



# **ANALYSIS OF KPK (CORRUPTION ERADICATION COMMISSION) POSITION AFTER THE CONSTITUTIONAL COURT DECISION NUMBER 70/PUU-XVII/2019 FROM THE PERSPECTIVE OF THE NEW SEPARATION OF POWERS**

**Shafira Gita Amara Sandy**

*Law office Faris Ahmad Jundi and Patners Associates*

[shafirasandy@gmail.com](mailto:shafirasandy@gmail.com)

## **Abstract**

In 2019 Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission was passed. The second amendment to the KPK Law has changed the position and structure of the KPK institution quite a lot. In the same year, a review of Law Number 19 of 2019 was proposed in the Decision of the Constitutional Court Number 70/PUU-XVII/2019. This research will focus on analyzing the position of the KPK after the issuance of the Constitutional Court Decision Number 70/PUU-XVII/2019 by using the theory of The New Separation Of Power. This research is a normative legal research (legal research) that uses two approaches, namely the statutory approach and conceptual approach which in this case uses the Constitutional Court Decision Number 70/PUU-XVII/2019 and the theory The New Separation of Powers. The results of this study indicate that the Court decided that the state institution KPK is part of the executive power clump on the grounds that the KPK carries out executive functions in the executive domain. On the other hand, The New Separation

Of Powers theory sees KPK as having to be included outside of the three main branches of power which in The New Separation Of Powers theory is referred to as a "new branch of power" or "fourth branch of power" because the KPK carries out its mixed functions and also because the KPK fulfills the characteristics of an independent state institution.

**Keywords:** *The New Separation of Power, Corruption Eradication Commission, Constitutional Court Decision*

### **Abstrak**

Pada tahun 2019 Undang-Undang Nomor 19 Tahun 2019 tentang Perubahan Kedua Undang-Undang Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi disahkan. Perubahan kedua UU KPK ini cukup banyak merubah kedudukan maupun struktur lembaga KPK. Di tahun yang sama pengujian terhadap Undang-Undang Nomor 19 Tahun 2019 diajukan dalam Putusan Mahkamah Konstitusi Nomor 70/PUU-XVII/2019. Penelitian ini akan berfokus untuk menganalisis kedudukan KPK pasca terbitnya Putusan Mahkamah Konstitusi Nomor 70/PUU-XVII/2019 dengan menggunakan teori *The New Separation Of Power*. Penelitian ini merupakan penelitian hukum normative (legal research) yang menggunakan dua pendekatan yaitu pendekatan perundang-undangan (*statue approach*) dan pendekatan konseptual (*conceptual research*) yang mana dalam hal ini menggunakan Putusan Mahkamah Konstitusi Nomor 70/PUU-XVII/2019 dan teori *The New Separation Of Powers*. Hasil dari penelitian ini menunjukkan bahwa Mahkamah memutuskan lembaga negara KPK sebagai bagian dari rumpun kekuasaan eksekutif dengan alasan bahwa KPK melaksanakan fungsi-fungsi dalam domain eksekutif. Namun, ditinjau dari teori *The New Separation Of Powers* KPK merupakan lembaga yang seharusnya masuk ke dalam cabang kekuasaan diluar tiga cabang kekuasaan utama yang dalam teori *The New Separation Of Powers* disebut sebagai "cabang kekuasaan baru" atau "cabang kekuasaan keempat" sebab KPK menjalankan fungsi campuran dan juga karena KPK memenuhi karakteristik-karakteristik sebagai lembaga negara independen.

**Kata Kunci:** *The New Separation of Power, Komisi Pemberantasan Korupsi, Putusan Mahkamah Konstitusi*

## **INTRODUCTION**

The Law Number 30 of 2002 concerning the Corruption Eradication Commission explains that the Corruption Eradication Commission is a state institution which in carrying out its duties and authority is independent and free from the influence of any power. However, in 2019 Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission has changed this phrase. This latest law explains that the Corruption Eradication Commission (KPK) is a state institution within the executive power group which carries out the task of preventing and eradicating criminal acts of corruption. We can clearly see that in the latest Corruption Eradication Commission Law is declared as part of the executive agency. In hereby that there is a friction in the position of the Corruption Eradication Commission (KPK) from an independent auxiliary state institution to an executive institution.

The second amendment of the Corruption Eradication Commission Law was a lot of rejection from various groups, both the public and experts because the Corruption Eradication Commission Law actually narrowed the Corruption Eradication Committee's movements. The KPK is not only an executive institution, but also must be accountable for its duties and authority to the Supervisory Board. In the latest KPK Law, the Supervisory Board has considerable authority to intervene in the performance of the KPK.

