# Theoretical Reconstruction of the 'Existence of the Indonesian Corruption Eradication Commission and Its Comparison to Other Anti-Corruption Agencies in Asia

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**Abstract**

Article 3 of the Indonesian Law Number 19 of 2019 stipulates that the Corruption Eradication Commission is a state institution within the executive power branch, which in carrying out its duties and authorities is independent and free from the influence of any power. The basic arrangement is not without problems, considering the institutional design of the Corruption Eradication Commission was initially stated in the Law Number 30 of 2002 *"…a state institution, which in carrying out its duties and authorities is independent…,"* becomes *"…state institutions within the executive power branch…."* The stipulation in Article 3, also the basic article of the law was confirmed by the Constitutional Court in Verdict Number 70/PUU-XVII/2019. This study aims to answer problems of theoretical construction of the commission after the Constitutional Court Verdict Number 70/PUU-XVII/2019. This study used the normative legal research method. The study concluded that, theoretically, there was a shift in the institutional design of the commission, from an independent agency to an independent executive organ, equivalent to the National Police and the Attorney General's Office of Indonesia. The change is a setback in corruption eradication. Compared to other anti-corruption agencies in Asia, the institutional design is not an ideal condition or best practice. Therefore, legislators should restore the commission as an independent agency.

**Keywords**: Corruption Eradication Commission, independent agency, independent executive organ.



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## A. Introduction

The Indonesian Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* –KPK) was established as a solution to the corruption problems in Indonesia through the Law Number 30 of 2002 on the Corruption Eradication Commission (the KPK Law). The establishment was motivated by the need to eradicate corruption in a systematic, targeted, and sustainable manner. Prior to the second amendment to the KPK Law in 2019, it provided a significant impact on the national agenda of corruption eradication. There was an increase in Indonesia's Corruption Perception Index (CPI), which continued to improve since its establishment in 2002. It was drastically declined in 2020, less than a year after the KPK Law was amended. It was confirmed by Transparency International (TI), which launched the results of the 2020 Corruption Perception Index (CPI) survey. In 2020, Indonesia was ranked 102 out of 180 countries with a score of 37.[1] It was a drastic decrease compared to the 2019 ICP for 40.2 In 2021, Indonesian CPI was increased slightly to 38, ranked 96 out of 180 countries.[3] However, in 2022, it was decreased to 34, minus four points from the previous year.[4]

The increase in the CPI cannot be separated from the fundamental paradigm used by law makers when the KPK was first formed in 2002, that corruption is an extraordinary crime. Therefore, only extraordinary approaches can handle it. These extraordinary approaches are regulated in provisions that deviate from the general provisions of criminal law and administrative law.[5] In this spirit, the KPK is designed as an independent agency, equipped with significant authorities that make the KPK a super body. Currently, the KPK significant power is no longer fulfilling the political reality and the willingness of major political parties. Thus, it is not surprising that there are several efforts to reduce the KPK's authorities and institutional status, including the proposals to amend the KPK Law.

Such an effort was eventually successful. On September 17, 2019, the President and the House of Representatives (*Dewan Perwakilan Rakyat* –DPR) agreed on the second amendment to the KPK Law (Revision of the KPK Law) through the enactment of the Law Number 19 of 2019. This Amended KPK Law drastically changed the KPK's

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1 Transparency International, "Corruption Perception Indeks 2020 and 2021," accessed on January 28, 2021, https://www.transparency.org/en/cpi/2020/index/idn.

2 Indonesia Corruption Watch, "Indeks Persepsi Korupsi Indonesia Anjlok: Politik Hukum Negara Kian Memperlemah Agenda Pemberantasan Korupsi," accessed on January 28, 2021, https://antikorupsi.org/id/node/87872.

3 Transparency International, "Corruption Perception Indeks 2020 and 2021."

4 Transparency International.

5 Sukmareni (et.al.), "Implication of Regulation Authorities on the Efforts to Accelerate the Eradication of Corruption," *Hasanuddin Law Review* 4, no. 3 (2018): 357, https://doi.org/10.20956/halrev.v4i3.1078.

institutional status, [6] reduced its duties and authorities, and threatened its independence. Some scholars consider the process in amending the KPK law as "fast-track legislation" which does not follow all necessary procedures in forming legislation. For many the Amended KPK law is considered undemocratic and most importantly violating constitutional values.[7]

The change of the KPK's institutional status can violate several international regulations and conventions, including The United Nations Convention Against Corruption (UNCAC) and The Jakarta Principles on Anti-Corruption Agencies. Indonesia has ratified the UNCAC through the Law Number 7 of 2006 on the Ratification of the UNCAC. In Article 6 paragraph (2) and Article 36, the state party has an obligation to provide the agency or bodies the necessary independence, to follow the basic principles of its legal system, and to enable the agency or agencies to carry out their functions effectively and free from undue influence. One of the crucial points of the Jakarta Principles is encouraging the state to protect the independence of anti-corruption institutions, it is especially on the leadership aspect of anti-corruption institutions, which is agreed upon by all anti-corruption institutions worldwide.

The revision to the KPK Law is the opposite because it shift the KPK from The Jakarta Principles on Anti-Corruption Agencies.[8] The revision of the KPK Law has disarmed several authorities and weakens the KPK's governance, and reduce the independence of corruption eradication work.[9] There have been several regulatory changes to the KPK but for practical purposes of this study, one of the substantial changes is the KPK's status or institutional position. Before its law was revised, the KPK was an independent state institution and free from the influence of any power in carrying out its duties and authorities. The change in status is not without problems. The KPK's institutional design was *"…a state institution which in carrying out its duties and authorities is independent…"* has been shifted to *"…state institutions in the executive power branch (dependent)…"*. Various groups consider the shift as an attempt by the state to weaken the national agenda of corruption eradication. The status of the KPK in the executive power branch will weaken its institutional independence. Eventually, it will affect its performance in carrying out their duties and authorities.

