Questioning the Independence of the Corruption Eradication Commission (KPK) and Judicial Restraint

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Abstract. The Corruption Eradication Commission (KPK), an independent state institution, continues to face threats. The extension of the term of office of the current KPK chairman through the decision of the Constitutional Court (MK) Number 112/PUU-XX/2022 is not based on the principle of universal law, namely, the principle of non-retroactivity. This study aims to examine two problems: the legal implications for the independence of the KPK after the Constitutional Court's decision and the judicial restraint on the position of the Constitutional Court in extending the term of office of the KPK leadership. This study used normative legal research with a statutory approach. The results of this study showed that the degree or degradation of KPK independence is increasingly evident. The extension of the term of office through a retroactive Constitutional Court decision violated the universal principle of law. The extension of the term of office of the current KPK chairman has no urgency because they still have the opportunity to be re-elected in the next period.

Keywords: Corruption Eradication Commission, Independence, Constitutional Court, and Judicial Restraint.

1. Introduction

The Corruption Eradication Commission (hereinafter referred to as KPK) is a state institution that, in the execution of its duties and powers, is expected to maintain independence and remain free from the influence of any other institutions. This is particularly crucial given that the KPK is an institution tasked with eradicating and preventing corruption in Indonesia. [1] This signifies that the KPK holds "pro justitia" authority in executing tasks encompassing investigation, prosecution, and the handling of corruption cases. Nevertheless, in recent times, the perception of the institution's independence has become increasingly skewed, owing to ongoing endeavors that undermine the integrity of the KPK. Efforts to weaken the KPK include the revision of the Law on KPK, which fundamentally alters its structural organization, as well as the ambiguity in the position of the KPK within the executive branch. [2]

The most recent effort that continues to undermine the independence of the KPK is the decision made by the Constitutional Court (MK) in Case Number 112/PUU-XX/2022, which extends the term of the KPK chairman from 4 to 5 years.

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This decision has garnered significant public attention since, instead of being applied for future terms (prospectively), it has been implemented retroactively. Furthermore, the individual who submitted the application to challenge the law is none other than the current commissioner, who is not only presently in office but also set to conclude his tenure in December 2023. Additionally, it is evident that a conflict of interest exists, despite the applicant written in the application having categorized himself as a citizen.

Zainal Arifin Mochtar previously conducted research on the topic of KPK independence in 2021 under the title Independence of the Corruption Eradication Commission after Law Number 19 of 2019. The results of this study showed that the KPK as an anti-corruption institution requires independence in eradicating corruption, considering that the crime of corruption is an extraordinary crime, and the second amendment to the KPK Law has resulted in further erosion of its independence. Another study was conducted by Kartika S. Wahyuningrum, Hari S. Disemadi, and Nyoman S. Putra Jaya with the title Independence of the Corruption Eradication Commission: Does It Exist? The findings of this research are that the amendment of Article 3 of the KPK Law has eliminated the independence of the KPK, in addition to the transfer of the status of KPK employees to the State Civil Apparatus, and the establishment of the KPK supervisory board has resulted in the independence of the KPK owing to the limited space for the KPK to carry out its duties and functions. Furthermore, another study was conducted by Muhammad Habibi with the title Independence of the Authority of the Corruption Eradication Commission after the Amendment to the Corruption Eradication Commission Law. The results of this study revealed that amendments to the KPK Law as a whole have not created the concept of an independent state institution. This is because there are still arrangements for changing articles that interfere with the independence of the KPK's authority in prosecuting corruption.

Based on this proposition, the research highlights the independence of the KPK and judicial restraint after Constitutional Court Decision Number 112/PUU-XX/2022. This study aims to determine the implications of the independence of the KPK after the Constitutional Court's decision. Furthermore, this research will also determine how judicial restraint affects the position of the Constitutional Court towards the granting of the application for the extension of the term of office of the KPK chairman.