Rejected of law demonstrated by several submissions for judicial review of Law No. 19 of 2019. There are at least 10 applications for judicial review of Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 about the Crime Eradication Commission Corruption. However, almost all requests for judicial review of Law Number 19 of 2019 were unsuccessful, either rejected, withdrawn or decided that the request had no legal grounds. One application for a judicial review of Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 about the Corruption Eradication Commission whose request for material review is considered legally grounded is Constitutional Court Decision Number 70/PUU-XVII/2019.

In the material review of Law Number 19 of 2019, there were several articles that the Petitioner considered problematic, as follows:

1. Article 1 number 3 and Article 3 of the Corruption Eradication Commission Law which according to the Petitioner is contrary to Article 24 of the 1945 Constitution of the Republic of Indonesia

2. Article 24 and Article 45a paragraph (3) Letter a of the Corruption Eradication Committee Law are contradict with Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia
3. Article 37B paragraph (1) Letter b, Article 12B, and Article 47 of the Corruption Eradication Committee Law are contradict with Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia
4. Article 40 paragraph (1) of the Corruption Eradication Committee Law is contradict with Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

Some of these points were contradicted to the 1945 Constitution of the Republic of Indonesia by the Constitutional Judge, so in the material review of the Petitioner's petition, parts were accepted, namely as follows:

1. Article 1 number 3 of Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission
2. Article 12B, Article 37B paragraph (1) letter b, and Article 47 paragraph (2) Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission
3. The phrase "accountable to the Supervisory Board" in Article 12C paragraph (2) of Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission and replaced by notifying the Supervisory Board
4. The phrase "not completed within a maximum period of 2 (two) years" in Article 40 paragraph (1) of Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission
5. The phrase "must be reported to the Supervisory Board no later than 1 (one) week" in Article 40 paragraph (2) of Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission
6. The phrase "with written permission from the Supervisory Board" in Article 47 paragraph (1) of Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission.

The Constitutional Court Decision Number 70/PUU-XVII/2019 regarding Article 1 number 3 and Article 3 is the focus of researchers in this research. Which, according to the Petitioner, Constitutional Court Decision Number 70/PUU-XVII/2019 is contrary to the 1945 Constitution of the Republic of Indonesia. This article basically states that the Corruption Eradication Committee (KPK) is a state institution that included in executive powers, so we can clearly conclude that in Law Number 19 of 2019 Article 1 number 3 and Article 3 KPK is categorized as a branch of executive power. The executive is one of the three branches of power contained in the Trias Politika concept of separation of powers.

In 2000 Bruce Ackerman in his work entitled *The New Separation of Powers* introduced a new theory of separation of powers. Bruce Ackerman explained the structure of the branches of power in the United States constitutional system which no longer uses the trias politica theory of separation of powers which divides power into three, but instead uses a new concept of separation of powers which divides power into five branches of power, that the House of Representatives, Senate, President as chief of Executive, Supreme Court, and Independent Agencies.<sup>1</sup>

In this research, the author is interested in analyzing the considerations of constitutional judges regarding the position of the Corruption Eradication Committee (KPK) in state administration after the Constitutional Court Decision Number 70 of 2019. And examining whether, with the continued development of independent state institutions, the concept of separation of powers adopted in Indonesia today is still relevant to remain executed.

## RESEARCH METHODE

The research of the researcher conducted was normative legal research. Normative legal research is a process of finding legal rules, legal principles and legal doctrines to answer the legal issues faced.<sup>2</sup> In this research, researchers used two approaches, that the Statute Approach and the Conceptual Approach. The Legislative Approach is carried out by reviewing all statutory regulations related to the problem (legal issue) being faced. In this case, the researcher examines the Constitutional Court Decision

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<sup>1</sup> Bruce Ackerman, *The New Separation of Powers*, The Harvard Law Review, vol. 113, HVLR 633 (Jan. 2000), hal. 728.

<sup>2</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana Prenada, 2010, hal 35.

Number 70/PUU-XVII/2019 and Law Number 19 of 2019. Meanwhile, for the Conceptual Approach, this approach departs from the views and doctrines that have developed in legal science. This approach is important because comprehension of views/doctrines that develop in legal science can footing for building legal arguments when resolving the legal issues faced. Views or doctrines will clarify ideas by providing legal definitions, legal concepts, and legal principles that are relevant of problem. In this case the researcher uses the theory of separation of powers, The New Separation of Powers that presented by Bruce Ackerman.

