INFORMATION PRIVACY IN E-COMMERCE AND THE CONCEPT MODEL OF REGULATIONS IN INDONESIA

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A. Introduction

The right to privacy is well established in International law and recognise as one of a fundamental human rights that firmly established in law.[1] The core privacy principle in modern law may be found in the Universal Declaration of Human Rights. Article 12 of the UDHR states "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks"[2]. Privacy underpins human dignity and other key values such as freedom of association and freedom of speech. It has become one of the most important human rights issues of the modern age[3]. From the state practice has shown every country in the world recognizes a right of privacy explicitly in their Constitution.

At a minimum, these provisions include rights of inviolability of the home and secrecy of communications. Most recently-written Constitutions such as South Africa's and Hungary's include specific rights to access and control one's personal information. However , there are also many In many of the countries where privacy is not explicitly recognized in the Constitution, such as the United States, Ireland and India, the courts have found that right in other provisions.[4]

The development and the convergence of telecommunication, information technology and broadcasting have posed new threat to our privacy rights. Those new technologies make it easier for third parties to access, restore and disseminate personal information because the information become digital that can be copied in a great number without losing acuracy therefore the digitized information is very easy to distribute at a low cost. In the marketing business, personal information is become an valuable assets for targeted marketing in what we call direct marketing.[5]

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2 Privacy and Human Rights, gilc.org/privacy/survey/intro.html, diakses tanggal 10 Oktober, 2009 , hlm 1-3.

3 ibid.

4 Marc Rotenberg, Preserving Privacy in Information Society, Paper, hlm 1. See also Lee A Bygrave, Data Protection Pursuant to the Right to Privacy in Human Rights Treaties, "International Journal of Law and Information Technology", 1998, volume 6, page.247-284.

5 Privacy and Human Rights, gilc.org/privacy/survey/intro.html, diakses tanggal 10 Oktober, 2009 , hlm 1-3.

5 Ibid.

Personal information define as facts, communications or oppinion which relate to the individual.[5] It also relates to Personal information define as facts, communications or oppinion which relate to the individual.[6] It also relates toall human personality and behaviour particular to sensitive matters, such as sexual preferences and orientation[7].

The Development of E-commerce related with Breach of Information Privacy

E- Commerce is defined as any services normally provided for remuneration at a distance by electronic means,[8] this new modes of communication have allowed vendors to launch new business models, such as co-shopping models, online auctions, reseller platforms, and agency services, etc.

Information privacy was first introduced by Alan Westin who decribed *as " the claims of individuals, groups , or institutions to determined for themselves when, how and to what extend information about themselves is communicated to others".*[9] This new kind of privacy emerged by the development of information technology and wireless business and shaped our live with technological devices such as telephones, audio recording devices , computer and internet. Information is the lifeblood of today's society and has involve the transfer, recording of information.[10] This information gathering mainly toward personal information that was carry out both by government and business. Many government collects large quantities of personal information such as individual's birth, property, educational background. Business also gathering a vast amount of personal information such as consumer preferences for marketing purposes.

B. Model Regime for Privacy Protection

There are four major[11] models regulation for privacy protection. However in application depending on the legal system of each countries. In most countries several are used simultaneously. In the countries that protect privacy most effectively, all of the models are used together to ensure privacy protection.

Comprehensive laws

The formal recoqnition of a legal right of privacy was built in ancient time expecially after the society began to divide between public and private realm[12] and In many countries around the world, there is a general law that governs the collection, use and dissemination of personal information by both the public and private sectors. One of the model regulation that being apply in state practice is comprehensive law where the government regulate both government and business activitie in one comprehensive laws. This model also uses an oversight body known variously as a Commissioner, Ombudsman or Registrar, monitors compliance with the law and conducts investigations into alleged breaches. This is the preferred model for most countries adopting data protection laws and was adopted by the European Union to ensure compliance with its data protection regime. A variation of these laws, which is described as a "co-regulatory model," was adopted in Canada and Australia. Under this approach, industry develops rules for the protection of privacy that are enforced by the industry and overseen by the privacy agency[13].

Sectoral Laws

Some countries, such as the United States, have avoided enacting general data protection rules in favor of specific sectoral laws governing, for example, video rental records and financial privacy. In such cases, enforcement is achieved through a range of mechanisms. A major drawback with this approach is that it requires that new legislation be introduced with each new technology so protections frequently lag behind. The lack of legal protections for individual's privacy on the Internet in the United States is a striking example of its limitations. There is also the problem of a lack of an oversight agency. In many countries, sectoral laws are used to complement comprehensive legislation by providing more detailed protections for certain categories of information, such as telecommunications, police files or consumer credit records.

Self-Regulation

In self-regulation, the companies and industry establish codes of practice and engage in self-policing. This approach both by market and consumer that privacy regulation is unnecessary. The industry have publishing a privacy statement a series of promises and disclosure about what the company does and does not do to collect or share user information[14]. However, in many countries, especially the

6 Daniel J. Solove, The Digital Person, New York, 2004, page16-17.

7 Raymond Wacks, Personal Information, Oxford, 1989, page 26.

8 Warren B. Chik, The Lion, The Dragon and The Wardrobe Guarding The Doorway to Information And Communications Privacy on the Internet : Comparative Case Study of Hong Kong and Singapore- Two Differing Asian Approach, "International Journal of Law and Information Technology, Spring, 2006, Page 11-12.

9 See EU Directive 98/48 EC on Tranparency, 1998.

10 Alan F. Westin, Privacy and Freedom, page, New York, 1967.

11 Daniel J. Solove and Marc Rotenberg, Information Privacy Law, Aspen Publisher, New York, 2003, Page 1-2.

12 David Banisar and Simon Davies, Global Trends in Privacy Protection : An International Survey of Privacy, " John Marshall Law School", 1999, hlm 1-35. See, Privacy\Privacy and Human Rights \Privacy and Human Rights 2003 Overview.htm, diakses tanggal 3 November 2008. See also Daniel J. Solove and Christ Jay Hoofnagle, A Model Regime for Privacy Protection, " University of Illinois Law Review, Vol 2006, page 357-404.

13 Richard C. Turkington, Privacy Law : Cases and Meterials, St Paul. Minnesota, 1999, page 2-5.

14 David Banisar. Loc. Cit

United States and Singapore[15] these efforts have been disappointing, with little evidence that the aims of the codes are regularly fulfilled since the privacy statement is static description and it permit the company to change its statement at any time without any notice . Adequacy and enforcement are the major problem with these approaches. Industry codes in many countries have tended to provide only weak protections and lack enforcement.

C. The Concept of Model Regulation in Indonesia

As for Indonesia, globalization of information has placed Indonesia as a part of the world information society therefore Indonesia has the obligation to harmonize national legislation with international regulation[16]. The government of Indonesia, through its *Information and Electronic Transaction Law* 2008, has committed to support the development of information technology through law and regulation so the utilization of the information technology can be secured to protect the society[17].

The Indonesia legal system does not specifically recognise privacy however in the *Constitution of Indonesia* 1945 third Amendment 2002 we can find implicitly the protection of privacy[18]. On the other hand, the issue of protection of privacy right has already addressed in several regulations, for example the *Health Act*[19], *Corporate Document Act*[20], *Banking Act* 1998[21], *Telecommunication Law*[22], and *Human Right Act*[23].

Facing the development of electronic commerce transaction in 2008 Indonesia the Government of Indonesia promulgated the Law Number 11, 2008 on *Information and Electronic Transaction*. For the first time the protection of personal data is clearly stipulated in article 26 which states that:

(1) Otherwise stipulated by the laws and regulations, the use of any information by means of electronic media relating to someone's personal data shall be cariried out with the approval from the person concerned.

(2) Every person whose right is infringed as referred to the article (1), may file a law-suit for the loss incurred based on this law.

The term 'privacy' is also stipulated [?? defined ??] in the elucidation of article 26 which clearly divided privacy as follows: (a) the right to enjoy individual life and is free from any and all kind disturbance ; (b) the right to communicate with any other persons without being spied; (c) the right to control the access of person's personal data.

Development of a personal data Bill

However the above regulation is still not enough to protect information privacy and personal data. In 2007, The Minister of Public Official , Taufik Effendi said the purpose of academic drafting of personal data[24] and drafting the personal data bill is to secure and building the trust in transmitting personal data and to ensure the security and trust, either domestic and international, therefore foreign parties will have legal protection of their personal data while they are conducting business in Indonesia.

Therefore, like other countries the government of Indonesia is already in the process of drafting a specific regulation on personal data protection. The data protection bill was drafted by the Ministry of Public Official and the proposed bill is still under discussion. The Ministry of Public Official also has a task to create an Indonesian National ID Card as a single system that will compile a citizen's personal information.