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6 Darmawan Sigit Pranoto and Teguh Kurniawan, "Three Years of the Corruption Eradication Commission's Institutional Reform: A Narrative Policy Analysis," *Integritas: Jurnal Antikorupsi* 8, no. 2 (2022): 151, https://doi.org/doi.org/10.32697/integritas.v8i2.943.

7 Josef Mario Monteiro, "Amendment of the Corruption Eradication Commission Act and Its Impact on the Constitution," *Jurnal Media Hukum* 28, no. 2 (2021): 192, https://doi.org/10.18196/jmh.v28i2.10941.

8 Raka Dwi Novianto, "Laode Sebut Revisi UU KPK Bertentangan Dengan Jakarta," accessed on November 9, 2019, https://nasional.sindonews.com/berita/1438654/13/laode-sebut-revisi-uu-kpk-bertentangan-dengan-jakarta-principles.

9 Alvin Nicola, "KPK Has Fallen: Menilik Pelemahan KPK Dari Perspektif UNCAC dan The Jakarta Principles," accessed on June 10, 2021, https://ti.or.id/wp-content/uploads/2021/06/Materi_Alvin-Nicola.pdf.

Even though the new set up has been concluded, several parties including the KPK have submitted a constitutional review of the Law to the Constitutional Court. Furthermore, the Constitutional Court Verdict Number 70/PUU-XVII/2019, which was set on May 4, 2021, formulated a new constitutional design for the KPK as a state institution. This study aims to answer an important question: how is theoretical construction of the KPK institution based on the Constitutional Court Verdict Number 70/PUU-XVII/2019 and its comparison to other anti-corruption agencies in Asia? The question above is important because studies and literature often refer to the KPK as an independent agency. Mochtar[10] stated that the KPK is one of the independent agencies in Indonesia and Tauda also considers the KPK an independent agency.[11]

The theoretical construction of the KPK institution must be reinterpreted or reconstructed. Similarly, a comparative analysis to other similar institutions is also important since the efforts to eradicate corruption in Indonesia are not only a national agenda but it is also an integral part of the common agenda at the global level. The adoption of UNCAC by many countries shows that the international community, including Asian Countries is determined to prevent and control corruption. A comparative analysis of the institutional design of the KPK and other similar institutions with excellent reputations in several Asian Countries, such as Hong Kong, South Korea, Singapore, Thailand, and Malaysia is important to be carried out. This study is expected to contribute scientifically to the redefinition of the theoretical construction of the KPK institution and its equivalents in other countries and to provide relevant literature.

## B. The KPK's Institutional Design Prior to the Second Amendment to the Law Number 30 of 2002

### 1. The Background of the Establishment of KPK

Corruption always gets more attention compared to other crimes. At certain periods, corruption is considered a major problem in various countries since it has spread widely and poses a serious threat to economic and social development, political stability, and most importantly the aspirations of the rule of law. This phenomenon is reasonable since the negative impact of the crime influences various fields of life. Corruption is very detrimental to the country's finances and economy. It also obstructs national development. Therefore, it must be eradicated to create a just

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[10] Zainal Arifin Mochtar, *Lembaga Negara Independen: Dinamika Perkembangan dan Urgensi Penataannya Kembali Pasca Amandemen Konstitusi* (Jakarta: Rajawali Pers, 2016), 67.

[11] Gunawan A. Tauda, *Komisi Negara Independen: Eksistensi Independent Agencies Sebagai Cabang Kekuasaan Baru Dalam Sistem Ketatanegaraan* (Yogyakarta: Genta Press, 2012), 106.

and prosperous society.[12] As a worldwide issue, the problem of corruption is faced by all countries of the world,[13] including in Indonesia. Following the reform era after 1998, corruption tends to be more forgiven by various parties. Many cases of corruption have not been touched or handled properly. In fact, corruption can be a crime that is untouchable by the law.[14]

The conditions are exacerbated by endemic political corruption. The concept of 'political corruption' is defined as satisfying private interests at the expense of the public interest.[15] In 1998, after being saved from economic disaster by the International Monetary Fund (IMF), Indonesia was obliged to pass a law to establish an anti-corruption commission. Throughout the reform era, Indonesia was dominated by international creditors as it struggled to restructure its debt and liberalize its economy. The IMF bailout package of US$43 billion was agreed upon a condition to form a comprehensive anti-corruption commission. After Indonesia's first free elections in November 1999, the DPR passed the Law Number 31 of 1999, which provide two years for the government to form a new anti-corruption commission. In 2000, based on the law, the Ministry of Justice drafted an anti-corruption commission law (the Law Number 30 of 2002) with the technical support from the Asian Development Bank (ADB) and the approval of the Indonesian Legislator and the IMF. It was passed into law on December 29, 2002.[16]

There are three agencies in Indonesia that have the authority to file corruption allegations. The Attorney General's Office and the National Police are both under the auspices of the executive branch. These two offices were given the power to investigate and prosecute for corruption during Suharto's New Order regime. However, they were widely considered ineffective. The KPK was created during the Post-Suharto Reform period as a centralized anti-corruption agency.[17] In this context, the background for the establishment is due to corrupt practices that occur in the judiciary and its supporting institutions, which is widely known as "judicial corruption." Judicial corruption is inherited from the new order era. It is further exacerbated by the ineffectiveness of the police and the Attorney General's Office in

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12 Deni Setya Bagus Yuherawan, "Obstruction of Justice in Corruption Cases: How Does the Indonesian Anti-Corruption Commission Investigate the Case?" *Journal of Indonesian Legal Studies* 5, no. 1 (2020): 232, https://doi.org/10.15294/jils.v5i1.38575.