## **DISCUSSION**

### **A. The New Separation Of Powers**

In 2000, Bruce Ackerman, an expert of constitutional law who served as a professor at Yale Law School, developed a new theory of separation of powers, namely the theory of The New Separation of Powers in his work with the same title, that The New Separation of Powers (2000). Bruce Ackerman explained the branches structure of power in the United States constitutional system which nevermore uses the trias politica theory of separation of powers that divides power into three, but instead uses a new concept of separation of powers which divides power into five branches of power, that the House of Representatives, Senate, President as chief of Executive, Supreme Court, and Independent Agencies.<sup>3</sup> In his explanation, Ackerman said:

*"... the American system contains (at least) five branch: House, Senate, President, Court and Independent Agencies such as the Federal Reserve Board. Complexity is compounded by the bewildering institutional dynamics of the Americans federal system. The crucial question is not complexity, but whether we Americans are separating power for the right reasons".*

"...separation of powers in the United States constitutional system consists of at least five branches; The House of Representatives, the Senate, the President, the Supreme Court, and independent institutions such as the Federal Reserve Board. This complexity is deepened by the dynamics of expanding the state institutional system at the federal level. The crucial question is not complexity, but whether we, the United States, are separating powers for the right reasons".

As also explained in Gunawan Tauda's research, Bruce Ackerman idealized the latest form (distinctive pattern) of the modern understanding separation of powers which is nevermore limited to the separation of three functions (Separationism's Three Rationales), as desired by Montesquieu

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<sup>3</sup> Bruce Ackerman, *Loc.Cit.*, hal. 728

and Madison, but has been realized in institutions that exist in the country's institutional system itself. Based on this understanding, Ackerman said that the branches of state power should be strictly seen based on their institutional model, which in the context of the United States consists of (1) the branches of power of the House of Representatives, (2) Senate, (3) President, (4) Supreme Court, and (5) branches of independent agencies (independent state commissions).<sup>4</sup>

In his research, Bruce Ackerman also offers a model of separation of powers by placing parliament (and the executive, in the context of a parliamentary system) as the center of power, while other organs were created, with the aim of limiting parliament's power. He stated it in fullfill:

*“At the centerpiece of my model of constrained parliamentarianism is a democratically elected house in charge of selecting a government and enacting ordinary legislation. The power of this center is checked and balanced by a host of special-purpose branches, each motivated by one or more of the three basic concerns of separationist theory”.*

According to him, this limitation of parliamentary (and executive) power is based on three principles, which have so far motivated the birth of the doctrine of separation of powers, that democracy, professionalism and protection of the basic rights of citizens. Ackerman also emphasized that checks and balances should be based more on the three principles above. Not strictly based on which one has the 'right' to be categorized as a state organ and which one is the main state organ. Then it makes increasingly clear that the branches of state power are increasingly developing and their relationship patterns are increasingly complex.<sup>5</sup>

Apart from the theory of new separation of powers, there is also the theory of the fourth branch of government which was stated by Yves Meny and Andrew Knapp, as follows: "Regulatory and monitoring bodies are a new type of autonomous administration which has been most Widely developed in the United States (where it is sometimes referred to as the 'headless fourth branch' of the government). It takes the form of what are generally known as Independent Regulatory Commissions"<sup>6</sup>

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<sup>4</sup> Gunawan A. Tauda, 2011, *“Kedudukan Komisi Negara dalam Struktur Ketatanegaraan RI”*, Jurnal Pranata Hukum, Volume 6 Nomor 2, Juli 2011, hal. 68

<sup>5</sup> Zainal Arifin Mochtar, *Lembaga Negara Independen: Dinamika Perkembangan dan Urgensi Penataannya Kembali Pasca-Amendemen Konsitusi*, Depok, PT Raja Grafindo Persada, 2016, hal. 26 – 27

<sup>6</sup> Yves Meny dan Andrew Knapp, *Government and Politic in Western Europe: Britain, France, Italy, Germany, 3rd edition*, Oxford: Oxford University Press, 1998, hal. 281

“Regulatory and supervisory agencies constitute a new type of autonomous administration that has developed rapidly in the United States (where it is sometimes referred to headless fourth branch of the Federal government). These institutions are widely known generally as Independent State Commissions (Independent Regulatory Commissions)”.

Based on the opinion of Yves Meny and Andrew Knapp, there is a fourth power, namely independent institutions. According to Yves Meny and Andrew Knapp, this institution exists because of the tendency in administrative theory to transfer regulatory and administrative tasks to become part of the tasks of independent institutions.

In Indonesian constitutional context, there is a tendency in administrative theory to transfer regulatory and administrative tasks to become part of the duties of independent state commissions. For example, the authority to take action (investigation, inquiry, prosecution and confiscation) and prevention of criminal acts of corruption is also carried out by the Corruption Eradication Commission (KPK). Apart from that, the authority to organize general elections, which was previously under the control of the Minister of Home Affairs, is now fully carry out by the General Election Commission (KPU) independently.

