

# THE AUTHORITY RATIONALIZATION PHILOSOPHY OF THE INDONESIA COMPETITION COMMISSION: The Due Process of Law and Maqashid Sharia Perspectives

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## *Abstract*

*The Indonesia Competition Commission (ICC) is a super body institution in enforcing business competition law in Indonesia. There are three subsystems of authority in the said law, namely the authority to investigate and observe, the authority to prosecute and the authority to adjudicate. The ICC is full of conflicts of interest in performing its functions, thus, impartiality is not an easy task. This is normative research with statutory and conceptual approaches. The primary, secondary, and tertiary legal materials were obtained through literature study and analyzed using extensive interpretation. The research focus is, first, rationalization in the due process of law perspective guarantees the impartiality of the ICC in executing its authority. Second, in the maqashid sharia perspective, ICC can realize justice and protect citizens' property. In the second perspective, this rationalization is included at the primary level by separating the prosecution and the adjudication authorities. The government should provide a clear policy so the ICC stands as a prosecution agency with more authority to conduct a search to obtain the needed evidence. Meanwhile, the authority to adjudicate is on the Commercial Court, a special court in the General Court. This article contributes thoughts on Business Competition Law and the authority of the KPPU in the legal process and the perspective of Maqashid sharia.*

*Komisi Pengawas Persaingan Usaha merupakan lembaga superboddy dalam menegakkan hukum persaingan usaha di Indonesia. Dalam hukum tersebut, terdapat tiga subsistem kewenangan, yaitu kewenangan penyelidikan dan penyidikan, kewenangan penuntutan, dan kewenangan mengadili. KPPU sarat dengan konflik kepentingan dalam menjalankan fungsinya, karenanya, imparsialitas sulit ditegakkan. Artikel ini merupakan penelitian normatif dengan pendekatan perundang-undangan dan konseptual. Bahan hukum primer, sekunder dan tersier diperoleh melalui studi kepustakaan dan dianalisis menggunakan penafsiran ekstensif. Fokus penelitian, pertama, rasionalisasi dalam perspektif *due process of law* menjamin imparsialitas KPPU dalam melaksanakan kewenangannya. Kedua, dalam perspektif *maqashid syariah*, KPPU dapat mewujudkan keadilan dan perlindungan harta benda warga negara. Dalam perspektif *maqashid syariah*, rasionalisasi ini masuk pada jenjang primer dengan memisahkan kewenangan penuntutan dan mengadili. Hendaknya pemerintah dapat memberikan kebijakan yang jelas agar KPPU berdiri sebagai lembaga penuntut dengan penambahan kewenangan untuk melakukan penggeledahan dalam upaya mendapatkan bukti-bukti yang dibutuhkan. Sedangkan, kewenangan mengadili ada pada Pengadilan Niaga yang merupakan pengadilan khusus dalam Pengadilan Umum. Artikel ini memberikan kontribusi pemikiran mengenai Hukum Persaingan Usaha serta kewenangan KPPU dalam proses hukum dan perspektif *Maqashid sharia*.*

**Keywords:** *commercial court, maqashid sharia, The Indonesia Competition Commission*

## Introduction

Good business on the basis of economic democracy can foster investment in a country, and Indonesia is no exception. Due to the importance of investment, Indonesia issues regulations that are considered to attract investors to the country. The regulation is the Job Creation Law or more commonly known as the Omnibus Law. Based on this, business competition law is a non-negotiable necessity, therefore large, medium, and small business actors have the same opportunity to run a business which automatically affects consumers' protection.

Law No. 5 of 1999 concerning The Prohibition of Monopolistic Practices and Unfair Business Competition is present as a guideline. There are philosophical foundations for this law formation, namely, first, advancing the national economy as an effort to improve consumer welfare; second, creating a conducive business climate through the regulation of fair business competition, thereby ensuring the certainty of equal business opportunities for large, medium, and small business. Law No. 5 of 1999 is used to prevent monopolistic practices and/or unfair business competition caused by business actors. It is also used to bring the world of trade and business towards a fairer direction based on the principles of fair market

competition.

Realizing the philosophical values, Law No. 5 of 1999 concerning The Prohibition of Monopolistic Practices and Unfair Business Competition states the establishment of the Indonesia Competition Commission (ICC or in Indonesia, *Komisi Pengawas Persaingan Usaha* or KPPU). The institution was established to supervise business actors in carrying out their business activities so as not to practice monopolies and/or do unfair business competition that centralize on only some business actors. The law wants every citizen to have participation opportunity in the production and marketing process of goods and services in a healthy, effective, and efficient business climate, thus encouraging economic growth and creating a fair market. The ICC is an independent institution, both function and job wise. However, ICC has become a super body institution,<sup>1</sup> exceeds the Corruption Eradication Commission (or KPK). This is because ICC has the authority to investigate (police), prosecute (prosecutors), and decide (judges). Although this super body assumption was rejected by the ICC,<sup>2</sup> the fact of such extraordinary authority is difficult to negate.

The extraordinary authority of the ICC can potentially damage its image as an independent institution, thus, leading to unfairness when performing ICC's duties and authorities. This situation can make investors to give up on investing in Indonesia, because what they need is not only a stable political condition, low labor wages, but also fair and impartial dispute resolution.

Hence, the irrational "super body authority" of the Indonesia Competition Commission must be reduced and reformulated as an effort to rationalize the power. So, its presence can contribute positively to the country's economic growth and development, not the other way around. For the reformulation purpose, this paper focus on 2 (two) essential issues, (a) the urgency of reformulation of the ICC's authority from the perspective of due process of law and Islamic law (*maqashid sharia*); and (b) the ideal reformulation of the ICC's authority in supervising business competition and monopoly.

To date, many scholars have been doing academic studies, descriptions, and

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- 1 Institutions with extraordinary powers. This is more than the Indonesian Corruption Eradication Commission, which is only authorized to carry out investigation, examination, and prosecution. Ulang Manguan Sosiawan, "Peran Komisi Pemberantasan Korupsi (KPK) Dalam Pencegahan Dan Pemberantasan Korupsi," *Jurnal Penelitian Hukum De Jure* 19, no. 4 (2019): 518.
  - 2 Indonesia Competition Commission is not a super body, <https://finance.detik.com/berita-ekonomi-bisnis/d-3346253/Indonesia-Competition-Commission-tidak-superbody> accessed on July 22, 2021.

analysis of business competition law and The Indonesia Competition Commission on a macro basis. Risnain explains that ICC is currently carrying out the functions of judicial power within the scope of business competition. The problem is on the decision implementation because the ICC and the Supreme Court do not have a functional-constitutional relationship. As an institution that exercises judicial power, it is important for The ICC to be supervised by the Judicial Commission and the Supreme Court to maintain the dignity of the commissioners.<sup>3</sup> The next study is done by Toha, concentrating on the amendment of the Business Competition Law with several aspects. Those include foreign business actors as the subject of Indonesian Business Competition Law, post to pre-merger changing, procedural law, and the ICC status in the constitutional system.<sup>4</sup>