13 Hendi Yogi Prabowo, Rizky Hamdani, and Zuraidah Mohd Sanusi, "The New Face of People Power: An Exploratory Study on the Potential of Social Media for Combating Corruption in Indonesia," *Australasian Accounting Business & Finance Journal* 12, no. 3 (2018): 20, http://dx.doi.org/10.14453/aabfj.v12i3.3.

14 Evi Hartanti, *Tindak Pidana Korupsi* (Jakarta: Sinar Grafika, 2007), 1-2.

15 Marie Dela Rama and Michael Lester, "Anti-Corruption Commissions: Lessons for the Asia- Pacific Region from a Proposed Australian Federal Anti-Corruption Watchdog," *Asia Pacific Business Review* 25, no. 4 (2019): 576, https://doi.org/10.1080/13602381.2019.1589971.

16 Centre for Public Impact, "Indonesia's Anti-Corruption Commission: The KPK," accessed on July 4, 2016, https://www.centreforpublicimpact.org/case-study/indonesias-anti-corruption-commission-the-kpk.

17 Joe Amick, Mlada Bukovansky, and Amy H. Liu, "Presidential Electoral Cycles and Corruption Charges," *Journal of East Asian Studies* 22, no. 2 (2022): 287, https://doi.org/doi:10.1017/jea.2022.9.

eradicating corruption. Before the establishment of the KPK, the corruption eradication was carried out by the police and the Attorney General's Office ineffectively.[18]

**2. The KPK as an Independent Agency**

Before the second amendment to the KPK Law, the KPK was usually defined or classified as an independent agency. Independent agencies were included in the Indonesian constitutional system after the reform era to be an instrument that strengthen democracy and the ideals of the rule of law. The KPK's independency was emphasized by Mochtar[19] because it fulfils the following theoretical characteristics.

1. The institution that was established and placed is not part of the existing branch of powers.
2. The selection process is not by political appointees or not through a monopoly of one branch of power.
3. The selection and dismissal process can only be carried out based on the mechanism determined by the underlying regulations.
4. The deliberation process is robust so that membership, the selection process, and the report of performance are brought closer to the people as the holder of the highest sovereignty of the state.
5. The leadership is collective in making every institutional decision related directly to its duties and functions.
6. It is not the primary state institution. However, it does not mean it is not essential to exist.
7. It has a more devolved authority, which is self-regulated, that it can issue its rules which also apply in general.
8. It has a basis of legitimacy in the rules, both constitution and laws.[20]

In line with Mochtar, before the second amendment to the KPK Law,[21] this study is of the position to classify the KPK as an independent agency because it fulfils the following characteristics.

1. The legislators in the commission of law expressly states the KPK's independence.

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[18] Chaerudin, *Strategi Pencegahan & Penegakan Hukum Tindak Pidana Korupsi* (Bandung: Refika Aditama, 2009), 22.

[19] Zainal Arifin Mochtar, *Lembaga Negara Independen: Dinamika Perkembangan dan Urgensi Penataannya Kembali Pasca Amandemen Konstitusi*, 67.

[20] Zainal Arifin Mochtar, 64.

[21] The Law Number 30 of 2002 and Law Number 10 of 2015 on Stipulation of Government Regulations in Lieu of The Law Number 1 of 2015 on Amendments to The Law Number 30 2002 on the Commission for the Eradication of Criminal Acts of Corruption into Law.

2. The independent KPK is free from the influence, will, or control of the executive branch of power, and not responsible to that branch of power.
3. The dismissal and appointment of KPK commissioners use specific mechanisms that are specifically regulated, not solely based on the will of the President (political appointees).
4. The KPK's commissioners are collegial, several members or commissioners are odd, and decisions are made by majority vote;
5. KPK's leadership is not controlled, or the majority are from certain political parties (non-partisan);
6. The term of office of the KPK chairperson is definitive.
7. The KPK's membership is not intended to maintain a balance of non-partisan representation.[22]

In the context of global influence to form an additional institution in response to the development of corruption, the establishment of the KPK cannot be separated from the international world authorities agreeing that corruption is a severe crime that can be transnational. The agreement was then stated in the initiative of the United Nations (UN) through the United Nations Officer on Drugs and Crime (UNODC) to implement an international agreement United Nations Convention Against Corruption (UNCAC),[23] which Indonesia ratified on December 18, 2003. In Article 6 paragraph (2) of UNCAC, it is determined that the state party is obliged to provide the agency or bodies the necessary independence, following the basic principles of its legal system, to enable the agency or agencies to carry out their functions effectively and free from undue influence. The embodiment of the "agency" as referred to above in the Indonesian context is the KPK.

Several crucial phrases in this article are "necessary independence" and "free from undue influence" which means that the ideal conditions of the KPK institution before the second amendment to the KPK Law should be maintained as an independent agency, super body, and not classified in the executive power branch. As previously described, the Pre-Second Amendment KPK to the KPK Law was able to have a significant impact on the national agenda for eradicating corruption. On the other hand, changes to the KPK Law have set back the achievements of the corruption eradication agenda. Therefore, this study is of the position that the amendment to the KPK Law does not explicitly contradict UNCAC, but the change can be interpreted as a form of avoiding the spirit or original intent of UNCAC or at least distancing the KPK from UNCAC's mandate, especially on the fundamental paradigm that corruption is an extraordinary crime.