The fourth branch of power referred to in theory above can also take the form or be interpreted as an independent state commission, because its existence is not within the realm of legislature, executive or judicial branches of power. Therefore, the theoretical construction of existence of an independent state commission in the constitutional context of the Republic of Indonesia can be classified into the headless fourth branch of government.<sup>7</sup>

Transformation public thinking have impact on the structure of state institutions, including form and function of state organizations in Indonesia. As a consequence of developments over time, new state organizations have emerged in form of council, commission, committee, board or authority.

The conditions in Indonesia, new state organizations tend to established as a result of amendments to the 1945 Constitution of the Republic of Indonesia. The new state organizations are usually known as state auxiliary organs or state auxiliary institutions as translated into Indonesian is an auxiliary state organization and a state organization that functions as a support to other organizations. Some of these organizations are also known as self-regulatory agencies, independent supervisory bodies,

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<sup>7</sup> Gunawan A. Tauda, *Op .Cit.*, hal. 177



or organizations that carry out mixed functions between regulatory, administrative and court functions which are usually separated but instead carried out jointly by these new organizations.<sup>8</sup>

In the constitutional practice of the Republic Indonesia, all state institutions that are categorized as independent state commissions are those that fulfill certain prerequisites, namely having the characteristics of<sup>9</sup>:

1. The legal basis for formation expressly states the independence of relevant independent state commission in carrying out the duties and functions (normative requirements).
2. Independent, in sense of being free from influence, will or control from the executive branch of power.
3. The dismissal and appointment of commission members uses certain mechanisms that are specifically regulated, not solely based on wishes of the President (political appointee)..
4. The leadership of commission is collegial collective, membership or commissioners is odd and decisions are taken by a majority of votes.
5. The leadership of the commission is not controlled or majority does not come from a particular political party.
6. The terms of office definitive commission leaders expire simultaneously and can be reappointed for another period.
7. Membership of these state institutions is sometimes aimed at maintaining a balance of non-partisan representation.

Based on the characteristics above, it can be determined whether an institution meets these characteristics or not, so that it can be clearly ascertained whether an institution is part of an independent institution or not.

### **B. The Position of the Corruption Eradication Committee in the Constitutional Court Decision Number 70/PUU-XVII/2019**

The Court explained the legal considerations regarding Article 3 of Law No. 19/2019, of which Petitioner questioned constitutionality of the phrase "the executive cluster". In this case, the Court emphasized that the position and independence of the Corruption Eradication Commission had been considered by the Court in previous decisions, including Constitutional Court Decision Number 012-016-019/PUU-IV/2006 and Constitutional Court Decision Number 36/PUU-XV/2017.

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<sup>8</sup> Bambang Sadono, *Kedudukan Komisi Pemberantasan Korupsi Dalam Sistem Ketatanegaraan Di Indonesia*, Jurnal USM Law Review Vol 3 No 2 Tahun 2020, hal. 261

<sup>9</sup> Gunawan A. Tauda, *Op .Cit.*, hal. 174

Constitutional Court Decision Number 012-016-019 of 2006 page 269 which discusses the independence of the Corruption Eradication Commission is explained by the Court as follows:

"... that the formulation in Article 3 of the Corruption Eradication Commission Law itself does not provide for the possibility of any other interpretation other than that formulated in the provisions of the article in question, namely that the Corruption Eradication Commission's independence and freedom from the influence of any power is in carrying out its duties and authority. There are no constitutionality issues in the formulation of Article 3 of the Corruption Eradication Committee Law."

Constitutional Court Decision Number 36/PUU-XV/2017 which decided the case regarding the review of Law No. 17 of 2014 concerning the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and the Regional People's Representative Council discussing the constitutionality of the Corruption Eradication Commission (KPK) institution as the object of the DPR's Right to Inquiry. In this decision to decide the constitutionality of the Corruption Eradication Committee as the object of the DPR's Right to Inquiry, the Court needs to clarify the position of the Corruption Eradication Committee in the Indonesian state administration.

The Court opinion that the Corruption Eradication Committee (KPK) is actually an institution in the executive domain, which carries out functions in executive domain, that investigations, inquiries and prosecutions. The Corruption Eradication Commission (KPK) is clearly not in the realm of the judiciary, because it is not a court body that has the authority to try and decide cases. The KPK is also not a legislative body, because it is not a law-forming organ. The Court stated;

"... It is true that the Corruption Eradication Commission is a state institution which in carrying out its duties and authority is independent and free from the influence of any power. That position in the executive realm does not mean that the KPK is not independent and free from any influence. In the Constitutional Court Decision Number 012-016-019/PUU-IV/2006 on page 269, it is stated that the KPK's independence and freedom from the influence of any power is in carrying out its duties and authority..."