Sukarmi conducts a study to discuss the integration between the Indonesia Competition Commission and Indonesian National Police Investigators. The integration is manifested in a Memorandum of Understanding (MoU), then followed up with the formation of a working group of both institutions to handle cases on business competition.<sup>5</sup> Sapitri compares the ICC's works in handling business competition cases with other common law countries. She finds that, in playing the role, ICC did not establish good cooperation with government institutions. As a result, ICC often finds difficulties in collecting additional data and information. Meanwhile, the Federal Trade Commission (from the US), Australian Competition and Consumer Commission (ACCC), the Competition Commission of Singapore (CCS) get full assistance from the respective government and the community in carrying out their duties.<sup>6</sup>

## Research Methods

This is normative legal research to analyze the authority rationalization of the Indonesia Competition Commission. The statutory approach used to analyze the regulation of the ICC authority and the conceptual approach is employed

3 Muh. Risnain, "Eksistensi Lembaga Quasi Judisial dalam Sistem Kekuasaan Kehakiman di Indonesia: Kajian terhadap Komisi Pengawas Persaingan Usaha," *Jurnal Hukum dan Peradilan* 3, no. 1 (2014): 49–58., 57-58.

4 Kurnia Toha, "Urgensi Amandemen UU tentang Persaingan Usaha di Indonesia: Problem dan Tantangan," *Jurnal Hukum & Pembangunan* 49, no. 1 (2019): 76., 89.

5 Sukarmi, "Integrasi Antara Komisi Pengawas Persaingan Usaha dan Penyidik Kepolisian dalam Penegakan Hukum Persaingan Usaha," *Jurnal Hukum Ius Quia Iustum* 28, no. 2 (2021): 348–372., 370.

6 Baiq Ervinna Sapitri, "Authority of The Business Competition Supervisory Commission (KPPU) in Case Management Competition (Studies Comparative In Indonesia by Common Law System Countries)," *Ius Kajian Hukum Dan Keadilan* 30, no. 02 (2015): 139–58., 155.

to solve the issue based on *maqashid sharia* in Islamic law theory. Primary legal materials consist of regulations related to the authority of the ICC such as Law No. 5 of 1999 concerning The Prohibition of Monopolistic Practices and Unfair Business Competition. The secondary legal materials are those related to the current study's topic taken from books, journal articles, research results containing in theses and dissertations. Legal materials are obtained through literature study. The analysis of this study uses an extensive interpretation of the Indonesia Competition Commission's authority by using the perspective of due process of law and *maqashid sharia*.

## Discussion

### The Rationalization of Super Body Authority of the Indonesia Competition Commission: The Due Process of Law Perspective

There are several well-known independent institutions in the country i.e., The Supreme Audit Agency (*Badan Pemeriksa Keuangan*), the General Election Commission (*Komisi Pemilihan Umum*), the Republic of Indonesia Ombudsman, the Prosecutor Commission (*Komisi Kejaksaan Republik Indonesia*), the Indonesian Judicial Commission (*Komisi Yudisial Republik Indonesia*) and the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*). There are also five other similar institutions namely, the National Police Commission (*Komisi Kepolisian Nasional*) for supervising law enforcement, *Bank Indonesia* in the Banking field, the Indonesia Competition Commission (*Komisi Pengawas Persaingan Usaha*) and the Financial Services Authority (*Otoritas Jasa Keuangan*) in the field of supervision of the economy and financial institutions, and the Indonesian Broadcasting Commission (*Komisi Penyiaran Indonesia*) in the field of broadcasting media supervision.<sup>7</sup>

The Indonesian Corruption Eradication Commission, known as KPK (*Komisi Pemberantasan Korupsi*), is considered a super body in exterminating corruption in Indonesia. KPK's authority is in the form of investigations and prosecutions, which before the revision of the law, was not authorized to issue a Warrant Termination of Investigation (a.k.a. SP3-*Surat Perintah Penghentian Penyidikan*) against the determined suspects. So, it can be ascertained that those who were arrested would become suspects. KPK as a super body authority<sup>8</sup> was

7 Rizki Ramadani, "Lembaga Negara Independen di Indonesia dalam Perspektif Konsep Independent Regulatory Agencies," *Jurnal Hukum Ius Quia Iustum* 27, no. 1 (2020), 173-174.

8 KPK is often considered arrogant and abuse their power. See "KPK's Arrogance Must Stop", <https://>

born due to the extreme corruption practices in the country,<sup>9</sup> thus, an independent institution to solve the matters is urgently needed. However, KPK is not authorized to prosecute corruption criminals. Another institution allowed to conduct trial on such criminals is the judiciary, namely the Corruption Court (*Pengadilan Tindak Pidana Korupsi*),<sup>10</sup> a special court within the General Court.

The Financial Services Authority (OJK) is a supervisor in the financial services sector that has the authority to investigate as part of its main duty. Besides, OJK has the authority to file lawsuits. Article 30 paragraph 1 Law No. 21 of 2011 states that for the protection of consumers and public, OJK has obligation to take legal defense, including (1) commanding Financial Services Institution to respond to consumer's complaints; (2) filing a lawsuit which aims to (a) recover the assets of the injured party from the party causing the loss; and (b) get compensation from parties who cause losses to consumers and/or Financial Services Institutions as a result of violations against the laws and regulations in the financial services sector.

OJK is also authorized to facilitate the settlement of consumer disputes who feel disadvantaged by the Financial Services Institutions. This facility is a part of the consumer service which is one of the tasks carried out by the OJK.<sup>11</sup> The

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[www.jpnn.com/news/arogansi-kpk-harus-dihentikan](http://www.jpnn.com/news/arogansi-kpk-harus-dihentikan); also see "Pengamat Anggap Revisi UU Perlu Supaya KPK Tak 'Membabi Buta'", <https://www.cnnindonesia.com/nasional/20190915164859-12-430657/pengamat-anggap-revisi-uu-perlu-supaya-kpk-tak-membabi-buta>. Accessed on March 10, 2021.

9 Vidya Prahassacitta, "The Concept of Extraordinary Crime in Indonesia Legal System: Is The Concept An Effective Criminal Policy?," *Humaniora* 7, no. 4 (2016): 513, <https://doi.org/10.21512/humaniora.v7i4.3604>, p. 513. Muhammad Pabalik, Daeng, Hatta and Hardianto Nur Hidayat, Muhammad Bima, Rinaldy Djanggih, "Characteristics of Criminal Acts of Corruption in Indonesia," *International Journal of Psychosocial Rehabilitation* 24, no. 8 (2020), <https://doi.org/10.37200/IJPR/V24I8/PR280279>, 2596.