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[22] Gunawan A. Tauda, *Komisi Negara Independen: Eksistensi Independent Agencies Sebagai Cabang Kekuasaan Baru Dalam Sistem Ketatanegaraan*, 106-108.

[23] The World Bank, "About UNCAC," accessed on May 16, 2023, https://star.worldbank.org/focus-area/uncac.

In simple terms, according to the author, after the second amendment to the KPK Law, even though the Elucidation of the KPK Law contained the phrase "extraordinary crimes", judging from the content of the law, the legislators considered that corruption was no longer an extraordinary crime but only an ordinary crime. So, no extraordinary handling models are needed. It can be seen from the shift in the KPK's institutional design, which was initially determined as *"...a state institution which in carrying out its duties and authorities is independent…,"* to *"…state institutions within the executive power branch..."*. Even in the Elucidation of Article 3, it is stated that what is meant by "state institution" is a state institution that act as state auxiliary agencies that are included in the executive branch.

### 3. Two Positions of the KPK

The Law Number 30 of 2002 is legislator's institutional experimentation. The KPK has an unclear and ambiguous theoretical construction design and meaning in the state administration system. In constitutional practice, the KPK as a state agency is interpreted in two ways. The first is as an auxiliary state agency to the executive in Montesquieu's *trias politica*. In addition, the second is an independent state agency in the context of a new branch of power outside separationism's three rationales. It can be seen in some expert's opinions that still group independent agencies, including the KPK, in the domain or realm of executive power. On the other hand, some experts such as Asshiddiqie group them separately outside the context of Montesquieu's *trias politica*.[24] Huda, also emphasized that after the amendment to the 1945 Constitution, the definition and understanding of state agencies are very diverse, it can no longer be limited to only three legislative, executive, and judicial institutions.[25]

The duality in theoretical construction meaning is even distorted by the duality in the Constitutional Court decisions, which differ in their regulation of the existence of independent agency. The Constitutional Court's Verdict Number 36/PUU-XV/2017 substantially stipulates the KPK as part of the executive because this institution carries out executive functions such as the police and the prosecutor's office. By having this function, according to the verdict, the KPK can be subject to the right of inquiry as part of the checks and balances mechanism. Whereas, on the other hand, the DPR's right to question the KPK has the potential to injure the principle of

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[24] Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi* (Jakarta: Sinar Grafika, 2010), 8.

[25] Ni'matul Huda, "Potensi Sengketa Kewenangan Lembaga Negara dan Penyelesaiannya di Mahkamah Konstitusi," *Ius Quia Iustum* 24, no. 2 (2017): 194, https://doi.org/10.20885/iustum.vol24.iss2.art2.

independence of the KPK as an independent agency.[26] The verdict on the request for a judicial review of Article 79 paragraph 3 of the Law on the MPR, DPR, and DPRD immediately invalidates the previous KPK verdict regarding its position. Previously in several verdicts, including Number 012-016-019/PUU-IV/2006, 19/PUU-V/2007, 37-39/PUU-VIII/2010, and Number 5/PUU-IX/2011 which the point is to emphasize that the KPK is an independent institution that is not in the realm of the executive, legislative, and judicial branches. The duality of the Constitutional Court's verdict above indicates the inconsistency of theoretical meaning of independent agency in Indonesia.

## C. Background Formation and Theoretical Construction of Indonesian Independent Agencies

### 1. Background Formation of Indonesian Independent Agencies

The change in the political and legal configuration from the previous authoritarian to a democratic rule of law state requires a shift in the management of power from being personal to impersonal, and structuring a political configuration compatible with democratic values,[27] after the downfall of Suharto and the transition to democracy in 1998 (Reform Movement).[28] The dramatic end of Suharto's authoritarian regime ushered in two decades of law reform, which included by constitutional reforms, legislative reforms, and major institutional reforms through the establishment of various state institutions, including independent agencies.[29] In this context, the government and the House of Representatives through a number of laws carry out the establishment of the National Commission on Human Rights, the Election Supervisory Agency, the Corruption Eradication Commission, Ombudsman, and so on. These institutions, besides being judicial, but often mixed functions with regulatory functions and/or administrative functions.[30]

The Reform Movement is a noble agreement of the nation which is the basis for the 1945 Amendment, and the start of the establishment of independent agencies. In the Reform era, as described earlier, due to a crisis of trust in state administrators coupled with the bitter experience of past authoritarian attitudes, there was a transition from an authoritarian political system to a democratic political system,

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[26] Fahmi Ramadhan and Bayu Dwi Anggono, "Menimbang Kewenangan DPR Dalam Penggunaan Hak Angket Pada Kasus Korupsi KTP Elektronik," *Lentera Hukum* 6, no. 1 (2019): 171, https://doi.org/10.19184/ejlh.v6i1.9545.

[27] A. Ahsin Thohari, "Kedudukan Komisi Negara Dalam Struktur Ketatanegaraan," *Jentera: Jurnal Hukum* 12, no. 1 (2006): 23.

[28] Melissa Crouch, "Asian Legal Transplants and Rule of Law Reform: National Human Rights Commission in Myanmar and Indonesia," *Hague Journal on the Rule of Law* 5, no. 2 (2013): 163, https://doi.org/doi:10.1017/S1876404512001108.

[29] Melissa Crouch, "The Challenges for Court Reform After Authoritarian Rule: The Role of Specialized Courts in Indonesia," *Constitutional Review* 7, no. 1 (2021): 9, https://doi.org/10.31078/consrev711.

