



THE INDEPENDENT STATE COMMISSION IN INDONESIA: A COMPARATIVE REVIEW OF ITS INSTITUTIONAL ASPECTS

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ABSTRACT

The establishment of the Independent State Commission and other non-structural institutions was one of the alterations in the structure of the Indonesian constitution during the transition era and after the 1945 Constitution was amended. It is not uncommon for these Commissions to face criticism and controversy due to their autonomous authority and independence from the major branches of power. The objective of this research is to examine and describe the primary traits of such an institution in order for it to be recognized as an Independent State Commission by comparing it to the concept and best practices in the United States. As well as to justify the legitimacy of its position within the Indonesian constitutional framework. As a doctrinal legal research, this study uses a conceptual and legal comparative approach to secondary data presented in a descriptive-analytical manner. The findings revealed that the independent State Commission's two key characteristics were its independence from the executive organs and its autonomous-regulatory power. In terms of legal position, the classical trias politica perspectives need be modified as the Independent State Commission is now viewed as a new branch of government under a new separation of powers framework.

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INTRODUCTION

The increasing Since the 1980s, the organization and functions in the The Organisation for Economic Co-operation and Development (OECD) have experienced a major shift. One of the most dominant trends of public institution in OECD countries is the shift from a centralized and consolidated public affairs, to a decentralized and autonomous public affairs.¹ The public administration system is then separated into various types of autonomous organizations, or independent institutions, which are usually termed as 'Independent regulatory agencies² or Independent state commissions.³

In the context of the state of the Republic of Indonesia, the 1945 Constitution presents its new face after the four sequential changes made by the MPR over the four years from 1999 to 2002.⁴ As stated by Denny Indrayana, although constitutional reform was prepared using a patchwork method and without adequate planning, the 1945 Constitution as the result of the amendment is still more democratic compared to the previous product.⁵ Beside impacting to the constitutional reform, an interesting phenomenon that can be observed is the rise of new state institutions known as independent state commissions.⁶

¹ Ramadani, Rizki, and Andika Prawira Buana. "The Needed but Unwanted Independent Regulatory Agencies: Questioning Their Legitimacy and Control in Indonesia." In *The 2nd International Conference of Law, Government and Social Justice (ICOLGAS 2020)*, pp. 674-684. Atlantis Press, 2020.

²Verhoest, Koen, Paul Roness, Bram Verschuere, Kristin Rubecksen, and Muiris MacCarthaigh. *Autonomy and control of state agencies: Comparing states and agencies*. Springer, (2010). p. 3.

³ Yves, Meny, and Andrew Knapp. "Government and Politic in Western Europe: Britain, France, Italy, Germany." (1998). p. 281.

⁴ Rishan, Idul. "Batas Konstitusional Penggunaan Hak Angket terhadap Komisi Pemberantasan Korupsi." *Jurnal Konstitusi* 16, no. 3 (2019): 630-654. p. 44-45.

⁵ Indrayana, Denny. *Negara antara ada dan tiada: reformasi hukum ketatanegaraan*. Penerbit Buku Kompas, (2008)., p. 263.

⁶ Rishan, Idul. "Relevansi Hak Angket Terhadap Komisi Negara Independen." *Dialogia Iuridica: Jurnal Hukum Bisnis Dan Investasi* 10, no. 1 (2018): 44-64. p. 44-45.



It has become such a requirement in the context of democratic transition that the framework of the constitution must pay attention to concepts or ideas about human rights and democracy. The foundation of an independent State Commission is the most important step in the development and formation of democratic institutions. Arjomand's article has essentially demonstrated that the institutionalization of independent state commissions dominates all stages of legal history. This phenomena is nearly universal in any country that undergoes constitutional revision after transitioning from authoritarian to democratic rule.⁷

As the results of their research, Firmansyah Arifin, et al., conclude that, the change and formation of new institutions in the constitutional structure is a correction to the ways and systems of state power, as a result of demands for reform and aspirations that develop in society.⁸ Similar things was stated by Zainal A. Mochtar, that the tendency to form institution such as Independent comission, becomes inevitable because state institutions whose performance is not satisfactory, are involved in corruption, collusion and nepotism, and the inability to be independent from the influence of other powers.⁹ Thus, the formation of new institutions such as an independent state commission, can be interpreted as an effort to encourage the realization of the ideals of a democratic state (*demokratische rechtsidee*), the upholding of human rights, as well as a clean and responsible government.