10 In 2006, through the decision of the Constitutional Court No. 012-016-019/PUU-IV/2006 issued on December 19, 2006 the establishment of the Corruption Court in Law 30 of 2002 was declared to oppose against the 1945 Constitution of the Republic of Indonesia. The Corruption Court must be established by a special regulation other than the said law. Hence, Law No. 46 of 2009 was then issued concerning The Corruption Court. Hasril Hertanto, "Evaluasi Pengadilan Tindak Pidana Korupsi Di Indonesia (Studi Atas Kebutuhan, Peran Dan Kualitas Putusan Hakim Di Pengadilan Tindak Pidana Korupsi Jakarta Dan Bandung Pasca Pemberlakuan Undang-Undang No. 46 Tahun 2009 Tentang Pengadilan Tindak Pidana Korupsi)," *Jurnal Hukum & Pembangunan* 44, no. 1 (2014): 1, <https://doi.org/10.21143/jhp.vol44.no1.13>, 15.

11 Adi Herwastoeti, Sulistiyono and Najib Imanullah, "Reconstruction of Consumer Protection Banking Sectors Making The Legal Perfection The Substantive Justice," *South East Asia Journal of Contemporary Business, Economics and Law* 14, no. 5 (2017): 17–24., 19.

settlement will be done if the internal dispute resolution in each financial institution does not work and there is no Alternative Dispute Resolution Institution. OJK, as a facilitator, acts as a mediator for the disputing parties and does not act as a settlement for its own claims.

ICC is a state complementary institution which has the authority based on Law No. 5 of 1999 to enforce competition law.<sup>12 13</sup> The role of a quasi-independent (quasi) state institution is important as a responsive effort for countries that are transitioning from authoritarianism to democracy.<sup>14</sup> Indonesia Competition Commission is essentially a supervisor for developing a healthy business and investment ecosystem. However, in fact, the jurisdiction of ICC exceeds its function, because apart from supervision, it also has the authority to conduct investigations (police), prosecution (prosecutor), and make decisions (judge). This authority is written in Article 36 of Law No. 5 of 1999 concerning The Prohibition of Monopolistic Practices and Unfair Business Competition regulating that ICC acts as an investigator, observer, examiner, prosecutor, adjudicator, and consultant in the business competition law enforcement.<sup>15</sup> Looking at those authorities it holds, no wonder do people assume that ICC has a super body authority compared to other similar institutions such as KPK.<sup>16</sup>

Referring to the criminal justice system, enforcing criminal law is done in 4 (four) subsystems, namely, (a) the power of “investigation” (by the Investigation Agency); (b) the power of “Prosecutor” (by the Public Prosecutor Institution); (c) the power of making a criminal decision (by the Court Institution); and (d) the power of “Implementing Criminal Decisions” (by the executor apparatus). If this is seen in the ICC context, it has power in 3 (three) subsystems, (a) enforcing business competition law by the implementation of investigation and observation

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12 Alum Simbolon, “Kedudukan Hukum Komisi Pengawas Persaingan Usaha Melaksanakan Wewenang Penegakan Hukum Persaingan Usaha,” *Mimbar Hukum* 24, no. 3 (2013): 529–41, <https://doi.org/10.22146/jmh.16123>, 529.

13 Jimly Asshiddiqie, *Perkembangan Dan Konsolidasi Lembaga Negara Pasca Reformasi* (2<sup>nd</sup> Ed.). (Jakarta: Konstitusi Press, 2006), 24.

14 Andi Fahmi Lubis and Ningrum Natasya Sirait, editors., *Hukum Persaingan Usaha: Antara Teks dan Konteks* (Jakarta: Komisi Pengawas Persaingan Usaha, 2009), 312.

15 Binoto Nadapdap, *Hukum Acara Persaingan Usaha Pasca Putusan Mahkamah Konstitusi* (Jakarta: Prenada Media Group, 2020), 37-40. Also, see Adis Nur Hayati, “Analisis Tantangan Dan Penegakan Hukum Persaingan Usaha Pada Sektor E-Commerce Di Indonesia,” *Jurnal Penelitian Hukum De Jure* 21, no. 1 (2021): 109, <https://doi.org/10.30641/dejure.2021.v21.109-122>, 199.

16 Marwan Mas, “Efektivitas Pelaksanaan Kewenangan Superbody Komisi Pemberantasan Korupsi,” *Masalah-Masalah Hukum* 42, no. 1 (2013): 71-78–78, <https://doi.org/10.14710/mmh.42.1.2013.71-78>, 71.

powers; (b) the prosecution power; and (c) the decision-making power.<sup>17</sup>

Three-power in one body is not ideal for law enforcement because it does not meet the elements of due process of law. Mardjono Reksodiputro states that the “due process of law” term is simply translated by the fair legal process. The opposite of the “due process of law” is an “arbitrary process”, a decision based on the power of law enforcement officials. Due process of law is often misinterpreted. This is because the meaning and nature of a fair legal process is not only in the form of law or legislation application which is assumed to be formally fair, but also guarantees the rights of citizen’s independence.<sup>18</sup>

The elements of the due process of law are, at least, hearing, counseling, evidence, and a fair and impartial court.<sup>19</sup> The one that has not been fulfilled by ICC from the aforementioned elements is the existence of the impartial court. In the process of resolving cases of alleged monopolistic practices and unfair business competition, ICC is full of conflicts of interest. The conflicts were caused by the 3 (three) subsystems of business competition law enforcement, all of which are under ICC. The team performing investigation and prosecution are staff in The Investigation Division of the Indonesia Competition Commission who are in the Investigation Division under the Deputy for Law Enforcement, which is a direct subordinate of the Commission. Meanwhile, the Commission will act as a judge in deciding whether or not there are allegations of monopolies and unfair business competition.

Usually, the reports and the settlement requests of unfair business competition allegations received by ICC are from citizens, business actors, and/or ICC’s initiatives.<sup>20</sup> Article 10 of the Commission Regulation No. 1 of 2019 states that the commission can examine business actors if they violate the law even without any report from the public. This kind of initiative action is usually done based on the research data or information regarding the alleged violations of law.<sup>21</sup> After

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17 Barda Nawawi Arief, *Kapita Selekta Hukum Pidana Tentang Sistem Peradilan Pidana Terpadu* (Semarang: Badan Penerbit Universitas Diponegoro, 2006), 20.

18 Atip Latipulhayat, “Due Process of Law,” *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 4, no. 2 (2017): 683., hlm. ii. Mahrus Ali, “Pengawasan Peredaran Barang Cetak, Due Process of Law dan Hak Atas Kebebasan Mengeluarkan Pendapat,” *Jurnal Konstitusi* 8, no. 4 (2011), 526.