[30] Ibnu Sina Chandranegara, "Defining Judicial Independence and Accountability Post Political Transition," *Constitutional Review,* 5, no. 2 (2019): 305, https://doi.org/10.31078/consrev525.

accompanied by a struggle to control government power, through the establishment of an independent agencies.[31] Therefore, the existence of independent agencies including KPK, and the noble purpose of its formation cannot be separated from the Reform Movement.

According to Nurtjahjo, the background for the establishment of independent agencies in the Indonesian context is due to two things: (1) the increasingly complex state tasks that require sufficient independence for their operations; and (2) an effort to empower existing state institutions through the formation of new, more specific institutions.[32] Mochtar also explained that the factors for the formation of independent agencies cannot be separated from the basis of arguments on: (1) reform with a neo-liberal approach; (2) transitional obligations to support certain things; (3) the need for accelerated democracy; (4) part of the image of power; (5) reduce the task of dispute resolution institutions between the state and citizens; (6) disillusionment with the old institution; and (7) haste in legislation.[33]

## 2. Theoretical Construction of Independent Agencies

In the United States, as an established democracy and a role model for the formation of independent agencies,[34] various theories have been developed on which to base it. For example, Funk and Seamon developed the delegation doctrine. As a constitutional basis for the separation of powers for independent agencies, the delegation doctrine is also a theoretical basis for the existence of independent agencies in the United States. Furthermore, according to Funk and Seamon, independent agencies at the federal level were formed because congress only wanted to solve certain problems. To make it easier for these independent agencies to carry out their functions, congress delegates powers to independent agencies which are usually limited to the affairs assigned to them. These powers are broadly divided into administrative powers (quasi-executive), legislative powers (quasi-legislative), and adjudicative powers (quasi-judicial).[35]

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[31] Retno Mawarini Sukmariningsih, "Penataan Lembaga Negara Mandiri Dalam Struktur Ketatanegaraan Indonesia," *Mimbar Hukum* 26, no. 2 (2014): 196, https://doi.org/10.22146/jmh.16039.

[32] Hendra Nurtjahyo, "Lembaga Badan dan Komisi Negara Independen (*State Auxiliary Agencies*) di Indonesia: Tinjauan Hukum Tata Negara," *Jurnal Hukum dan Pembangunan* 35, no. 3 (2005): 280, http://dx.doi.org/10.21143/jhp.vol35.no3.1518.

[33] Zainal Arifin Mochtar, *Lembaga Negara Independen: Dinamika Perkembangan dan Urgensi Penataannya Kembali Pasca Amandemen Konstitusi*, 114.

[34] In this section, the term independent agencies (plural), except in certain context will be consistently used rather than independent state agency or independent agency (singular), considering that in the global context, the terms of institutional nomenclature used are very varied, for example, there is the term independent regulatory agencies (IRA), administrative agencies, independent bodies, and many others.

[35] William F. Funk and Richard H. Seamon, *Administrative Law; Examples & Explanations* (New York: Aspen Law & Business, 2001), 28.

Besides the delegation doctrine above, there are various prominent theories related to the existence of independent agencies, including Indonesian KPK Pre-Second Amendment to the Law Number 30 of 2002, such as "the fourth branch of the government" proposed by Yves Meny and Andrew Knapp; and theory of "the new separation of power" postulated by Bruce Ackerman. The whole theory in principle postulates theoretical construction of the existence of independent agencies as a reality of modern state administration practice which is a separate branch of power outside of Montesquieu's *trias politica* doctrine.[36]

There is a recent prominent theory related to the existence of independent agencies initiated by Tushnet in 2021, known as "the new fourth branch." This theory asserts that today's 21st-century constitutions typically incorporate a new "fourth branch" of state governing power, a group of institutions tasked with protecting constitutional democracy, notably the electoral management bodies, the anti-corruption agency, and the ombudsman's office. This theory explains that a fourth branch of power is needed because, in a world where governance is exercised through political parties, we cannot be confident that the traditional three branches are enough to preserve constitutional democracy. By concentrating within distinctive forms of expertise, the fourth-branch institutions can deploy that expertise more effectively than when it is dispersed among the traditional branches. Simply put the new fourth branch institutions as the guarantors of constitutional democracy.[37]

### 3. The Concept of Independent Executive Organ

In addition to independent agencies, there are also state instruments or institutions that can resemble independent agencies. Several experts, such as Asimow, refer to these institutions as administrative agencies because they are part of the executive, and Nilakovich and Gordon position these institutions as Dependent Regulatory Agencies (DRAs), with the same argument because they are part of the cabinet or administrative structure.[38] In the Indonesian context, both administrative agencies and DRAs can be equated with non-structural state institutions (*lembaga negara non-struktural*), non-departmental government agencies (*lembaga pemerintah non-departemen*), extra-structural institutions (*lembaga ekstra 182 struktural*), and ministerial level agency *(lembaga setingkat menteri)*, some of which are independent executive organs (*organ eksekutif independen*).

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[36] Gunawan A. Tauda, *Komisi Negara Independen: Eksistensi Independent Agencies Sebagai Cabang Kekuasaan Baru Dalam Sistem Ketatanegaraan*, 148.

[37] Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Cambridge: Cambridge University Press, 2021), 2.

[38] Gunawan A. Tauda, *Komisi Negara Independen: Eksistensi Independent Agencies Sebagai Cabang Kekuasaan Baru Dalam Sistem Ketatanegaraan*, 96.