From a historical perspective, reffering to best practice in many countries, it is not enough to develop democracy by relying solely on the branches of power introduced by Montesquieu. These branches of legislative, executive and judicial power are seen as incapable and no

⁷ Arjomand, Said Amir. "Law, political reconstruction and constitutional politics." *International Sociology* 18, no. 1 (2003): 7-32. p. 9.

⁸ Firmansyah Arifin, et al., *Lembaga Negara dan Sengketa Kewenangan Antar Lembaga Negara*, Jakarta: Konsorsium Reformasi Hukum Nasional bekerjasama dengan Mahkamah Konstitusi Republik Indonesia, 2005. p. 1

⁹ Mochtar, Zainal Arifin, and Iwan Satriawan. "Efektivitas Sistem Penyeleksian Pejabat Komisi Negara di Indonesia." *Jurnal Konstitusi* 6, no. 3 (2009): 155. p. 146.



longer effective in resolving existing "day to day" problems.¹⁰ At present, the institutional format of the State organization with the complexity of its administrative system has been very far developed, and it seems difficult if it must be correlated with the classic paradigm of the Montesquieu trias politica from the eighteenth century.¹¹

After a long time since the formation of the independent state commission, Indonesian constitutional system has not shown clear intention or consistency in positioning these independent state commissions. For Example, in the case which involved The Corruption Eradication Commission (KPK). It must be acknowledged that the institutional design of KPK which stated in its regulation (UU No. 30 year 2002 Jo. UU No. 19 year 2019) almost entirely in accordance with the concept of modern independent state commission. However, its existence in Indonesia is the most often reaping conflict and being exposed to various problems. Since the Antasari Azhar Leadership, the term "lizard vs. crocodile" emerged as an analogy of the KPK conflict against the national police department (POLRI). The course of this conflict then not only happened once, but up to three times.¹² The conflicts which occurred varies from the issue of criminalization, to the authority dispute between two institutions.

As a result, these Independent state Commissions have become unclear regarding their position, and their spiritual atmosphere (legal spirit) in the Indonesian constitutional system.¹³ In fact, since the end of the twentieth century, established democracies such as the United States, have developed a variety of new state institutions. The development of state institutions tends to be stable and established because it is based on firm theoretical thoughts and concepts. Therefore

¹⁰ Falaakh, M. Fajrul. "Konstitusi dalam berbagai lapisan makna." *Jurnal Konstitusi* 3, no. 3 (2006). P. 43.

¹¹ Asshiddiqie, Jimly. "Perkembangan & Konsolidasi Lembaga Negara Pasca Amandemen." *Sinar Grafika, Jakarta* (2010). p. 11.

¹² Ramadani, Rizki, and Moch Andry WW Mamonto. "Independency of the Corruption Eradication Commission of the Republic of Indonesia (KPK RI) in Indicators of Independent Regulatory Agencies (IRAs)." *Substantive Justice International Journal of Law* 1, no. 2 (2018): 82-94. p. 91.

¹³ Tauda, Gunawan A. "Kedudukan Komisi Negara Independen dalam Struktur Ketatanegaraan Republik Indonesia." *Pranata Hukum* 6, no. 2 (2011). p. 173.



this paper attempts to analyze the problem regarding the theoretical construction of the authority of an independent State commission. What is the characteristic of the so called independent commission? Also, this paper will discuss relevant concepts to explain the issue of legitimacy for Independent state commission, how can it fits our constitutional structure?

METHODS

As a normative legal research, this research is a study of authority and independence characteristic of independent state commission. Thus, this research requires secondary data such as statutory regulations and previous research from library studies. From its nature, this is a descriptive-prescriptive method of analysis. Information from various aspects of the issues discussed in this research using several approaches, such as statutory approach and conceptual approach. Furthermore, the analysis was carried out using qualitative analysis methods with descriptive analysis.

RESULTS AND DISCUSSION

The Primary Aspects of Independent State Commission

It is difficult to construct a systematic and distinct idea of Independent State Commission in Indonesia. This is due to two factors. First, in the case of Indonesia, there are not many references and literature that explore such a topic in depth in terms of theoretical aspects. Second, contrasts can be observed in the West, where talk concerning independent institutions is fast developing.¹⁴

In general, Independent state institutions are basically organs of the State not different from ministry or police institutions. What distinguishes it from other institutions is the independent characteristics that inherent in these institutions, which then have implications for their position and relationship with other institutions,

¹⁴ Ramadani, Rizki. "Lembaga negara independen di Indonesia dalam perspektif konsep Independent Regulatory Agencies." *Jurnal Hukum Ius Quia Iustum* 27, no. 1 (2020): 169-192. p. 172.



and the nature of their authority.¹⁵ In foreign literature, independent state institutions are called by various terms, although the definition refers to the same entity, which is what we conceptualize as an independent state institution.