19 W J Brockelbank, “Role of Due Process in American Constitutional Law Recommended Citation,” *Cornell Law Review* 39, no. 4 (1954): 561–92., 582.

20 Article 2 of the Commission Regulation No. 1 of 2019 concerning Procedures for Case Handling.

21 This initiative is based on Article 36 point (a) of Law No. 8 of 1999, which states to conduct an observation on allegations of business activities and/or actions of business actors that may result in monopolistic practices and/or unfair business competition.



examining, ICC will investigate the target business actors to collect evidence.<sup>22</sup> This is done definitely after getting approval or direction in the commission meeting. The investigation results are reported administratively and concisely to the Chair of the Commission.

The investigation of the law violation allegation is performed by the work unit. They handle the investigation in 60 (sixty) days at most and can be extended based on the decision of the coordination meeting. Investigation aims to obtain sufficient evidence and clarity of a case or dispute. The steps for performing an investigation are, (a) summoning the whistleblower for questioning; (b) summoning the business actors suspected of having violated the law for questioning; (c) summoning and inviting witnesses; (d) inviting experts and any person deemed to have insights on the law violations; (e) obtaining letters and/or documents related to the case; (f) obtaining data related to the reported party's assets and turnover; (g) conducting local inspection; and (h) analyzing the information, letters, and/or documents as well as the results of the inspection.

The Investigation Report is submitted to the work unit that handles filing and/or case handling and this unit assesses the feasibility of the report. The filing and case handling unit then conducts a brief report at the Commission Meeting within a period of 14 (fourteen) days after the Investigation Report is deemed appropriate for reporting. Reports are prepared by the Prosecution Investigator in the Report of Alleged Violations. Based on the report, the Commission Meeting determines the Preliminary Examination and the formation of the Commission Council to handle the case in question. The determination of the Preliminary Examination and the establishment of the Commission Council as referred to paragraph (1) shall be set forth in a Commission Decision. Implementation of

22 According to Subekti, what is meant by evidence is anything that according to the law can be used to prove something. Subekti in P.N.H.Simanjuntak, *Hukum Perdata Indonesia* (Jakarta: Prenada Media Group, 2015), hlm. 232. Ibnu Akhyat, "Penggunaan Indirect Evidence (Alat Bukti Tidak Langsung) Dalam Proses Pembuktian Dugaan Praktik Kartel Di Indonesia Oleh KPPU," *Era Hukum - Jurnal Ilmiah Ilmu Hukum* 16, no. 2 (2019): 351. In the theory of business competition law, it can be classified into two types, (1) Direct Evidence, namely evidence that can explain the existence of a written or unwritten agreement or agreement that clearly explains the material of the agreement (2) Indirect Evidence (Indirect Evidence) that is evidence that cannot explain clearly and specifically the subject matter of the agreement between business actors. Susanti Adi Nugroho, *Hukum Persaingan Usaha Di Indonesia Dalam Teori & Praktik Serta Penerapan Hukumnya* (Jakarta: Prenada Media Group, 2012), 190-192. Martono Anggusti, Dina Mayasari Sinaga, and Janpatar Simamora, "Penggunaan Indirect Evidence (Alat Bukti Tindak Langsung) Oleh Kppu Dalam Proses Pembuktian Dugaan Praktik Kartel (Studi Di Kantor Komisi Pengawas Persaingan Usaha Wilayah I Medan)," *Nommensen Journal of Legal Opinion* 2, no. 01 (2021): 40-41.

Preliminary Examination and/or Follow-up Examination, the Leader in charge of Law Enforcement shall assign, (a) Prosecution Investigator to prove the alleged violation of the Law in the Commission Council Session; (b) Registrar to assist the Commission Council; and (c) Secretary to assist the administration of the trial.

The illustration of the process of handling cases of alleged monopolistic practices and unfair business competition above, which started on their own initiative, self-research and self-investigation, is carried out by certain units in ICC. The conflict of interest will be seen during the commission hearing to determine whether there is an allegation of monopoly and unfair business competition. The impartiality of the commission assembly will be greatly disturbed and it is reasonable to suspect that impartiality is ignored. This is because there is no confirmation on the initiative, no investigation and research results which have been done in several stages, reported to the ICC Chairman. Those can undermine the authority of the Commission institutionally. As a result, business actors will label it as an institution that is not credible and unprofessional in holding its authority. On the contrary, when ICC confirms all the results of their own initiative research, investigation and prosecution of its own members, people will see it as a natural thing because it is part of the ICC jobs.

Investigators who carry out the function of the prosecutor's office in claiming for alleged violations of business competition law are part of ICC, while the commissioners who will evaluate the claims and carry out judicial functions are commissioners of ICC. This has created a conflict of interest which could eliminate Indonesia Competition Commission's impartiality in employing its authority so that it does not fulfil the minimum element of due process of law. This can affect the personal independence of the commissioner, because the investigator as a prosecutor and the commissioner as a judge are one unit in one institution.

Bagir Manan states that the panel of judges is considered as not being neutral or taking sides due to several factors, (a) the influence of power in which the panel of judges is powerless to face the will of the higher power holders, both from within the judiciary itself, as well as from outside (e.g. governors, regents, ministers, and others); (b) public influence, excessive public pressure can cause fear or anxiety to the panel of judges so they end up making decisions that are in accordance with the public coercion; (c) influence of parties, it can come from certain primordial relationships, and because of the commercialization of the case (the case becomes a commercial commodity, the one who pays more will be won).<sup>23</sup>

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23 Bagir Manan, *Sistem Peradilan Berwibawa (Suatu Pencarian)* (Yogyakarta: FH UI Press, 2004), 20-21. Also see Firman Floranta Adonara, "Prinsip Kebebasan Hakim Dalam Memutus Perkara Sebagai Amanat Konstitusi Principles of Freedom of Justice in Decidene The Case

Indonesia Competition Commission implements the authority in its capacity as a quasi-court.<sup>24</sup> The signs that the judges are not neutral can be used to analyze the quasi-judicial process in the Commission. Based on this, it can be said that ICC is not neutral because of influence from one of the parties, namely the investigator who is a member of the ICC itself. The process of resolving allegations of monopolies and unfair business competition is carried out through an adversarial process (contradictory) between the investigator (Indonesia Competition Commission) and the reported party (business actor). The investigator is a member of ICC and the party as a judge is also part of ICC. The Investigator and the Commission can significantly influence each other so that the independence that should be protected will be injured.

