainable manner. According to the Court, the Corruption Eradication Commission will not carry out the duties and responsi-bilities in a professional and sustainable manner to a maximum extent without continuity of commissioners of the Corruption Eradication Commission. To ensure the continuity of the duties of the commissioners of the Corruption Eradication Commission, so that the commissioners does not have to start together all over again, then the commissioners of the Corruption Eradication Commission should not be replaced simultaneously. Therefore, it would be more proportionate and to ensure fair legal certainty and equal treatment before the law in the event that there is an interim replacement among the commissioners of the Corruption Eradication Commission appointed for a period of four years ... ;

[3.26] Whereas although according to Article 47 of the Constitutional Court Law, the Constitutional Court's decision shall be valid since it was stipulated (prospective), but for the sake of expediency principle which is the universal legal principle and purpose then for certain cases the Court may enforce its decision retroactively. ... Therefore, to avoid legal uncertainty in the transition period as a result of this decision, in relation to the term of office of the (newly elected) substitute commissioners of the Corruption Eradication Commission, then this decision shall apply to the substitute commissioners of the Corruption Eradication Commission which have been selected and have assumed the office now for a term of office of four years after being elected;

> [3.27] Whereas based on the foregoing description of the considerations, the Court is of the opinion that Article 34 of the Corruption Eradication Commission Law is conditionally unconstitutional, which is inconsistent with the 1945 Constitution as long as it is not interpreted that the term of office of the commissioners of the Corruption Eradication Commission appointed simultaneously from the beginning as well as a substitute for commissioners replacing the former commissioners who quit in the middle of the term shall be four years and they may be re-elected for another term only;

In this case, the Court's supports to the existence of a strong KPK are highly visible, especially to Commissioner M. Busyro Muqoddas. Had the legal object not been associated with a reputable individual like Mr. Busyro, the verdict could have been different. In fact, as a form of respect, the provisions of the Court's decision were not applied on a prospective basis as they were supposed to be. The reason of expediency, which is to save the selection budget, is used as the basis of the decision that the tenure of the KPK's replacement commissioner is also 4 (four) years. Whereas, on the other hand, budget saving was also used as the basis for the Commission to reject a selection of Busyro Muqoddas' replacement after his four year tenure ended. KPK commissioners proposed to just extend Busyro Muqoddas' tenure, and he will retire simultaneously with four other KPK commissioners in December 2015, citing budget savings. Surely, this Court decision presented a non-simultaneous selection process (staggered system) for the Commissioners. Although, according to some experts, the non-simultaneous system is one formula to strengthen the independence of the Commission, presumably, it was then agreed that such method is not efficient. Therefore, even though the 2014 KPK selection committee had produced two KPK commissioner candidates, the selection process at the House of Representatives was intentionally postponed in order to coincide with the selection of four other candidates. Finally, to the current period of the KPK, the selection system that had once punctuated, thanks to this Court's decision, is finally sustainable. Now in the era KPK Chairman Agus Rahardjo, the five KPK commissioners are elected and will retire simultaneously again.

k. Decision No. 81/PUU-X/2012 dated October 2, 2012

The petitioner of this petition is Farhat Abbas who is an advocate. Article 8 paragraphs (1), (2), (3), (4) and Article 50 paragraphs (1), (2), (3), (4) KPK Law, which regulate:

Article 8

(1) In performing its task of supervision as outlined in Article 6 (b), the KPK is authorized to conduct surveillance, research, and studies on institutions whose tasks and authority are relevant in the fight against corruption, as well as on institutions that perform public service.

(2) In performing its authority as outlined in the previous sub-article (1), the KPK is authorized to take over an indictment or a prosecution process against a corruptor, that is at that time being performed by the Police or the Prosecutor's Office.

(3) Should the KPK take over an indictment or a prosecution process, the Police or the Prosecutor's Office is obliged to hand over the suspect along with all the case files and other documents and evidence within 14 working days, since the date the request from the KPK was received.

(4) The process of handing over proceedings to the KPK as outlined in the previous sub-article (3) should be carried out by formulating and signing a hand-over statement so as to ensure that all the tasks and authority of the Police or the Prosecutor's Office will fall to KPK during the hand-over event.

Article 50

(1) When a corruption case is found out and the KPK has not commenced its indictment process, while the case is being indicted by the Police or the Prosecutor's Office, that institution is obliged to inform the KPK at the latest fourteen days since the commencement of the indictment process.

(2) An indictment process being conducted by the Police or the Prosecutor's Office as outlined in (1) must be coordinated continuously with the KPK.

(3) When the KPK has already commenced its indictment process as outlined in (1), the Police or the Prosecutor's Office no longer have the authority to conduct an indictment process.

(4) When an indictment process is being conducted concurrently by the Police and/or the Prosecutor's Office and the KPK, the process conducted by the Police or the Prosecutor's Office shall cease immediately.

MK Decides to reject the petitioner's petition entirely because it is legally baseless. More complete opinion of the Court is as follows:

[3.13] Considering that, in reverse, the welfare state aspired to be realized becomes hindered by corruption where, according to legislators, corruption is very detrimental to the state's finance and hamper national development hence should be eradicated in order to realize a just and prosperous society based on

Pancasila and 1945 Constitution [vide preamble paragraph a Law No. 31 of 1999 on the Eradication of Corruption (Official Gazette of the Republic of Indonesia Year 1999 Number 140, Supplement to State Gazette of the Republic of Indonesia Number 3874)]. Furthermore, in the preamble of Law Number 20 of 2001 on the Amendment of Law No. 31 of 1999 on Corruption Eradication, among others considered, "that the widespread corruption cases have not only inflicted losses on the state but also violated the social and economic rights of the general public so that corruption needs to be categorized as a crime that must be eradicated in an extraordinary way". …

Then, in the preamble Law 30 of 2002 on KPK … the eradication of corruption has not been optimally implemented. Therefore, the eradication of corruption needs to be professionally, intensively, and continuously improved, as corruption has had direct consequences on the wealth and the economy of the nation, as well as hampering national development; b. that government agencies that have handled corruption cases have not been functioning effectively and efficiently in eradicating corruption; … Those issues above are the main principles which contain philosophical, sociological, and juridical elements that become consideration and reason for the establishment of both the Law on the Eradication of Corruption and the Law on the Corruption Eradication Commission;

[3.14] Considering that from the preamble and several articles of the 1945 Constitution and the preamble of the Law on Corruption Eradication, as quoted above, the Court considers both in line, namely the will to realize a fair and prosperous society which is hampered because of the corruption, so that corruption must be eradicated. Corruption is classified as an extraordinary crime that the eradication must be done in extraordinary ways. Therefore, the institutions authorized to eradicate it, such as the Corruption Eradication Commission (hereinafter referred to as the KPK) by Article 2 of Law 30/2002, is given extraordinary powers in terms of supervision and coordination in the examination, investigation, and prosecution of corruption. In fact, the KPK is also authorized to conduct wiretapping of a person's conversation and not allowed to issue SP3;

[3.15] … according to the Court, Article 8 Law 30/2002 is in order and applies legal certainty …

[3.16] Considering that in relation to Article 50 Law 30/2002, the meaning is clear …

[3.17] Considering that the Petitioners' argument stating that the dualism in the handling of corruption cases which the Petitioner argues that its existence harms the constitutional rights of an advocate for the Petitioner faces uncertainty and

injustice in the handling of corruption cases, according to the Court, even though there is a duality, but the two are not overlapping because each institutions can still exercise its own authorities, and to eliminate such uncertainty and injustice, the KPK is granted special authority for supervision and coordination. In this regard, the basis is the relation between lex specialis and lex generalis. Therefore, the Petitioners' argument has no legal grounds;

The Court's ruling for the umpteenth time confirms MK strengthening anti-corruption extraordinary legal politics that must also be done by the anti-corruption agency with extraordinary institutionality and authorities. Only by doing so, the Court states that the ideal legal and welfare state can be realized. Related to the authority of the Commission to carry out supervision and coordination, even case take over, the Court expressly states that the matter is not contrary to the 1945 Constitution-the Court's affirmation attitude that keeps KPK institution strong and effective.

l. Decision No. 31/PUU-X/2012 dated October 8, 2012

The petitioner of this case is PLN Director Eddie Widiono Suwondho, who was at that time investigated for corruption by the KPK. Reviewed articles were Article 6 letter a and its elucidation of the KPK Law. The petitioner's argument basically question the state losses calculation method by the BPKP which was used by the KPK. In its decision, the MK states it rejects the petitioner's petition entirely because it does not have legal grounds. To be more clear, the Court's opinion is as follow:

[3.12] … Petitioner in his petition filed a provisional request which essentially pleaded that the Court issue a provisional injunction ordering the KPK to stop, or at least postpone the Petitioner's case examination at the Supreme Court and annul or at least postpone the decree of his travel ban including its extension until there is a decision by the Constitutional Court in the a quo case that is legally binding. According to the Court, the application for a quo injunction is not right according to the law because it is not directly related to the subject of the a quo petition for several reasons:

(i) in judicial review, the Court's decision only tests abstract norms, does not judge a concrete case such as ordering the KPK to suspend or postpone a case examination at the Supreme Court and revoke or suspend the implementation of the travel ban letter;

(ii) the Court's decision on the norms in judicial review has the nature of erga omnes;

(iii) the Court's decision has the nature of prospective in accordance to Article 58 MK Law and Articles 38 and 39 Constitutional Court Regulation No. 06/ PMK/2005 on the Procedural Guidance of Judicial Review Cases;

From these considerations, the Court seems to use different approach than it was of the decision on Bibit and Chandra's provisional request which was granted, which was also related to a concrete case. Or, it was also different to the case filed by Feri Amsari et al. in relation to the tenure of Busyro Muqoddas where the decision was not applied prospectively. In this context, it becomes relevant to criticize that the Constitutional Court's decision may depend on several other factors, so that the results and considerations are different, even though the substance being applied is the similar.

Subsequently, the Court considers that:

> [3.14] Considering that the Petitioners principally argue that the provisions of Article 6 letter a and elucidation of Article 6 KPK Law create legal uncertainty because the Commission can use the Report on the Calculation of State Loss (Laporan Hasil Penghitungan Kerugian Keuangan Negara—LHPKKN) created by the BPKP in calculating state losses and start an investigation, while according to Petitioner, the LHPKKN is not the authority of BPKP; That one of the considerations underlying the establishment of the Corruption Eradication Commission according to the elucidation of KPK Law which is as follows: "Law enforcement with regards to the eradication of corruption so far has been lackluster. In order to improve conditions, we must enhance law enforcement methods by forming a special agency that has a wide authority, independent, as well as free from the influence of notorious powers in the effort to combat graft in a coordinated effort that is implemented optimally, intensively, effectively, professionally, and continuously". Eradicating corruption extraordinarily is done because corruption is extraordinary crime. This can be seen in the elucidation of KPK Law that states, "This rampant growth of corruption will wreak havoc not just to Indonesia's economic life but also to the viability of the nation in general. Corruption is a violation of the social and economic rights of society, and as such should no longer fall under the standard category of merely "crime", corruption is an extraordinary crime. Therefore the effort to eradicate corruption must no longer be just acting against a criminal act, corruption must be prosecuted

against by extraordinary means." The facts regarding the extraordinary nature and impacts of corruption in Indonesia so that it is declared as "extraordinary crime" hence the establishment of a special institution which can carry out non-conventional or "extraordinary" methods;

Article 3 KPK Law states that the KPK is a state institution which in carrying out its duties and authorities is independent and free from any power. The KPK is a state institution that was established with the purpose of carrying out special or non-conventional methods to combat corruption. Article 4 KPK Law states that the purpose of the establishment of the KPK is to enhance and improve the effectiveness of corruption eradication ...

Whereas the Court in MK Decision No. 012-016-019/PUU-IV/2006, dated December 19, 2006 has considered on the backgrounds of the establishment of the KPK in connection to the extraordinary nature of corruption crime. In the consideration of the decision, the Court, among others, considers, "whereas the KPK was established in the context of creating a fair, prosperous, and safe society based on Pancasila and the 1945 Constitution of the Republic of Indonesia, as the eradication of corruption has not been performed optimally. Therefore, the eradication of corruption needs to be improved in a professional, intensive, and sustainable manner because corruption has inflicted losses to the state finance, state economy, and has also disrupted the national development. Meanwhile, the institution handling corruption cases has not functioned effectively and efficiently in eradicating the corruption, so that the establishment of institution such as KPK can be deemed constitutionally important and such institution can be classified as a state institution the function of which relates to the judicial authorities as intended in Article 24 Paragraph (3) of the 1945 Constitution." ...