Compared to the United States, it can be argued that the term of "Independent State Commission in the context of Indonesia doesn't have any firm or clear definition. Until the present day there has not been a single article in the legislation which mention the term "independent" definitively. In the early time of the UUD NRI 1945 (1945 Constitution) formulation, the Independent institutions has not yet found a place of discussion in the constitutional format,¹⁶ this include the term of "state institution" itself. While the 1945 Temporary Constitution (UUDS), used the term "state equipment" to define state institutions, but still has not specifically embedded the word "independent". The legitimacy for the establishment of independent state institution (LNI) just gained quite good welcome only after the amendment of the 1945 Constitution.¹⁷

In contrast to the fact above, the existence of Independent Commission in United States and Western Europe are legally guaranteed by the legislation and even explicitly and limitatively mentioned. This exist for example in the provisions of The Paperwork Reduction Act 44 (U.S.C. § 3502), which in point (5) states;¹⁸

"The term "independent regulatory agency" means the Board of

¹⁵ Bima, Muh Rinaldy, and Rizki Ramadani. "Position of Supervisory Board Organ and Its Implications for the Institutional Corruption Eradication Commission." *Law Reform* 16, no. 2 (2019): 179-197. p. 183.

¹⁶ Mochtar, Zainal Arifin. *Lembaga negara independen: dinamika perkembangan dan urgensi penataannya kembali pasca amandemen konstitusi*. PT Raja Grafindo Persada, (2016). p. 5.

¹⁷ *Ibid.*

¹⁸ See "The Paperwork of Reduction Act of 1980". As quoted from <https://www.law.cornell.edu/uscode/text/44/3502> This regulation is essentially designed to lighten the administrative burden of government agencies in the private sector by delegating such authority to institutions outside the executive. All of these rules contain procedural requirements for such institutions in exercising their authority.



Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission,and any other similar agency designated by statute as a Federal independent regulatory agency or commission”.

Based on the regulation, it is readily apparent that at least nineteen state institutions have been expressly recognized as independent state commissions. As a result, there is a model or standard for what Independent Regulatory Agencies relate to in the context of the United States. Other institutions that do not fall under the purview of the provision or do not possess the same characteristics as those stated are not considered as independent state commissions. To answer this topic conceptually, we can go to Funk and Seamon's perspectives on independent regulatory bodies or independent state commissions in the context of the United States of America. In Administrative law, Example and explanation, Funk and Seamon state;¹⁹

“There is one category of agencies that is often considered outside of the executive branch - the “independent regulatory agencies.” There are about 15 such agencies, They are called “independent” because they generally share characteristics that insulate them from control by the president that normal, executive agencies are subject to.”

Based on the Funk and Seamon Theory, there is a direct correlation between the term “independent” and the relationship model with the President. An institution could be recognized as independent commission if it is “not” under the direct control of the president (presidential control), where the other institutions such as

¹⁹ William F. Funk and Robert H. Seamon. *Administrative Law: Examples and Explanations*, New York: Apen Law & Bussiness, (2001). p. 6.



ministries are subject to. Furthermore, Funk and Seamon provide the following independent aspect:²⁰ First of all, they are led by multi-member groups rather than a single agency head; second, no more than a simple majority of these members may be from one political party; third, each member of the group has a fixed, staggered term so that their terms do not expire at the same time; and finally, they can only be removed from their position for "cause", in contrast to most executive officials who serve at the president's pleasure.