The independence of judicial power has 2 (two) aspects. First, in a narrow sense, the independence of judicial power means institutional independence or in another sense it is called structural, external, or collective independence. Second, broadly speaking, the independence of the judiciary includes individual, internal, functional, or normative independence. The definition of personal independence can also be seen from 2 (two) points of view, namely (a) personal independence is the judge independence against the influence of fellow judges or colleagues; and (b) substantive independence is the judge independence from any power, either when deciding a case or when carrying out his duties and position as a judge.<sup>25</sup>

The independence of the judicial power can be used as a tool to measure the independence of Indonesia Competition Commission. Indonesia Competition Commission has not fulfilled the internal independence aspect because the individuals acting as investigators are the Deputy of Law Enforcement Section which is part of ICC internal affairs. There is a very close relationship between investigators and Indonesia Competition Commission commissioners in an institutional structure.

The authority of the ICC as a superbody, at a later stage, can potentially discourage investors from coming to Indonesia, that it will eventually distract the improvement of the national economy. To date, there has yet any research study discussing the positive contribution of Indonesia Competition Commission to the

as a Constitutional Mandate,” *Jurnal Konstitusi* 12, no. 1 (2015): 225.

24 Eglė Bilevičiūtė, “The Role Of Quasi-Courts In Controlling The Legality Of Public Administration: Prerequisites For Systematisation Of Pre-Trial Tax Dispute Resolution In Lithuania,” *International Comparative Jurisprudence* 6, no. 2 (2020): 180.

25 Adonara, “Prinsip Kebebasan Hakim Dalam Memutus Perkara Sebagai Amanat Konstitusi Principles of Freedom of Justice in Decidene The Case as a Constitutional Mandate.”, 225.

national economy. In order to ensure the implementation of the due process of law, the Indonesia Competition Commission's authority needs to be reformulated, by separating the prosecuting power from the judicial power, or separating the duties of the prosecutor's office from those of the judiciary. The Indonesia Competition Commission's authority needs to be limited only to the prosecution stage, as what has been done in the Indonesia Financial Services Authority and the Corruption Eradication Commission, which exclude the court's domain. Therefore, the authority to decide is handed to the judiciary, namely the perpetrators of judicial power.

There are several basic arguments for the urgency of ICC's authority reformulation in terms of philosophical, theoretical, and sociological urgency. In the philosophical aspect, Indonesia Competition Commission is normative based on Law No. 5 of 1999. The law states that ICC was formed to supervise business actors in their activities so as not to monopolize or do unfair things in the world of business. The purpose of supervision is to create democracy in the economic field that requires equal opportunities for every citizen to participate in the process of producing and marketing goods and/or services, in a healthy, effective, and efficient business climate. This is also to encourage economic growth and the operation of a market economy. The philosophy of supervision is to prevent deviations from achieving the planned goals so the performance process is in accordance with the procedures that have been outlined. Furthermore, the supervision is to prevent and eliminate obstacles or difficulties that will come, or may occur in the implementation of business activities.

This philosophical aspect encourages Indonesia Competition Commission to return to the philosophy of its own name, namely a supervisor—as an agency that do monitoring so there will never be monopoly and unfair business competition. Preventive actions are urgently required because violations of business competition laws can be suppressed early, that will affect positively to the investment climate and business ecosystem. Indonesia Competition Commission acts as an ombudsman which receives reports from the public and as an investigator. In exercising its authority as an investigator, Indonesia Competition Commission needs to be equipped with the authority to conduct searches to obtain evidence of allegations of monopolies and unfair business competition.

Theoretically, the prosecuting power and the judicial power in one institution is a problem when viewed from the due process of law. Due process of law is a constitutional guarantee to ensure a fair legal process. Due process of law is a constitutional guarantee emphasizing that the law will be enforced rationally, not arbitrarily, and full of certainty. Article 28D of the 1945 Constitution paragraph

(1) states that everyone has the right to fair recognition, guarantees, protection, and legal certainty, and equal treatment before the law.<sup>26</sup> The basis of the philosophy of due process of law is connected to natural law which postulates that the philosophy of due process of law is nothing but justice, which is inherently natural to humans in defending their rights and freedoms.

The due process of law in the perspective of human rights theory, cannot be separated from human rights implementation, because due process of law is human rights itself. Based on this, the due process of law is the basic procedural rights to ensure the implementation of fair judicial procedures.<sup>27</sup> The right to a fair trial does not focus on a single issue, but rather consists of a complex set of rules and practices. The right to a fair trial is interpreted here as the rules administered through courts of justice in accordance with established and approved legal principles and procedures, for the protection of individual rights. The rules applicable to the administration of justice are wide and refer to, inter alia, a fair and open public hearing, the presumption of innocence, and the independence as well as impartiality of the court party. The importance of these rights in the protection of human rights is underscored by the fact that the implementation of all human rights depends upon the proper administration of justice. Whenever a person's rights are disturbed, she/he can only defend herself/himself adequately if she/he enjoys an effective recourse to due process.

Procedure is the heart of law because a good procedure is a form of justice. The urgency of the procedure was recorded in Islamic history, when Sayyidina Ali had a case regarding his armor which was in the hands of a dhimmi infidel. Settling this case, both of them went to Judge Suraih. In the litigation process, Sayyidina Ali proved that the armor belonged to him with two witnesses, namely Sayyidina Hasan (his son) and Qanbar (his slave). However, Judge Suraih rejected Sayyidina Hasan's testimony because he was related by blood to Sayyidina Ali. According to Islamic teaching, Islam does not accept the testimony of a person who betrays a man or a woman, nor does it accept the testimony of a person who harbors hatred for his Muslim brother, nor accept the testimony of a child against his parents, nor the testimony of a parent against his child.<sup>28</sup> At the trial, because Sayyidina Ali did not fulfill the elements of the procedure, he was defeated by a dhimmi infidel.

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26 Nur Basuki Minarno, "Authorities of Preparation and Hospitality of Applications for Post-Conditions Post-Decision of Constitutional Court," *Yuridika* 35, no. 1 (2020), 79.

27 Ralph Henham, "Human Rights, Due PROCESS And Sentencing," *The British Journal of Criminology* 38, no. 4 (1998): 592.

28 Sayyid Sabiq, *Fikih Sunnah 14*, Terjemah. (Bandung: Al-Maarif, 1988), 64.

Sociologically, due process of law can lead to abuse of power.<sup>29</sup> The party who can be harmed is the business actor. This can lead to an unhealthy and unfair business climate. This is definitely a paradox in an attempt to create a fair business competition. It can also cause trauma to business actors. This shows that there is no ease in doing business as promised by the government when issuing Law No. 11 of 2020 concerning Job Creation, yet, it is difficulty in doing business because of the chaos within the Indonesia Competition Commission itself.

Sociological conditions have a crucial position in law enforcement. This condition cannot be ruled out, although sometimes its existence is only a distraction. The law must have a sociological basis for applicability, in addition to philosophical and juridical legitimacy. The strength of the enforceability of this law is identified with the objectives introduced by Gustav Radbruch, namely justice, certainty, and expediency. Sociological applicability is identified to realize the purpose of legal expediency.