Whereas the norms requested by the petitioner, namely Article 6 letter a and the elucidation of Article 6 KPK Law regulates on the KPK's duties to coordinate with institutions authorized to eradicate corruption crime. ... According to the Court, the coordination task is a task that must be held by the KPK in order to carry out the corruption eradication task effectively, so that such a function cannot be deemed in contrary to the constitution. In some decisions of the Court, the KPK's existence with all of its functions and authorities has been declared constitutional,

therefore every coordination effort in order to make the function and authorities more effective is also constitutional;

Therefore, according to the Court, the KPK is allowed to, not only coordinate with the BPKP and BPK as part of investigation into corruption, but also coordinate with other agencies, it could even prove beyond the findings of BPKP and BPK, for example by inviting experts or by requesting materials from inspectorate generals or other bodies within government agencies that have the same functionality, even from other parties (including companies), which may indicate the material truth in calculating the financial loss to the state and/or be able to prove the case under investigation.

Whereas, in addition, constitutional impairment argued by the petitioner on whether it is legal or not the LHPKKN being used by the KPK as the basis in investigation regarding the losses or potential losses that can occur because of the implementation of the judicial process or the implementation of the norms of the KPK Law. The validity of LHPKKN created and published by BPKP is not directly related to the constitutionality of the norms that govern the task of the KPK to coordinate with other agencies ... Regarding proven or not proven the state losses stated in LHPKKN or whether the LHPKKN is legal or not remains the absolute authority of the judge who oversee the case on trial. In other words, although the Commission has the discretionary authority to use information about the loss to the state in the form of LHPKKN from the BPKP or BPK in its investigation, whether or not the information used in the court's decision making is within the independence of judges who try the case. Therefore, according to the Court, the problems faced by the petitioner remains the domain of the implementation of the norm, not an issue of constitutionality of the norm. The mention of BPKP and other institutions in the elucidation of Article 6 of KPK Law without limiting the authority of each agency cannot be deemed as provisions that create legal uncertainty. In addition, the petitioner's petition that wants the Commission to be no longer be allowed to coordinate with BPKP is incorrect and contrary to the purpose of the establishment of the KPK, because it will instead weaken the implementation of the functions and authority of the Commission so that the Petitioner's argument must be declared groundless.

In this decision, the Court strengthens the authority of the Commission to coordinate with other state institutions, in this case is the BPKP, in order to carry out the arduous task to extraordinarily eradicate corruption which has also been extraordinarily damaging. For the umpteenth time, the Court is consistent with the exceptional legal politics of the KPK as an institution.

Although, for those who disagree with the Court's decision, the different attitude of the Constitutional Court to decide on a concrete case in this petition, compared to the petition of Chandra-Bibit, or the one related to the leadership term of Busyro Muqoddas, is a questionable matter. For the author, indeed, the Court's consistency in deciding constitutional issues that are relatively similar but with a different decision is one issue that needs to be addressed critically. However, consistency of decisions is something that needs to be maintained by the judiciary. However, it should also be noted, that the difference in decision does not necessarily mean decision inconsistency has occurred. It needs to be examined carefully whether there are different details of legal issues, which could have led to different final decision. Because, if there were indeed different fact details or legal issues, then the different verdict is, not only wrong to be classified as a form of inconsistency, but also something that should be done instead.

m. Decision No. 80/PUU-X/2012 dated Ocotber 23, 2012

This case's petitioners are: Habiburokhman, Muhamad Maulana Bungaran, and Munathsir Mustaman, all the three are advocates. The requested provision is Article 50 paragraph (3) KPK Law, that regulates, "When the KPK has already commenced its indictment process as outlined in (1), the Police or the Prosecutor's Office no longer have the authority to conduct an indictment process." The MK through its decision states the petitioner's petition cannot be accepted due to ne bis in idem. The Court's consideration is as follows:

[3.14] Whereas Article 50 paragraph (3) Law 30/2012 has also been requested to be constitutionally reviewed and decided in the Decision No. 81/PUU-X/2012, dated October 23, 2012, with the decision, "Declaring to reject the petitioner's petition entirely";

[3.15] Whereas the Decision No. 81/PUU-X/2012 has stated in its legal consideration as follow:

"Considering that the Petitioners' argument stating that the dualism in the handling of corruption cases which the Petitioner argues that its existence harm the constitutional rights of an advocate for the Petitioner faces uncertainty and injustice in the handling of corruption cases, according to the Court, even though there is a duality, but the two are not overlapping because each institution can

still exercise its own authorities and to eliminate such uncertainty and injustice, the KPK is granted special authority for supervision and coordination. In this regard, the basis is the relation between lex specialis and lex generalis. Therefore, the Petitioners' argument has no legal grounds";

The Court's decision has once again affirmed KPK's stronger position in conducting coordination and supervision, including in terminating a corruption case that is handled simultaneously, or even taking over corruption case under investigation of the police or the prosecutors' office.

n. Decision No. 49/PUU-IX/2013 dated November 4, 2013

The petitioner is M. Farhat Abbas and Narliswandi Piliang. Both requested review of Article 21 paragraph (5) KPK Law that regulates on the collective collegial nature of KPK leadership. To be clearer, the norm of Article 21 paragraph (5) states, "Corruption Eradication Commission leaders afromentioned in paragraph (2) work collectively". The Court decides to reject this petition with argumentation as follows:

[3.12.1] Whereas the KPK is the institution established by Law and is an institution that the establishment is not expressly instructed by the 1945 Constitution. The establishment of institutions related to the functioning of the judicial authorities, including the KPK has a constitutional basis in Article 24 paragraph (3) of the 1945 Constitution stating, "other agencies whose functions related to the judicial authority regulated by law".

In eradicating corruption as mandated by the MPR Decree No. XI / MPR / 1998 on State Officials who are Clean and Free of Corruption, Collusion, and Nepotism, Law No. 31 of 1999 on the Eradication of the Criminal Act of Corruption was enacted which also mandates the establishment of the KPK. In addition to the constitutional judicial ground, KPK's establishment was also triggered by philosophical and sociological factors, namely the presence of spirit to eradicate corruption in the early reform era which has positioned corruption as an extraordinary crime, where the efforts to eradicate it can no longer be carried out conventionally, but with extraordinary methods too. On the other hand, the existing state institutions dealing with corruption were yet to be effective and efficient in eradicating corruption.

[3.12.2] Whereas with its position to coordinate and supervise institutions authorized to eradicate corruption, KPK's position becomes very important and strategic. In fact, in conducting supervision of corruption eradication by other institutions, the KPK can take over the investigation to make it more effective. In

addition, in conducting its authorities, the KPK is authorized to conduct wiretapping and record conversation … and is not authorized to issue a letter of order to stop investigation.

All of the authorities, not to mention other authorities regulated by the KPK Law, show the presence of special and extraordinary power to eradicate corruption. The great power shall be complemented with prudence to prevent misuse. From this consideration, according to the KPK, there is adequate reason that the KPK Law regulates that KPK commissioners make decisions in collective collegial nature … because, among others, it is aimed at preventing mistakes or error in carrying out extraordinary acts. The purpose is also to make the KPK extra prudent in taking legal decisions in corruption eradication, because otherwise, or if decision making was only granted to the chairman or left to majority opinion among the commissioners, mistakes or errors or even misuse of KPK's authorities could be driven by political powers outside the KPK. …[206]

In this ruling, the Court affirms the constitutionality of the KPK's collective leadership. The affirmation also indicates the characteristics the KPK as an independent agency, which is based on one of the theoritical characters that is collective collegial leadership. That character is the uniqueness of all independent state institutions, not only for the anti-corruption commission. This matter has been outlined more clearly in the previous sub-chapter on the independent state commission theory.

Issues related to the collegial collective leadership is indeed interesting to observe. On the one hand it is the hallmark of an independent state agency. On the other hand such a leadership model is an internal control mechanism aimed at minimizing the possibility of abuse of power by independent institutions, which often hold strong and strategic authorities. It is interesting to see how the collective-collegial work standards are practiced. In the latest KPK leadership period, a regular meeting every day is implemented at a round table, where the entire Commissioners are present, and letters as well as policies that require the mutual consent were decided together-different from the previous periods, where the letter is circulated from one commissioner to another separately. The regular meeting at one table model is certainly more appropriate to embody the concept of collective and collegial, and I believe with a different degree and detail has also been implemented by the Commissioners in the previous periods.

[206] MK Decision No. 49/PUU-XI/2013 page 30 – 32.

Table 12

Recapitulation of MK Decisions on KPK Law

No	Decision Number	KPK Law articles reviewed	Decision
1	006/PUU-I/2003	Article 12 paragraph (1) letters a and i; Article 13 a; Article 69 paragraphs (1) and (2); Article 26 paragraph (3) letter a; Article 40; and Article 71 paragraph (2)	Cannot be accepted. Rejected
2	069/PUU-II/2004	Article 68	Rejected
3	010/PUU-IV/2006	"Considering" letter b, preamble: "Considering" letter c, Article 1 (3), Article 2, Article 3, Article 4, Article 6, Article 7, Article 8, Article 9, Article 10, Article 11, Article 14, Article 20, Article 21 paragraph (4), Article 26, Article 38, Article 39, Article 41, Article 42, Article 43, Article 44, Article 45, Article 46, Article 47, Article 48, Article 49, Article 50, Article 51, Article 52, and Article 53, Article 54, Article 55, Article 56, Article 57, Article 58, Article 59, Article 60, Article 61	Not accepted
4	012-016-019/PUU-IV/2006	Article 2	MK grants the petition partly. Article 53 KPK Law is declared contradictory to the 1945 Constitution, but is still legally binding until amendment at the latest 3 (three) years after the decision is read.
5	19/PUU-V/2007	Article 29 letter d	Rejected

6	133/PUU-VII/2009	Article 32 paragraph (1) letter c	MK partly grants the provisional request of the petitioner. MK decides to postpone the implementation of Article 32 paragraph (1) letter c and Article 32 paragraph (3) KPK Law, namely the permanent dismissal of KPK commissioner who becomes a defendant for a crime, until there is a final decision by the Court.
7	138/PUU-VII/2009	Perppu No. 4 of 2009 on the Amendment of KPK Law	Not accepted
8	37-39/PUU-VIII/2010	Article 29 numbers 4 and 5 KPK Law	Rejected
9	60/PUU-VIII/2010	Article 40 on no SP3 authority	Not accepted. Ne bis in idem
10	5/PUU-IX/2011	Article 34	Granted. Tenure of KPK commissioners is 4 years.
11	81/PUU-X/2012	Article 8, paragraph (1), paragraph (2), paragraph (3), paragraph (4) and Article 50 paragraph (1), paragraph (2), paragraph (3), paragraph (4)	Rejected
12	31/PUU-X/2012	Article 6 letter a	Rejected
13	80/PUU-X/2012	Article 50 paragraph (3)	Not accepted
14	49/PUU-XI/2013	Article 21 paragraph (5)	Rejected

As a summary of the whole 17 (seventeen) petitions and 14 (fourteen) court's decisions,[207] it is clearly visible how the majority of the articles of KPK Law does not contradict the Constitution according to the Constitutional Court. There are

[207] Some petitions were combined into one decision

only two requests granted in full, related to the KPK leadership tenure of four years and the permanent dismissal of KPK commissioner who becomes defendant of a crime; and one petition is granted in part, namely article 53 KPK Law related corruption court, which is stated by the Court to be contrary to the 1945 Constitution. The four years term for KPK commissioners and KPK commissioners being permanently dismissed if indicted, and not suspended when they are still suspect, are verdicts that strengthen the KPK. While the decision to annul Article 53 on Corruption court instead opens the chance to the establishment of Corruption Court Law with clearer authority and constitutional legal basis, so it also strengthens the KPK.

The remainders, all articles reviewed before MK's red table, in 11 other petitions, the petitions were rejected or not accepted because the Court declared the articles in question were constitutional, or does not conflict with the 1945 Constitution.