During the discussion there are several important factor that are being considered :

(1) In order to harmonise with international development and state practices , Indonesia will consider applying a comprehensive model of regulation that regulated both public and private sector .

(2) In applying the personal data principles, the Indonesia government will study closely the OECD Gudelines Governing the Protection of Privacy and Transborder Flow of Personal Data, European Directive on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data 1995, EU Directive on Protection Privacy in Telecommunication Sector, 1997 and APEC Privacy Framework, 2004.

(3) The Ministry also conducted seminars and researched state practices in regulating data protection such as in

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15 Abdul Raman Saad, Personal Data & Privacy Protection, Malaysia, 2005, page, 141-142.

16 Ang Peng Hwa, The Role of Self-Regulation of Privacy and the Internet, " Journal of Interactive Advertising, Vol 1, No2. Spring, 2001, hlm 5-6.

17 Such as OECD, EU and APEC have taken a positive step to protect and regulate privacy .

18 Law Number 11, 2008, Information and Electronic Transaction Law.

19 Article 28 G, Everyone have the right of individual protection, family, dignity, reputation and property

20 Law Number 23, 1992 stated that medical employees have the obligation to act upon the professional standard and respect the patient rights including the right of the patients of the privacy and confidentiality of their medical records.

21 Law Number 8, 1997 stated that corporate documents means the data and record that created or received by the company in all forms, included the data of costumers and employees.

22 The Law Number 8, 1997, regulated that the Banks have an obligation to protect all information regarding their customers and its accounts.

23 Law Number 36, 1999, this regulations protect the right of individual of the illegal action or illegal access in using telecommunication network and no individual will be permitted to conduct the act of tapping information that is transmitted through telecommunication network.

24 Law Number 39, 1999, under article 14 stated that: 'Everyone has the rights to communicate and obtain the information in order to develop themselves as individual as well as develop their social environment; Everyone has the right to seek, obtain, own, store. Process and convey information using al available facilities.'

Additionally, article 21 of the Act provides that: 'Everyone has the right as individual both spiritual and physical and shall not made as the object of any research'.

the United States, United Kingdom and Australia[25].

Indonesia has to harmonise its policies and regulation on privacy with global trends in order to drive e-commerce growth in Indonesia therefore effective protection of personal information in e-commerce is desirable both in public and private sector. The personal information regime should be based on international recoqnised standards. For that reason Indonesian Government has to decide the model regulations that best suited to protect privacy in online business. The model of regulations should serves three purposes:

- Established acceptable standards protection;
- Promotes harmonisation with the global trends and with various sector (public and private) ;
- Enabling enforcement agencies to fulfill their mandate to protect information;
- Increase international cooperation to promote and enforce information privacy and to maintain the continuity of information flows among countries.

Since Indonesia has not yet regulate privacy in specific regulations therefore Indonesia need a strong an comprehensive regulation . The reason is first in accordance with Indonesia Legal System and second is connected with the global trend that towards a comprehensive data protection regime. In order to harmonise privacy regulation, Indonesia should similarly regulate in comprehensive coupled with self regulation approach where the Industry also have the responbility to protect privacy (hybrid approach).

CONCLUSION

The development of information technology have increase the vulnerability of the privacy of personal information . In the Information Age, we are experiencing the abuse of the government and business toward our personal information. International society have already attempt to regulate privacy in personal information in addition the consumer confidence in electronic commerce depend on th elevel of protection afforded to their personal information. As one of the developing countries, Indonesia have to harmonise its regulation with the global trends in order to protect privacy in e-commerce. As for indonesia, the model regulation that best suited to protect individual is the hybrid of government regulations and self regulation by the market therefore hopefully it will be able to drive all stake holder to take the responsibility in protection privacy in e-commece.

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Regional Instrument

EU Directive 98/48 EC on Tranparency, 1998.

TRUSTING THE NATION'S INDEPENDENT INSTITUTION

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What then is to be done?
For, according to this reasoning,
we may be told that good government appears to be impossible.

(James Mill-*Essay on Gevernment*)

The endless and never ending discussion on the existence of Anti Corruption Committee (Komisi Pemberantasan Korupsi) in Indonesia has resurfaced, after years of its formation. Its predecessors, compared with ACC (KPK)-Indonesian National Police Force and Attorney General Office- are wondering again the Committee's authority, in upholding the law against corruption. For some people, there has been intersecting between the police, attorney general, and the committee. Such view is inevitable, judging by the chaotic structuring between departments in this post reformation era. The born of new state's institutions, excluding the first three ruling institutions, as the government's implementer of power, do carries its own baggage of polemic, in structure, status, function and authority, or as the national treasure's protocol.

The shifting of these recent so-called state's institutions, or known as 'national committee', has begun since the nation's amendment; Indonesian Statute of 1945. This was taken as a measure to the democracy consolidation in Indonesia, after the fall of the Soeharto's bureaucratic authoritarian regime, the nation's constitution was structurally designed, to create a mechanism of power that are checks and balances, with a reasoning to run a healthy and transparent constitution; the Indonesian Statute of 1945 is being placed as the holy script, discipline, and could not be modified in any ways. The brief and flexible nature of Indonesian Statute of 1945 became the foundation of the thought that it will never aged from time to time. In which it could evolve on its own as time changes therefore it won't need any modification on what it contain. Constitution is not a living norm whereas it moves and evolves dynamically, in order with the time and the needs of the nation. The impact from such thinking is that it will only be another excuse for the Soeharto regime to keep its legacy, in his years of presidency.

The ideas to restructure the system and the distribution of power, to mould that effective separation of powers and checks and balances turn out to be the key factor which has become the background for the reformation of the nation's constitution.-Indonesian Statute of 1945, after the

reformation took place in the first half in 1998. Other than that, the efforts to renegotiate the contract between the country and its people related to the fulfillment of rights and obligations, which were neglected during the regime of New Order, has also becoming a strong impulse for the birth of constitutional amendment.

Through constitutional amendment, it makes the opportunity grew wider for the birth of new nation's organs, to comply the complexity of the issues of contemporary constitutional. After ten years of reformation, Indonesia has at least 18 independent state committees, such as Judicial Committee (YK), National Committee for Human Rights, Anti Corruption Committee (KPK), Witness and Victim Protection Committee (LPSK), Commerce Watch Committee (KPPU), etc. There are at least 40 state committees under the executive branch agencies, such as The National Law Committee, Committee of Police Force, Board of Attorney General, Indonesian National Transportation Safety Board, etc. And, there are almost 24 state institutions non departments (LPND).

The tendency to form such recent state institutions as mentioned earlier, on one hand, is something that is inevitable, since the previous institutions are showing no progress in the stability of upholding the law in Indonesia, namely involved in corruption, misuse of power and nepotism, added with the inability to be independent from any influences. On another hand, new issues emerge, when the tendency to form these new state institutions have become uncontrollable, which may cause the authorities to intersect among them.[1] Not to mention the expensiveness to support the salad days of each institution could cost. It will only make the burden for the national budget gained heavier.[2]

Jimly Asshiddiqie stated that the development of such new institutions that are called as the government implementer, both independent or a branch of a certain ruling institution, reflects the necessity to decontration of power from the hands of the bureaucrat or conventional institutions, sectors in the government which powers are concentrated in the early times. This is the outcome of the increase of a more complex and crucial demanding, bureaucratic ruling organization, centralistic, and concentrated has proven to be unreliable. At the same time, come new waves of deregulation, de-bureaucratic, privatization, decentralization, and decontration.[3]

Aside from the above facts, United States of America shown that the public trust towards conventional institutions has dried out. Susan D. Baer (1988) record this public distrust towards state institutions which has made the birth of new independent state institutions to carry the task and has been made ideal to provide a performance where public would seek to. This factor is one of many factors that would cause the birth of federal institutions.[4] Such measures made the function of powers which were closely attached within executive institutions, legislative, and judicative are being transferred to independent institutions. The impact of this is these new institutions will end up in a conflict upon carrying double functions since each institution are acting as independent agencies.[5]

Some of the independent institutions are closely related to the legislative and regulative function, some are more to the administrative-executive and even a few to the judicative. The National Committee for Human Rights, for example, its function is more to an aspiration tool for the Indonesian Legislative Assembly and judicature. The National Committee of Ombudsmen (Ombudsman) is closer to the executive function. While the Judicial Committee and Anti Corruption Committee (KPK) is more to the judicature function.[6] In short, the birth of the state committee has been going on continuously in Indonesian government structure, especially after the reformation in 1998 begun.