2. Problems

Building upon the previously established premises, the author identifies several critical questions that warrant exploration within this study:

a. What are the legal implications surrounding the independence of the KPK in light of the Constitutional Court's decision?

b. What are the exercising Judicial Restraint in Response to the Constitutional Court's Involvement in Extending the Tenure of KPK Chairmen?

3. Method

This study is normative legal research conducted by examining library materials or secondary data through three legal materials (primary, secondary, and tertiary legal materials). [3] Secondary data are used to explore legal provisions and beneficial legal principles, books, or other documents related to the research under study. This study was conducted using a statutory approach. This approach is carried out to find legal principles regulating the independence of the Corruption Eradication Commission.

4. Discussion

4.1 Legal Implications of the KPK Independence Following Constitutional Court Decision

Observing the systems of state administration across different countries, it is evident that many have adopted Montesquieu's concept of the separation of powers. Nevertheless, as the dynamics of state administration continue to evolve over time, the conventional trias politica framework has become insufficient and less applicable as a foundational system for modern governance. This is due to the fact that the traditional model of three distinct branches of power exclusively interacting through an executive interface is no longer feasible. [4] Furthermore, the state's increasing needs in serving citizens. Therefore, one of the developments that emerged in constitutional practice was the creation of new independent state institutions, agencies, and commissions as state organs to answer these needs. [5]

State apparatus, as described by Hendra Nurtjahjo and elucidated in research by Nehru Asyikin and Adam Setiawan, encompasses a variety of designations. These encompass terms such as organs, institutions, bodies, forums, agencies, additional institutions, state auxiliaries, independent state bodies, self-regulatory bodies, quangos (quasi-autonomous non-governmental organizations), and state enterprises. [6] Irrespective of the terminology employed, these supplementary institutions serve a common purpose: to address the intricate demands of state administration. Consequently, the establishment of these additional institutions is crucial for fostering the effective functionality of state administration.

One of the state auxiliaries within Indonesia's system of state administration is the KPK. Given its functions and responsibilities, it is a reasonable expectation that the KPK should remain immune to interventions from external parties or institutions. This expectation is particularly valid since the KPK was established as an independent entity, entrusted with addressing the pervasive issue of corruption in Indonesia—an extraordinary crime. Jimmy Ashiddiqie further elaborates that the establishment of independent state agencies underscores the necessity of diffusing power away from bureaucratic structures and traditional government organs, which have traditionally held authoritative power. [7]

According to Black's Law Dictionary, independence refers to a state in which something does not rely on or is not subjected to control, limitations, alterations, or constraints from external sources beyond what has been provided. [10] In the

Dictionary, the Indonesian Language Major (KBBI) is independent of its own standing meaning: alone, soulful free, no bound, free, and free. [9] This implies that the concept of independence that the KPK should possess is actually in harmony with the notion of requiring state auxiliaries. The reasons or background behind the establishment of the KPK as an additional state agency include:

a. The escalation in the complexity of state duties and powers, necessitating the creation of supplementary independent institutions to effectively manage these functions;

b. The endeavor to enhance the capabilities of existing state institutions by instituting new entities that are more specialized and systematically organized. [10]

Furthermore, there exist several criteria that the KPK should have to be both an additional and independent institution. These criteria include:

a. Explicit declaration by the congress written in the legislation that the institution is designed to be genuinely independent;

b. The President does not have the authority to unilaterally dismiss leaders from a specific institution;

c. The absence of a singular leadership figure; instead, a collective leadership structure should be present;

d. Leadership positions should not be subject to control by any particular political party; And

e. Leadership positions should not be subject to control by any particular political party. [10]

Furthermore, according to Article 3 of Law Number 30 of 2002 on The Corruption Eradication Commission, the KPK is established as a state institution that conducts its duties and wields its powers with autonomy, devoid of external influence. This signifies that when executing its responsibilities concerning corruption, the KPK should operate with complete freedom and independence, not only from interventions by other agencies but also from other state officials. [2]

However, due to the subsequent amendment of Law Number 30 of 2002 on on The Corruption Eradication Commission, as modified by Law Number 19 of 2019 on the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission (referred to as the Law on KPK), the formerly independent state agency, the KPK, has undergone a decline in its status. This degradation is evident through the revised Article 3 of the Law on KPK, placing the KPK under the umbrella of the executive branch of power. When in fact, as previously stated, the concept of trias politica as a system for state administration has become inadequate and insufficient.