Surely, through its decisions, the MK strengthens KPK's constitutionality that:

1. institutionally is an independent state institution that established under a law, and has constitutional legal basis, even though not explicitly based on Article 24 paragraph (3) 1945 Constitution;
2. institutionally is an independent state institution that aims at eradicating corruption as an extraordinary crime using extraordinary methods too;
3. in terms of personnel, commissioner and employee must have the best integrity and competence, through the best selection process too, in order to enable them doing the heavy corruption eradication tasks; and
4. has extraordinary authorities to extraordinarily eradicate corruption, for example by using interception, without SP3 authority, and with authorities in the areas of prevention and enforcement, including examination, investigation, and prosecution. Furthermore, the MK emphasizes the constitutionality of KPK's authority to coordinate, supervise, and take over corruption case under investigation of the police and prosecutors' offices; and
5. despite being independent, still limited by law, for instance in terms of conducting wiretapping, and KUHAP in terms of due process of law in criminal procedures.

With such clear decisions by the Court, with some of them repeated, so the KPK in its current design and authorities, has been confirmed as a state organ that is in accordance with the 1945 Constitution, which is needed to implement the extraordinary corruption eradication legal politics. So, even if the KPK Law is going to be amended, it should not be done by reducing let alone limiting the

Commission's existence-as once became the formulation of the law's amendment draft perpared at the House of Representatives. However, amendment is only possible with the format and purpose to strengthen the Commission, for instance by strengthening the presence and the legal basis of the Commission into a constitutional organ; strengthening KPK's human resources, including making its investigators permanent employees; including providing limited immunity for the commissioners and employees of the Commission, which will protect them from possible legal attacks through criminalization or civil lawsuit; increasing budget allocation for the Commission; supporting the opening of representative offices of the KPK in selected locations as needed; and supporting an effective monitoring system within the Commission without making it an entrance to interventions that can interfere with the principle of independence of the KPK.

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CHAPTER III
EVALUATION & FUTURE DESIGN OF THE KPK

This section will evaluate the institutionality and performance of the KPK over the years, based on Annual Reports 2004 - 2014, and propose the KPK's future institutional design. Indicators to conduct an institutional evaluation are four parameters that have been reviewed previously, namely: the theory of independent state institutions; the basic principles of anti-corruption commissions, particularly based on Jakarta's Principles; comparison of anti-corruption commissions in some countries; and Constitutional Court decisions related to Law on Corruption Eradication Commission; then in this section KPK's institutionality and performance will be evaluated, and the future design of the KPK will also be presented.

A. Effective Anti-Corruption Commission Formula

Before conducting an evaluation, of course, effective anti-corruption commission parameters must first be defined. In this case, I would argue, a good anti-corruption commission formula can be formulated as a definition of corruption is formulated as **Corruption = Authority + Monopoly - Transparency**. Which means that a corrupt system will flourish if there is monopolistic authority-without-control and living in a completely closed system, or without openness.

In line with the formulation of corruption definition, I am of the view that the design of an Effective Anti-Corruption Commission, must have several elements, namely: 1) guarantee on Institutional Independency; 2) guarantee on Powerful Authority; and 3) good Controlling System. Or in mathematical formulation:

E-ACC = Independency + Authority + Control

The formula of independence guarantee, strong authority and effective control are the three elements that complement each other. Without independence, anti-corruption commission would not be possible to undertake the corruption eradication task because it would be prone to intervention by the various interests which in various ways want to protect corruptors. Furthermore, independence alone is not

enough, the KPK should also be granted strong authority, to carry out its heavy duties. Lastly, with only independence and strong authority, in the absence of effective control, misuse of power could happen. Therefore, effective control system should still be held by the anti-corruption commission, while maintaining the independence of the institution. The three elements are the formula that is influential and complementary to each other. The absence of one element will cause the ineffectiveness of an anti-corruption commission.

Regarding the **first** element, guarantee of anti-corruption commission's institutional independence, need to be assured are:

1. Anti-corruption Commission is independent state agency, not executive agency, nor institution that is under other branches of power for instance one that reports to the parliament such as Thailand's Anti-corruption Commission.
2. The assurance as an independent state institution should be explicitly stated in the legal basis of its formation, at least at the level of a law, even better if it is at the level of Constitution. It would be even better if not only the institutional name that is mentioned like the Singapore model, but also its constitutional authorities, such as the Thailand model.
3. The underlying legal basis for its formation should also confirm the existence of a permanent institutional, not temporary or ad hoc. Therefore, putting anti-corruption commissions as a constitutional organ, will ensure the endurance of the anti-corruption commission, rather than in a law which is vulnerable to amendment through the political legislation process.
4. The mechanism of appointment and dismissal of the leadership of the anti-corruption commission is not through appointment process (political appointee) but through tight election or selection process; the process is not only monopo-

lized by one branch of power, but rather involving a minimum of two branches of power, to ensure checks and balances in the process of appointment and dismissal.

5. There should be the right of immunity for the commissioners of the anti-corruption commission not to be prosecuted or sued in civil lawsuits as a result of performing their duties, unless caught red-handed committing a heavy crime, especially corruption; or proved to have violated ethics after going through the independent and fair process at the ethics commission.
6. In the event of a vacancy within the anti-corruption commission's commissioners, due to dismissal of one of them in the middle of his tenure, the selection process must go through the same mechanisms as the process of selecting a new commissioner; or at least through the appointment process by the head of state which then get parliamentary approval.
7. Anti-corruption commission leadership is not a single office but consists of several commissioners the total number is odd, and in performing their duties are collective-collegial, especially in taking institutional decision related to its duties and functions.
8. Has the authority to issue its own rules (self-regulated) although it can still be tested through the mechanism of judicial review;
9. Chairman of the commission should be detached from partisan element, for example from political parties, at least within the minimum time span that is sufficient to demonstrate the KPK commissioner candidates' impartiality; and
10. The Commission should have the power to hire its own employees, especially those related to the investigation and the prosecution, not relying to other law enforcement elements.
11. In addition to the ability to hire its own employees, it is necessary to ensure the availability of sufficient funds for the commission to perform its duties. In the legal basis, a minimum of a law related to the commission, it must be stressed that the commission's budget should be in accordance with the needs and could not be lowered without apparent reason, such as the nation's weak economic conditions that is insufficient for a budget increase

The **second** element is the guarantee of a strong authority stipulated in constitution, or at least a law. The strong authorities include aspects of prevention and enforcement. Further on the aspect of enforcement, anti-corruption commission must have comprehensive authorities, starting from examination, investigation and prosecution. Authorities which are part of modern investigation such as wiretapping

must also be given. This powerful authority can not be separated from the element of independence, because, as affirmed by Constitutional Court decisions, the definition of independent nature within the KPK is: in carrying out its duties and authorities, it cannot be intervened by anyone and anything. Lastly, if the enforcement of anti-corruption is conducted by other law enforcement, then the anti-corruption commission should have a higher authority, for example to carry out coordination, supervision, even takeover of the case, if necessary. In the Indonesian context, the Constitutional Court has given a decision that the strong authority of the Commission, including wiretapping, no SP3, up to the takeover authority is in line with the extraordinary legal politics of corruption eradication, and therefore does not contradict the 1945 Constitution.

The **third** element is effective control. It should be emphasized that, how independent an institution could be, control element is still needed. Of course with the right format, which is certainly not in the form of intervention. The formulation, too independent without control will be corrupt, otherwise, minimal independence plus control will lead to intervention.

Then the control system must be set up with: first, internal-personal, by selecting commissioners and employees with integrity. Without integrity, the independence of the institution would instead be misused, and tends to lead to abuse of power. Like a formula, institutional independence must be paired with personal integrity-competence. Therefore, the independence of the justices in the United States, which is marked with lifetime tenure, should be excluded if the judge did not carry out their duties in good behavior, aka integrity. To ensure the integrity and competence of the best commissioners and employees of the anti-corruption commission, then the selection process should be made by considering all aspects of track records, and also by the selection team with undoubted credibility.

The second control is internal-institutional, namely the internal mechanism within the commission itself, for example, there should be a strict Code of Conduct to ensure that commissioners and employees of the commission do not commit misconduct. In the event of misconducts, mechanisms for imposing sanctions through the trial process at the Ethics Council which is professional and fair must be built, as an integral part of the staffing system at the anti-corruption commission. That means, the staffing system at the anti-corruption commission shall have a system of reward and punishment that should be well implemented. Also included in the reward and punishment system is performance-based salary system. The prepared remuneration system must guarantee the minimum requirements of commissioners and employees of the commission.

The third type of control is external monitoring, namely control system based on legislation, for example, performance control is monitored through the checks and balances mechanism with the parliament; financial control is through BPK audit; wiretapping authority control through audit by the Communication and Information Technology Ministry; and enforcement control is through judges' verdicts at Corruption court.

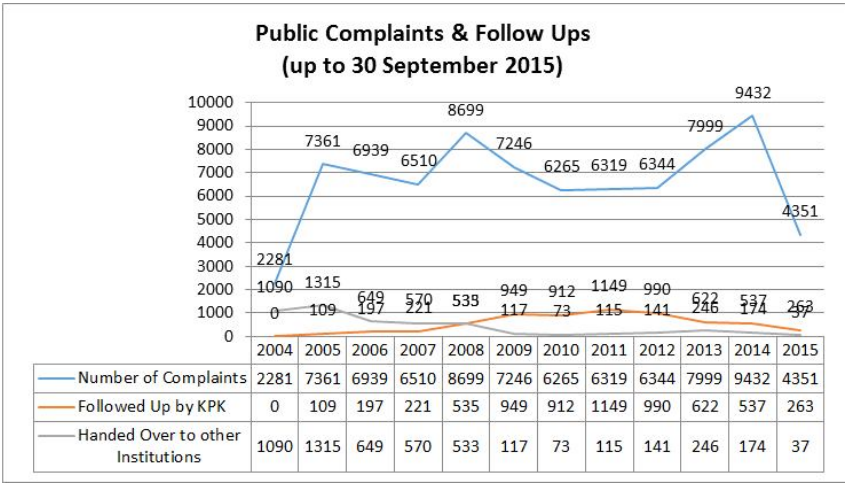
B. Evaluation of KPK's Performance and Institutionality[208]

1. Public Reports

The table below shows the KPK receives thousands of cases each year, with an average of about 6,000 reports each year, with a record in 2009 with 9,432 complaints from the public. Certainly, KPK's ability to handle this reporting is not yet maximal. With an average of 6,000s reports, the KPK can never process and examine more than 1,000 complaints, except in 2011. Another thing, it should also be noted that public complaints dropped dramatically in 2015, which, up to September 30, 2015, only 4,351 were recorded, far lower than 9,432 in 2014. This drastic decline is likely related to the problems faced by the KPK in 2015, as a result of the cases beginning with the nomination of Commissioner General Budi Gunawan for the National Police chief by President Joko Widodo.

It is indeed very difficult to complete the study of thousands of complaints. The availability of budget and human resources definitely affect KPK's performance in assessing the public reports. Certainly, if not completed, the reports will continue to accumulate and affect the credibility of KPK. Whereas, one way to maintain the credibility of KPK before the public is by resolving public complaints. ICAC experience in Hong Kong that completed examinations of all public complaints result in very high credibility before the public. Especially ICAC continues to respond every report, even for petty corruptions.