In order to find out if the above characteristics are exist within the Independent State commission in Indonesian, we can see through the institutional regulation. For example, Law No. 30 of 2002 Jo. Law No. 19 of 2019 concerning the second revision of the Law of Corruption Eradication Corruption. An analysis of the institutional aspects of the KPK as independent state commission can be seen in the following table;

Table 1. Independence aspect of KPK

No	Independence aspects	Article of the UU KPK
1	<i>Headed by multi-member groups, rather than a single agency head</i>	Article 21 (1) no. 3 The Chairperson of the Corruption Eradication Commission consist of 5 (five) Members of the Corruption Eradication Commission
2	<i>No more than a simple majority of these members may come from one political party</i>	Article 29 To be appointed as the Chairperson of the Corruption Eradication Commission must meet the following requirements: ... h. does not become an administrator of a political party
3	<i>The member of the group has fixed, staggered terms</i>	Article 34 The Chairperson of the Corruption Eradication Commission shall hold office for 4 (four) years

²⁰ *Ibid.* p. 7.

	and may be re-elected only for one term
4	<i>Can only be removed from their position for "cause"</i>
	Article 32 (1) The Chair of the Corruption Eradication Commission stops or is dismissed because: a. die; b. term of office ends; c. be accused for committing a crime; d. unable to remain permanently or continuously for more than 3 (three) months unable to carry out their duties; e. resignation; or f. be subject to sanctions under this Law.

Source: Author's Processed Results

In United States, administrative institutions are generally the 'role' of the law. A certain federal institution only sharpens the Congress that formed it to solve certain problems. Congress delegates its authority to the institution like Independent commission to complete the tasks it has in hand along with certain limitations regarding its authority.²¹ This is what is often referred to as "delegation doctrine", it describes the constitutional limits that apply when Congress invest an agency or certain comission with regulatory Power. It was stated by Commers that "*Congress regularly entrust to agency expertise the task of discerning the purpose and boundaries of law*".²²

Based on the principle of delegation doctrine, many independent comissions in the United States are given constitutional authority by the legislature (by law) to exercise power independently. These federal agencies practically carry out special functions of government that Funk and Seamon can characterize as quasi-legislative, quasi-executive, quasi-judicial or a combination of these three

²¹ *Ibid.* p. 31.

²² Kommers, Donald P., John E. Finn, and Gary J. Jacobsohn. *American constitutional law: essays, cases, and comparative notes*. Vol. 2. Rowman & Littlefield Publishers, (2009). P. 323.



functions.²³ An example of such an independent commission is the Environmental Protection agency (EPA) which specializes in the protection of environmental pollution.

EPA literally has regulatory power since it can set rules to prohibit communities from destroying wetlands. The EPA also conducts investigations on those suspected of violating these rules, and if someone has been determined to violate, the EPA can impose sanctions in the form of a number of fines. Thus, it's also has the quasi-judicial authority. To this Funk and Seamon said, "In a sense, EPA acts like a legislature, a police officer, and a court all rolled into one."²⁴

In the case of Indonesia, there is similar case with the formulation of Independent State Commission. Many of those commissions in Indonesia are given authority by law to establish certain regulations which are characteristic of legislative powers. Also, having the authority to carry out the provisions of the regulation as an executive agency, and apply it in specific cases similar to judicial authority. One real example is the mixed function and authority possessed by the Business Competition Supervisory Commission (KPPU) which is almost similar to the Community Future Trading Commission (CFTC) in the United States.

According to Jimly Asshiddiqie, KPPU as an Independent State Commission has quasi-judicial authority. The Law No. 5 of 1999 did not mention the KPPU as a court institution. Its duties and authority are also not related to the task of adjudicating like official judicial bodies. Even so, KPPU theoretically in essence remains a semi-judicial or quasi-judicial institution.²⁵ This judgement is based on the characteristic of its power, which KPPU could do various things such as (i) examine, (ii) provide an assessment, (iii) decide and determine the loss, and (iv) sanction administrative measures in the process of proving cases of

²³ William F. Funk dan Robert H. Seamon, *Op.cit.*, p. 23-24.

²⁴ *Ibid.*

²⁵ Jimly Asshiddiqie, "Fungsi Campuran KPPU Sebagai Lembaga Quasi-Peradilan", Paper Downloaded from http://www.jimly.com/makalah/namafile/61/Makalah_KPPU_Koreksian.pdf. Accessed on June 21, 2023.



alleged violations of monopoly prohibitions and unfair business competition.²⁶

Independent State Commission as The New Branch of Government

The establishment of independent state institutions illustrates the profound and fundamental changes in the style and composition of state organizations today. Today the institutional style of state organizations with the complexity of the administrative system is very far developed, and is unimaginable if it is connected with the paradigm of Montesquie's trias politica in the eighteenth century.²⁷ The essence of the Trias Politica idea is separation power based on the main functions of the state: executive: legislative, and judicial. The executive functions to exercise governmental power; Legislative, making legal provisions to exercise power; Judicial power has the function to adjudicate violations of the provisions of the law which already made.²⁸