The amendment to Article 3 of the Law on the KPK is undoubtedly influenced by the role played by the Constitutional Court. This sequence of events began with the establishment of a special committee within the DPR for a parliamentary inquiry,

which was one of the institutional rights granted to the DPR. This committee was formed to oversee the KPK's activities, but this matter eventually became the subject of constitutional review. In Decision Number 36/PUU-XV/2017, the Constitutional Court ruled that the DPR cannot subject the KPK, as an independent institution, to parliamentary inquiry. Ironically, this conclusion was reached based on the textual clarity that the KPK falls under the jurisdiction of the executive branch of power (vide 3.23.1, page 111). These developments have led to a noticeable decline in the degree of the KPK's independence as an autonomous institution.

Whereas, reflecting on the history of Constitutional Court rulings, there are four pivotal decisions that underscore the interpretation of the KPK's position as an independent institution, holding a significant role within the state's power structure. [11] The aforementioned decisions include Decision Number 012-016-019/PUU-IV/2006, Decision Number 37-39/PUU-VIII/2010, Decision Number 5/PUU-IX/2011, and Decision Number 49/PUU-XI/2013. Ironically, however, the trend of diminishing the KPK's independence is perpetuated once again by the second amendment to the Law on the KPK, especially according to Article 3, as confirmed by the Constitutional Court's ruling based on Decision Number 70/PUU-XVII/2019. This ruling reaffirms that the KPK is indeed positioned under the executive branch of power.

These concerning trends, indicating a problematic inclination toward diminishing the independence of the KPK, persist up to the present day. This is particularly evident when considering recent events, such as the Constitutional Court's approval of the application to extend the KPK leadership's tenure from the previously established 4 (four) years to 5 (five) years. Consequently, Article 38 of the Law on the KPK is found to be inconsistent with the 1945 Constitution. The extension of the KPK leadership's term through the Constitutional Court's Decision Number 112/PUU-XX/2022 is seen by the author, especially looking at the section of legal considerant, as introducing two distinct issues, both juridical and non-juridical.

Based on the juridical perspective, the problem emerges from the immediate enforcement of the ruling to extend the term of office of the current chairman, who is still actively serving. This enforcement is undeniably in conflict with the universal legal principle of non-retroactivity. As elucidated by Ferry Amsari and Bivitri Susanti, the implementation of the Constitutional Court Ruling should not only consider the date of the decision but also take into account the ongoing tenure period of the current KPK chairman. [12], [13] This implies that the ruling should ideally be implemented for upcoming KPK chairpersons (in a prospective manner).

From a juridical perspective, the author believes that the issue is evident within the "legal considerant" section. In this regard, the Constitutional Court seems to find the duration of the KPK chairman's single term, set at four years, to be unequal compared to the terms of leadership for other independent commissions or institutions. Taking into consideration that the Constitutional Court's rulings are expected to be both final and binding, applicable to all (erga omnes), and established as jurisprudence during constitutional review decisions, the analysis of state agencies' leadership tenures and their associated threshold limits reflects the Constitutional Court's role in shaping an open legal policy on behalf of the legislative body.

If the legal consideration is based on the perceived injustice stemming from the comparison with the tenure periods of leaders within other independent institutions or commissions, this approach has the potential to undermine the constitutional significance of the KPK as an independent body. Consequently, the ruling's implications should also extend to the tenure period of constitutional judges, as outlined in Law Number 7 of 2020 on the Third Amendment to Law Number 24 of 2003 on the Constitutional Court (hereinafter referred to as the Law on the Constitutional Court). In relation to this matter, Arsul Sani explains that the Constitutional Court's ruling concerning the extension of the KPK chairman's term should not only prompt an immediate revision of the Law on the KPK but should also prompt amendments to the Law on the Constitutional Court. [14] Furthermore, from the viewpoint of the state administration system's concept, by issuing a ruling that declares Article 34 inconsistent with the 1945 Constitution, the Constitutional Court has effectively implied that the legislative body tasked with drafting the Law on the KPK (in this instance, the DPR along with the President) has abused its authority in formulating the provisions of the said article.