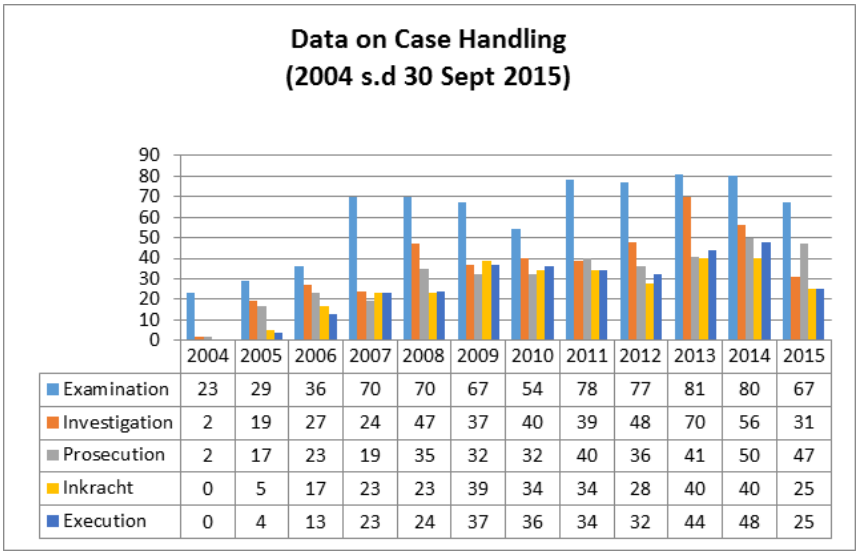
[208] This evaluation is based on analysis of KPK Annual Reports from 2004 to 2014; combined with latest data up to September 2015 which is also available at KPK's website: http://www.acch.kpk.go.id



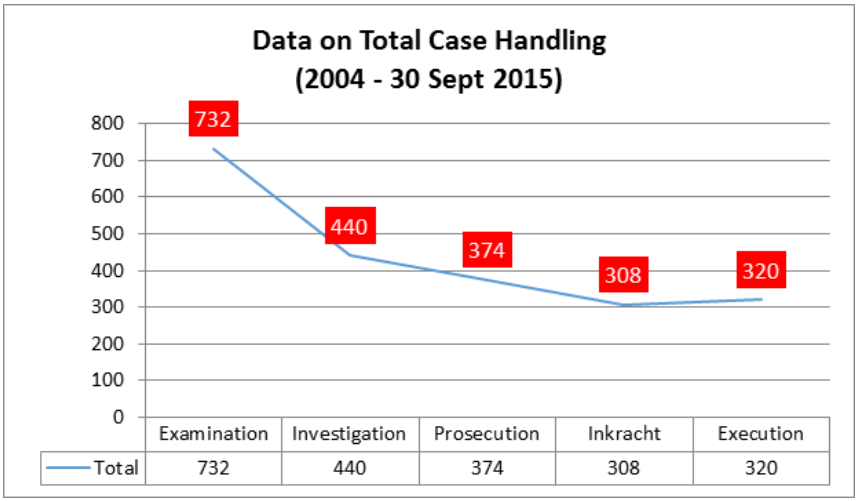
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Number of Complaints	2281	7361	6939	6510	8699	7246	6265	6319	6344	7999	9432	4351
Followed Up by KPK	0	109	197	221	535	949	912	1149	990	622	537	263
Handed Over to other Institutions	1090	1315	649	570	533	117	73	115	141	246	174	37

2. Case Handling

Handling of cases at KPK showed increasing trend every each year, with a record in 2013 with 81 examinations, 102 investigations, 73 prosecutions and 40 cases reached inkracht. The improvement in case handling shows two things. One, a lot of corruption is still going on, and the Commission remains relevant to be retained instead of dissolved as several times suggested in the debates over to the planned revision of the KPK Law. Two, the improved case handling shows increased ability of KPK employees that they are better in handling cases, at least in terms of the increasing number of cases that can be handled simultaneously; although it appears that the increased capacity is also due to increased number of KPK employees as described later in the Human Resources section, which means that this does not necessarily performance of KPK employees more effective.

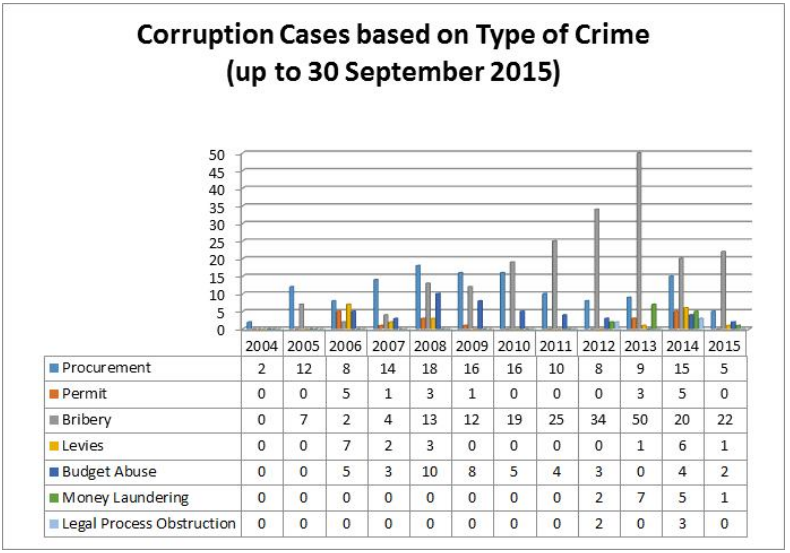


	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Examination	23	29	36	70	70	67	54	78	77	81	80	67
Investigation	2	19	27	24	47	37	40	39	48	70	56	31
Prosecution	2	17	23	19	35	32	32	40	36	41	50	47
Inkracht	0	5	17	23	23	39	34	34	28	40	40	25
Execution	0	4	13	23	24	37	36	34	32	44	48	25



	Examination	Investigation	Prosecution	Inkracht	Execution
Total	732	440	374	308	320

3. Corruption Cases Based On Crime Types



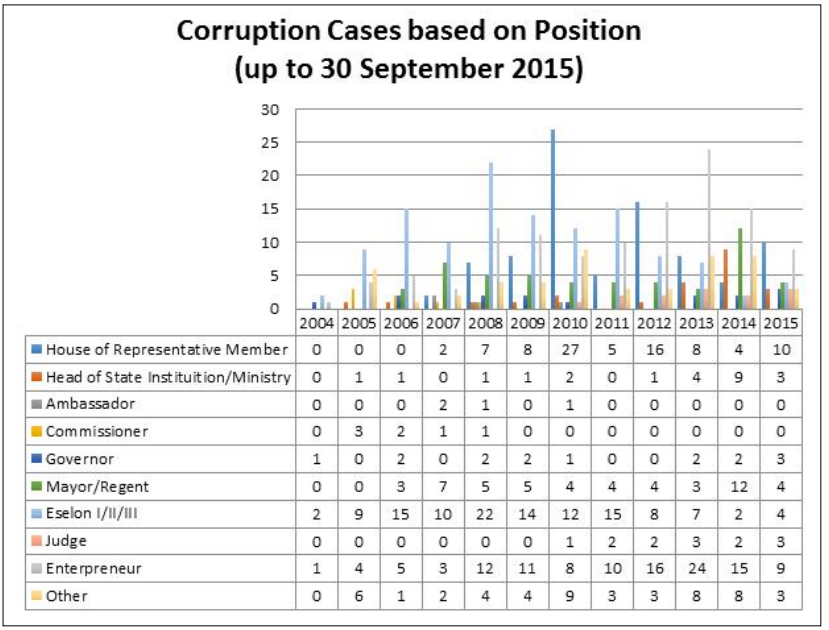
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Procurement	2	12	8	14	18	16	16	10	8	9	15	5
Permit	0	0	5	1	3	1	0	0	0	3	5	0
Bribery	0	7	2	4	13	12	19	25	34	50	20	22
Levies	0	0	7	2	3	0	0	0	0	1	6	1
Budget Abuse	0	0	5	3	10	8	5	4	3	0	4	2
Money Laundering	0	0	0	0	0	0	0	0	2	7	5	1
Legal Process Obstruction	0	0	0	0	0	0	0	0	2	0	3	0

Based on the existing types of corruption cases, it can be seen from time to time, bribery and procurement of goods and services has always been two kinds of cases handled by the KPK a lot. Initially, cases related to procurement were still more than bribery, with 2008 recorded the most, 18 cases. But since 2010, bribery case has become higher than procurement-related cases, as high as 50 cases recorded in 2013. Documenting types of cases is important to identify what consideration on the direction of corruption prevention and eradication strategies must be done. For example, if representative offices will be opened, the consideration over areas with most corruption, as well as the type the cases, may be used as consideration where the representative office is prioritized to be opened.

4. Corruption Cases Based On Positions

From the available data, it can be seen that the actor of corruption cases handled by the KPK are of various positions. Most of them are from the legislative bodies (DPR/DPRD), executives (Governor, Regent/Mayor/Echelon officials) and businessmen/private sector. Although there is no single type of position that constantly tops the list of the most involved in corruption, the available figures can indicate that corruption occurs because of collusive relations between the public sector (bureaucrats) and the private sector.

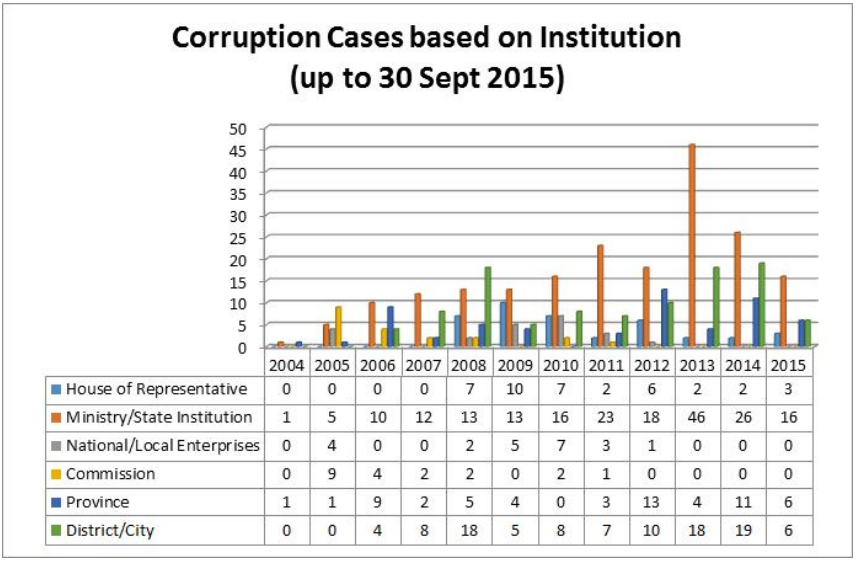
Furthermore, it should be underlined, the mandate of KPK is to combat corruption by state officials and law enforcement, but only a little number of offenders from the law enforcement can be investigated by the KPK. And that's just happened since 2010 (before, from 2004 to 2009, zero). Even though only judges that were recorded, whereas the Commission also handles corruption by other law enforcers (police, prosecutors, lawyers), the number is still far below the number of cases involving state officials. The author believes that the small number of cases was not because of the lack perpetrators from law enforcers, but because the difficulty is higher. It is proven that, any allegations of corruption by police officers, for example, the KPK always faced institutional crisis known as Gecko vs Crocodile episodes I, II and III.



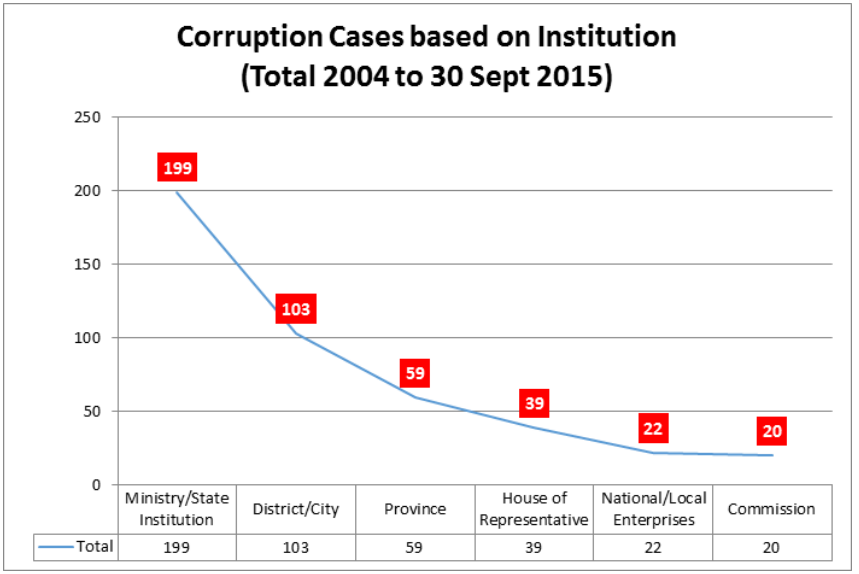
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
House of Representative Member	0	0	0	2	7	8	27	5	16	8	4	10
Head of State Instituition/Ministry	0	1	1	0	1	1	2	0	1	4	9	3
Ambassador	0	0	0	2	1	0	1	0	0	0	0	0
Commissioner	0	3	2	1	1	0	0	0	0	0	0	0
Governor	1	0	2	0	2	2	1	0	0	2	2	3
Mayor/Regent	0	0	3	7	5	5	4	4	4	3	12	4
Eselon I/II/III	2	9	15	10	22	14	12	15	8	7	2	4
Judge	0	0	0	0	0	0	1	2	2	3	2	3
Enterpreneur	1	4	5	3	12	11	8	10	16	24	15	9
Other	0	6	1	2	4	4	9	3	3	8	8	3

5. Corruption Cases Based On Institutions

Based on institution, ministry/state institutions and regional administrations have recorded the most corruption cases at the KPK. The record was made in 2013 with 46 cases at ministry/state institutions.