Nevertheless, some observers consider that the increasing number of the state committee is without a well planned blueprint. Denny Indrayana (2005) presuming that there has been uncertainty on the state committee in Indonesia, since they were formed without any comprehensive clarity of structural concept on what and how a good government committee should be. Most of the state committees are outputs of a reactive-responsive policy, instead of preventive-solution policy towards the issue of the nation.[7] Moreover, he stated that,

> "The Committees are tend to be formed since the ruling government sees the decision as a popular policy, that when supported it will shift their status as the ruling government. The result is the birth of these state committees is merely a form of manipulation and goodies of the elites, distancing from the goodwill of making a better structural in the government which are supposedly democratic, modern, and anti-corruption."[8]

A significant indication which shows the absence of blueprint of the state committee is the growing numbers of

1 Critics are often addressed to the way of defending the human rights performed by three institutions, National Committee for Human Rights, Child Protection Committee, and National Committee for Women. Ideally to defend the human rights should conclude only by a powerful ruling institution, committee for children and women should not be parted. Moreover, see: Denny Indrayana, National Committee: Recent Evaluation and The Challenges of the Future, Short paper on Kompas Seminar, "Eighth Year of Reformation, Looking for a vision toward 2030", Jakarta, 8-9 May 2006, p 9. See also, Amendment Script of Indonesian Constitute of 1945, A Cluster of Leadership of Political Party at Regional Level (DPD) in the House of Representatives (MPR), 2008, "The basic Thinking of Recommendation to Modify the Indonesian Constitute of 1945, p 34.

2 Ni'matul Huda, State Institutions in The Democracy Transition, (Yogyakarta, UII Press, 2007), p 169.

3 Jimly Asshiddiqie, Development and Consolidation of State Institutions In The Reformation Era, (Jakarta, Secretary General and Secretariat of Indonesian Constitutional Court, 2006), p 23.

4 Susan D. Baer, The Public Trust Doctrine – A Tool to Make Federal Administrative Agencies Increase Protection of Public Law and Its Resources, (Boston: Boston College Environmental Affairs Law Review vol. 15, 1988), p 382.

5 Jimly Ashiddiqie, Op.Cit., p 23.

6 Ibid, p 23-24.

7 Denny Indrayana, Revitalizing State Committee in The Hometown of The Thieves, Kompas 30 April 2005.

8 Ibid.

variations on the form of the regulations of the ordinance in which it is the basis. A higher hierarchy makes the authority becoming imbalance with the new state committee, which were formed at the lower level of governance. The absence of this blueprint created various misunderstandings on the context of state institutions. The biggest impact is the inharmonic form of appointment and discharge of its commissioner from each of the state committee, the responsibility for each committee, and the differences in protocol, and budgetary.

The fact is that after a few years of the forming of the so-called state committee, some observers consider it roles not yet the best, suffice to say they are disappointing. Some parties even consider the committees have failed to do its duty. Anti Corruption Committee (KPK), for example, according to Taufik Basari, they are incapable in obtaining expected achievement in wiping out corruption.[9] The Judicial Committee (KY) has not also made its move in keeping the honorary of the judges before they are stepping further more; it already has its own conflict of authority with the Supreme Court (MA). Not to mention that the officials in the Judicial Committee (KY), Irawadi Yunus, is indicted in being involved corruption, misuse of power and nepotism case in the supply and inventory of the Judicial Committee Office. Other state committee such as the National Committee of Ombudsmen has not yet given the best performance as expected. Similar thing happens to the Witness and Victim Protection Committee (LPSK) that has not done its role significantly, both for the protection of the witness and the fulfillment of the victim's rights.

The First Step of Constitutional Democracy

The birth of these new government organizations, with its role and authority, comes from the basic idea of limitation for power and power sharing, in performing their duty as the nation's ruler. The ideas of sharing the power and limiting the power started developed as a manifestation of the concept of constitutional democracy. The idea of constitutionalism of democracy wants an effort to limit the power, so that the ruling government will not misuse its power and became corrupt. Lord Acton has given us a warning on this, he stated that it was man who has the tendency to misuse the power, and powers tends to corrupt, but absolute power corrupts absolutely.[10] Therefore, a power should be at the limited state. Constitution guarantees the rights of the people and it held the government with designated sharing of power, that power at the executive level will be equally followed with power at the legislative level and judicative institutions.

A similar idea on limiting the power in a government is also shared by Carl J. Friedrich. According to Carl J. Friedrich, constitutionalism is interpreted as an idea of a government which included certain reflections as follows:

> "a set of activities organized by and operated on behalf of the people, but subject to a series of restraints which attempt to ensure that the power which is needed for such governance is not abused bay those who ara called upon to do the governing" [11]

Jhon Alder also stated that constitutionalism is at least should be supported with two main pillars consisting of the rule of law—a constituent nation and separation of powers. The law should be limiting the government's power and not the opposite. As Alder said, in full quotation, "the concepts of the rule of law and the separation of powers are aspects of the wider notion of 'constitutionalism', that is, the idea that governmental power should be limited by law."[12]

The doctrine of limiting the power is also shared by Annen Junji, in Junji's opinion, constitutionalism is being meant as a form of limitation towards the political power through the constitution itself. Same as Junji, Lane defines constitutionalism as a political doctrine, which clearly stated that the political authority should be limited under an institution. Scott Gordon shared the same ideas as well, Gordon think that constitutionalism is a political system that put the limitations into effect towards a political power.[13]

A similar view comes also from Charles Howard McIlwain that wanted a limitation against absolute power of the government, to avoid misuse of power. Statement made by McIlwain, as quoted by Denny Indrayana:

> "... in all its successive phases, constitutionalisme has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law ... the most persistent and the most lasting essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law".[14]

A framework in limiting the power as a constitutionalism core is also mentioned by William G. Andrews. Furthermore, on limited government itself, Andrews breaking the limitation into two types of limitations, implemented into two kinds of limitation relationship. First, the relationship between the governments with the people in which each party could

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9 Taufik Basari, Upholding The Law Against Corruption Going to A Dead End (Reflection of The Fight Against Corruption 2007), Jakarta, Bulletin of The Judicial Committee, p 47-48.

10 Taufik Basari, Upholding The Law Against Corruption Going to A Dead End (Reflection of The Fight Against Corruption 2007), Jakarta, Bulletin of The Judicial Committee, p 47-48.

11 Carl Friedrich, Constitutional Government and Democracy, (Walheim, Mass: Blaisdell, 1967), chapter vii. See also, Denny Indrayana, Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution Making in Transtition, (Jakarta: Kompas, 2008). p 92.

12 Jhon Alder, Constituional and Administrative Law, (London: Macmillan Education LTD, 1989), p 39.

13 Denny Indrayana, Indonesian Constitutional..., Op. Cit., p 92-93.

14 Ibid., Seperti dikutip dari Charles Howard McIlwain, Constitutionalism: Ancient and Modern, (Ithaca: Cornell University Press, 1966, hal. 21-22

supervise one and another, criticized, and make limitation. Second, it is the relationship of inter-institutions—under constitutionalism, two types of limitations impinge on government. Power proscribe and procedures prescribed.[15] Same with Andrews' opinion, constitutionalism interpreted by Richard S. Kay, that:

> Constitusionalism implements the rule of law; It brings about predictability and security in the relations of individuals and the government by defining in advance the powers and limits of that government.[16]

Andrew Heywood translate constitutionalism into two points of views, both with specific and broader meaning. According to Heywood, in the specific scope, constitutionalism could be interpreted as running the government with constitute as its basis. This means that a nation could be said adopting constitutionalism in its government if the state institutions and political process in that government effectively limited by a constitution. While in a broader sense, constitutionalism is a value and manifestation from civilized political aspiration, which act as a reflection from the goodwill of protecting the freedom, through a supervised mechanism, both internal and external towards the power of the government.[17]

Daniel S. Lev in his study on constitutionalism in Indonesia and Malaysia, understood constitutionalism as a political process-either with or without written constitute-that is rather oriented on the regulations and public institutions, founded to make the limitation of the political power. Furthermore, as mentioned by Lev, constitutionalism has its state above the rule of law dan rechtstaat, it is an ideology of 'a nation with limitations', whereas the political power is officially being surrounded with ordinances which then continued with the changing of power into authority, that could only decided through legal action. Bottom line, constitutionalism is a legal action which confines the issue of power sharing and authority.[18]

In its development in the modern structuralism, the idea of constitutionalism itself, according to William G. Andrews, could at least be uphold with three ways of consensus, which included: First, the general goals of society or general acceptance of the same philosophy of government. Second, there should be an understanding on the rule of law as the basis of a governing a government or as the basis of government. Third, there should be the form of institutions and procedures.[19]

Soedjatmoko, a member of the Board of the Constitutions, formed as a result of the 1955 general election, also agrees on the basic characteristic of constitutionalism is the limitation of political power. In organizing Indonesian constitution, Soedjatmoko stated that the features of a constitutional nation are:

> "The function of constitution in the society is to make limitations for the political power against the freedom for the people, other than that, which I want to emphasize, the function of a constitution in a free society is to determine the procedure and its tools to distribute and adjusting any political conflict and its importance which was included in the society itself."[20]

The idea of constitutional democracy is what then implemented into a mechanism of division and separation of the government's power. This mechanism is meant to created an effective government whereas the sharing of power existed and the differentiation of authority among the ruling institutions. This would make an equal power and making limitation among inter-institutions with each authority became possible. The birth of these state committees, as the government's institutions, conceptually, as an effort to uphold the constitutionalism. In the framework of checks and balances, and in the efforts to fulfill the people's constitutional rights, is taking form of a service and various guarantees from the ruling government.