The Court considers that it cannot be used as a basis for stating that the DPR's Right to Inquiry does not include the Corruption Eradication Commission as an independent institution, because textually it is clear that the Corruption Eradication Commission is an organ or institution which includes the executive and implementers of laws in the field of law

enforcement, especially in eradicating criminal acts of corruption. So it can be concluded that the decision states that the DPR's supervisory functions (the right to interpellation, the right to inquiry, and the right to express opinions) can be directed to the Corruption Eradication Commission regarding its duties and authorities except for judicial authorities, including investigations, inquiries and prosecutions.

These opinions are the result of the thoughts of 5 (five) of the 9 (nine) constitutional judges. The five judges are Arief Hidayat, Anwar Usman, Manhan MP Sitompul, Aswanto, and Wahiduddin Adams. Meanwhile. The other four judges had different views or opinions. There are three different opinions in the Constitutional Court Decision Number 36/PUU-XV/2017, the first is the opinion of the five constitutional judges, that Arief Hidayat, Anwar Usman, Manhan MP Sitompul, Aswanto, and Wahiduddin Adams which was later determined to be the Court's Decision, second the opinion expressed by constitutional justices I Dewa Gede Palguna, Suhartoyo and Saldi Isra is listed in the Dissenting Opinion, and third is the opinion expressed by constitutional judge Maria Farida Indrati which is also listed in the Dissenting Opinion.

Constitutional justices I Dewa Gede Palguna, Suhartoyo and Saldi Isra said that the Corruption Eradication Commission is an independent institution by looking at the characteristics put forward by various experts and paying attention to the provisions in the Corruption Eradication Committee Law, whose existence is outside the powers of the executive, legislative and judiciary. This refers to Asimow's opinion which states "the unit of statute most administrative agencies fall in the executive branch, but some important agencies are independent." State organs which are given independent status are therefore outside the three branches of power in the trias politica doctrine. Quoting from William F. Funk & Richard H. Seamon, it is not uncommon for institutions that are called independent to have "quasi legislative", "quasi executive" and "quasi judicial" powers. In line with this opinion, Jimly Asshidiqie stated that state organs are independent because they are outside the executive, legislative and judicial branches of power. This means that with this "quasi" position, independent institutions are not included in the legislative, executive or judicial branches of power.

The three constitutional judges also emphasized that based on the original intent of Article 20 A paragraph (2) of the 1945 Constitution when amendments were made to the 1945 Constitution, when discuss regarding

the right of inquiry, the MPR members explicitly stated that the use of right was intended to supervise the government in executive sense. So, according to them, the Corruption Eradication Commission which is an independent institution and outside the three branches of state power institutions in the *trias politica* should not be the object of the DPR's inquiry rights.

Constitutional judge Maria Farida Indrati, regarding position of the Corruption Eradication Commission (KPK) is same opinion as the Court, but has a different opinion regarding the constitutionality of the Corruption Eradication Commission (KPK) as the object of the DPR's inquiry rights. According to him the KPK is included in the realm of executive power which is often called a government institution (*regeringsorgaan bestuursorgaan*) even though it has independent characteristics (*zelfstandige bestuursorganen zbo's*). Independent here must be interpreted as independent in carrying out its duties and authority. Meanwhile, with regard to the DPR's right to inquiry according to constitutional judge Maria Farida Indrati, the use of the right to inquiry should not be appropriately directed at the Corruption Eradication Commission. This is based on the KPK's accountability in carrying out its duties and authority to public and submitting its reports openly and periodically to the President of the Republic of Indonesia, the House of Representatives of the Republic of Indonesia and the Financial Audit Agency. So, in the opinion of constitutional judge Maria Farida Indrati, supervision of the Corruption Eradication Commission by other institutions is no longer through the right to inquiry in order to carry out the DPR's supervisory function. Supervision of the Corruption Eradication Commission has been carried out through open and periodic reports to other state institutions.<sup>10</sup>

In summaries that this decision there are 3 (three) different opinions, but with regard to the position of the Corruption Eradication Commission in state administration there are 2 (two) different opinions, that the opinions expressed by 6 (six) constitutional judges, namely Arief Hidayat, Anwar Usman, Manhan MP Sitompul, Aswanto, Wahiduddin Adams and Maria Farida Indrati who are of the opinion that the Corruption Eradication Commission is a state institution that is included in executive realm and is independent. Then there was opinion of 3 (three) constitutional judges I Dewa Gede Palguna, Suhartoyo and Saldi Isra who were of opinion that the Corruption Eradication Commission was an independent institution and was

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<sup>10</sup> Putusan Mahkamah Konstitusi Nomor 36/PUU-XV/2017

outside the 3 (three) powers of the Trias Politika, namely legislative, executive and judicial.