The enactment of law sociologically implies that the law is in accordance with the empirical needs of the community so that its benefits can be felt by the community and used as social control. In addition, the law must also be in accordance with the living law as said by Eugen Ehrlich. Sociological applicability of the law must also be the basis of thought in building or constructing legal norms. In Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2012 concerning the Establishment of Legislation, the term is known as the sociological basis. Therefore, the urgency of reducing the authority of the Indonesia Competition Commission is based on empirical reality, describing in the following paragraph.

First, during the 2000 to 2020 period, the number of decisions of Indonesia Competition Commission submitted to the District Court is 195—the confirmed ones were 112 decisions, 77 decisions were annulled, and 6 decisions were not yet *inkracht* (a verdict with permanent legal force). Second, the decisions of Indonesia Competition Commission submitted by Cassation were 204 in total—105 decisions were upheld by the Supreme Court (MA), 42 decisions were annulled, and 57 cases were not decided. Third, the decisions of Indonesia Competition Commission submitted for judicial review were 47 cases—32 decisions were upheld, 5 decisions were annulled, and 10 cases were undecided.

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29 Seno Wibowo Gumbir and Ratna Nurhayati, "An Overview on The Abuse of Power In The Perspective of Corruption Law And Government Administration Law In Indonesia Based on The Criminal Justice System and The State Administration of The Justice System," *Yustisia Jurnal Hukum* 5, no. 3 (April 28, 2017), <https://doi.org/10.20961/yustisia.v5i3.8798>.

The empirical reality above shows that there are a total of 373 cases of objection to the Indonesia Competition Commission's decision, of which the District Court and the Supreme Court overturned 124 decisions or 34%. This is a bad signal for law enforcement carried out by Indonesia Competition Commission as a superbody institution. It should be borne in mind that the annulled 124 decisions have been examined by legal and economic experts, but could not be enforced. Therefore, this has not been able to realize the benefits of the decision as "law in concreto". There are different assessments and interpretations of the same case between Indonesia Competition Commission and the panel of judges, both at the first level and at the cassation level. Indonesia Competition Commission believes that it is wrong to violate the business competition law, but in an objection or cassation it is declared not wrong. The occurrence of these various interpretations, surely, creates legal uncertainty. This is in contrast to legal certainty as a legal goal. In addition, the number of Indonesia Competition Commission decisions that were canceled by the PN (The State Court) and/or MA (the Supreme Court) was also due to the misalignment between the legal considerations and the economic considerations in the Indonesia Competition Commission's decisions.

The above matters serve as a basis for sociological arguments to urgently reduce the authority and prosecute Indonesia Competition Commission for alleged violations of the Unfair Business Competition Law. Furthermore, it is the unification of authority that is not based on the principles of good governance and the ambiguous position of Indonesia Competition Commission. It will become a party to its own decision when the Indonesia Competition Commission's decision is filed an objection to the District Court or issued an appeal to the Supreme Court.

The current attractiveness of investment does not only rely on the sector of political stability and security or low labor wages, but also reliable, effective, and efficient means of resolving business disputes. Adam Smith once warned that "only peace, less taxation, and an acceptable administration of justice are needed to elevate the poorest countries to the most prosperous; the rest depends on natural factors".<sup>30</sup> The aforementioned description becomes a rational basis that the superbody reformulation of the Indonesia Competition Commission's authority (separating the authority to demand and decide) is important to do with the arguments that have been presented, both on philosophical, theoretical and sociological aspects.

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30 Adi Sulistyono, *Pembangunan Hukum Ekonomi Untuk Mendukung Pencapaian Visi Indonesia 2030*, Pidato Pengukuhan Guru Besar Hukum Ekonomi (Surakarta, 2007), 50.

### The Maqashid Sharia Approach to the Rationalization of the Superbody Authority of the Indonesia Competition Commission

Islamic law is one of the legal systems that apply in the midst of Indonesian society.<sup>31</sup> The purpose of law in Islam is called *maqasid sharia*. *Maqasid Sharia* is the goal of Allah and His Messenger in formulating Islamic laws. This goal can be traced in the verses of the Quran and hadith as a logical reason for the formulation of a law that is oriented to human benefit.<sup>32</sup> The laws are prescribed by Allah to realize the benefit of mankind, both in this world and in the hereafter.<sup>33</sup>

Jasser Audah classifies classical *maqasid shariah* covering 3 (three) levels of necessity: al-darûriyyah (primary), al-hajjiyyah (secondary), and *al-tahsinyyah* (luxury). The scholars divide the necessity into 5 (five): *hifz al-dun* (preservation of religion), *hifz al-nafs* (preservation of life), *hifz al-mal* (preservation of property), *hifz al-'aql* (preservation of reason), *hifz al-'aql* (preservation of reason), and *hifz al-nasl* (preservation of heredity). Some scholars add *hifz al-'ird* (preservation of honor) to fulfill the five *maqashid sharia* into six main/primary goals or necessity.<sup>34</sup> In addition, there are also those who include *al-'adl* (justice).<sup>35</sup>

The urgency of the reformulation of Indonesia Competition Commission's authority can be seen by using the theory of *maqashid sharia*. Referring to the level of necessity mentioned above, the reformulation is in the primary level. The argument is to separate the power of prosecution and adjudication, which philosophically functions to achieve justice. This is because the impartiality of judges will be realized in resolving allegations of monopolies and unfair business competition, and also avoiding the potential of the abuse of power.

There is a maxim that is commonly known in Islam which states that *Ma la yatimmul wajib illa bihi fahuwa wajib*, which means that all the prerequisites for the perfection of an obligation, then the law becomes obligatory as well.<sup>36</sup> Islam through its primary source, the Quran, commands to uphold justice. This

31 A. Qadri Aziziy, *Elektisisme Hukum Nasional* (Yogyakarta: Gama Media, 2002), 110.

32 Satria Effendi M. Zein, *Ushul Fiqh*, Cetakan I. (Jakarta: Kencana, 2005), 233.

33 Abu Ishaq al-Syatibi, *Al-Muwafaqat Fi Usul Al-Syari'ah*, Vol. I Printed III. (Bayrut: Dar Kutub al-'Ilmiyyah, 2003), 195.

34 Jasser Auda, *Maqasid Al-Shariah As Philosophy Of Islamic Law A Systems Approach* (London Washington: The International Institute Of Islamic Thought, 2007), 3-5.

35 Galuh Nashrullah kartika Mayangsari R and H. Hasni Noor, "Konsep Maqashid Al-Syariah Dalam Menentukan Hukum Islam (Perspektif Al-Syatibi Dan Jasser Auda)," *Al-Iqtishadiyah: Jurnal Ekonomi Syariah dan Hukum Ekonomi Syariah* 1, no. 1 (2014), 63.