In particular, the independent executive organs are independent in carrying out their functions, and the legal basis for their formation states the independence of these organs, for example, the Indonesia Bank (*Bank Indonesia*-BI), the Indonesian National Armed Forces, the Indonesian National Police, and the Attorney General's Office. They have fulfilled the normative requirements as an independent agency because the legal basis for their formations states their independence (either explicitly or implicitly). However, they do not meet the academic requirements as an independent agency.[39] After all, these state instruments are responsible to the president in carrying out their duties and functions. The President structurally controls these institutions as the highest state administration official. However, a legal mechanism is used to choose official positions (except the Attorney General). Therefore, the Indonesia Bank, the Indonesian National Armed Forces, the Indonesian National Police, and the Attorney General's Office are the state's instruments which Asshiddiqie referred to as an independent executive organ.[40]

Simply put the independent executive organ is a tool of the state that in carrying out its duties, functions, and authorities is independent but bound by obligations and controlled structurally by the president as the head of state and as the highest state administration official (dual obligation). In the Indonesian context, some administrative agencies and DRAs are part of the presidential cabinet and have the status of a ministry level institution, where officials have ministerial level protocol positions, namely the Indonesian Military, the Attorney General's Office, the Indonesian National Police, Indonesia Bank, Cabinet Secretary, Office of the Presidential Staff, State Intelligence Agency, National Research and Innovation Agency, and Nusantara Capital City Authority.

## D. Shifts in KPK's Institutional Theoretical Construction

### 1. Theoretical Reconstruction of the KPK's Institutional Design

Based on the Law Number 30 of 2002, the KPK is an independent agency but after the amendment to the KPK Law, the KPK is no longer an independent agency (not being classified or not placed in the original three axes of power). Article 3 of the Law Number 19 of 2019 determines that the KPK is a state institution within the executive power branch, which in carrying out its duties and authorities is independent and free from the influence of any power. It should be underlined that the phrase "state institutions within the executive power branch" represent a fundamental change regarding the institutional design of the KPK which in the Law Number 30 of 2002 stipulated "The Corruption Eradication Commission is a state institution that is

[39] Gunawan A. Tauda, 132.

[40] Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* (Jakarta: Konstitusi Press, 2006), 156.

independent and free from the influence of any power in carrying out its duties and authorities."

In the Constitutional Court's Verdict Number 70/PUU-XVII/2019, related to the position of the KPK as a state institution, the Constitutional Court redefined the KPK as a state institution by "only" reaffirming its independence and freedom from the influence of any power. Indonesia Constitutional Court (*Mahkamah Konstitusi*- MK) defines The Corruption Eradication Commission as a state institution within the executive power branch which in carrying out Eradicating Corruption Crimes duties is independent and free from the influence of any power. Previously, based on Article 1 point 3 of the Law Number 19 of 2019 on the Second Amendment to the Law Number 30 of 2002 on the Corruption Eradication Commission it was stated that The Corruption Eradication Commission hereinafter referred to as the Corruption Eradication Commission is a state institution within the executive power branch that carries out the task of preventing and eradicating Corruption Crimes under this Law.

Regarding the phrase "executive power branch," Article 3 of the Law Number 19 of 2019, which was tested before the Constitutional Court, the Constitutional Court, through its legal considerations stated that the argument of the petitioners which stated Article 3 of the Law Number 19 of 2019 was contrary to the 1945 Constitution was groundless according to law. Thus, the Constitutional Court confirmed the regulation in Article 3, which is also the basic article of the Law Number 19 of 2019. It can be traced in the following legal considerations for Verdict Number 70/PUU-XVII/2019:

> *"[3.20.2] Furthermore, on the arguments of the petitioners who question the constitutionality of the phrase 'in the executive power branch' in the provisions of Article 3 on the Law Number 19 of 2019, which the petitioners fear will weaken the institutional independence of the KPK. On this argument, apart from the court having considered the existence of Article 3 on the Law 19 of 2019 on the conditional constitutional provisions of Article 1 point 3 on the Law 19 of 2019 in Sub-paragraph [3.20.1], the court has also affirmed in the verdicts of the Constitutional Court. Among others, the Constitutional Court Decision Number 012-016-019/PUU-IV/2006 and the Constitutional Court Decision Number 36/PUU-XV/2017 state that the independence and freedom of the KPK from the influence of any power is in carrying out its duties and authorities... thus, on the application of the phrase 'in the executive power branch' in Article 3 on the Law 19 of 2019, the court argues that it does not cause the implementation of the duties and authorities of the KPK to be impaired because the KPK is not responsible to the holder of executive power, 'in casu' the president as stated in the provisions of Article 20 on the Law 30 of 2002, namely, KPK is responsible*

*to the public for the implementation of its duties and submits its reports openly and periodically to the President, DPR, and BPK."*

The important thing that needs to be underlined in the legal considerations above is that the court even explicitly emphasized that the independence and freedom of the KPK from the influence of any power is only when carrying out its duties and authorities. Consequently, when it does not carry out its duties and functions, the KPK does not have institutional independence. In addition, placing the KPK as a state institution in the executive power branch is problematic. This argument is reasonable considering that the KPK's characteristics as an independent agency after the second amendment to the KPK Law and the Constitutional Court Verdict Number 70/PUU-XVII/2019 are no longer fulfilled especially regarding institutional independence.

