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Dispute Resolution of State Auxiliary Institutions in Indonesia: Comparative Study in Several Countries

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Abstract
Common problems faced by countries that form state auxiliary institutions, including Indonesia are accountability mechanisms, positions in the state administration structure and patterns of working relationships. The research is normative legal research. The results show that the dispute resolution for state auxiliary institutions is an authority of the Constitutional Court as long as it obtains their authority in a delegative manner and not hierarchical, although the constitution confirms that the authority of the Constitutional Court is to decide disputes over the authority of state institutions whose authority is granted by the 1945 Constitution of the Republic of Indonesia. However, for state auxiliary institutions whose establishment is a delegation through a law, it can be interpreted that these state institutions can become parties in dispute resolution at the Constitutional Court. It is necessary to establish a law in order to eliminate the legal void related to dispute resolution of state auxiliary institutions whose establishment is through a law.
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1. Introduction

The amendment to the Constitution of the Republic of Indonesia implies several changes that were previously unknown in the constitution. One of the new things is the emergence of state auxiliary organs. According to Prayitno[1], the emergence of state auxiliary organs was caused by a decrease in public trust in existing state institutions. For example, public distrust of the services of state officials gave rise to an ombudsman, distrust of the handling of human rights violations rise to the National Human Rights Commission and distrust of judges in handling cases rise to the Judicial Commission, distrust of the police rises to the Police Commission and distrust of the implementation of the prosecutor duties rise to the Corruption Eradication Commission.

In addition to these institutions, state institutions were also formed and directly responsible to the President or part of the executive so that they were referred to as executive branch agencies. Several institutions are the National Law Commission, the Witness and Victim Protection Agency, the Strategic Industry Advisory Council, the National Research Council, the Indonesian Maritime Council, the National Economic Council, the National Business Development Council, the National Transportation Safety Commission, the Interdepartmental Commission on Forestry, the National Accreditation Commission, Independent Assessment Committee and others. These institutions were formed not only based on laws but some were formed only based on presidential regulations.

The different legal bases imply that state auxilities institutions were formed based on partial, incidental

[1] Arliman, Laurensius. "Komnas Ham Sebagai State Auxialiary Bodies Di Dalam Penegakan Hak Asasi Manusia Di Indonesia." *Jurnal Bina Mulia Hukum* 2, no. 1 (2017): 54-66.

issues, and as a specific response to the problems being faced. It causes these commissions operating independently and not complementing one another, so that in further implications it can result in the effectiveness of the presence of these commissions in the state administration structure which does not appear to be running in accordance with the noble goal of establishing an extralegislative, extraexecutive and extrajudicative institutions.

Common problems faced by countries that form state auxiliary institutions, including Indonesia are accountability mechanisms, positions in the state administration structure and patterns of working relationships with primary state institutions. This condition has a negative impact in the form of unclear accountability and working patterns of these independent institutions because their formation is often not based on rational needs and sufficient juridical foundations. As an independent institution apart from a structural relationship with the government, the government certainly does not have the capacity to be able to control specifically these extra institutions. The ambiguity of the accountability mechanism is caused by the provisions governing these extra agencies which sometimes create separate mechanisms that are different from one another.

As described above shows that the background for the emergence of state auxiliary institutions in the constitutional structure of the Republic of Indonesia is not a constitutional design that can become a legal umbrella to maintain its existence but incidental issues that are expected to answer the problems at hand. This fact has at least 3 (three) consequences as follows: *the first*, the juridical legitimacy for the existence of state auxiliary institutions is very weak so that they always face obstacles in exercising their authority. *The second*, these state auxiliary institutions operate independently without any work systematics that are synergistic and can support one another. *The third*, the possibility of disputes occurring between state auxiliary institutions or between primary state institutions and state auxiliary institutions and there is absolutely no clear regulation regarding the resolution of disputes. This ultimately resulted in the effectiveness of the existence of state auxiliary institutions in the constitutional structure which still did not appear to be in accordance with the original objective of establishing the institution which was extraexecutive, extralegislative and extrajudicial in nature.

2. Method of Research

The research is a descriptive normative research to describe a number of variables related to the studied problem. The type of research is descriptive, the data analysis technique begins to be processed when data collection is carried out and worked on intensively from the first time describing the background of the research problem. Each data obtained was analyzed qualitatively by describing it in the form of sentences according to the studied problem.