Division of Power, preventing Tyranny

In 1788, in The Federalist No. 47, along with the process of structuring the constitution of America, James Madison warned the Americans that the centralization of power in passing the bills, implementing the laws, and upholding law, at the same person would only ended in a birth of a tyranny. He mentioned, "the accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny".[21] The above statement is then being strengthened in The Fedaralist Paper No. 71, stating that:

> "The same rule which teaches the propriety of a partition between the various branches of power teaches likewise that this partition ought to be so contrived as to render the one independent of the other. To what purpose separate the executive or the judiciary from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be merely nominal

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15 Jimly Ashiddiqie, Op. Cit., hal. 29.

16 Larry Alexander (ed), Constitutionalism: Philosopical Foundations, (Cambridge: Cambridge University Press, 1999), hal. 4.

17 Andrew Heywood, Politics, (New York: Palgrave, 2002), hal. 297. Seperti dikutip Miriam Budiardjo dalam Op.Cit., hal. 172.

18 Daniel S. Lev, Gerakan Sosial, Konstitusionalisme dan Hak Asasi, dalam Daniel S. Lev, Hukum dan Politik di Indonesia: Kesinambungan dan Perubahan, (Jakarta: LP3ES, 1990), hal. 513-515.

19 Jimly Ashiddiqie, Op. Cit., p 25. As quoted from William G. Andrews, Constitutions and Constitutionalism, (New Jersey: Van Nostrand Company, 1968), p 12-13.

20 Adnan Buyung Nasution, Aspiration of the Indonesian Government: Sosio Legal Study on Constituent 1956-1959, (Jakarta: Pustaka Utama Grafiti, 1995), p 129. As quoted from Essay of Constituent Court, 1957/VII, p 219).

21 William F. Funk and Richard H. Seamon, Administrative Law: Examples and Explanations, (New York, Aspen Publishers, Inc, 2001), p 23.

and incapable of producing the ends for which it was established. It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government."[22]

Therefore, to avoid the misuse of power and the birth of a tyranny, all power should be limited and supervised—at the limited state. Constitution has become the main basic instrument in terms of implementing regulations in governing, through a division and separation of powers that is designed in such manner. This is taken so that the ruling power will not be centralized in a certain polar. Power is divided according to its function, in implementing the power of the government. Generally, the function of power is divided into three; first, the function of rulemaking—legislative. Second, there is the rule application function—executive. And, third, it is the rule adjudication function—judicative. Other than doing its authority, according to each territory, all three branches of power could also be used to create a balance and to supervise between one and another, based on the checks and balances.

Firmly, the theory on power division is known widely when the theory of the law of the nature began to develop. However, the concept of power division is already known since the age of Aristotle. In his idea, Aristotle, vote for the classic doctrine on power division. As stated by Aristotle, power should be divided accordingly based on the importance of the ruling government; power is then divided into the power of the monarch, aristocracy, and democracy. Such doctrine is then applied as the classic teaching of power division. The concept of power division is known in the whole England, whereas the power is run by the British institutions of monarch, House of Lords, and House of Commons, in which each represent its own importance (the royal, the noble and intellectual, and the common people).[23]

Next is the theory of power division having through a significant development since Montesquieu propose his theory, along with beginning of the French Revolution, an outcome of misuse of power and the tyrannical King Louis. Montesquieu's theory could be used as a solution in a chaotic and uncertain state from conflicts between the king with his parliament, as what has happened in the 17th century. According to Montesquieu, as quoted from his book entitled De L'Esprit de lois (1748), the power of the government could be broken into several. First, it is the legislative power, which concludes the authority of rule-making for the common people. Second, there is the executive power that concludes the authority related to the implementation and upholding the law. And, third, it is the judicative power, concluding the authority related to the resolving the matter of lawsuit as an impact of the implementation of the law.

In his theory, Montesquieu, sees on the paradigm of a division of an absolute power. He thinks that there is an absolute separator among the branches of power. Each branch could not interfere, or supervised one and another. He explained that whenever there are two or three kinds of power vested in the same person, a tyranny will give birth to a son. Therefore, each branches should never step on another branches' territory. Each must be able to maintain its independency.[24] Montesquieu idea is then adopted thoroughly into the American constitution, in its early years. The Federalist Papers, formed by James Madison, Alexander Hamilton, and John Jay, demanding that there should be a division of power in absolute terms. They think that that is where individual freedom really lies and the guarantee for the human rights. In the constitution of United States of America, power is divided into legislative power vested to the Congress (Article I), and the executive power is vested to the President (Article II), both have an entirely different luggage. And, to control and create a balance in between both powers, it is the independent judicative power, lies on the Supreme Court of United States of America (Article III).[25]

As emphasized by Montesquieu, to prevent the abuse of powers, within the government should be instituted carefully, as a principle of a power should run autonomous and independent. Montesquieu explained as follows:

> When the legislative and executive powers are united in the sama person, or in the sam body magistrates, there can be no liberty; because apprehensions may arise lest tha same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative or executive. Were it joined with the legislative, the life and liberty of the subject would be subject to arbitary control; for the judge would then be legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[26]

Hans Kelsen explained that the concept of power division in absolute sense refers to the principle of a political organization. This explanation postulating the three branches of power can be determined as the three function of the nation that are being coordinated differently, and it has been

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22 Jack H. Knott and Gary J. Miller, When Ambition Checks Ambition: Bureaucratic Trustees and the Separation of Powers, dalam The American Review of Public Administration, Volume 38 Number 4, December 2008, hal. 387.

23 John Alder, Op. Cit., hal. 53.

24 Ibid., hal. 53

25 See Michael R. Asimov, Administrative Law, (Chicago: The BarBri Group, 2002), p 2.

26 Montesquieu, Spirit of Laws, (Chicago: Chicago University Press, 1989), p 162. See also Brian Z. Tamanaha, On The Rule of Law: History, Politics, Theory, (Cambridge: Cambridge University Press, 2004)

made possible to differentiate and limiting each of the branches of power. [27] However, in its development, it is difficult to apply the principle of pure separation of powers. Since, in terms of doing its own function as the state's subsidiary, it is impossible for each branch to apply its own power individually.[28]

The first rebellion against the principle of pure separation of powers began when the Supreme Court of United States of America, under Chief Justice John Marshall, made a judicial review of the constitute, as a product of legislative, in the court law.[29] The following idea is then developed is the necessity to guarantee that each power will not go beyond its vested power. Based on that, it is then required to create a mechanism of checks and balances. With such mechanism, all branches of power could supervise and create a balance with other branches of power.