	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
House of Representative	0	0	0	0	7	10	7	2	6	2	2	3
Ministry/State Institution	1	5	10	12	13	13	16	23	18	46	26	16
National/Local Enterprises	0	4	0	0	2	5	7	3	1	0	0	0
Commission	0	9	4	2	2	0	2	1	0	0	0	0
Province	1	1	9	2	5	4	0	3	13	4	11	6
District/City	0	0	4	8	18	5	8	7	10	18	19	6



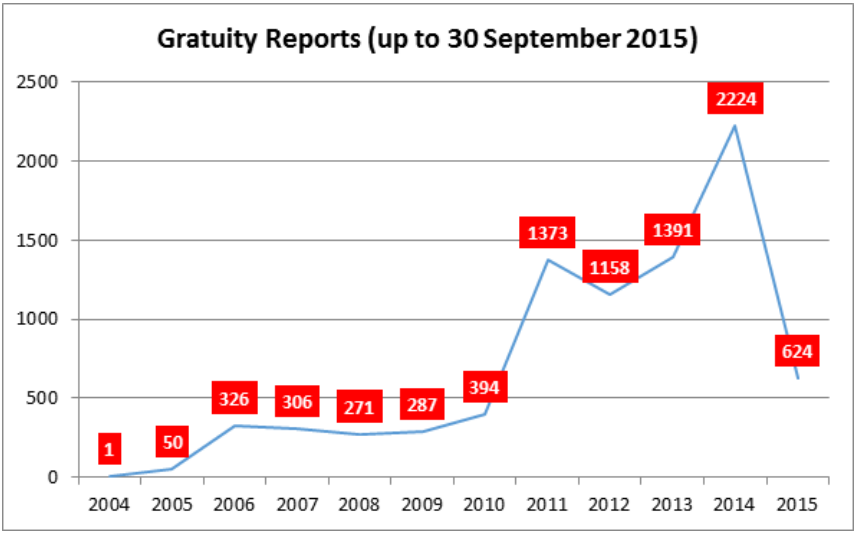
	Ministry/State Institution	District/City	Province	House of Representative	National/Local Enterprises	Commission
Total	199	103	59	39	22	20

6. Reported Gratuity

Gratuity reports received by the KPK continues to rise from year to year, with record highs in 2014 when a total of 2,224 reports of gratification were filed. This increasing trend is certainly good news, and shows improved socialization

about gratuities, and the awareness to report it also continues to improve. A small note on gratuity is significant increase of reports from 2010 to 2011, from 394 reports to 1,373, though later dropped again in 2012 to 1,158; then another significant increasing trend again in 2013 with 1,391 reports, then became 2,224 in 2014. Unfortunately there is not enough explanation as to why there was a significant increase in 2011 and 2014. It may be good for the KPK to find out why gratuity reports in these two years rose very sharply. If the cause is a different way of public relation, for example, the same model of communication must be considered effective and hence needs to be made a successful PR model, so it should be developed.

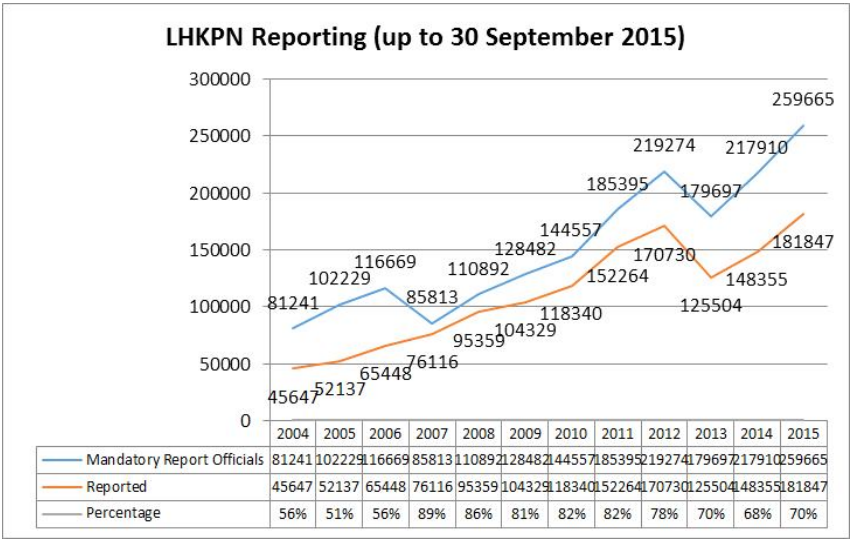
Another thing, it is surely necessary to underscore the drastic drop in 2015, where up to September 30, 2015, only 624 reports were recorded. The author suspects this has something to do with the lower awareness due to KPK's weakened position after the cases faced by the commission since the nomination of Comr. Gen. Budi Gunawan for National Police chief by President Joko Widodo.



7. Official Wealth Report (Laporan Harta Kekayaan Penyelenggara Negara LHKPN)

Similar to other data, LHKPN statistics also show a trend that continues to rise, and it is a good sign that socialization is quite effective, so that the awareness of state administrators obliged to report LHKPN is also getting better. However, from the existing chart, we will easily note that there is a significant decline in 2013, from initially 170,730 reports, declined to 125,504. What caused the decline

in 2013? This would need to be evaluated in order to look at the cause, so it can be anticipated and prevented from reoccurring. Unfortunately, the author did not have the opportunity to discuss and conduct interviews with officials at KPK to clarify the data.



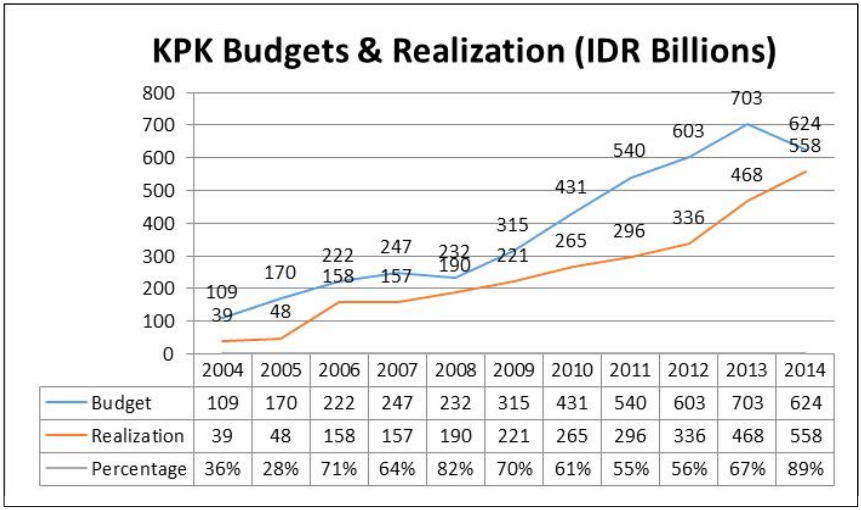
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Mandatory Report Officials	81241	102229	116669	85813	110892	128482	144557	185395	219274	179697	217910	259665
Reported	45647	52137	65448	76116	95359	104329	118340	152264	170730	125504	148355	181847
Percentage	56%	51%	56%	89%	86%	81%	82%	82%	78%	70%	68%	70%

8. KPK Budget & The Realization

Similarly to other KPK data above, KPK's budget and the realization has also shown increasing trend since 2004, with exception that budget allocation only decreased in 2008 and 2014, but the realization kept on increasing. In fact, even though the allocation dropped from 703 billion in 2013 to 624 billion in 2014, KPK budget realization in 2014 still rose to 89%. Based on data related to budget, there are some notes by the author. First, after enjoying budget realization increase in 2008 which was 82%, KPK's budget realization continues to drop down to the lowest in 2012 with only 56% before it bounced back in 2013 and 2014. Surely, budget realization or low absorption is not always negative, particularly if it was done to save the budget. However, such a matter still needs attention, especially if linked to good planning which is supposed to lead to good absorption too.

Second, this budget increase will be more of a good news if it is not merely caused by inflation, or the need to allocate more to construct new building, for instance. But it should also be balanced with improvement in terms of allocation per capita. As explained in the previous sections, KPK's budget per capita is still lagging behind other countries, for example Hong Kong's ICAC. To be clear, the

budget per capita of ICAC in Hong Kong in 2013 was US$ 121.87 which was 441.6 times as much higher as KPK's which was only US$ 0.276.[209]

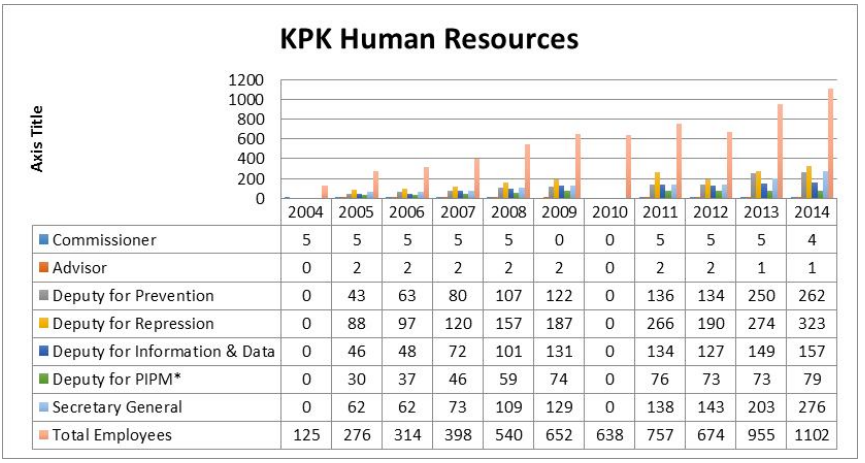


	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Budget	109	170	222	247	232	315	431	540	603	703	624
Realization	39	48	158	157	190	221	265	296	336	468	558
Percentage	36%	28%	71%	64%	82%	70%	61%	55%	56%	67%	89%

9. KPK's Human Resources

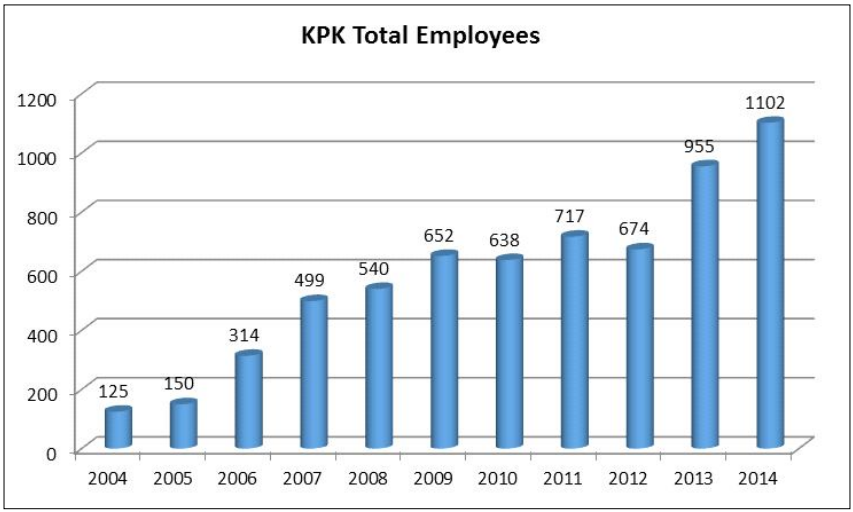
Although more detailed data for 2004 and 2010 are not available, but from the available statistics, we can conclude that human resources at the KPK has also increased from year to year. From only 125 employees in 2004, the KPK in 2014 was supported by 1,102 employees. Such improvement is certainly important, though not sufficient. As described in the previous section, it is not only the number of employees that is important, but their quality of integrity and competence should also be the best. Furthermore, KPK employees should be KPK's own employees, not those seconded from other agencies let alone other law enforcement institutions. Quah firmly believes, KPK employees should not come from law enforcement, especially if the institution of origin itself is problematic when it comes to the spirit of anti-corruption.