3. The Essence of Formation of State Auxiliary Organs in Indonesia: Comparative Study in Several Countries

Changes in the political configuration of democratic authoritarianism applied in a country absolutely demand a shift in the management of power from personal to impersonal. This also has implications for changes in the distribution of power which was previously considered a doctrine, no longer only divided into the power to make laws, government power and judicial power. This is marked by the formation of State Auxiliary Organs which in reality have a position based on their duties and functions.

The formation of state auxiliary institutions did not only occur in Indonesia. In other countries, state institutions like this have also been formed. In the United States along with the expanding role of parliament in the constitutional structure as a result of the accelerated dynamics of society which are increasingly complex and present challenges that are different from before, thus requiring new answers to be found immediately. Therefore, the United States parliament established a body responsible to it in various special matters relating to legislative functions, such as *the Federal Communications Commission, the Civil Aeronautics Board, the Securities and Exchange Commission, the National Labor Relation Board, Federal Power Commission*, *Interstate Commerce Commission*, and *Federal Trade Commission*. In Jimmy Asshiddiqie's note, throughout the United States, there are no less than 30 bodies like this which are relatively independent special bodies with the task of carrying out semi-judicial and semi-legislative functions. Although the position of these special agencies in the United States is administratively within the government, the appointment and dismissal of members of these special agencies is determined by election by Congress.[1]

Scandinavian countries such as Sweden, Denmark, Finland and Norway, France, New Zealand, Guyana Mauritius the state auxiliary institutions are also established outside the powers of government, legislature and judiciary. This is done in order to protect its citizens from unfair actions by the government. This institution has no right to adjudicate or have a judicial function on citizen complaints over unfair actions by the government. However, this institution can conduct an investigation into the matter. The nomenclature for such institutions is

[1] Ishiyama, John T. and Breuning, Marijke. *Ilmu Politik dalam Paradigma Abad ke 21.* Jakarta: Kencana Prenada Group, 2015, p. 45

called differently in different countries. Sweden, for example, calls it the *Justitie Ombudsman*, France with the High Commissioner for Defense *(Haut Commissioneraire Defenseur)*, and New Zealand with the *Parliamentary Commission for Administration*.[1]

In Hans Kelsen's view, state organs exercise 2 (two) functions in general, namely creating law and the function of implementing or applying law.[2] Kelsen's analysis of the two functions associated with Indonesia as put forward by Jimly Asshiddiqie that after the amendment to the 1945 Constitution of the Republic of Indonesia in Indonesia there were 34 state institutions and there were 28 state institutions whose powers were determined in the constitution and the rest were passed down to laws or regulations under them to regulate authority.[3]

The 34 state organs mentioned above are then distinguished in 2 (two) aspects, namely hierarchy and function. Hierarchy is very urgent because it determines the arrangements regarding legal treatment of people who have a position in that organ. To determine the hierarchy, there are two criteria used, namely the normative source of authority and the quality of its functions. Furthermore, related to the function, it is necessary to know the nature of these state institutions, namely that they are primary or only supporting, primary or secondary.[4] In connection with the above, it can be said that judging from its function, there are state institutions that have a primary function and those that have a secondary function while from the hierarchy, it can be distinguished into three layers, namely high state institutions, state institutions, and regional institutions. Among these institutions there are those which can be categorized as main or primary organs (*primary constitutional organs*), and some which are supporting (*auxiliary state organs*).

The formation of state auxiliary institutions is essentially an implication of the tendency of contemporary administrative theory to shift regulatory and administrative tasks to become independent institutions. This is in line with John Alder's view that classifies these types of institutions into 2 (two), namely regulatory, to function of making rules and supervising relationship activities that are private and advisory, to function of providing advice or input to the government[5]. Theoretically, the formation of state auxiliary institutions stems from the will of the state to create new state institutions whose filling is taken from non-state elements, given state authority and financed by the state with the aim of providing opportunities for the public to supervise so as to create horizontal and vertical accountability.[6]

The development of the emergence of state auxiliary institutions cannot be separated from several background matters, such as economic and social progress so that the executive body regulates almost all of people's lives, as an effort to achieve state goals that require speed and accuracy, complexity and dynamics of people's lives, democratic transitions resulting in the state experienced drastic changes in social and economic terms, thus making institutional experimentation efforts. [7]