In contrast to the classical theory of Montesquieu which introduces the three original branches of power, the existence of an independent state commission today has led to much speculation and analysis about the birth of new powers outside the three branches conventional power. In an article in The Washington Times, entitled Bureucracy: The Fourth Branch of Government, Lawrence J. Fedewa writes that a strong case can be made that the real government of the United States is not the Congress, not the president, not the courts, not the Constitution, but the federal bureaucracy.²⁹ Those bureaucracy nowadays referred to Independent state commission, which have become a veritable fourth branch of the Government. Dobkin also agree that the

²⁶ Article 35 (a), (b), (c), dan (d) Also see Article 36 (c), (d), (e), (f), dan (h) UU No.5/1999

²⁷ Asshiddiqie, J. *Perkembangan...*Op.cit., p. 11.

²⁸ Nurtjahjo, Hendra. "Lembaga, Badan, Dan Komisi Negara Independen (State Auxiliary Agencies) Di Indonesia: Tin. Jauan Hukum Tata Negara." *Jurnal Hukum & Pembangunan* 35, no. 3 (2005): 275-287. p. 277.

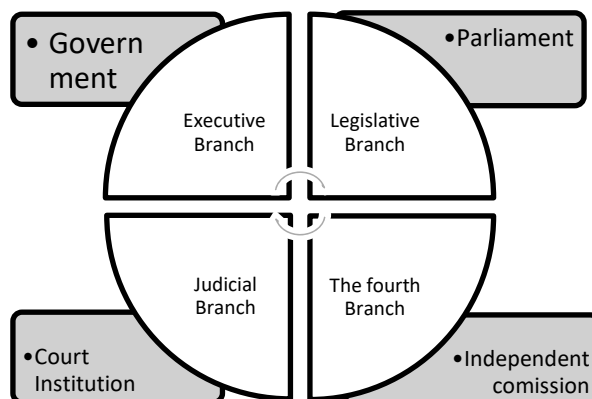
²⁹ Fedewa, J. L., "Bureucracy: The Fourth Branch of Government" article as cited from <http://www.washingtontimes.com/news/2014/jul/3/fedewa-bureaucracy-fourth-branch-government/>, accessed on May 2, 2023.



existence of such commission has deranged the common three-branch legal theories as much as the concept of a fourth dimension unsettles our three-dimensional thinking.³⁰

An argument made for calling administrative agencies a "fourth branch" of government is the fact that independent commission typically exercise all three constitutionally divided powers within a single bureaucratic body. For example, in a single independent commission, it has the legislative authority to issue regulations, on the other hand it has the authority to implement these regulations that characterize executive functions, and interpret and apply them in real cases as the judicial authority. Jimly Asshiddiqie has similar opinion regarding the status of General Election Commission (KPU). He stated that the election committee should be recognized as fourth branch of power, base on its nature as an organizer, not as participant like the executive or legislative organs.

Figure 1. The Separation of Power base on The Fourth branch of power Theory



Source: Author's Processed Results

As Gunawan explained, that the fourth branch of authority which mentioned in the theory may also take the form or be interpreted as an

³⁰ Dobkin, Donald S. "The Rise of the Administrative State: A Prescription for Lawlessness." *Kan. JL & Pub. Pol'y* 17 (2007): 362.

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independent State commission, because its existence is not in the legislative, executive, or judiciary branches of power.³¹ As a result, the presence of the independent State commission is theoretically justified by the fourth branch of government. One may argue that the Indonesian constitution should be seen from the same angle.

CONCLUSION

The study on the concept of Independent Institutions in US shows that the independency of a State commission is interpreted as the extent to which the institution can exercise its authority and function without influence and intervention from the executive or other institutions. These independent characteristics are theoretically presented by American scholars, but they are also contained and practiced in several independent institutions that exist in Indonesia. In terms of its legitimacy, an independent State Commission is a branch of power whose existence and power are formed based on the delegation doctrine with the unique nature of its characteristic. Independent State Commissions can have quasi-executive, quasi-legislative or quasi-judicial powers, some of which even have three characteristics of authority at the same time. Based on the independent characteristics, and the nature of the authority, the independent State Commission is interpreted as a "fourth branch of power in government" or according to the theory of the fourth branch of government creates its own model beyond the original separation of powers.

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³¹ Ramadani, Rizki. "Reformulation of Institutional Relationship between the People's Representative Council and the Corruption Eradication Commission." *Corruptio* 2, no. 1 (2021): 33-44. p. 35.



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