The Court opinion in Constitutional Court Decision Number 70/PUU-XVII/2019 based on considerations from previous decisions that the enactment of the phrase "within the executive power" does not cause the implementation of the duties and authority of the Corruption Eradication Committee to disrupt its independence because the Corruption Eradication Commission is not responsible to the power holder executive, which in this case is held by the President as stated in the provisions of Article 20 of Law 30/2002, that;

"The Corruption Eradication Commission is responsible to public for carrying out its duties and submitting its reports openly and periodically to the President, DPR and BPK."

And based on these considerations, the Court considers the Petitioner's argument that Article 3 of Law No. 19 of 2019 is contrary to the 1945 Constitution to be legally groundless. Which we can conclude that Article 3 of Law No. 19 of 2019 states that the Corruption Eradication Commission is a state institution in the executive family which in carrying out its duties and authority is independent and free from the influence of any power remains valid on the basis of this decision.

### **C. Analysis of the Position of the Corruption Eradication Commission (KPK) After the Constitutional Court Decision Number 70/PUU-XVII/2019 in the Perspective of the New Separation of Powers Theory**

The formation of supporting state institutions is generally driven by the fact that bureaucracy within government can no longer meet the demands for public services with increasing quality standards, more efficiency and effectiveness. The ever-increasing dynamics of demands for democracy, citizens' rights, and demands for public participation in state management are also quite influential. In its development, these massive demands failed to be aggregated through the available state institutions, resulting in changes to organizational structure. The state organizational structure, which is dominated by government departmental structures, is starting to be filled by supporting state institutions which can be in form of council, commission, committee, board or authority.

The Corruption Eradication Committee (KPK) as one of the institutions included in ranks of supporting institutions was formed from a condition that

showed the inability of competent authorities to eradicate criminal acts of corruption, that the police and prosecutors, so historically the duties of the police and prosecutors' state institutions that were given functions of investigation, investigation and prosecution were divided to the independent institution KPK. Considering that the Police and Prosecutor's institutions are hierarchically subordinate to executive power, the Corruption Eradication Commission exists as an independent institution and free from the influence of any branch of power. The Corruption Eradication Committee (KPK) is present as a trigger for the way conventional institutions work which are considered no longer effective in eradicating criminal acts of corruption and as a symptom of self-criticism towards conventional separation of powers between the executive, legislative and judiciary.

In the constitutional practice of the Republic Indonesia, all state institutions that are categorized as independent state commissions are fulfill certain prerequisites, that having the characteristics of<sup>11</sup>:

1. The legal basis of formation expressly states the independence or independence of relevant independent state commission in carrying out its duties and functions (normative requirements).
2. Independent, in sense of being free from influence, will or control from the executive branch of power.
3. The dismissal and appointment of commission members uses certain mechanisms that are specifically regulated, not solely based on the wishes of the President (political appointee).
4. The leadership of the commission is collegial collective, members or commissioners is odd and decisions are taken by a majority of votes.
5. The commission's leadership is not controlled or the majority does not come from a particular political party.
6. The terms of office the definitive commission leaders expire simultaneously and can be reappointed for another period.
7. Membership in these state institutions is sometimes aimed at maintaining a balance of non-partisan representation.

The author analyzes the Corruption Eradication Commission with the characteristics mentioned in Law No. 30 of 2002 concerning the Corruption Eradication Commission (UU KPK) in relation to the characteristics of an independent state commission.

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<sup>11</sup> Gunawan A. Tauda, *Loc. Cit.*, hal. 174

The independence of the Corruption Eradication Commission was explicitly and firmly stated by the legislators. It can be seen in Article 3 which states:

"The Corruption Eradication Commission is a state institution which in carrying out its duties and authority is independent and free from influence of any power."

The Corruption Eradication Committee (KPK) is institution that is independent and free from influence of any power, so we can see that the provisions above are in accordance with characteristics in points number 1 (one) and 2 (two), that it states independence and free from the influence of executive power in carrying out its duties and functions.

The appointment and dismissal of commissioners is regulated by certain mechanism and stated in Article 30, Article 31 and Article 32. Article 30 regulates the procedures for appointing commissioners and Article 31 regulates how all procedures are carried out transparently. Article 32 regulates the dismissal of commissioners. This provision of course in accordance with the characteristics in points number 3 (three) and 6 (six) which state that the dismissal and appointment of commission members uses a certain mechanism rather than based on a decision from the President. This provision also regulates the term of office and rules regarding re-appointment in the next period. So it is clear that the KPK meets the characteristics of an independent institution contained in points number 3 (three) and 6 (six).