36 Quoted from Ahmad Dzulfikar and Muhammad Afwan Romdloni, "Al-Qur'an dan Relasi Umat Beragama; Prinsip Dasar Harmoni Antar Umat Beragama Perspektif al-Qur'an," *Journal of Islamic Civilization* 1, no. 1 (2019), 11.



command is a mandatory, thus many verses are revealed about this.<sup>37</sup>

Methodologically, in the science of Usul Fiqh, the terms *ghayah* and *wasail* are known. *Ghayah* is the ultimate goal of a command (final goal), while *wasail* is a tool, an instrument to achieve the goal. Indonesia Competition Commission is an instrument (*wasail*) in resolving allegations of monopolistic cases and unfair business competition for the purpose of upholding justice (*ghayah*). The problem is, the instrument (ICC) does not guarantee the perfect achievement of the goal (justice), because it does not fulfill the due process of law, thus, needed to realize. Based on the rule of *ma la yatimmul wajib illa bihi fahuwa wajib*, the existence of ICC that fulfills the due process of law is a mandatory, so that the authority reformulation of ICC is also a mandatory. The instruments (*wasail*) that can negate the existence of conflicts of interest or can guarantee the existence of a due process of law are needed.

In addition to the rules above, there is also the rule of *al-amru bi syain amrun bi wasailihi*,<sup>38</sup> which means an order to do something means an order also to hold the instrument. However, according to the author, it is not only about the existence of an instrument, but how the instrument can be a means in realizing the ordered case. To contextualize in the current discussion, the enforcement of justice in the settlement of cases of alleged unfair business competition is an order, while the means of enforcing the order is the Indonesia Competition Commission. The existence of ICC means that it is also an order, but its existence does not guarantee that the order can be perfectly enforced, because it does not fulfill the due process of law.

The due process of law as mentioned above is a constitutional guarantee for the realization of fair law enforcement. Due process of law is an anticipatory step to prevent injustice. Preventing injustice is more important than eliminating injustice based on the rule *ad-daf'u aula minarraf'i* (prevention is more important than eliminating). This also confirms the importance of Indonesia Competition Commission to return to the truth, as the name implies, which is to its supervisory duties in preventing monopolies and unfair business competition.

The description above describes the urgency of reformulation of the Indonesia Competition Commission's authority by separating the prosecution from the

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37 The Quran as the main source of Islamic teachings, mentions justice a lot. The word *al-Adl*, in its various forms, is mentioned 28 times, the word *al-Qisth* in its various *shighabs* is mentioned 27 times, and the word *al-Mizan* which contains meanings relevant to both is mentioned 23 times. Look Muhammad Fuad Abd al-Baqiy, *Al-Mu'jam Al-Mufabras Li Alfaz Al-Qur'an Al-Karim* (Beirut: Darul Fikr, 1981), 448-449 dan 544-545.

38 Abdul Hamid Hakim, *Al-Bayan* (Jakarta: Sa'diyah Putra, tth), 21.

judicial power. From *maqashid shariah* perspective, it is included in *al-daruriyyah* (primary) level, aiming to realize justice (*al-'adl*). Article 28G paragraph (1) of the 1945 Constitution states that everyone has the right to personal protection, family, honor, dignity, and property, and has the right to a sense of security and protection from the fear or threat to do or not do something. According to the author, this article is very *syar'i* in accordance with *maqashid sharia*. The reason is that the authority reformulation of ICC is related to constitutional guarantee for the safety of everyone's property. Islam considers one's death for defending property as *syahid*. This proves that Islam respects one's property rights.

Fair business competition and anti-monopoly are arenas in seeking input for property ownership for every business actor. Allegations of unfair business competition in the input of the property must be resolved fairly. A fair settlement can be guaranteed if it meets the due process of law. The due process of law can be realized by the existence of impartiality within the Indonesia Competition Commission as the institution authorized to resolve the alleged case of unfair business competition. Impartiality can be realized if there is no conflict of interest in the said institution. This conflict of interest can be eliminated, if the powers of prosecution and judicial powers that exist in the Indonesia Competition Commission are separated.

The above description shows that the reformulation of the Indonesia Competition Commission's authority by separating the powers of prosecution and judicial is non-negotiable. This philosophically aims to achieve impartiality and neutrality in the settlement of cases of alleged unfair business competition. The separation of powers of prosecution and adjudication can bring about a fair settlement, so that the constitutional rights of business actors to their assets can be guaranteed for their maintenance and protection.

Certainty on the protection of citizens' property is a constitutional obligation of the state, because the protection of property is a constitutional right of citizens guaranteed by the constitution. Departing from this, the state has a constitutional obligation to ensure the existence of a neutral and impartial institution that fulfills the due process of law that is authorized to settle cases related to the property of the citizen. Islam also respects everyone's property, which in *maqashid sharia* (sharia goals) is categorized as *hifz al-mal* (protection of property). Protection of property (*hifz al-mal*) is one of the primary objectives of the sharia.

The description of the rational argument above has relevance to the urgency of reformulation of the Indonesia Competition Commission's authority because the process is fair, impartial, and no conflicts of interest. The separation of powers

is an ideal effort of ICC reformulation. ICC should stand as a prosecutor, as done by the Corruption Eradication Commission and the Financial Services Authority. While the power to judge, it is important to be handed over to the perpetrators of judicial power, namely the Commercial Court. The court has at least three principles regarding the judiciary in the 1945 Constitution of the Republic of Indonesia, (a) independent judicial powers (independence of the judiciary); (b) judicial institutions consisting of the Supreme Court and the four lower courts, namely the general courts, religious, military, state administration and the Constitutional Court, plus other bodies that regulated by law; and (c) the Judicial Commission which maintains and upholds the honor, dignity and behavior of judges.<sup>39</sup>

This guarantee of independence is the basis for an ideal authority to adjudicate cases of alleged unfair business competition. The independence of the judiciary is guaranteed both on the institutional and personal aspects. Institutional independence philosophically aims to guarantee the freedom and independence of the judiciary in carrying out its functions and roles to uphold justice and the law. Meanwhile, personal independence aims to prevent judges from external influences, politics, economy, and worry.<sup>40</sup>

It is crucial to solve cases of alleged unfair business competition through the commercial court. The special court is sociologically needed for the settlement of certain cases so the cases are handled in professional, fast, precise, and simple ways, as well as at a low cost. To support the professionalism of the commercial court as a special court in resolving special cases in the field of monopolistic practices and unfair competition, the appointment of ad hoc judges, both permanent and temporal, has the opportunity to be realized. This opportunity is accommodated in Article 32 of Law No. 48 of 2009 concerning Judicial Power which states that ad hoc judges can be appointed to special courts to examine, hear, and decide cases that require expertise and experience in certain fields for a certain period of time.