Another issue arises from a juridical perspective. Considering that the Constitutional Court's ruling as a form of jurisprudence holds the characteristics of being final, binding, and universally applicable, it follows that constitutional review should extend to encompass both the parliamentary threshold and the presidential threshold. Notably, constitutional reviews regarding the presidential threshold have been conducted a total of 21 times between 2017 and 2022, [17] has underscore the Constitutional Court's role in shaping an open legal policy, effectively extending from the legislative body. This scenario highlights that the Constitutional Court appears to deviate from adhering to its own established rulings. Even Mahfud MD has expressed his view that the Constitutional Court's decision to extend the term of the KPK chairman contradicts their own prior decisions. This incongruence is noteworthy, as all Constitutional Court rulings are expected to be upheld consistently. [16]

Furthermore, from a non-juridical perspective, the issues surrounding the extension of the term of the current active KPK chairman can also be scrutinized through the lens of the individual judges' opinions. Notably, aside from the five constitutional judges who supported the review application, the remaining four constitutional judges expressed dissenting opinions. Constitutional Justices Suhartoyo, Wahiduddin Adams, Saldi Isra, and Enny Nurbaningsih, who formed the dissenting group, emphasized that the request for the Court to interpret Article 34 of Law 30/2002 as "the Chairman of the Corruption Eradication Commission holds the position for 5 (five) years" lacks legal foundation and thus should be rejected (vide 6.10., page 129). Their stance hinges on the assertion that the KPK, as an independent institution, holds constitutional significance, despite not being explicitly stipulated in the 1945 Constitution. This importance is underscored by the Constitutional Court in various other rulings, particularly in the context of combating corruption (vide 6.4., page 124).

Based on the elaboration provided above, the concerns raised by the five constitutional judges who rendered the ruling to approve the application for extending the term of the currently active KPK chairman constitute a non-juridical issue.

Specifically, the lack of urgency to enforce the aforementioned ruling onto a currently active KPK chairman is problematic, as it contravenes the principle of non-retroactivity. Moreover, this scenario disregards the original understanding that the KPK chairmen were expected to conclude their tenures on December 20, 2023, [17] when the President has taken steps to establish a committee for the re-election of KPK chairmen. Consequently, the current KPK chairmen who are in the midst of their first term of service remain eligible for re-election, adhering to the stipulated terms and conditions for their potential second term.

Furthermore, the lack of urgency to extend the term of the currently active KPK chairman could potentially undermine the public's trust in the KPK. This apprehension is supported by the findings of a survey conducted by the Lembaga Survey Indonesia (hereinafter referred to as LSI) in April 2023, which indicated a decline in approval ratings from 68% in the previous month of February to 64%. [18] These survey results signify a noticeable decrease in the public's trust in the KPK. This decline is especially significant when combined with the assortment of allegations pertaining to ethical problems linked to the KPK chairmen. [19]

4.2 Exercising Judicial Restraint in Response to the Constitutional Court's Involvement in Extending the Tenure of KPK Chairmen

The Constitutional Court possesses the jurisdiction to undertake constitutional reviews, serving as a vital component of checks and balances within the national state administration framework. This system of checks and balances offers a mechanism for overseeing legislation produced by the legislative body, comprising the DPR in conjunction with the President. Consequently, any legal norm that has been formulated can be subjected to scrutiny for its conformity with the Constitution through the avenue of constitutional review. M. Fajrul Falaach clarifies that the purpose of constitutional review is to uphold the Constitution, thus necessitating that all written legislation and legal actions remain in harmony with its provisions. [20] This consequently establishes the perception that the Constitutional Court functions as both the custodian of the Constitution and the primary interpreter of its provisions.