The mechanism of checks and balances gives the President to issue a veto against a draft bill approved by the Congress. Vice versa, the Congress could put aside the issued veto, when 2/3 members of the Congres, consisting of a Senat and House of Representatives approve it. The President could also be impeachment by the Congress, if proven to have violated constitutional violation, or committed any criminal acts. The Supreme Court has the authority to perform judicial review on the bill passed on by the Congress. In the opposite, the Congress has the authority to discharge the Chief Justice, if proven to have committed any criminal acts; although the President has elected the Chief Justice for life. In appointing the Chief Justice and ambassador, the President must have approval from the Senat. This system enables all branches of power, with certain limitation, could interfere the authority of other branches. This means pure separation of powers has no longer running as it should be, it has changed to the mechanism of division of powers, whereas each branch of power could always perform checks and balances.[30]

The Impact of New Wave of Democratization

A big change occurred in the late of 80s and early 90s, which was indicated by the fall of authoritarian regime in some countries, and communism one in Eastern Europe. From Hegel's thesis, "the end of history", new phase of democratic consolidation started. According to Fukuyama's record, the third wave of democracy placed the Western (Europe and USA)—liberal democracy — as the winner of all politic and economic streams in whole world.[31] Liberal democracy was fought as the agent of capitalism improvement, and as the only prevailing system. Class ideology was replaced by universal democratic logic and the thought becomes market-oriented. In turn, the arrogance of Montesquieu' trias politica, as well as pure separation of powers he promoted, was definitely attacked by a storm. In the period, disintegration and institutional massiveness occurred in country level, which was further institutionalized through constitutional change mechanism in the respective country. [32]

Arising out of the new democracy in a number of countries, especially those which experienced transition process of democracy from authoritarian to democracy, new dominance organs appeared; either they are independent regulatory agencies or state auxiliary agencies. This new dominance organs appearance was so-called 'state commission' term. This state commissions birth, which was independent or intermediary agencies, when it was not the form of trias politica over new development and governmental paradigm displacement from Huntingtonian perspective of the new dominance organs birth can be read as a form of state adjustment to maintain the system stability in trias politica arrangement pattern toward a ordered politic condition.[33]

Meanwhile, Cornelis Lay's view, state commissions birth, were the effect of third wave of democracy, at least induced by the following reasons: *first*, state fidgetiness of uncertainty and negligence of individual and marginal group protection, the public officials despotismor other citizens; *second*, of state centrality as the public authority, a quite huge politic responsibility; *third*, an evolution product which was *incremental* complementary one, the former dominance organs, was a result of *trias politica* selection.[34]

As a response of state commisions birth, Bruce Ackerman states that this concept was absolutely an effort to reject the model of Montesquieu and Madison dominances separation applied in the USA.[35] Ackerman offer was focused on the model of dominance separation by assigning parliament (and executive, in the context of parliamentary system) as the dominance centre, while the other created organs aimed to limit parliament dominance. His complete statements are as follows:

"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."[36]

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27 Hans Kelsen, General Theory of Law and State (translated by Raisun Muttaqien), (Bandung: Nusamedia, 2006), p 382.

28 Eric Barendt, An Introduction to Constitutional Law, (Oxford: Oxford University Press, 1998), p 15.

29 Hans Kelsen, Op. Cit., p 382.

30 Ibid., p 15-16. See also William F. Funk and Richard H. Seamon, in Op. Cit., p 23-25.

31 See Francis Fukuyama, the End of History and the Last Man, (London: Penguin Book, 1999).

32 Cornelis Lay, State Auxiliary Agencies, In Jentera Journal Edition 12 Year III, (Jakarta: PSHK, April-June 2006), p. 6.

33 Lihat Samuel P. Huntington, Political Order in Changing Society, (New Haven and London: Yale University Press, 1968).

34 Cornelis Lay, *State Auxiliary Agencies*, in Jentera Journal Edition 12 Year III, (Jakarta: PSHK, April-Juni 2006), p. 11-12.

35 Bruce Ackerman, *The New Separation of Powers, 113 Harvard Law Review,* . 633.

36 *Ibid.,* p. 726.

He thinks that the parliament dominance (and executive) restriction was based on three principles, which has motivated the birth of dominance separation doctrine, i.e. democrazy, proffessionalism, and citizen basic rights protection. Ackerman also asserts that *checks and balances* must be more leaned on the principles. It means that it was not only rigidly based on which one that had 'the right' to be categorized as *state organs* or *main state organs*.

In Said Amir Arjomand reading, the state commissions' presence or as *administrative organ*, has dominated whole process of law development (*legal development*) in this modern era, especially in constitution reformation in several countries that experience transition process from authoritarian to democracy. This domination occurred almost in entire countries because of too complex modern society needs. Arjomand says that one of constitution reformation trend in these new countries is:

> *"The modern stage of political reconstruction by rational design in the age of democratic revolutions in the late 18th century, when constitution-making itself was introduced as the procedure for the elaboration of a rational design for political reconstruction, alongside parliamentary law-making as an expression of national sovereignty and the principle of separation of powers; The age of modernization in the second half of the* 19th and early 20th *centuries, when (authoritarian) constitutions served as instruments of state-building and rationalization of the centralized bureaucratic Rechtsstaat, and law-making by parliaments and administrative organs dominated legal development".*[37]

Arjomand further explains that this concept increasingly widely developed, accompanied by law development use forcefulness applied by the World Bank, especially for the third world countries as their economic restructurization step. World Bank adopted institutional model of *rule of law* in democratic transition of Eastern Europe countries, communism post-disrepair, to apply in the third world countries. By quoting Santos's assertion (1999: 73), Arjomand states that

> *"the reconstruction of 'the post-developmentalist state in the semi-peripheral countries' in order to meet 'the regulatory needs of the new neo-liberal development model".*[38]

The Arjomand statement was reinforced by Fabrice E. Lehouc's assertion that democratic consolidation, which emphasized on status quo group, coinciding with the presence of third wave of democratization, by new politic institutionalization ways, by formation of play rules, was a medium for pro-market economic development. In his study in Latin America, Lehoucq asserts that electoral comission formation—that isolate oneself from executive and legislative involvement has given big contributions in constitutional democratic reinforcement. The Latin America success in innovating new institution formation, which was free from executive and legislative intervention, later became literature and being adopted by many countries in this world.[39]

In the US , the new dominance organ birth, which was later recognized by 'state commission' or administrative agencies, had been begun by Interstate Commerce Commission formation that stands by the 1887 Congress authentication. Continued in 1914, when economic crisis attacked this world, the US wanted an institution which specifically administers world business, to look about the business competition forms. Thus, Federal Trade Commision was born. In the next period, a number of independent state commissions (independent regulatory agencies) in the US popped out. As yet, there were at least 30 independent state commissions possessed by the USA. According to Nixon's Independent Regulatory Commissioner Database (2005), the commissions such as: the Consumer Product Safety Commission, Equal Employment Opportunity Commission, Federal Communications Commission, Federal Election Commission, Federal Energy Regulatory Commission, Federal Reserve Board of Governors, Federal Trade Commission, Interstate Commerce Commission, National Labor Relations Board, National Transportation Safety Board, Nuclear Regulatory Commission, and Securities and Exchange Commission.[40]

Similar to the US, state commissions' birth in England even been initiated since Industrial Revolution period. specific agencies emergence outside the core dominance organ was an answer of the increasing complexity of British society problems as the effect of social and politic structure and configuration, post-revolu. meet the need, *Countryside Commission*, *The Office of Fair Tradding*, *The Commission for Racial Equality*, *The Helath and Safety Commision*, other agencies in England were establised. [41]

According to Jack H. Knott and Gary J. Miller, one of things which encourage the birth of new state agencies in the US was the developing 'agencies theory' in American administration and bureaucracy system. This theory previously improved in economic theory storage, which was based on supply and demand. However, this was later adopted in administration and bureaucracy development. This theory created principal and agent in bureaucratic relation. The principal itself constitutes a main organ of dominance, while the agent was administrative agency

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37 Saïd Amir Arjomand, *Law, Political Reconstruction and Constitutional Politics, Journal International Sociology*, edition March 2003 Vol 18 (1), p. 9.

38 *Ibid.*, p. 12.

39 Fabrice E. Lehoucq, *Can Parties Police Themselves? Electoral Governance and Democratization*, *Journal International Political Science Review* (2002), Vol. 23, No. 1, p. 29–46.

40 Ryan C. Black, etc., *Adding Recess Appointments to the President's "Tool Chest" of Unilateral Powers*, dalam Journal *Political Research Quarterly*, Volume 60 Number 4, December 2007, p. 645-654.