Quoting Mochtar's opinion, as described earlier, the first and primary characteristic of an independent agency is that institutions that are established and placed are not part of the existing branches of power (legislative, executive, and judicial), although, at the same time, they can become independent institutions that carry out the duties formerly owned by the government. In short, by placing the KPK grammatically as a "state institution in the executive power branch," the first and primary element or characteristic of the KPK as an independent agency by itself (self-evidence) is not fulfilled. If analyzed further, the phrase "which, in carrying out its task of eradicating the Crime of Corruption is independent and free from the influence of any power" can be interpreted that the KPK is independent and free from the influence of any power only "at the time" or "in" carrying out the task of eradicating corruption only not on the existence of its institutions.

As mentioned earlier, prior to the second amendment to the KPK Law, the independence of the KPK is stated in Article 3 of the Pre-Amendment KPK Law. It states that the KPK is a state institution which in carrying out its duties and authorities is independent and free from the influence of any power. Therefore, the KPK is independent or free from the influence, will, or control of the executive branch. The KPK is not responsible to any branch. Although it is independent and free from the influence of any power, the KPK in the executive branch of power conceptually can bind KPK by obligations to the president as the head of the executive or the highest state administration official (dual obligation). Furthermore, Mochtar emphasizes that the KPK has been an independent state institution since its formation. Giving independence to the KPK means not being influenced by any power. The second revision of the KPK Law has an impact on the independence of the KPK. The principles of the independence of the KPK, as typical of independent

state agencies and anti-corruption agencies are fading through the provisions of the Law Number 19 of 2019. The implication is that the KPK has increasingly limited space for movement and is open to the influence of other powers, especially the executive.[41]

In short, administratively, the KPK does not exist in a vacuum condition. Therefore, the existence of the KPK must be interpreted as part of the executive power branch, equivalent to the Indonesian Police and the Attorney General's Office of the Republic of Indonesia, which have the status of independent executive organs. Consequently, these three institutions have institutional designs that can be said to be similar. The burden of responsibility for implementing the national agenda for eradicating and preventing corruption lies with these three law enforcement agencies. Ideally, in achieving their common goals, i.e., accelerate the eradication of corruption, these three law enforcement agencies need to work together through mutually agreed methods, not compete.[42]

This change in the KPK's existence is certainly a matter of concern for eradicating corruption, given that KPK has had a consistently better public image than other law enforcement agencies in Indonesia since it started operations. This image can mostly be attributed to its outstanding success in investigating and prosecuting high profile corruption cases and to its organizational culture of integrity and independency.[43] This is so because historically speaking, relying on the conventional law enforcement agencies alone has proven to ineffective in combating corruption.[44] Such argument is reinforced by the president's intervention or control over the KPK through the establishment of several presidential regulations established by the president, for example, Presidential Regulation Number 102 of 2020 on the Implementation of Supervision for the Eradication of Corruption Crimes, and Presidential Regulation Number 91 of 2019 on Organs for the Supervisory Board of the Corruption Eradication Commission causing the independence of the Corruption Eradication Commission to be injured, considering that the president as the head of government intervenes in policies aimed at eradicating corruption which has been regulated in the KPK Law. Even if the KPK's supervisory authority is not regulated in the KPK Law, as a self-regulatory body, the KPK can form a similar regulation without a presidential

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41 Zainal Arifin Mochtar, "The Independence of the Corruption Eradication Commission Post-Law Number 19 of 2019," *Jurnal Konstitusi* 18, no. 2 (2021): 321, https://doi.org/10.31078/jk1824.

42 Yunus Husein, "National and International Cooperation in the Prevention and Eradication of Money Laundering," *Indonesian Journal of International Law* 7, no. 1 (2021): 4, https://doi.org/10.17304/ijil.vol7.1.225.

43 Sofie Arjon Schütte, "Keeping the New Broom Clean: Lessons in Human Resource Management from the KPK," *Bijdragen Tot de Taal, Land- En Volkenkunde* 171, no. 4 (2015): 424, https://doi.org/DOI:10.1163/22134379-17104001.

44 Prabowo Hendi Yogi, "To Be Corrupt or Not to Be Corrupt Understanding the Behavioral Side of Corruption in Indonesia," *Journal of Money Laundering Control* 17, no. 3 (2014): 315, https://doi.org/DOI 10.1108/JMLC-11-2013-0045.

regulation. The establishment of the Presidential Regulation above proves that the KPK is currently under the sphere of influence of the executive power branch. This does not include the problem of the existence of the Supervisory Board (*Dewan Pengawas*), whose relationship model with the KPK leadership is not yet transparent.

## 2. A Comparative Analysis of the KPK's Institutional Design to Its Counterparts in Other Asian Countries

The comparative analysis must be carried out, at least to describe global trends in the institutional design of anti-corruption institutions and the best practices of these institutions in carrying out their duties and functions. Some indicators are the legal basis for formation, institutional status, and the impact of performance outcomes on the corruption perception index in each country. In short, it is necessary to explore the correlation between the institutional design of anti-corruption institutions and the success of these institutions in corruption eradication. The anti-corruption agencies that will be briefly analyzed are the Hong Kong's Independent Commission Against Corruption (ICAC), Singapore's Corrupt Practices Investigation Bureau (CPIB), Thailand's National Anti-Corruption Commission (NCCC), Malaysia's Anti-Corruption Commission (MACC), and South Korea's Anti-Corruption and Civil Rights Commission (ACRC). For the practical purposes of the study, Table 1 illustrates the comparisons.