Regarding the possibility of appointing ad hoc judges to commercial courts, the author recalls the statement i.e., good judges are not born but made, good judges are not born but created through a good recruitment, selection, and training system.<sup>41</sup> This also applies to career judges who handle certain specific cases as it is very possible to develop the career of existing judges.<sup>42</sup> It is important

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39 Komisi Yudisial Republik Indonesia, *Hitam Putih Pengadilan Khusus* (Jakarta: Sekretariat Komisi Yudisial Republik Indonesia, 2013), 168-169.

40 Indonesia., 169-170.

41 Komisis Yudisial Republik Indonesia., 178.

42 Indonesia., 186-187.

to see the academic background of judges to facilitate the coaching process, such as having a business background, certified in competition law courses, and compiling a final project in the field of business competition law. As one piece of information, even though they are in the business law study program, not all of them compose business competition final assignments and also not all take business competition law courses, because this course in some law and sharia faculties is an elective course.

Based on rational argumentation, the authority to adjudicate cases of alleged unfair business competition is delegated to the Commercial Court, in line with the current existence and authority of this institution. The existence of the Commercial Court is currently inhabited by Human Resources (HR) who<sup>43</sup> (a) has experience as a judge in the general court environment; (b) has dedication and mastery of knowledge in the said field that are within the scope of authority of the Commercial Court; (c) is authoritative, honest, fair, and not reprehensible; and (d) has successfully completed a special training program as a judge at the court.

The requirements to become a commercial court judge above show that in the recruitment process, they have gone through a selection process, and the selected judges have gone through a coaching process. Thus, it can be seen that commercial court judges suits the “good judges are not born but made” statement. Human Resources (HR) of judges in these commercial courts are currently very much needed in the midst of the business world that has penetrated the digital sector with all its complexity, which requires special expertise in it and also experience. The complexity of today’s business requires qualified human resources to handle and resolve it, if one day there is a violation of business competition.

The authority of the Commercial Court is currently being added after Law No. 11 of 2020 concerning Job Creation, namely adjudicating objections to the Indonesia Competition Commission’s decision which was previously the authority of the General Court. This can be seen in the table below:

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<sup>43</sup> Article 302 of the Law of the Republic of Indonesia Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations.

**Table 1.** Matrix of Comparison of Article 44 of the Business Competition Law with the Job Creation Law

<b>Law No. 5 of 1999</b>	<b>Law No. 11 Year 2020</b>
Article 44	Article 44
(1) Within 30 (thirty) days after the business actor receives notification of the Commission's decision as referred to in Article 43 paragraph (4), the business actor is obliged to implement the decision and submit a report on its implementation to the Commission.	(1) Within 30 (thirty) days after the business actor receives notification of the Commission's decision as referred to in Article 43 paragraph (4), the business actor is obliged to implement the decision and submit a report on its implementation to the Commission.
(2) Business actors may file an objection to the District Court no later than 14 (fourteen) days after receiving notification of the decision.	(2) Business actors may file an objection to the Commercial Court no later than 14 (fourteen) days after receiving notification of the decision.
(3) Business actors who do not file objections within the period as referred to in paragraph (2) are deemed to have accepted the Commission's decision.	(3) Business actors who do not file objections within the period as referred to in paragraph (2) are deemed to have accepted the Commission's decision.
(4) If the provisions as referred to in paragraphs (1) and (2) are not implemented by the business actor, the Commission shall submit the decision to the investigator for investigation in accordance with the provisions of the prevailing laws and regulations.	(4) If the provisions as referred to in paragraphs (1) and (2) are not implemented by the business actor, the Commission shall submit the decision to the investigator for investigation in accordance with the provisions of the prevailing laws and regulations.
(5) The Commission's decision as referred to in Article 43 paragraph (4) is sufficient preliminary evidence for investigators to carry out an investigation.	(5) The Commission's decision as referred to in Article 43 paragraph (4) is sufficient preliminary evidence for investigators to carry out an investigation.

Source: The Regulation

Prior to the enactment of the Job Creation Law, the powers of the Commercial Court are (a) to examine and decide on the application for a declaration of bankruptcy; (b) to examine and decide on the application for Suspension of Debt Payment Obligations; (c) to examine other cases in the commercial sector whose stipulation is stipulated by law, for example disputes in the field of intellectual property rights.<sup>44</sup>

The delegation of authority to adjudicate objections to the Indonesia Competition Commission's decision to the Commercial Court is the initial evidence of the awareness of the legislators that special expertise is needed in solving increasingly complex commercial problems that violate business competition today. The initial step of this awareness is to involve the Commercial Court as a special court in special matters, even though it is only limited to adjudicating objections to the Indonesia Competition Commission's decision, with the aim of being able to create more justice in resolving cases of alleged monopolistic practices and unfair business competition.

The delegation of authority to adjudicate objections to the Indonesia Competition Commission's decision to the Commercial Court, is appropriate to make corrections to the Indonesia Competition Commission's decision which institutionally has not complied with the due process of law which has the potential to be unfair to the Indonesia Competition Commission's decision, so that an experienced institution is needed in resolving commerce in the midst of the complexity of today's trade. Seeing the existence and authority of the Commercial Court at this time, in the future this court has the prospect of being authorized to adjudicate cases of alleged unfair business competition.

## Conclusion

All in all, first, it is urgent to rationalize the Indonesia Competition Commission's authority from a due process of law perspective to create a process for resolving cases of alleged unfair business competition that is fairer and more impartial. Indonesia Competition Commission has factually not fulfilled the due process of law because it integrates three subsystems of law enforcement power, namely the power to conduct investigation and observation, the power to make demands, and the power to adjudicate. The integration of the three subsystems makes Indonesia Competition Commission full of conflicts of interest which could potentially eliminate its impartiality.

Second, the *maqashid sharia* approach is needed to rationalize the Indonesia  
<sup>44</sup> Rahayu Hartini, *Hukum Kepailitan Berdasarkan UU No 37 Tahun 2004 Tentang Kepailitan Dan Penundaan Kewajiban Pembayaran Utang* (Malang: UMM Press, 2008), 258.

Competition Commission's authority by separating the power to conduct investigations and prosecutions from the power to adjudicate to create the ICC that fulfills the due process of law. Thus, ICC is able to create justice and is able to guarantee the constitutional rights of citizens to their assets. This is the embodiment of the *maqashid sharia* in *al-daruriyyah* (primary) level, namely preserving justice and protecting one's property. Indonesia Competition Commission should stand as the holder of the power to carry out investigations, examinations, and prosecutions with the power to carry out searches in order to obtain legal evidence needed to carry out prosecutions. The power to adjudicate should be given to the Commercial Court, which by the Job Creation Law is authorized to adjudicate objections to the Indonesia Competition Commission's decision.

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