41 Jhon Alder, *Constituional and Administrative Law*, (London: Macmillan Education LTD, 1989), p. 232-233.

formed to support the main organs works.[42]

Again, the theory's birth becomes initiative of the investors who demanded the firm and detail *rule of the game* in their investment as well as their doubt of bureaucratic professionalism and integrity. The US government confessed that this agencies presence was to improve state economic growth. Some state commissions appeared as the result of this theory are: *National Labor Relations Board* (NLRB), dan *Securities and Exchange Commission* (SEC). Moreover, to monitor the *public agencies*, *Congress* also establishes *the Government Accountability Office* (GAO) and *the Congressional Budget Office*. By the agencies establishment, it is expected that US bureaucracy would develop its credibility, transparency, professionalism, monitoring, and commitment over the market.[43]

Afar from its appearance in England and the US, an institution like such a state commissions with their various nomenclature had presented during Roman imperialism period. In the Roman imperialism, a sort of agency like ombudsman one had appeared which was so-called 'Tribunal Plebis'. This agency functioned to protect the marginal people rights from the arbitrary attitude of the noblemen. The similar institution also presented in China in Tsin Dynasty period in 221 BC, which was so-called as 'Control Yuan' institution. This institution especially functioned to monitor the imperialism officials' deeds as well as mediate the people in delivering their inspiration and idea to the emperor. [44]

'*Ombudsman*' term just appeared when Sweden was defeated of the war from Russia in *The Great Northern War* (1700-1721). In her isolation in Turkey, Charles XII King established an institution which was intended to assure the symbolic presence of highest arbiter. The name of this agency was *His Majesty's Supreme Ombudsman* as the symbol of king authority presence. Ombudsman means 'legal people representatives' in Swedish. This agency was initially not equipped with any politic authority but only the king symbolism. However, after passing too long and deep internal politic problem internal, in its development, Ombudsman was placed as an institution which has a power to monitor the politic official works in giving their service for the people. As asserted in Sweden Constitution, Ombudsman Commission was an independent institution which monitors the works of public agencies. This ombudsman model was later widely adopted in a number of countries, including Indonesia, as one of the steps to improve public services of public officials to the people. Though there were different term, status, and arrangement in each state, it still had the same intention and goals.[45]

In its development, recognized with 2 types of state commission, a state commission can be related to state organ; its status was independent. Such a division was asserted by Milakovich and Gordon. They say that state commission (*regulatory bodies*) can be divided into two types. *The first* is *dependent regulatory agencies* (DRAs). This commission is usually a division of certain department in the government, cabinet or other executive structures.[46] The consequence of part of executive is that this commission absolutely depended on the president's *political will* as the highest executive stakeholder. Hence, such a commission can behave independently, primarily with ones related to the government interests. In Indonesia, some commissions which can be categorized as DRAs are National Law Commission (NLC), National Law Development Agency (NLDA), Police Commission, and Attorney Commission.

The second one is *independent regulatory boards and commissions* (IRCs). Milakovich and Gordon states that IRCs possesses some differences structurally compared with DRAs. *First*, this commission has collegial leadership character that its decisions are taken collectively. *Second*, the members or institutional commissioners do not serve what the president wants as other position chosen by president. This agency is independent. It means that it is free from the president control though independence is relatively not absolute.[47] *Third*, the commissioners' tenure is commonly definitive and quite long, for example, 14 years for the positional period of *Federal Reserve Board* in the US. *Fourth*, its positional period is also *"staggered"*. It means that every commissioner is annually replaced gradually and thus, a president cannot wholly henpeck the related agencies leadership because the commissioners' position periodization does not follow presidential political periodization. *Fifth*, the amount of members or commissioners is odd and the decision is taken based on the voice majority. *Sixth*, the agency membership usually maintains the balance of partisan representation.[48] With the mentioned characters, IRCs relatively possesses free position in performing its function because it is not under any absolutely dominance control.

Similar to Funk Seamonopinions, Michael R. Asimovsays that state commission or *administrative agencies* the *units of government created by statute to carry out specific tasks in implementing the statute. Most administrative agencies fall in the executive branch, but some important agencies are independent.*[49] Regarding a commission characters, whether they depend on certain dominance branch, atau bersifat independen, Asimov view it as how appointment and dismissal mechanism of the commission. He says that the member dismissal of independent state commission can only be done based on the causes ruled by related commission formation laws. Meanwhile, the common state commission member can be dismissed by the president at any time, through arrangement mechanism owned by the president.

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42 Jack H. Knott and Gary J. Miller, *Op. Cit.*, p. 392.

43 *Ibid.*, p. 396-406.

44 Cornelis Lay, dalam *Op. Cit.*, p. 8. Seperti dikutip dari Bryan Giling, *The Ombudsman in New Zealand*, (Wellington: Dunmore Press, 1998).

45 *Ibid.*, p. 9. As quoted from Weislander, *The Parliamentary Ombudsman in Sweden*, (Fringfraf: Sodertalje, 1999).

46 Michael E. Milakovich and George J. Gordon, Public Administration in America, p. 442.

47 William F. Funk dan Richard H. Seamon, in *Op. Cit.*, p. 9.

48 *Ibid*, p. 443.

49 Michael R. Asimov, *Op. Cit.*, p. 2.

50 *Ibid.*, p. 20.

William F. Fox, Jr. asserts that a state commission can be independent when it is firmly stated in related commission law made by *Congress*. Besides, when there is president's authority restriction for not be able to freely decide (*discretionary decision*) the dismissal of the state commission leader.[51] An independent state commission is a public agency which has independence, autonomy, and arrangement competence in running the sensitive space, like competition protection, capital market supervision, and arrangement of commonly economic interest service. This commission is justified by complexity of certain things arrangement, and supervisory tasks and definitely need specific expertise. Fast implementation need is exactly the public authority in a certain sector and free politic intervention from the market realization.

Transitional must?

As outlined before, the state commission existence increasingly developed in post third wave of democratization which destroyed a number of authoritarian regimes of the third world. Coincide with the democratic transition process of the authoritarian, the state commissions were institutionalized in various kinds which accorded with each state needs. This institutionalization process occurred like in South Africa, Filipina, South Korea, and Indonesia.

South Africa Selatan was feasibly the first which initiate this re-democratization project that was later following by other third world countries. The formation of a number of state commissions has become trend for the third world countries in their democratic consolidation. This trend seems that the democratic transition is identical with the state commission formation either as *independent agencies* or as the derivative of certain branch dominance (*branch agencies*).

In his study of democratic transition process of several ex-communist countries , and ones which experienced transition from authoritarian to democracy, Heinz Klug says that new state agencies formation is one of main trend. Klug focuses his study on how the process of democratic transition occurs in South Africa. He states that one of his main findings in democratic transition of South Africa is "*each new wave of state reconstruction seems to produce new variations in the division of power, between centre and periphery and between different organs of government, as well as new conceptions of the relationship between different branches of government.*" [52] Meanwhile, the reasons why new agencies are established would be the effort of encouraging transparency, clean government, meeting human right, and preventing abuse of authority. Klug asserts that: [53]

> *On the one hand, mechanisms were introduced to distance certain decisions from party political or purely government control and to ensure transparent and clean government, while on the other hand there were various institutions designed to further human rights and to prevent the abuse of government power.*

Some state commissions are established in democratic transition process in South Africa with their various functions as mentioned in the following South Africa Constitution: [54]

> *South African Law Commission—a government—sponsored law reform body—to investigate group and individual rights as part of its own preparations for the reform of apartheid. The first category included the Independent Electoral Commission, the Judicial Service Commission, the Public Service Commission and the Financial and Fiscal Commission, which serve to insulate the electoral system, judicial and public service appointments, as well as the distribution of financial allocations and resources between the regions, from purely party political dynamics. Provision was also made for the appointment of an ombudsperson called the Public Protector, an Auditor-General and a parliamentary standing committee with powers of parliamentary supervision over the National Defence Force. The procurement of goods and services by government was also to be insulated from political interference by the creation of independent tender boards at every level of government. The second category of mechanisms established to check abuses of power and to promote human rights includes the Human Rights Commission, with a mandate to develop an awareness of fundamental rights and to investigate any alleged violation of human rights, and the Commission on Gender Equality which was constitutionally charged with the duty to promote gender equality. Apart from an advisory function with respect to proposed legislation and the power to educate and investigate, the Human Rights Commission was empowered to receive complaints and to assist, even financially, those adversely affected by a violation of their fundamental rights to seek redress before a competent court.*

Similarly, Thailand mandate a number of independent state commissions formation, .e. *The Election Comission, National Counter Corruption Comission, National Human Rights Comission, The Ombudsman,* and *the State Audit Comission*, that have their own works and authorities as well as how the member recruitment mechanism of each commission. Meanwhile, Philippine Constitution mandates formation of *the Civil Service Comission, the Comission on Elections, the Comission on Audit, Judicial and Bae Council,* and *Ombudsman*. According to Jimly Ashiddiqie, the independent agencies formation in the third world countries is encouraged by the fact that bureaucracy in government sphere is valued that it does not meet a need of public service with increasingly qualified standard and is expected that it will be more efficient and effective.[55]

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51 William F. Fox, Jr., *Understanding Administrative Law*, (Danvers: Lexis Publishing, 2000), p. 56.

52 Heinz Klug, *Postcolonial Collages: Distributions of Power and Constitutional Models: With Special Reference to South Africa*, dalam *Journal International Sociology*, edition March 2003, Vol 18 (1), p. 115–116.

53 *Ibid.*, p. 118.

54 *Ibid.*, p. 117-118.

55 Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, p. 28.