**Table 1.** Comparative Analysis of Anti-Corruption Agencies in Asia

| No. | Anti-Corruption Agency | Formation Date | Legal Basis/Constituting Instrument | Institutional Status | Corruption Perception Index Score | | |
|---|---|---|---|---|---|---|---|
| | | | | | 2020 | 2021 | 2022 |
| 1 | Indonesian (KPK) | December 29, 2003 | the Law Number 30 of 2002, as amended up to the Law Number 19 of 2019, and the Constitutional Court Verdict Number 70/PUU-XVII/2019. | Legislative Entrusted Power, Independent Agency (2003-2019), Independent Executive Organ (2019 to date). | 37 | 38 | 34 |
| 2 | Malaysian (ACC) | January 1, 2009 | Malaysian Anti-Corruption Commission Act 2009, as amended | Legislative Entrusted Power, | 51 | 48 | 47 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | up to Act A1567 2018. | Independent Agency. | | | |
| 3 | Singapore (CPIB) | June 17, 1960 | Singapore's 1963 Constitution as amended up to 2016, Prevention of Corruption Act 1960, as amended up to 2020 Revised Edition. | Constitutional Organ, Independent Agency. | 85 | 85 | 83 |
| 4 | Thailand (NACC) | 17 November B.E. 2542 (1999) | Section 232 of the Thailand's 2017 Constitution and Organic Act on Counter Corruption 1999. | Constitutional Organ, Independent Agency. | 36 | 35 | 36 |
| 5 | Hong Kong (ICAC) | February 15, 1974 | Article 57 of the Basic Law of the Hong Kong Special Administrative Region of The People's Republic of China, and Independent Commission Against Corruption Ordinance 1974 as amended up to E.R. 3 of 2021. | Constitutional Organ, Independent Agency (1974—1997). Independent Executive Organ (1997 to date). | 77 | 77 | 76 |
| 6 | South Korea (ACRC) | January 25, 2002 (KICAC). February 29, 2008 | Anti-Corruption Act of Korea 2001 (KICAC), Act on the Prevention of Corruption and the Establishment and Management of the Anti-Corruption and Civil Rights Commission 2008, as amended up to Act No. 18438, 2021. The ACRC | Legislative Entrusted Power, Independent Agency (2002—2008), Independent Executive Organ (2008 to date). | 61 | 62 | 63 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | was launched on February 29, 2008, by the integration of the Ombudsman of Korea, the Korea Independent Commission against Corruption (KICAC), and the Administrative Appeals Commission. | | | | |

**Source:** Processed Data, 2023.

The table indicates that in terms of institutional design, there are only three independent agencies: the CPIB in Singapore, the ACC in Malaysia, and the NACC in Thailand. The institutional arrangements of these institutions are not designed as part of the executive branch; and are not under the control of the head of government.[45] On the other hand, there are three institutions that are independent executive organs: The KPK in Indonesia, the ICAC in Hong Kong, and the ACRC in South Korea.[46] Furthermore, these six anti-corruption institutions have legislative entrusted power but only the NACC, the CPIB, and the ICAC that are constitutional organs.[47] Interestingly, the KPK, the ICAC, and the ACRC were shifted from originally independent agencies to independent executive organs. Such phenomena indicate that in the Asian context, there is a trend of a shift in the institutional design of anti-corruption agencies.

The table also clearly illustrates a positive correlation between the institutional design of anti-corruption institutions and performance achievements proven by the CPI figures. Anti-corruption agencies that are independent are more effective and better in executing their duties and functions. The CPI achievements during 2020-2022 that were above 50 are the prove. As the spearheads of corruption prevention

[45] For the record, the form of government of Thailand, Malaysia, and Singapore is a parliamentary system. The leadership these three institutions were appointed by their respective heads of state, namely the King of Thailand, *Yang di Pertuan Agong*, & Singapore President.

[46] These institutions are designed as part of the executive branch. They are under the structural control of the head of government i.e., Chief of Executive & Prime Minister. However, they are independent in their duties and functions, based on Article 57 of Hong Kong Basic Law & Section 5 of ICAC Ordinance & Section 3 of Prevention of Corruption Act 1960 as amended up to 2020 Revised Edition.

[47] Based on its formation regulations, Section 232 of Thailand's Constitution of 2017 & Section 22 of Singapore's Constitution of 1963 with Amendments through 2016.

and eradication in their respective states, the CPIB, the ACC, and the ICAC also prove similar. the NACC in Thailand and the ACRC South Korea are the exceptions. In the Thailand case, the NACC is a constitutional organ and an independent agency. However, Thailand's CPI achievements are still below 50. On the other hand, the ACRC is not a constitutional organ. It is an independent executive organ but the state scores 50. In the Indonesian context, after the shift of the KPK from an independent agency to an independent executive organ, there was a drastic decline in the CPI rate, from 38 in 2021 to 34 in 2022. the drastic decline signifies a setback in the corruption eradication agenda in Indonesia.

## D. Conclusion

Theoretically, the KPK is an independent executive organ. Based on the Law Number 19 of 2019, the KPK is a state institution in the executive power branch, equivalent to the Attorney General's Office and the police. There was a shift in the institutional design of the KPK, from initially an independent agency to an independent executive organ. Following the amendment to the KPK Law, it is a law enforcement agency in the executive branch. However, it carries out its duties and authorities independently.

The amendment to the KPK Law also indicates that corruption is no longer considered as an extraordinary crime. Furthermore, compared to other anti-corruption agencies in Asia, the institutional design of the KPK is not ideal and not the best practice. Therefore, various interested parties must understand the theoretical construction of the KPK as an independent executive organ because the change in the KPK' is a matter of concern. It can be concluded as a setback in the Indonesian corruption eradication. This statement is relevant to point out. Compared to the achievements of anti-corruption agencies in other Asian countries, there is a positive correlation between institutional design and performance achievements in the CPI figures. Therefore, legislators must restore the KPK's previous position through the third amendment to the KPK Law in the future.

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