Next are the characteristics of independent institution number 4 (four) which are explained in Article 21 paragraph (5) that states:

"The leadership of the Corruption Eradication Commission as intended in paragraph (2) works collectively, and Article 21 paragraph (1) letter a states: "The leadership of the Corruption Eradication Commission consists of 5 members of the Corruption Eradication Commission." Based on the provisions above it is clear that the leadership of the Corruption Eradication Commission is collegial collective, the membership or commissioners is odd, which can be interpreted as meaning that the KPK fulfills the characteristics in point number 4 (four).

Finally, the characteristics in numbers 5 (five) and 7 (seven) are listed in Article 29 letter h, which states:

"Not being an administrator of a political party"

This provision is accordance with the characteristics in numbers 5 (five) and 7 (seven) where the leadership of the commission should not be controlled or not have the majority come from a particular political party and therefore not be part of a particular interest group so that it is non-partisan.

From the explanation above, it is clear that the KPK meets the characteristics to become an independent institution.

The classical or conventional model of separation state powers with three branches of state power, executive, legislative and federative/judicial, as adopted by John Locke and Montesquieu unreach the current development of the modern state. The growth of state organs that are formed outside existing branches of government power in the classic concept of separation of power, which is also referred to many occasions as auxiliary state organs, most of them are under the supervision of the government or executive and generally they provide reports to the government (executive). Except for several institutions or organs that have regulatory, execution and adjudication functions in one institution which is contrary to the classic separation of power concept.

John Alder said that supporting state institutions generally function as a quasi governmental world of appointed bodies and non-departmental agencies, single purpose authorities, and mixed public private institutions. It is quasi or semi-governmental in nature, and given a single function or sometimes a mixed function, such as on the one hand as a regulator, but also punishing such as the judiciary mixed with the legislature. For this reason, apart from being called auxiliary state organs, these institutions also called self-regulatory agencies, independent supervisory bodies or institutions that carry out mixed functions.<sup>12</sup>

Jimly Asshiddiqie said in his book entitled *Development and Consolidation of Post-Reformation State Institutions* that emergence of a new branch of power (outside legislative, executive and judicial powers) that independent state commissions is termed independent supervisory bodies, namely institutions that carry out a mixture of functions regulatory, administrative and adjudgement.<sup>13</sup>

Bruce Ackerman in his work entitled *The New Separation of Powers* doubt whether there is good reason to think that an intelligent modern

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<sup>12</sup> John Alder, *Constitutional and Administrative Law*, London: Palgrave, 1989.

<sup>13</sup> Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Jakarta: Sinar Grafika, 2006, hal. 8



government should divide power among only three or four branches of power. He said that:

*"... the American system contains (at least) five branches: House, Senate, President, Court, and independent agencies such as the Federal Reserve Board. Complexity is compounded by the bewildering institutional dynamics of the American federal system. The crucial question is not complexity, but whether... Americans are separating power for the right reason."*<sup>14</sup>

Bruce Ackerman idealized the concept of separation of powers as no longer limited to Montesquieu's trias politica, because this concept was no longer able to keep up with developments in the modern era. Based on this understanding, Ackerman said that the branches of state power should be strictly seen based on their institutional model, which in the context of the United States consists of (1) the branches power of House of Representatives, (2) Senate, (3) President, (4) Supreme Court, and (5) the branch power of the Independent Agencies (Independent State Commission). Functionally, the axis of power from the new separation of powers theory is the legislative (House of Representatives and Senate), executive (President), judiciary (Supreme Court, and independent state commissions. Meanwhile, institutionally the institutions covered are, DPR, DPD, President, Supreme Court, Constitutional Court, and independent state commissions such as the Corruption Eradication Commission, Ombudsman, etc.

In the book Comparative Administrative Law, Chapter 8, Bruce Ackerman entitled his writing Good-bye Montesquie in he said;\

*"...the tradisional tripartite formula fails to capture their distinctive modes of operation, these new and functionally independent units are playing an increasingly important role in modern government. A new sparation of power in emerging in the twenty-first century. To grasp its distinctive features will require us to develop a conceptual framework containing five or six boxes or maybe more..."*

This means that currently is no longer rational to force an independent commission into one of the institutions of power (legislative, executive and judicial) and cannot answer the complexities of modern state administration.<sup>15</sup>

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<sup>14</sup> Bruce Ackerman, *Loc. Cit.*, hal. 728.