The principles of checks and balances extend beyond conferring oversight solely on the Constitutional Court over other state institutions. These principles are equally applicable to the Constitutional Court itself, imposing limits on its exercise of authority to prevent it from assuming the role of other state agencies. The limitation of restraint by the Constitutional Court, known as judicial restraint, is inseparable from the function of checks and balances created so that power does not rest on one state institution alone. This recognition stems from the division of the Indonesian state administration system into three distinct branches: executive, legislative, and judicial.

Historically, the establisment of the Constitutional Court within the Indonesian state administration system was intended to uphold the principle of checks and balances, ensuring parity among all state agencies and fostering equilibrium in the functioning of state administration. [21] Nevertheless, while upholding the checks and balances principle, it's equally vital for the Constitutional Court to recognize its boundaries and refrain from encroaching upon the jurisdiction of other state agencies. Avoiding or minimizing conflicts arising from overstepping into their domains is

crucial. In practice, instances have emerged where the Constitutional Court's rulings have displayed inconsistency, regardless of whether they pertained to their rightful jurisdiction. Hence, enforcing limitations on the Constitutional Court, in the form of judicial restraint, emerges as a significant measure to uphold the balance and harmony among state institutions.

The concept of judicial restraint was initially proposed by James B. Thayer. It aims to curtail and confine the courts from formulating policies that should properly fall within the realm of legislators, executives, and the agencies tasked with drafting legislation. [22] On the other hand, Aaron Barak elaborated that judicial restraint involves judges exercising caution in generating new legal norms when adjudicating cases. This approach aims to strike a balance between conflicting social values. [23] Lastly, according to Rebecca Zietlow, judicial restraint entails judges acknowledging and respecting the authority of other branches of political power, which are designated as the authoritative bodies responsible for legislating within a democratic framework. [23] Therefore, judicial restraint is a form of effort by the judicial branch of power not to hear cases that could interfere with other branches of power; the court is only allowed to hear cases that are determined imitatively based on the law as its authority.

Furthermore, Richard A. Posner, in Radian Salman's research, explains that the restriction or restraint of judges in court in carrying out their duties is divided into three categories, namely:

a. Legalism or formalism: judges only carry out the law according to the rules, and may not make the rule of law.
b. Modesty, institutional competence, or process jurisprudence: judges must respect and not enter the realm of legislative or executive authority when making laws, decisions, and/or policies.
c. Constitutional restraint, which places judges unwilling or at least very careful and thorough when declaring the unconstitutionality of executive and legislative decisions or actions because if they are not careful and thorough, the consequences can have a very broad impact on social life. [24]

Therefore, the author argues that courts and judges must understand the limits of their authority so that judges are willing and able to limit or restrain themselves from adjudicating or making policies that are not within their authority.

In the context of testing the constitutionality of a law, judicial restraint is defined as an attitude of restraint that regulates the extent or intensity of the court's willingness to scrutinize a legislative decision and the reasons given to support that decision. [25] As for the attitude of restraint, this does not mean that the judiciary cannot or refuse to test a legal product, but rather when and for what issues the judiciary must refrain. According to Aileen Kavanagh, judicial institutions must have a measure of their degree of authority as a parameter for when to act and when to refrain. [25] Therefore, the awareness and inner attitude of judges are very much related to the application of judicial restraint as well as when forming a decision that has a judge's consideration.

The justification for the application of judicial restraint is, in principle, the root of institutional restrictions on the courts, along with the concept of propriety of the constitutional relationship between the legislature and the judiciary. [26] One form of judicial restraint by the Constitutional Court through constitutional review is the examination of open legal norms (open legal policy). This is because, as an understanding, open legal policy is an open legal policy whose formation authority is an initiative of the legislator. In the formation of legal norms, authority is in the House of Representatives (DPR). As its authority is explicitly regulated in Article 20 paragraph (1) and Article 20A paragraph (1) of the 1945 Constitution, coupled with joint approval with the president by Article 5 paragraph (1) and Article 20 paragraph (2) of the 1945 Constitution, the law-making authority of the DPR is directly commanded by the 1945 Constitution as an open legal policy.