In more detail, the formation of state auxiliary institutions in Indonesia is based on 5 (five) important things. The first, there is no credibility in pre-existing institutions due to assumptions (and evidence) regarding corruption which is systemic, deep-rooted, and difficult to eradicate. The second, the non- independence of state institutions which for certain reasons fall under the influence of a certain power. The third, inability of existing state institutions to do the tasks that must be exercised during the transition to democracy, both due to internal and external problems. The fourth, there is global influence which shows the tendency of some countries to form extra state institutions called state auxiliary agencies or *institutional watchdogs* which are considered a necessity because the existing institutions have already been established and become part of the system that must be repaired. The fifth, there is pressure from international institutions to form these institutions as a prerequisite for a new era towards democracy.[8]

In outline, the characteristics of these state auxiliary institutions are free and independent in carrying out their duties and functions, apart from the grip of other powers, supervision or branches of executive power that originating from members of any political party, leadership positions in independent state institutions are also definitive in that when their term of office ends at the same time, these independent state institutions aim to balance representation with a non-partisan nature.

The establishment of such state institution is a development of state organizations that are required to meet the needs of the state. Meanwhile, the state auxiliary institutions can be interpreted as the agencies produced by

[1] Tauda, Gunawan A. "Kedudukan Komisi Negara Independen dalam Struktur Ketatanegaraan Republik Indonesia." *Pranata Hukum* 6, no. 2 (2011): 232-46
[2] Kelsen, Hans. *General Theory of Law and State*. New York: Russel & Russel, 1973. p. 192
[3] Jimly Asshiddiqie. *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*. Jakarta: Raja Grafindo Persada, 2006. p. 25
[4] Yazid, Lutfi. Komisi Nasional dalam Konteks Cita Negara Hukum. *Jurnal Law and Society* Vol. 3 No. 2, (2019): 54
[5] Pigome, Martha. "Implementasi Prinsip Demokrasi dan Nomokrasi dalam Struktur Ketatanegaraan RI Pasca Amandemen UUD 1945." *Jurnal Dinamika Hukum* 11, no. 2 (2011): 335-348.
[6] Riwanto, Agus, and Seno Wibowo Gumbira. "Politik Hukum Penguatan Fungsi Negara Untuk Kesejahteraan Rakyat (Studi Tentang Konsep Dan Praktik Negara Kesejahteraan Menurut UUD 1945)." *Jurnal Hukum dan Peradilan* 6, no. 3 (2017): 337-360.
[7] Basarah, Ahmad. "Kajian Teoritis Terhadap Auxiliary StateS Organ Dalam Struktur Ketatanegaraan Indonesia." *Masalah-Masalah Hukum* 43, no. 1 (2014): 1-8.
[8] Nawawi, Juanda. "Membangun kepercayaan dalam mewujudkan good governance." *Jurnal Ilmiah Ilmu Pemerintahan* 1, no. 3 (2012): 19-29.

the growing trend of government power to appointed or self-appointed bodies. So, this state auxiliary institution can be interpreted as a state decision in establishing a new institution whose membership is drawn from non-state elements, and is given power and facilitated by the state without having to become a state employee.[1] Today the formation of a state institution is often considered as a solution to be able to solve various problems that arise in society. In addition, there is also encouragement from international institutions or organizations to be able to form a special institution to carry out tasks on certain issues. Likewise, the idea emerged to form various state commissions that have an independent nature.

Theoretically, the state auxiliary institutions are established based on the desire of the state to provide opportunities for the public to monitor state performance with the aim of creating vertical accountability and horizontal accountability. From the description above it can be said that state auxiliary institutions are outside the executive, legislative and judicial power structures but their existence is public, the source of funding is by the state, aiming at the public interest. So, even though the state is still strong, it is supervised by the people so as to create vertical accountability and horizontal accountability. The emergence of state auxiliary institutions is also intended to answer the demands of society for the creation of democratic principles in every administration of government through institutions that are accountable, independent and trustworthy.