[209] The author has no knowledge on the ideal per capita budget, this matter would be the area of economic experts to analyze, but the assumption is that the higher the budget per capita the better for the KPK.



	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Commissioner	5	5	5	5	5	0	0	5	5	5	4
Advisor	0	2	2	2	2	2	0	2	2	1	1
Deputy for Prevention	0	43	63	80	107	122	0	136	134	250	262
Deputy for Repression	0	88	97	120	157	187	0	266	190	274	323
Deputy for Information & Data	0	46	48	72	101	131	0	134	127	149	157
Deputy for PIPM*	0	30	37	46	59	74	0	76	73	73	79
Secretary General	0	62	62	73	109	129	0	138	143	203	276
Total Employees	125	276	314	398	540	652	638	757	674	955	1102

Notes:
***Deputy for PIPM (*Pengawasan Internal dan Pengaduan Masyarakat*/Internal Monitoring and Public Complaints)**
****The 2004 and 2010 available data are only the total employees**
*****Total commissioner in 2009 includes Acting Commissioners**



Still related to KPK employees, from the more detailed data it can be seen that enforcement employees are more than prevention employees. The question is, is that really the blueprint of corruption eradication at the KPK? The point is,

every institutional development at the KPK, including the matter of employee composition, must be adjusted with the grand planning and strategy of KPK in eradicating corruption.

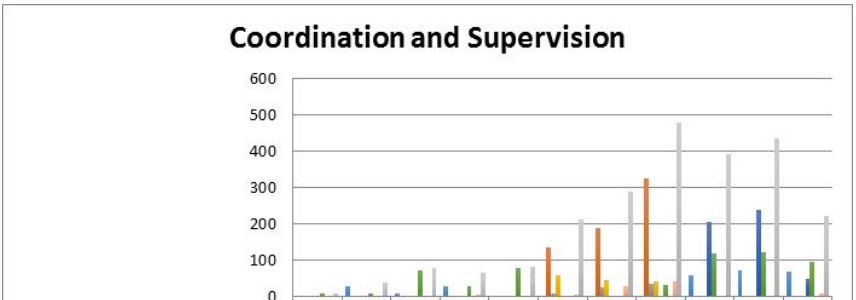
10. Coordination and Supervision

From the available data it appears that the work of Coordination and Supervision (Korsup) have more challenges, especially because they touch other law enforcement agencies: the police and prosecutors' offices. Case coordination for example was absent in 2008 to 2011, before appearing again in 2012. Similarly, case supervision once disappeared in 2009 and 2010. What is certain, is that, among all, the least was case takeover, with only 2 cases, which even only happened in 2014. According to the author, the tiny number does not show the lack of corruption cases that should be taken over which indeed needs to be very, very selective but shows that the character of "case takeover" authority is indeed not easy, and prone to conflicts between the KPK and the police or prosecution agencies.

In short, from the available data, the coordination and supervision duties as mandated by the KPK Law has yet to be optimal. Although it is understood that this duty is never easy, but the success of corruption eradication is not only from the standpoint of enforcement, but also in terms of helping reform the police and prosecutors' offices.[210] Regarding this coordination and supervision issue, it is necessary to read the column of Dedi Haryadi which questions the quality of KPK leadership itself in order to optimize korsup function in reality.[211]

[210] Further on matters related to Coordination and Supervision, read: Febri Diansyah, Emerson Yuntho, Donal Fariz, Penguatan Pemberantasan Korupsi melalui Fungsi Koordinasi dan Supervisi Komisi Pemberantasan Korupsi (Strengthening Corruption Eradication through Coordination and Supervision Functions of the Corruption Eradication Commission) (2011); Marie Chene, Coordination Mechanisms of Anti-corruption Institutions, www.U4.no, September 28, 2009.

[211] Dedy Haryadi, Optimization of KPK's Coordination and Supervision Function, Kompas, November 23, 2015.



	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Coordination	0	29	8	30	0	0	0	0	61	74	68
Asking for Investigation Progress	0	0	0	0	0	137	190	327	0	0	0
Analysis	0	0	3	0	0	10	25	36	0	0	0
Case Expose	0		0	0	0	58	46	42	0	0	0
Clarification	0	0	0	0	0	0	0	0	207	238	50
Supervision	8	11	73	31	78	0	0	33	121	122	95
Take-over	0	0	0	0	0	0	0	0	0	0	2
Hand-over	3	0	0	5	4	7	29	42	3	3	8
Total	11	40	81	66	82	212	290	480	392	437	223

C. Future Design of The KPK

After conducting: 1) theoretical analysis on the institutionality of anti-corruption commission as independent state commission; 2) study on Jakarta's Principles related to anti-corruption commission; 3) comparison of anti-corruption commissions in some countries; 4) analysis on MK decisions related to the constitutionality of KPK Law; and 5) evaluation of KPK's performance and institutionality based on KPK Annual Reports since 2004 to 2014; than in this section it is time for the author to convey proposal on how KPK's design in the future should be. Based on the proposed formula above, E-ACC = Independent+Authority+Control, then an effective KPK in the future should pay attention to the three aspects, namely: 1) strengthening the assurance of institutional independence; 2) strengthening the assurance of stronger authorities; and 3) improvement of control system. Below is recommendation for each of the improvements.

1. Strengthening the Assurance of KPK's Independence

a. Making the KPK a Constitutional Organ

The KPK is an independent state institution which the existence is based on the KPK Law, and indirectly guaranteed by Article 24 paragraph (3) 1945 Constitution. In the future, the legal basis of KPK's independence should not only on a law, but

decisively a constitutional organ, which is a state i nstitution which the institutional existence and authorities are regulated in the 1945 Constitution.

The strengthening to become a constitutional organ is strategic to be done due to a number of reasons. First, although globally, from the 77 countries, the majority of 47 countries have their anti-corruption commissions regulated under laws, but we instead need to look at the other 30 countries that have managed to strengthen their anti-corruption commission's existence based on the constitution. So, it is appropriate if the existence of the KPK in Indonesia is also strengthened in the 1945 Constitution, according to best practices in those countries. This is also to show strong political will from the leaders of this country to combat corruption more seriously and extraordinarily. Although, it is also realized that amending 1945 Constitution is an agenda that is easy to do. Certainly, in the proposal to amend the 1945 Constitution prepared by the Regional Representative Council, the proposal to make KPK a constitutional organ has been formulated.

Second, the strengthening of KPK's existence to be based on the 1945 Constitution is also to end the debates that try to say that the KPK is a temporary institution or ad hoc. Actually, it is clear that in the KPK Law there is no norms suggesting that KPK is temporary. However, in every debates on the existence of the KPK, suggestions saying that the KPK is a temporary institution are always surfaced. Therefore, putting the KPK into the 1945 Constitution can also become the solution, to emphasize that the KPK is an independent state institution for corruption eradication which is permanent, and not temporary at all. This is inline with one of the Jakarta's Principles related to anti-corruption commission, namely the third principle: permanence.

By putting KPK in the constitution, efforts to undermine the KPK or even dissolve it, should be able to be curbed. As a matter of fact, suggestions to disband the KPK were voiced several times, the last one was through the Amendment draft of the KPK Law, which included the proposal to set the age of the KPK to only twelve (12) years since the amendment bill was enacted. Then, since the legal basis and institution authority of the Commission is only at the level of a law, it is surely very vulnerable to political attack through the legislative process, then the legal politics of corruption eradication must strengthen the KPK into a constitutional organ, so that its position becomes stronger. It does not mean that the legal politics of KPK would become unchangeable. Such a change would still be possible, but through a more secure process, which is through constitutional reform at the MPR, and not merely a law amendment (legislative review) at the House of Representatives.

b. Improving Leadership Selection Mechanism

Still related to the assurance of KPK's independence, in addition to making the KPK a constitutional organ, the further regulations still can be done through legislation. It is good if the mechanism of selecting KPK commissioners who are determined to be collective collegial, the number is odd, is also regulated within the Constitution, or else could also be at least regulated by the KPK Law.

To emphasize their independence and impartiality, then the requirements to become KPK commissioners should add the requirement of not being from a political party. Or, even if the candidates was formerly a political party member, there should be a time gap, let's say 5 (five) years, before he or she can be nominated as KPK commissioner candidate. Limitation of candidate from political party is in line with MK decision, which, for the sake of keeping Commission of Election (Komisi Pemilihan Umum KPU)'s independence as election organizer, prohibit KPU member from political party, unless he or she has quit since 5 years before. This is also in line with the warning of Quah, suggesting that anti-corruption commission leaders are not partisan, so it is not prone to intervention from political parties.

Still related to the selection of KPK commissioners, the current legal politics surrounding election of independent commission is still diverse. One, the Parliament can only reject or approve the selection committee's work, namely in terms of election commissioners of the Judicial Commission (KY). This model is based on the Constitutional Court ruling related to the KY Law. Two, the House of Representatives vote from nominees proposed by the selection committee, which is twice as many as the required formation. This model, for example in the case of the KPK commissioners election, in which the selection committee filed 10 (ten) names, and the Parliament therefore elect 5 (five) from the ten candidates.

The author is of the view, that the KY model presents a risk of gridlock when the House never agrees with the candidates proposed by the selection committee. In a recent event, the House did not reject all 7 (seven) submitted candidates, but only rejected 2 (two) names. However, the rejection was enough to hamper the immediate formation of KY commissioners, and the President must propose again two names for the approval of Parliament. Remained is the risk that the House disagree again on the candidates proposed by President, and hence deadlock and vacancy of KY commissioners.

Furthermore, the KPK model indeed provides opportunity to the House to choose, and it is theoretically impossible to reach a deadlock. Although the latest selection process of KPK commissioners, there were baseless arguments to

reject KPK commissioner candidates proposed by the selection committee. Such a rejection by the House actually has no legal basis, and hence should have not been done. Certainly, the process at the House is vulnerable to various political considerations, which therefore should be anticipated with a system that prevents such political interests from undermining KPK's independence.

Based on this, the author proposes an amendment to KPK commissioners selection system that gives chance to the House to choose candidates proposed by the selection committee, which is to provide more limited room to choose. For instance, for the 5 (five) KPK commissioners, then the House is not only asked to accept or reject like in the KY model; or choose 5 (five) out of 10 (ten) candidates proposed by the selection committee, but the committee can only propose 7 (seven) candidates and therefore the House can reject 2 (two) candidates and must choose 5 (five) of them to become KPK commissioners. This way, potential of deadlock that could happen in the KY model will never happen, but the potential of politicization that is too destructive which is present in the present KPK model can also be avoided. This is the selection model that involves the House but more limited, namely the limited selection process model.

c. Limited Immunity for KPK Commissioners and Employees[212]

Immunity for commissioners and employees of the anti-corruption commission is the 8th principle of the Jakarta's Principles. Without immunity, anti-corruption commission would be vulnerable and prone to intervention. Immunity for KPK commissioners is important to affirm and strengthen KPK as an independent agency, of course the immunity in question is limited protection and not absolute without limit.

Certainly, the modus operandi to criminalize KPK commissioners or employees occurred several times each time Police leaders involved in a case investigated by the KPK. When Three-Starred Susno Duadji, then Kabareskrim, was detected by the KPK, two KPK commissioners Chandra M. Hamzah and Bibit S. Rianto were criminalized. Then when Two-Starred Djoko Susilo was involved in driving simulator corruption cases, KPK investigator Novel Baswedan was named suspect. Now when Three-Starred Budi Gunawan was a suspect of corruption, Bambang Widjojanto (Commissioner), Abraham Samad (Commissioner), and Novel Baswedan (Investigator) became suspects again.

[212] This section is taken from the author's column at Kompas daily, dated February 3, 2015 titled Urgensi Perppu Perlindungan KPK (The Urgency of Perppu on Protection of the KPK)

That KPK commissioners are ordinary human beings who are with the possibilities of committing crimes, we all understand. However, from the three cases above, we all also need to observe it smartly, how easy and vulnerable KPK commissioners and employees were criminalized, especially when investigating suspects who are also law enforcers. Therefore, a better legal protection system must be granted so the KPK can work comfortably, while at the same time also ensuring that the system is not abused as protection by KPK culprits who are indeed problematic.