Constitution reformation and the transition must through governance reform is intended to save any country from failure (*failed state*). Therefore, it needs to have *institutional strengthening, capacity-building*, and *necessary policy changes*. In Derick W. Brinkerhoff and Jennifer M. Brinkerhoff reports, there are several steps must be performed in saving the failed state in post crisis: [56]

1. *building and maintaining capable states and governance systems are longterm, multifaceted endeavors requiring commitment, country ownership, skillbuilding and technical assistance;*
2. *public sector capacity to perform core functions emerges more quickly and is more sustainable when complemented by strengthening of citizen demandmaking; and*
3. *successful governance reforms depend strongly upon existing levels of state capacity. If states are weak, incompetent, corrupt and/or semi-authoritarian, reforms often do not take or are unsustainable; or, in extreme cases, they lead to partial or total collapse of governance functions and institutions*

The following is the description of reconstruction process which must be passed by any post-crisis country—from authoritarian to democracy. The chart of bagan failed/failing state depicts the phases any state which failed in its government, while the chart of functional state will be the transition phases when state functions run properly:

Tabel 1:
Illustrative governance interventions in functional and failed/failing states

Functional state	Failed/failing state
• Structural adjustment/macroeconomic management • Regulatory framework and legal reform • Democratization and electoral reform • Decentralization • Legislative strengthening • Administrative reform • Budget systems • Public sector management training • Privatization • Infrastructure development • Sectoral service delivery capacity building (e.g. health, agriculture, social services) • Community development • Civil society strengthening/social capital formation • ngo watchdogs (human rights, anti-corruption)	• Constitutional reform, legal frameworks and rule of law • Demilitarization/demobilization of ex-combatants • Reconciliation mechanisms (e.g. truth and reconciliation commissions) • Conflict resolution/mitigation • Security/peacekeeping • Professionalization of military and police • Reconstituting representative institutions • Rebuilding central government core agencies • Reconstructing legitimacy (e.g. elections) • Limited service delivery/basic infrastructure • Rebuilding community organizations • Civil society trust-building

Source: *Derick W. Brinkerhoff and Jennifer M. Brinkerhoff (2002).*

Indonesia: Between Custom and Transitional Must

In Indonesia, it is not different with other third world countries. The development of *state auxiliary agencies*, either they are *independent* or *intermediary*, certainly support current state construction especially in post-fall of bureaucratic authoritarianism of Soeharto, in first mid of 1998. Further, it is legitimated through four constitution changes of Constitution of 1945 (UUD 1945). From the non-expert point of view, state commissions in Indonesia, either it is an independent state commission or complementary *branch agencies*, at glance it is just a custom in democracy and in an authority after it is under centralistic regime which was unwilling to derivate its authority for years. Thus, the phenomenon may be induced by a *phobia* over governance centralism model in the previous period.

Even the massively state commission institutionalization occurred in post-reformation of 1998, the formation *state auxiliary agencies* in Indonesia have begun since National Commission of Human Right (NCHR=*Komnas HAM*-Ind) formation in 1993. Initially, NCHR is only the prolongation executive governance as seen in its formation basis using Presidential Decree (Keppres-Ind), [57] and its entire members are also appointed and dismissed by the authorized president in the time, Soeharto.

The independence and credibility of commission established by Soeharto was initially in doubt. However, this commission is reliable enough when it coped with and

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[56] Derick W. Brinkerhoff and Jennifer M. Brinkerhoff, *Governance Reforms and Failed States: Challenges and Implications*, dalam *Journal International Review of Administrative Sciences*, 2002, Vol. 68, p. 513.

[57] *Komisi Nasional HAM* (Human Right National Commission) was firstly built based on Presidential Decree Number 50 Year 1993.

revealed some human right violation cases as well as its ability to open relation with the civil unsure.[58] Another record if this commission is that it was initially politically and constitutionally weak. Yet, NCHR institutionalization as a new state agency, beyond the main governance organ, at least has become a foundation and *pilot project* of similar agencies formation in subsequent time.[59]

Indonesia actually had some experiences in establishing non-state organ commissions, which were equal with the state ones, in different terms. In fighting against corruption, for example, the government formed some specific agencies. In the Old Order, the government formed corruption eradication for twice. *First*, by Emergency Law Number 23 Year 1959 about Dangerous Situation, this agency is recognized with State Apparatus Retooling Committee (Role). The role possesses an authority to inspect all state official properties, like LHKPN that recently exists. *Second*, in 1963 Presidential Decree Number 275, the government appoints A.H. Nasution who was occupying Menkohankam/Kasab, to lead a new agency with 'Budhi Operation'. This agency work was dragging down the corruption actor into the court. Its main target was public companies and other state agency which was considered to be sensitively corruption and collusion practices.[60]

In the New Order, Soeharto appointed Committee Four (Komite Empat-Ind), that its members were clean and charismatic old figures to fight against the corruption. From Law Number 28 Year 1999 about State Executor that Clean and Free of Corruption, Collusion, and Nepotism (KKN-Ind), B.J. Habibie, as the president, established a new agency namely Commission of Superintendant of State Official Wealth (KPKPN-Ind). This commission was an embryo of the birth of Commission of Eradication of Corruption Crime (KPK-Ind).

Another experience was the formation of several agencies to fulfill the logistic availability. In 1966 the Old Order government formed National Logistic Commission (Kolognas-Ind) to overcome food problem. This agency was later changed into Logistic Affair Agency (BULOG-Ind) in 1967 to handle main needs distribution—executive of politic policy of rice. Further, after cost stabilization program was attained, especially rice, through Presidential Directive (INPRES-Ind) Number 11 Year1969, BULOG had specific mission to handle rice policy.

Its main target was maintaining maximum and minimum cost of rice, from buying and selling in urban market and free market directly as well as from rice stock policy. In other words, BULOG possessed an authority to determine basic cost of farmers' rice (gabah-Ind) production. In this sense, the farmer must follow the determined cost. BULOG serves as a buffer agency and organizes food cost especially in harvest season.[61]

After the New Order fell down, there were many state commissions appeared as mushrooms in wet season. Thus, their works or authority intersects each other. In 2009, Indonesia has 14 independent state commissions which are not the prolongation of one of certain governance organs. The commissions can be seen as follows:

Tabel 2: Independent Regulatory Agencies

NO.	COMMISSION	LAW BASIS
1	Yudicial Commission	Pasal 24B UUD 1945 & UU No. 22/2004
2	General Election Commission	Pasal 22E UUD 1945 & UU No. 22/ 2007
3	Human Right Commission	Keppres 48/2001 – UU No. 39/1999
4	Business Competition Control Commission	UU No. 5/1999
5	National Ombudsman Commission	Keppres No. 44/2000 – UU No. 37/2008
6	Indonesian Broadcasting Commission	UU No. 32/2002
7	Komisi Pemberantasan Tindak Pidana Korupsi (KPK)	UU No. 30/2002 UU No 23/2002 & Keppres No. 77/2003
8	Child Protection Commission	UU No. 27/2004 (UU ini dibatalkan MK secara
9	Truth and Reconciliation Commission	keseluruhan)
10	Press Board	UU No. 40/1999
11	Education Board	UU No. 20/2003
12	Witness and Victim Protection Agency	UU No. 13/2006
13	Public Information Commission	UU No. 14/2008
14	General Election Control Agency	UU No. 22/2007

Source: *formulized by Firmansyah Arifin (2005) and other sources.*

58 Abdul Hakim Garuda Nusantara, *KOMNAS HAM: Sub-sistem dalam Sistem Perlindungan HAM*, makalah tidak dipublikasikan, Jakarta, Otober 2004.

59 Cornelis Lay, *Op. Cit.*, p. 5.

60 Zainal Arifin Mochtar, *et. al.., Naskah Akademis dan RUU Pengadilan Tipikor Versi Masyarakat*, (Jakarta: Konsorsium Reformasi Hukum Nasional, 2008), p. 7-8.

61 Wahyudi Djafar, *Pengaruh Ratifikasi Agreement on Agriculture (AoA) Terhadap Regulasi Pangan Nasional*, (Skripsi Fak. Hukum UGM, Jogjakarta, 2008), p. 118-119.