4. Assessing Dispute Resolution between State Auxiliry Instituins in Indonesia

The establishment of state auxiliary institutions which are increasingly providing opportunities for disputes over authority between these institutions, including disputes with permanent state institutions, opportunities for disharmony cannot be avoided. The potential disputes referred to can also be in the form of administrative disputes as well as occupational or personal disputes. The dispute in question is a difference of opinion accompanied by disputes and claims between one institution and another. This potential tends to be high because the relationship between these institutions is bound by the principle of checks and balances which provides an equal position between institutions and control between one and the other.[2]

Essentially, the emergence of independent (auxiliary) institutions is to answer the demands of society so that democratic principles are imprinted in every administration of government through institutions that are accountable, independent and trustworthy. However, the reality that then occurs is that these state auxiliary institutions often have multiple functions, where an independent institution can hold 3 (three) functions at once, namely the executive, legislative, and judiciary. This is contrary with the opinion of Jimmy Assidiqie that “one organ can only carry out one function and may not interfere with the functions of other organs.” With the broad functions of state auxiliary institutions, it will provide opportunities for ultra vires actions and these institutions will always protect themselves from statutory provisions that give authority to them. This ultra vires actions can then become one of the causes of disputes that occur between these state auxiliary institutions.[3]

The existence of independent institutions in Indonesia has implications for the implementation of governance in Indonesia. The implications in question are implications for the institutional position of state auxiliary institutions, administrative implications are the relationship between independent state institutions and other state institutions, implications for disputes over the authority of state institutions, implications for the need to strengthen institutional roaming, and implications for rules issued by state auxiliary institutions.[4]

Looking the potential for disputes over authority between state auxiliary institutions and other state auxiliary institutions or between state auxiliary institutions and other state institutions, it is important to be emphasized is legal standing of state auxiliary institutions in resolving disputes over the authority of state institutions by the court.[5] The constitution, which is currently the only state institution that is given special authority to decide on authority disputes between state institutions by looking at the existence and characteristics of independent state institutions in Indonesia, is accompanied by strategic position and authority in promoting the development of a democratic system in Indonesia which often intersects with the authority of other state institutions, can lead to disputes over the authority of state institutions.

In a democratic state, the position and authority of the government in administering the state, the principle of legality is the basic pillar which brings the consequence that government must be based on law (*wetmatigheid van bestuur*). The basic principle in a rule of law stipulates that every action by the government must be based on statutory regulations or the existence of legitimacy or authority, so that the action is considered valid. Lemaire argues that the ruler, in this case the government is given the task of carrying out a public interest carried out by

[1] Alamsyah, Bunyamin, and Nurul Huda. "Politik Hukum Pelembagaan Komisi-Komisi Negara Dalam Sistem Ketatanegaraan Indonesia." *Jurnal Hukum dan Peradilan* 2, no. 1 (2013): 85-108.
[2] Asshiddiqie, Jimly. *Sengketa Kewenangan Konstitusional Lembaga Negara*, Jakarta: Konstitusi Press, 2006, p. 9
[3] Nurtjahjo, Hendra. "Lembaga, Badan, Dan Komisi Negara Independen (State Auxiliary Agencies) Di Indonesia: Tinjauan Hukum Tata Negara." *Jurnal Hukum & Pembangunan* 35, no. 3 (2005): 275-287.
[4] Mochtar, Zainal Arifin. *Lemabaga Negara Independen: Dinamika Perkembangan dan Urgensi Penataannya Kembali Pasca Amandemen Konstitusi.* Jakarta: Rajawali Pers, 2016. p.132
[5] Rudy, Rudy, Rudi Natamiharja, Jalil Alejandro Magaldi Serna, and Ahmad Syofyan. "Implementation of Civil Rights against Vulnerable Groups in the Legal and Constitutional System in Indonesia." *Hasanuddin Law Review* 8, no. 3 (2023): 299-309.

the ruler, in which the ruler must have the authority to act or act. This authority is the basis for legitimacy to act or do something, so that in carrying out its functions and duties it can be appropriate and not take actions that abuse authority (*detournement de pouvir*).[1]

The existence of the Constitutional Court as a state institution that is given the authority to decide disputes over the authority of state institutions has yet to become an instrument for resolving disputes over authority between independent state institutions in dispute. This is due to the limitation of authority given to the Constitutional Court, namely that it can only decide disputes over state institutions whose authority is regulated in the 1945 Constitution of the Republic of Indonesia. Thus, the only state auxiliary institutions that can apply to decide disputes over authority are the Judicial Commission and the General Election Commission.