Therefore, the KPK Law should contain formulation of protection system that provides temporary immunity or protection during the tenure and carrying out duties as commissioners and employees of the KPK. Such a limited protection is thus necessary so that when carrying their heavy duties KPK commissioners cannot easily be criminalized, or were even suddenly broken due to a civil lawsuit.

Immunity right for state executives when carrying out the heavy duties from the state is not an empty concept that has no conceptual grounds. Since longtime ago, the concept of immunity has been attached to legislators. Article 224 Law No. 17 of 2014 on Parliament Act regulates that "Members of Parliament cannot be prosecuted in court for statements, questions, and/or opinions he presented both orally and in writing at the meeting of the House and outside the House meeting relating to the functions and powers and duties of the House of Representatives." Provisions on immunity that is relatively similar also once existed in Law No. 13 of 1970 on the Procedures of Police Acts against Members/ Leaders of MPRS (Temporary People's Consultative Assembly) and DPR-GR (Gotong Royong House of Representative), which principally prohibit any legal action from the police against members of the parliament who are carrying out their duties.

Article 10 Law 37 of 2008 on the Ombudsman of the Republic of Indonesia also adopts immunity by regulating that, "In executing its duties and jurisdiction the Ombudsman shall not be arrested, detained, interrogated, prosecuted, or sued before the court". In fact, the Natural Resources Law Article 66 also assures immunity by regulating, "Everybody fighting for the right to proper and healthy environment shall not be charged with criminal or civil offenses."

So it is clear, that the concept of immunity for certain state officials have long been and still is in our positive law. Therefore, looking at the heavy duties in combating corruption in the country, it should be appropriate for the commissioners of the KPK to also get protection from legal problems during their tenures.

Furthermore, such immunity right has also been common practice in the legal systems of many countries. In anticipation to counter attacks to commissioners

and employees of anti-corruption institution, the system to provide legal protection is present in laws in many countries. Let's take some examples of countries that adopt this kind of immunity: Malaysia, in Article 72 Law No. 694 of 2009; Australia in Law No. 66 of 2011; Swaziland in Article 17 Law No. 3 of 2006; and Zambia in Article 15 paragraph (1) of its KPK Law that regulates, "No proceedings, civil, or criminal, shall lie against any Commissioner of the Commission, for anything done in the exercise of such person's functions under this Act".

However, of course the right of immunity to the Commissioners (or other state agencies) are certainly not without limits. What is possible is temporary and limited right of immunity. The right of immunity without limit would lead to impunity, untouchable by law, the latter should not happen, though still occur, for example in the case of gross human rights violations committed by very powerful people.

Therefore, there should be limits, so that the right of immunity is not exploited by criminals. Some common restrictions are: in terms of tenure; in terms of function and authority; and does not apply in case of being caught red-handed committing a heavy crime, especially corruption.

On the limited immunity for commissioners and employees of the KPK, it is interesting to wait for the Constitutional Court's decision on the judicial review of KPK Law petitioned by Bambang Widjojanto who questions the formulation of temporary dismissal of KPK commissioners when being named suspect. The formulation in Article 32 paragraph (2) KPK Law that regulates, "When a KPK Commissioner becomes a suspect of a criminal act, he/she shall be temporarily relinquished from office" is considered too broad, so KPK commissioners are easily criminalized, named suspect, and eventually temporarily dismissed. Bambang Widjojanto argues, it should be limited as to what kind of crimes that can lead to temporary dismissal. Of course it should not be any kind of crime, but needs to be limited only to heavy crimes, such as corruption. On this petition, the Court has yet to issue its decision, and it is interesting too to see its legal considerations. The author himself is of the view that the petition should be granted, so KPK commissioners cannot be easily named suspect, which in the end could disturb KPK's institutional independence.

d. KPK Must Employ Its Own Permanent Employees, Including Investigators and Prosecutors

To affirm the principle of independence, in accordance with the Jakarta's Principles, the KPK should be able to appoint and dismiss its own permanent employees.

Moreover, comparative studies conducted by KPK itself, from 19 countries studied, only one state that the employees are non-permanent, i.e. Sri Lanka. Only three states that the status of the employees mixed between permanent and non-permanent, namely Brazil, Nigeria and Indonesia. The remaining 15 (fifteen) other countries apply the concept of permanent employment regime. Thus, the position of KPK employee which is still mixed should be improved, KPK should be able to appoint and dismiss its own employees, including to the positions of investigator and prosecutor, rather than relying on the police and prosecutors' offices.

Quah firmly states, anti-corruption commission must be free from the influence of the police, therefore, the employees should not come from the police, especially if the institution still has a lot of corrupt culprits. Quah's opinion can be accepted, statistics that show the very little cases of coordination and supervision demonstrate the difficult relationship between the KPK and other law enforcement institutions. Similarly, the fact that only two cases were taken over shows that the authority is difficult to do. Furthermore, the fact that cases involving law enforcement that can be captured by the Commission is still very little shows that the KPK should be more independent and should not rely its personnel on the police and prosecutors' offices. As described above, only very little law enforcers can be charged by the KPK, and only just happened since 2010 (before, from 2004 to 2009, none), with most cases were in 2013 with only 4 cases. This contradicts the fact that the practice of the legal mafia in the country is still rampant.

Limiting employees from the police, prosecutors' offices or other agencies does not mean that the Commission can not recruit employees from those institutions. Recruitment can still be made, with a rigorous selection process and accountable. To be sure, if employees were recruited from other agencies-including the police and prosecutors-they must decisively choose to become permanent employees in the Commission, and can not return to their home institutions. Thus their independence will not be compromised, and the independence of the Commission as an institution can be maintained. Because, if they still can go back to their original institutions, intervention can be easily done, as indicated in the withdrawal of KPK's prosecutors by the Attorney General's Office in the Social Aid case in the province of North Sumatra. Thus, to assert the independence of the Commission's employees, avoiding dual loyalty and intervention, the status of employees of the KPK must be certain, there should no longer be multi-status employees, which affect the independence of the Commission as an institution.

Still related to permanent employees, the number of KPK's human resources in the future must be considered to continue to be fulfilled. Particularly if the plan to establish KPK offices in regions is materialized. Then having an adequate

number of staff is a must to maintain the independence and quality of the works of the KPK. Although until today the number of KPK employees continues to rise, the latest in 2014 amounted to 1,102 people, the number was still far less than the employees of the anti-corruption commission in Malaysia, for example, which is 7,600 people. Whereas the number of Malaysia's population and area are far below Indonesia. Therefore, the quantity of KPK's human resources must be added, of course with the best quality of integrity and competence.

e. Budget Availability Warranty for The KPK

The availability of sufficient budget is one of the factors that affect independence and performance of the anti-corruption commission. No wonder, the matter on the availability of budget becomes the 11th principle of the Jakarta's Principles, related to the basic principles that must be owned by an anti-corruption commission. Moreover, not only the availability of the budget, further, the 12th principle requires autonomy for the KPK in managing its budget, of course with the accountability that still can be audited by authorized state institutions such as the BPK.

Certainly, the KPK in the future should not be interrupted because of the needs of its budget is not approved in the State Budget Law budgetary politics. Then the KPK Law should provide a guarantee, in order to maintain KPK as an independent state institution, so the budget available for the Commission is not only increased simply because of inflation adjustments, but further should not decrease, unless the reason is justifiable, for example, because the state is facing economic crisis.

Assurance that the budget is not cut, because of anti-KPK politics that may be present in parliament, should be built and the system should be ensured to be present. In addition to the guarantee in the KPK Law, the budget should not only rise, but when compared to per capita population of Indonesia is appropriate for the works of the KPK. The author is of the view, the difference of per capita budget in 2013 between ICAC Hong Kong with US$ 121.87 and per capita budget of the KPK which was only US$ 0.276, should not be repeated. Of course with the consideration over the capability of our budgeting, eradication of corruption budget fulfillment in the KPK as well as case handling budgets at the police and prosecutors' offices must continue to be improved.

Still related to budget, what is no less important is that, the KPK should adopt remuneration system that is adequate to their heavy duties. Because of their dangerous tasks, recruited commissioners and employees must be Indonesia's best individuals, thus it is normal if the salary and compensation

system for the commissioners and employees of the KPK is the best in Indonesia, or the highest, with of course considering appropriateness and the state's financial ability.

Good remuneration system must be built and held by the KPK and becomes one of the systems that underpin the principle of institutional independence of the KPK. I heard the compensation at the Commission has been for some time not adjusted. This is certainly not good and would disrupt the reward and punishment system that should be the durability that strengthens KPK in eradicating corruption. In the future, remuneration system with constant rise and adjustment according to performance should be developed and formulated in a Presidential Regulation. Actually it can also be formulated in a KPK Regulation, as a self-regulatory body, but because the substance is a matter on remuneration, so to avoid conflict of interest, it should be formulated in the form of Presidential Regulation, which still must be prepared in a professional manner and not becoming tools of power bargaining from government to the Commission.

2. Assurance on Powerful Authorities

a. Retaining KPK's Authorities

Authorities that are comprehensive, strong and clear are a must for the success of corruption eradication tasks, in particular those held by the anti-corruption commission. Therefore, matters on authorities becomes the first principle in the Jakarta's Principles, with the decisive term: Mandate.

Related to authorities, the KPK is one of the institutions that the authorities are quite comprehensive, covering prevention and enforcement; including the authorities of examination, investigation, and prosecution; also further coordination and supervision, including to takeover corruption case that is under investigation of other law enforcement institutions.

Of the 69 countries studied by the KPK, all of them provide prevention authorities to the anti-corruption commissions, except Croatia and Estonia; all the 69 countries give investigation authority. Whereas prosecution authority is more varied, where minority 28 countries give prosecution authority, and the rest 41 countries do not give prosecution authority to the anti-corruption institutions. Thus, the authorities held by the KPK are adequate to perform its duties, in fact it is one of the most comprehensive compared to other countries.

Especially given that the strong authority is coupled with authorization to conduct modern investigation such as wiretapping, the work of the KPK is supposed

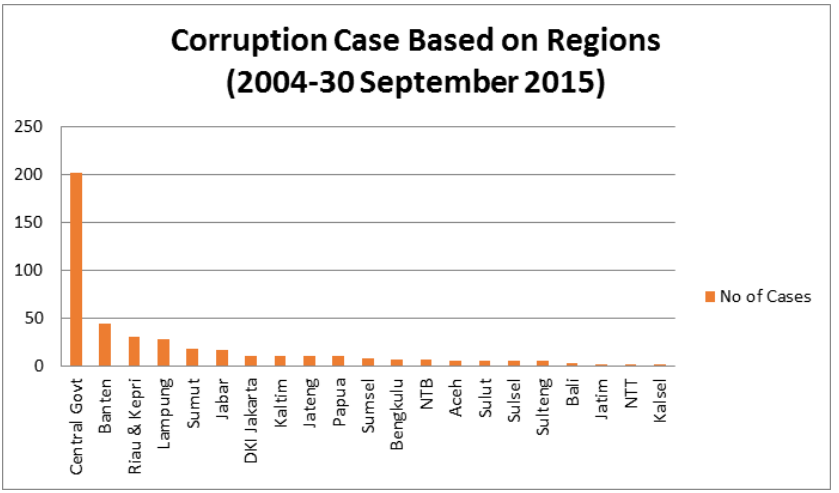
to be more effective. Moreover, in MK decision that reviewed KPK Law, not only the institutional independence of the KPK was affirmed to be constitutional, the strategic powers of the KPK were also declared not contradictory with the 1945 Constitution, even in line with the extraordinary legal politics of corruption eradication.

Thus, such authorities held by the KPK should not be reduced or limited, for example through amendment of the KPK Law that eliminate prosecutorial powers, or restrictions on wiretapping by permission from a judge. When our judicial condition is improved, asking wiretapping permission to a judge is appropriate. But when our judges are still vulnerable to corrupt practices, then judge's permission for wiretapping should not yet be included in the KPK working system. Matters related to wiretapping should be formulated in a law, in accordance to MK decision, while the technicalities become jurisdiction of the KPK itself to set, while the implementation is audited by other competent agencies, such as Kemenkominfo.

b. Empowering the KPK through Representative Offices

Matters related to representative offices is not a must for an anti-corruption commission. Therefore, the Jakarta's Principles does not include any principle that require representative offices for an anti-corruption commission. This is more to the efforts to expand the Commission's efforts in corruption eradication, especially in a country with vast area, and corruption is still rampant.