The ruling that approved the extension of the KPK chairman's term through the Constitutional Court Decision Number 112/PUU-XX/2022 can be perceived as inconsistent concerning the duration of leadership for state institutions. This inconsistency is evident when comparing this ruling with others, such as Decision Number 14/PUU-XI/2013 regarding the presidential threshold, Decision Number 52/PUU-X/2012 and Number 14/PUU-XI/2013 concerning the parliamentary threshold, and Decision Number 53/PUU-XIV/2016 and Number 73/PUU-XIV/2016 on the delegation of authority to determine the term of office for constitutional judges. These decisions were classified by the Constitutional Court as being within the purview of open legal policy vested in the legislative body. Notably, the term period for the KPK chairman doesn't even pertain to a constitutional issue, further highlighting the incongruence in the Constitutional Court's approach.[27] Even in the context of the most recent issue, the extension of the term for village heads (kepala desa) has also been established as falling under the jurisdiction of the legislative body (in this case, the DPR in collaboration with the President).[28]

Furthermore, referring to the previous decisions of the Constitutional Court and reflecting on the material of the lawsuit, which is an open legal policy, the application for the extension of the term of office of the KPK chairman should be rejected or unacceptable by the Constitutional Court. This is because the determination of the term of office and the requirements for candidates for KPK leaders are matters that are fully within the authority of the legislators as an open legal policy, namely, the DPR and the President, not the Constitutional Court. In addition, the Constitutional Court is not a fully democratic state institution because it is not directly elected by the people, whereas the term of office is closely related to the domain of open legal policy formulation. This means that the extension of the term of office of the leadership of any institution should be carried out through the law-making body, namely, the legislature, which is officially sovereign as the people's representative and in which there is a public participation process.

Furthermore, it's important to note that even though these matters are connected to open legal policy, the scope of which is not explicitly defined within the 1945 Constitution. This situation aligns with the findings of a study conducted by Ivan Satriawan and Tanto Lailam, revealing that the concept of open legal policy evident in various Constitutional Court rulings lacks clear delineations as stipulated in

the 1945 Constitution. [21] Even in Iwan Satriawan and Tanto Lailam's research, several Constitutional Court decisions containing an open legal policy are often misguided and not based on a strong constitutional basis. [20] Therefore, if an open legal policy is left unchecked without clear boundaries, it will create uncertainty and confusion in society. Therefore, if open legal policy continues to be left unchecked without clear boundaries, it will create uncertainty and confusion in society.

5. Conclusion

The extension of the term of office of the current KPK chairman through a decision of the Constitutional Court (MK) further degrades the tendency or degree of independence of the KPK. There are juridical issues such as the fact that the validity of the Constitutional Court's decision is not based on the principle of non-retroactivity as a universal legal principle, that the Constitutional Court does not comply with its decisions as jurisprudence, and that the Constitutional Court's decisions are final and binding. In addition, the non-juridical issue is that there is no urgency to extend the term of office of the current KPK chairman, because there is still a chance to be re-elected in the next period. The Constitutional Court, in carrying out its functions and authorities, must continue to carry out the principle of checks and balances in order to maintain a balance between branches of power in state administration. The extension of the term of office of the KPK chairman through constitutional review by the Constitutional Court has exceeded its authority by taking authority from legislators (DPR together with the President) as an open legal policy. Based on the conclusions of the problems discussed, it is necessary to conduct further research that focuses on the independence of the KPK after the extension of the term of office and clear or ideal arrangements regarding open legal policy in constitutional reviews. This is because each institution has authority over the distribution of power that has been regulated; therefore, there is no longer one institution taking the authority of another institution.

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