Establishment of a special mechanism to be able to resolve disputes over the authority of state institutions that are not granted constitutional authority as well as independent state institutions whose authority and formation are granted through statutory regulations under the Constitution, so that the application of the principle of checks and balances to encourage a democratic state can run well. In addition, it is also necessary to rebuild a culture of checks and balances in the Indonesian constitutional system in order to avoid tyrannical absolute government.

As described above, the researcher views that the interpretation of the authority of the Constitutional Court in deciding disputes between state institutions needs to consider how to obtain the authority. The granting of authority and power is basically attributive and derivative in nature. Mulyosudarmo argues that the acquisition of power which is attributive causes the formation of power, because it comes from a situation that does not yet exist. The power that arises with attributive formation is original (*oorsponkelijk).* In other words, the formation of power attributively causes a new power. Thus, the characteristics of the attribution of power are the formation of power rise to new powers and must be carried out by an agency whose formation is based on statutory regulations (*authorized organs*).

The Constitution as *regulation van attributie* is understood as the legal basis for the formation of various powers which are then given to state institutions whose formation is also based on the Constitution. After having the authority, the state institution (legal subject) can carry out the formation of power (attribution) or delegate its authority to other legal subjects. The delegation of authority is derivative in nature (*afgeleid). Afgeleid* power is power that is derived from other parties. Henk van Marseven argues that derivation delegation can be in the form of delegation (*delegatiee*) and mandate.[2]

Independent state institutions are a modern constitutional phenomenon that must be given a constitutional position, so that their roles are clearer in the future Indonesian constitutional system. The Constitutional Court should fill the legal void due to the rampant disputes over authority between independent state institutions and many other state institutions. This is in accordance with the spirit that the existence of the Constitutional Court is at the same time to maintain the implementation of a stable state government.[3]

There needs to be an interpretation that considers the expansion of authority that is inherent and implied in the authority regulated in the 1945 Constitution as a principle authority. Authorities that are not expressly mentioned in the constitution but are necessary and appropriate to carry out expressly conferred constitutional powers, are and are also inherent as powers conferred by the Constitution, even though they are later explicitly described in laws. Setting a material authority in one law, does not in itself make that authority not a constitutional authority. Conversely, the mention of an authority in a law does not always mean that the law is the source of the said authority. This authority is inherent and must exist to carry out the authority expressly granted by the Constitution. Thus, the interpretation must be expanded in such a way, because the development and dynamics of the problem cannot be perfectly anticipated by the legislators. However, this interpretation also needs to be limited according to the right context, namely the form of giving power to the institution which must be attributive and derivative which does not contain a hierarchy.

In addition to the state institutions as mentioned, in Indonesia there are also state institutions/state organs whose powers are delegated by legislators including executive branch agencies that are responsible to the president or ministers and/or are part of the executive. For this state institution, it is not included in the authority of the Constitutional Court to resolve disputes. Dispute resolution can be submitted to a political or cultural approach by a superior institution or agency that has a higher position than the institution involved in the dispute so that the decision-making mechanism is vertical.

5. Conclusion

Dispute resolution for state auxiliary institutions is an authority of the Constitutional Court as long as it obtains their authority in a delegative manner and not hierarchical, although the constitution confirms that the authority

[1] Asshiddiqie, Jimly. *Menuju Negara Hukum yang Demokratis*. Jakarta: Setjen dan Kepaniteraan MK-RI, Jakarta, 2008. p.39
[2] Mulyosudarmo, Suwoto. *Peralihan Kekuasaan, Kajian Teoritis dan Yuridis terhadap Pidato Nawaksara*, Jakarta: Gramedia Pustaka Utama, 1997. p. 39
[3] Constitutional Court of Indonesia, Case Decision No. 030/SKLN-IV/2006.

of the Constitutional Court is to decide disputes over the authority of state institutions whose authority is granted by the 1945 Constitution. However, for state auxiliary institutions whose establishment is a delegation through a law, it can be interpreted that these state institutions can become parties in dispute resolution at the Constitutional Court. It is necessary to establish a law in order to eliminate the legal void related to dispute resolution of state auxiliary institutions whose establishment is through a law.

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