Certainly, globally, most of the anti-corruption commissions chose to open representative offices to improve efforts to combat corruption. Evidently, from 49 countries reviewed by the KPK the majority of countries have representative institutions, i.e. 32 countries, while the remaining 17 countries do not have representative offices, including the KPK of Indonesia. Although the 32 countries that have representative offices, not all of them have representatives in each region (province or state). Indonesia is among the majority of countries which do not have representative offices in regions.



From the chart on regions with the most corruption cases, it is evident that the KPK is still focused on corruption at national level. At regional level, Banten remains the province with the most corruption cases at the KPK, followed by Riau and Riau Islands. The author himself has similar view with PuKAT Korupsi that, it would be better for the KPK to open representative offices with consideration of human resources and financial capacity, as well as selecting areas that in the need of representative office, because it is in line with KPK's corruption eradication roadmap, especially when the area has many corruption problems, like Riau for example, where three of the governors were involved in corruption at the KPK.

3. Improving KPK Control System

As an independent state agency, it does not necessarily mean the anti-corruption commissions is free from the control system. Moreover, an independent agency usually also has great authorities. Therefore, an independent state agency that has strong authorities like the KPK in fact needs precisely control functions to prevent abuse of power. However, the control system must also be designed so it would not instead give room for intervention that actually endangers independence.

Thus, the control system should start from: one, within the individuals of the commissioners and staff of the Commission themselves. This means that the commissioners selection process and recruitment must be made very selective to ensure that only people of best integrity and competence are selected. Furthermore, two, internal-institutional control systems within the Commission itself needs to be strengthened, namely by strengthening the code of conduct and enforcement

of such codes of conduct in internally. Currently the code of conduct of the KPK is considered one of the best, but it still needs to be re-evaluated in order make it more assertive and effective. The third control system is of course from external KPK. The control system is thus a part of the checks and balances system that also applies even to the independent state agency. That means, the KPK should still be able to be controlled properly by the parliament in terms of supervision from the people; through the BPK when it comes to financial audit; through Kemenkominfo to audit interception performance; and through the corruption court in relation to its enforcement authority.

Matters related to monitoring of independent state agency such as the KPK need more serious study on its relations to other primary constitutional organs. Every primary constitutional organ has its own degree of independence, which prevents intervention from other institutions; but it does not close the possibility of cross-control mechanism. Therefore, the formulation on how independence can be maintained on one hand, with working cross-control mechanism between institutions on the other hand, is a concept that needs to be strengthened in line with the more mature democracy in a country.

Surely, independency is more attached to institution and its authority duties, not attached to individual leaders or members. Especially if the individual has committed a crime, then there is no protection at his disposal for the shelter, nor the concept of institutional independence. Every individual who breaks the law, must equally be processed. The concept of limited immunity held by every state institution, including an independent institution such as the KPK, cannot lead to the commissioners or employees being free to break the law. However, it must be ensured that the legal process imposed is not a form of counter-attack, that is why, in some countries the immunity is granted until the end of the term of office. I agree to such a concept of limited immunity, except in cases of serious crimes that are caught red-handed. For example if KPK commissioners were caught red-handed accepting bribes, or becoming a drug dealer, he must still be legally processed, and cannot hide behind the concept of limited immunity.

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CHAPTER IV
CLOSING

After 12 (two) twelve years the KPK has been carrying out its duties as an independent commission to combat corruption, it is natural to do an evaluation. Surely, there are achievements beside the shortcomings that should be improved. The previous section has comprehensively explored what are the achievements and notes on improvements, which will not be entirely repeated in this section. What is certain is the KPK should further be strengthened, not weakened, let alone dissolved.

Some shortcomings of course need to be corrected for example enforcement against law enforcement officers which is still minimal; prevention through coordination and supervision authority is still not working optimally; and the realization of the budget that still does not meet the expectations of planning. Those things are very essential for the success of the work of the KPK. The intention is not to catch as many law enforcement officers as possible, but to eradicate the practice of legal mafia, which in consequence would require increased enforcement against law enforcers, as the Commission has been quite successful in carrying out enforcement duties in other state institutions.

Enforcement on corruption by law enforcers would be very significantly impact on the prevention side, including the importance of coordination and supervision authority held by the KPK. The fact that the Commission is always dealing with "counter-attack" whenever attempting to crack down on alleged corruption by unscrupulous police officers shows that more serious efforts against corruption by law enforcement officers must be more intense.

On institutionality, the KPK should be improved from just based on a law to a constitutional organ that is stipulated in the 1945 Constitution. Then, KPK's independence needs to be strengthened by improvement in recruitment system and limited protection to commissioners and employees of the Commission; including the authority to recruit its own investigators and prosecutors who are permanent and no longer part of other law enforcement institutions. Furthermore, assurance of budget availability, including remuneration for commissioners and employees of the KPK that hires the country's best individuals, must also be highlighted.

On the side of authority, what already held by the KPK today must be guarded from being reduced, particularly through amendment of the KPK Law. Conversely,

the strengthening of the authority should be given to the KPK in accordance with the decision of the Constitutional Court which confirms the Commission's strategic powers, including the Court's emphasis that the extraordinary legal politics of corruption eradication is not contrary to the 1945 Constitution.

Last but not least, the control system within the KPK needs to continue to be improved, in terms of internal-personal, internal-institutional, and external that stand on the basis of checks and balances mechanism.

Finally, corruption eradication by the KPK is actually our efforts as a nation to be more independent from corruption. The KPK is us. We who want Indonesia to be increasingly prosperous, fair and democratic. Every attempt against the occupiers still needs leaders. True is what Quah says, "Political will is perhaps the most important precondition for the effectiveness of an ACA".[213] Efforts to eradicate corruption-though obviously is law enforcement efforts, it must be admitted-would never succeed without strong political support. Those who have the responsibility that the political supports remain in line with the anti-corruption agenda are political leaders. Although, we cannot just give the responsibility and trust them. We, the people of Indonesia, still need to ensure that the leaders are in line with the efforts of the nation to struggle for freedom from colonialism of corruption. If they are with us, we fully support them, if they are defectors, we will make sure they will never lead our struggle against colonialism of corruption again.

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[213] Quah, page 89

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ABOUT THE AUTHOR

Denny Indrayana, born in Kotabaru, Laut Island (Pulau Laut), South Kalimantan on December 11, 1972. He grew up and completed his education up to high school level in Banjarbaru, in the same province. Within the time span, Denny lived in Manokwari, West Papua, for two years, following his father who was assigned there. Choosing law as the area he wanted to be expert on, Denny went to study at the Faculty of Law, University of Gadjah Mada in 1991 and was graduated in 1995. In 1996, Denny flew to the United States to advance his study at the University of Minnesota and earned his Master in Law (LL.M.) in 1997. Then, in 2002, he went to Australia to study at the Melbourne Law School, University of Melbourne, and managed to add Ph.D. behind his name in 2005.

In the professional world, in 1997, Denny started it with a legal consultant at a law office in Jakarta, before deciding to move and settle in Yogyakarta in 2000. The big plan of becoming a teacher encouraged him to leave Jakarta. In Yogyakarta, Denny began his career as a lecturer at the University of Muhammadiyah Yogyakarta (2000), he was subsequently accepted as a civil servant at the Faculty of Law UGM in 2001. Until today, Denny is still listed as a lecturer there. From the campus to the Palace. This is the big leap made by this Banjar boy. Especially because Denny was previously widely known as an NGO activist. In 2000-2001, he

was Secretary General of the Indonesian Court Monitoring, and then became director of the same NGO in 2005-2007. In 2006, Denny founded and became Chairman of the Center for Anti-Corruption Studies (Pu-KAT Korupsi) Faculty of Law UGM. The position was then given up, when in 2008, Denny was appointed as the Special Staff of the President for Legal Affairs. Then, his position in 2009 was expanded into the Special Staff of the President for Legal Affairs, Human Rights and Eradication of KKN.

In addition to serving as Special Staff of the President, several other important positions were served by Denny. In 2009, President Susilo Bambang Yudhoyono formed the Team 8 to resolve a case that convolute the two commissioners of the Corruption Eradication Commission: Bibit Samad Riyanto and Chandra M Hamzah, he was appointed as Secretary. Likewise, when the Legal Mafia Eradication Task Force was established by the President, Denny was appointed as Secretary. Then in 2011 - 2014, Denny Indrayana served as Vice Minister of Justice and Human Rights.

The peak of Denny's academic career was earned in September 2010, precisely when the Faculty of Law, Gadjah Mada University, his almamater where he also lectures, bestowed Denny as Professor of Constitutional law. This title was obtained in recognition to his activities in producing scientific works by delivering presentations and writing papers for scientific journals at home and abroad. Therefore, after completing his tenure, Denny returned to his almamater in UGM, and until today he is a Visiting Professor at the Melbourne Law School, and Faculty of Arts, University of Melbourne. Since mid-2016, Denny has been appointed as Associate Director of CILIS (Centre for Indonesian Law, Islam and Society) in the Melbourne Law School. Earlier, at the beginning until the end of 2015, Denny was also a Senior Advisor to the issue of Anti-corruption and Legal Assistance at the Australia Indonesia Partnership for Justice.

In addition to this "Don't Kill the KPK" book, which is his ninth book, other books written by Denny are: 1) Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition, (2008); 2) Negeri Para Maûoso/A Nation of Mafioso (2008); 3) Negara antara Ada dan Tiada/A Country between present and absent (2008); 4) Amandemen UUD 1945: Antara Mitos dan Pembongkaran/1945 Constitution Amendment: Between Myth and Dismantlement (2007); 5) Indonesia Optimis/Optimistic Indonesia (2011); 6) Cerita di Balik Berita: Jihad Melawan Mafia/Story behind the News: Jihad against Mafia (2011); 7) No Wamen No Cry/No Vice Minister No Cry (2013); and 8) Jangan Bunuh KPK/Don't Kill KPK (2016).

For his works and achievements, Denny has received several awards from Indonesia and overseas. He received a scholarship to complete a doctoral program at the University of Melbourne from Australian Development Scholarship, Australia. From the land of kangaroos, in 2009, he was awarded the Australian Alumni Award in the field of Sustainable Economic and Social Development. In addition, in two consecutive years, 2009 and 2010, Denny was chosen to be legal icon by Gatra Magazine. In 2013 Denny was named the Public Man of the Year by the Press Labour Association. Recently in 2014, Denny was bestowed the Mahaputra Star award from the President of Indonesia. (*)

Keep on fighting
for the better Indonesia

Don't Kill KPK

Corruption Eradication Commission

I know the author of this book, Prof. Denny Indrayana, not only as an academic, but also as an anti-corruption activist who has long been a consistent champion on anti-corruption issues. I, Mr. Bambang Widjojanto, Prof Denny and other anti-corruption activists have already felt how hard and challenging such struggles are, starting from being put into the intelligence's list, terrorized and intimidated, to criminalization.
(**Abraham Samad**, KPK Chairman 2011-2015)

The "Don't Kill KPK" book becomes relevant material in today's context. There is a terrifying force that wants to "destroy" the KPK's credibility. Hopefully this book can be a signal and commitment that the hope to improve people's welfare still exists, and must be sustained to fight for, whatever "cost" it may take. Congratulations, colleague Prof. Denny Indrayana. He has endowed another knowledge alms.
(**Bambang Widjojanto**, KPK Deputy Chairman 2011-2015)

"Corruptors Fight Back" in this republic seems to be more than just a figment. Slander civil society organizations that work in combating corruption. For the activists, threaten them with various offenses and petty mistakes that can be used to hit back. The author of this book himself is also experiencing it.
(**Zainal Arifin Mochtar**, PuKAT Korupsi, Faculty of Law, UGM)

This study on the KPK's institutionality aims to provide a strong perspective to the public at large about the importance of an independent anti-corruption commission. The qualifications of the author are certainly undeniable. He is a complete personal, be him as an academic and a state official recognized for his efforts to improve the governance of correctional facilities, especially for perpetrators of corruption, improvement of passport services, and others, as well as anti-corruption activist who has been directly involved in advocating on a wide range of public policies for the purpose of combating corruption.
(**Adnan Topan Husodo**, ICW Coordinator)

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