In addition to all 14 commissions, Indonesia also possesses 14 state commissions or specific agencies which are executive branch agencies. Their commissioners or members are appointed or dismissed by the President. They also give their institutional responsibility toward him. The agencies are in the following:

Tabel 3: Executive Branch Agencies

NO.	COMMISSION	LAW BASIS
1	National Law Commision	Keppres No. 15/2000
2	Police Commission	UU No. 2/2002
3	Attorney Commission	UU No. 16/2004 dan Perpres No. 18/2005
4	Strategic Industrial Controller Board	Keppres No. 40/1999
5	National Research Board	Keppres No. 94/1999
6	National Book Board	Keppres No. 110/1999
7	Indonesian Maritime Board	Keppres No. 161/1999
8	National Economic Board	Keppres No. 144/1999
9	Naitonal Business Development Board	Keppres No. 165/1999
10	National Committee of Transportation Safety	UU No. 41/1999 & Keppres No. 105/1999
11	Committee Inter-Department of Forestry	Keppres No. 80/2000
12	National Acreditaion Committee	Keppres No. 78/2001
13	Independent Assessment Committee	Keppres No. 99/1999
14	Indonesian National Sports Committee	Keppres No. 72/2001
15	Financial Sector Policy Committee	Keppres No. 89/1999
16	National Standard of Measurement Unit Committee	PP No. 102/2000
17	National Committee of Abolishment Action of Children's Worst Work	Keppres No. 12/2000
18	National Committee of Anti-Violation over Women	Keppres No. 181/1998 – Perpres No. 65/2005
19	Report and Financial Transaction Analysis Center	UU No. 25/2003 - Keppres No. 81/2003
20	Poverty Overcoming Coordination Team	Keppres No. 54/2005
21	National Sugar Board	Keppres No. 23/2003
22	Food Tenacity Board	Keppres No 132/2001
23	Eastern Indonesia Development Board	Keppres No. 44/2002
24	Local Autonomy Consideration Board	Keppres No. 151/2000
25	National Defense Board	UU No. 3/2003
26	National Narcotic Board	Keppres No. 17/2002
27	Disaster Overcoming National Agency	UU No. 24/2007
28	Kapet Development Agency	Keppres No. 150/2002
29	Indonesian Labor Development Coordination Agency	Keppres No. 29/1999
30	Gelora Bung Karno Organizer Agency	Keppres No. 72/1999
31	Kemayoran Region Organizer Agency	Keppres No. 73/1999
32	BRR Province of NAD and Nias Island, North Sumatera	Perpu No. 2/2005
33	Profession Certification National National Agency	PP No. 23/2004
34	Toll road Organizer Agency	PP No. 15/2005
35	Drinking Water Supply System Development Agency	PP No. 16/2005
36	Agency of Social Welfare Improvement Coordination and Control of the Disabled	Keppres No. 83/1999
37	Film Sensor Agency	PP No. 8/1994
38	Indonesian Medical Korsil	UU No. 29/2004
39	Agency of Science and Technology Center Development Organizer	Keppres No. 43/1976
40	Nation Life Development Agency	Keppres No. 85/1999
41	National Flight and Space Board	Keppres Keppres No. 132/1998

Source: *Formulized from Firmansyah Arifin, dkk (2005), State Ministry PAN*, and Amendment Script of the Constitution of 1945 (*UUD 1945), DPD Group in MPR, (2008).*

Explanation:

UU = Law
Keppres = Presidential Decree
PP = Government Rule
DPD = Local Leadership Board
MPR = Provisional People's Consultative Assembly

In order to help the government works, executive governance alsi establishes at least 24 non-department state agencies coordinated by certain ministries. The head of these agencies give suggestion, consideration, and institutionalization responsibility toward the president related to the minister who coordinates it. The 24 non-department state agencies formation is regulated by Presidential Decree Number 103 Year 2001, and Number 3 Year 2002. The 24 agencies are not Independent State Commissions because they include in government agencies. The state organs are: State Administration Agency (*Lembaga Administrasi Negara*/LAN-Ind), Indonesia Republic National Archive (*Arsip Nasional Republik Indonesia*/ANRI-Ind), State Personnel Board (*Badan Kepegawaian Negara* /BKN-Ind), National Library (*Perpustakaan Nasional*-Ind), National Development Plan Board (*Badan Perencanaan Pembangunan Nasional*/Bappenas-Ind), Statistic Center Agency (*Badan Pusat Statistik*/BPS-Ind), National Standardization Agency (*Badan Standardisasi Nasional*/BSN-Ind), Nuclear Force Controller Agency (*Badan Pengawas Tenaga Nuklir*-Ind), National Nuclear Force Agency (*Badan Tenaga Nuklir Nasional*), State Intelligent Agency (*Badan Intelijen Negara*/BIN), State Code Agency (*Lembaga Sandi Negara*-Ind), Logistic Affair Agency (*Badan Urusan Logistik*/Bulog-Ind), National Family Planning Coordination Agency (*Badan Koordinasi Keluarga Berencana Nasional*/BKKBN-Ind), National Space Flight Agency (Lembaga *Penerbangan Antariksa Nasional*/LAPAN-Ind), National Survey and Mapping Coordination Agency (*Badan Koordinasi Survey dan Pemetaan Nasional*-Ind), Financial and Development Control Agency (Badan *Pengawasan Keuangan dan Pembangunan*-Ind), Indonesian Science Agency (*Lembaga Ilmu Pengetahuan Indonesia*-Ind), Technological Research and Application Agency (*Badan Pengkajian dan Penerapan Teknologi*/BPPT-Ind), Modal Investment Agency (*Badan Koordinasi Penanaman Modal*/BKPM-Ind), National Land Affairs Agency (*Badan Pertanahan Nasional*/BPN-Ind), Medicine and Food Control Agency (*Badan Pengawas Obat dan Makanan*/BPOM-Ind), National Information Agency (*Lembaga Informasi Nasional*/LIN-Ind), National Defense Agency (*Lembaga Ketahanan Nasional*/Lemhanas-Ind), and Culture and Tourism Development Agency (*Badan Pengembangan Kebudayaan dan Pariwisata*/BP Budpar-Ind).[62]

Many state commissions in recent Indonesian structure system result in various questions, why did the commissions appear massively? *First*, May it be a form of Indonesian custom in manage democratic transition? Hence, in each law formulation which arranges public interest always mandate new state organs formation to manage the public interest; *second*, is it because of a necessity in facing democratic era? In response of the increasing complexity of modern society problems which cause death of primary state organs; *third*, does the birth of the state institutions which is beyond the governance primary organ only become an instrument to get authority? In post-reformation period, many civil society elements also entered in governance chair that it needs wider organization to accommodate entire elements; *fourth*, may there be big scenario beyond this state that design state organs formation outside the governance primary organs? There is an indication that the intervention of the 'neo-liberalist market fundamentalist' to amputate state main functions through new agencies institutionalization of the state. This step is absolutely an effort to improve *public distrust* of the state that the market will get more places inside the people; *fifth*, the new institutions birth is simply disappointment expression and distrust of the people over the state agency? Therefore, it needs to establish new state agencies to replace the previous ones or at least support.

In National Law Reformation Consortium (Dalam catatan Konsorsium Reformasi Hukum Nasional/KRHN-Ind) record, there are about five reasons which influence many state organs formation outside the governance primary organs, either dependent or independent.

The reasons are as follows: [63]

1. unavailability of existing institutional credibility because of an asumption (and proof) about systemic and rooted corruption and hard to cope with;
2. non-independent of existing state agencies because they are submissive and under state governance or other authority;
3. existing state agencies inability to perform urgent works in democratic transition phase because of bureaucratic problems and corruption, collusion, and nepotism (KKN-Ind);
4. global influence, in the formation of state auxiliary agencies or watchdog institutions in any countries which in transition situation to democracy becomes a need—even a must—as an alternative from the existing agencies which may be part of the system that must be reformed;
5. international agencies pressure, not only as a prerequisite to enter global market but only to make democracy as the only way for the states which were previously under authoritarian governance

From many reasons mentioned above, it seems that independent state commissions' formation cannot be undoubtedly avoided in each democratic transition process. In addition to the pressure of state internal need related to the citizen and similar existing state agency, the independent state commissions appearance are also influenced by international pressure. As expressed by Arjomand, World

62 Presidential Decree Number 3 Year 2002 about Presidential Decree Change Number 103 Year 2001 about Organization's position, work, function, authority, and Structure and non-department government agency work order.

63 Firmansyah Arifin, Zainal A.M. Husain, *et. al.*, *Lembaga Negara Dan Sengketa Kewenangan Antarlembaga Negara*, (Jakarta: Konsorsium Reformasi Hukum Nasional, 2005), p. 59-60.

Bank and other international fund agencies apply similar law development concept for every citizen who become its patients. Thus, it is common when there are similar democratic transition patterns from one state and another.

However, there is one thing which must be more underlined. Will these independent state agencies require certain treatment that 'inflation' of independent state agency does not occur that cause failure of synchronization and harmonization.

Indeed, one last words are that a necessity to make better structure must be absolutely performed.

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