<sup>15</sup> Bruce Ackerman, *Good-bye Montesquie in Chapter 8 Comparative Admistrative Law*, 2010, hal 129

In contemporary state administration, the position of independent state institutions (including the Corruption Eradication Commission) is parallel to the Trias Politica institution which consists of the executive, judicative and legislative. Borrowing a term from Yves Manny and Andrew Knapp that places independent state institutions as the fourth branch of government. Yves Manny and Andrew Knapp say;

“Regulatory and monitoring bodies are a new type of autonomous administration which has been most widely developed in the United States (where it is sometimes referred to as the ‘headless fourth branch’ of the government). It takes the form of what are generally known as Independent Regulatory Commissions.”<sup>16</sup>

This opinion resonates with the concept of The New Separation of Powers brought by Bruce Ackerman which essentially considers that independent institutions have an equal position with the executive, judicative and legislative institutions. Based on this that the Corruption Eradication Commission is not part of the executive but is an independent state institution whose position is equal to the Trias Politika institute.

The Court's decision decided that the Corruption Eradication Committee (KPK) is a state institution that falls within the realm of executive power is not relevant to needs of society, nation and state itself. Deciding to include the Corruption Eradication Commission (KPK) in executive power is one form of the Court's efforts to maintain the classic concept of separation of powers, that Trias Politika, which has been adhered to Indonesia.

The Court which basically realized that the concept of separation of powers currently in force was no longer able to reach and fulfill needs of society and the state which continued to develop, finally handed down a decision that seemed hesitant. The Court classified the KPK as part of the scope of executive power, but also made it an independent institution. These contradictory decisions make the status of the KPK's position uncertain. The Court's doubts are clearly visible in the Constitutional Court Decision Number 36/PUU-XV/2017 page 107, the Court said;

"The Court agrees that the classical doctrine of separating branches state power into three branches of power: executive, legislative and judicative, is no longer deemed adequate to realize state goals and the demands of an increasingly complex society. In other words, it is no longer sufficient to achieve and fulfill these goals and demands with the existence of a main institutional structure (main state organs), so that supporting state

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<sup>16</sup> Yves Meny dan Andrew Knapp, *Loc. Cit.*, hal. 281.

institutions (auxiliary state organs) are needed to carry out supporting functions for the main state institutions. In other words, these supporting state institutions are formed based on the function of the main state institutions which carry out three functions: legislative, executive and judicative. This means that, whether in the executive, legislative or judicative domains, it is possible for supporting institutions to emerge support the complexity of the functions of the main institutions. The purpose of its formation is clear, that in context of effective implementation of the powers that are the responsibility of these main institutions."<sup>17</sup>

The Court statement shows that how the Court chose to make independent commissions into supporting state institutions (auxiliary state organs) as a solution to classic doctrine of separation branches of state power into three branches power: executive, legislative and judicative which are no longer adequate to realize the objectives goals of state and increasingly complex demands of society. Meanwhile, the reality of the Republic of Indonesia today shows that there is a separate branch of power, that an independent state commission. As a separate branch of power, the theoretical construction of the existence independent state commission can be interpreted as part of the "New Separation of Power" or the "Fourth Branch of Power".

The author views that the implementation of the new separation of powers concept (The New Separation of Powers) which was coined by Bruce Ackerman, supported by the opinions of other experts is needed by Indonesia to realize the state's goals and the demands of society which are now increasingly complex. As previously explained, the current concept of separation of powers can no longer meet the demands of needs society, nation and state which continue to develop over time. So that the position of independent state institutions (including the Corruption Eradication Commission) becomes clearer and they can carry out their duties and authority more efficiently in accordance with their respective functions. And therefore, the Corruption Eradication Commission (KPK) should be placed in an independent state institution which is a branch of power that different from the three branches of power of the Trias Politika, that legislative, executive and judicative. So that the independence and freedom of the Corruption Eradication Committee carrying out its duties and authority are more

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<sup>17</sup> Putusan Mahkamah Konstitusi Nomor 36/PUU-XV/2017

guaranteed and more effective and efficient in eradicating criminal acts of corruption.

## **CONCLUSION**

Constitutional Court Decision Number 70/PUU-XVII/2019 makes the KPK part of the realm independent executive power. This decision was made based on the consideration that the Corruption Eradication Committee carries out the duties of investigation, investigation and prosecution in cases of criminal acts of corruption, where these duties are actually the authority of the Police and/or Prosecutor's Office, therefore the Corruption Eradication Commission which carries out functions in the executive domain is declared an institution a state that falls within the realm executive power but independent in carrying out the duties and authority. In term of the New Separation of Power Theory, the KPK is an independent state institution that fulfills the characteristics of independent state institution, so the KPK should be included in own branch of power, that the "new branch of power" or "fourth branch of power".

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