

From Executive Branch to Independent Commission: The Development of Crime Prosecution and Lessons from Indonesia

Muhammad Bayanullah¹, Moh. Khusaini², Abdul Madjid³, Slamet Wahyudi⁴, Mariyam Jameelah⁵.

¹Graduate Program, Brawijaya University, Indonesia. E-mail: bayanullah@student.ub.ac.id

²Graduate Program, Brawijaya University, Indonesia. E-mail: khusaini@ub.ac.id

³Graduate Program, Brawijaya University, Indonesia. E-mail: majid@ub.ac.id

⁴Graduate Program, Brawijaya University, Indonesia. E-mail: slamet_w72@ub.ac.id

⁵Willem Pompe Institute for Criminal Law and Criminology, Utrecht University, Netherlands.
E-mail: m.jameelah@uu.nl

Abstract

This study aims to analyze the impact of political dynamics on institutional independence in criminal prosecution processes, focusing on the Corruption Eradication Commission (KPK) and the National Human Rights Commission (Komnas HAM) in post-1998 democratic transition Indonesia. The central issue examined is how constitutional weaknesses are exploited by lawmakers to manipulate institutional design, thereby undermining the capacity of these bodies to function independently. Utilizing a socio-legal methodology that integrates legal analysis with social science perspectives, this interdisciplinary approach explores the interplay between institutional frameworks, regulatory structures, and political dynamics. The findings reveal that the concept of the unitary executive, previously abandoned, has reemerged as a justification for political intervention in institutional design. Consequently, both the KPK and Komnas HAM have experienced a significant erosion of their institutional independence, impairing their effectiveness in addressing corruption and human rights violations. This study contributes to theoretical debates on institutional challenges in emerging democracies and offers practical insights for safeguarding institutional autonomy to ensure the accountability and integrity of governance structures.

Keywords: Unitary Executive; Independent Commission; Criminal Justice System; Corruption Eradication Commission; Indonesia.

1. INTRODUCTION

Under the current criminal justice system, Indonesia has entered a new phase marked by the presence of an independent commission that has acquired the classic functions of inquiring, investigating and prosecuting certain crimes from the executive branch of power.¹ The emergence of the Corruption Eradication Commission (KPK) and the National Human Rights Commission (Komnas HAM) is considered by various legal and political scholars as supporting institutions for Indonesia's democratic transition process to resolve the legacy

1 I Nyoman Prabu Buana Rumiarta, Ni Luh Gede Astariyani, and Armindo Moniz Amaral, "The Comparative Law on the Distribution of Power in the 1945 Constitution of the Republic of Indonesia and the Constitution of the Republic Timor Leste," *Jurnal IUS Kajian Hukum Dan Keadilan* 10, no. 3 (December 23, 2022): 541–54, <https://doi.org/10.29303/ius.v10i3.1134>.

of the New Order regime's problems,² especially in terms of corruption and human rights crimes.³ They are expected to be able to build confrontation against predatory elites—both old and new actors—because they have political autonomy so they are able to investigate and prosecute cases of corruption and human rights crimes in court.⁴ Ackerman describes the emergence of independent commissions of this kind as non-judicial institutions that different and separate from the three main branches of power which interested in providing more effective protection for the democratization process and realizing commitment fulfilling distributive justice in post-authoritarian countries.⁵

Long before Indonesia formed a commission, since the 18th century, the United States had a commission that worked independently and was free from executive control.⁶ The presence of the commission was met with resistance from conservative politicians initiated by Robert Bork and Antonin Scalia,⁷ but was recently developed further by Calabresi and several other scholars. Their rationale refers to the text of the United States constitution which is translated in a textual conservative style to produce theoretical claims about the unitary executive which requires the purification of the United States constitution which only recognizes three powers.⁸ Barkow, for example, supports constitutional purification by stating that 'only the executive branch of power has exclusive and absolute authority to carry out criminal prosecutions.' The basis of his thinking is heavily influenced by theoretical claims about the unitary executive which only recognizes 3 main branches of power because it has strong historical roots and is in accordance with the basic nature of the executive branch as the executor of law.⁹

Considering these theoretical differences, the ups and downs of independent commissions *vis-a-vis* the unitary executive, especially in the functioning of the criminal justice system, have also occurred in Indonesia.¹⁰ From 1999-2017, the institutional design of the Indonesian independent commission received support through laws and decisions of the Constitutional Court. Even though judicial challenges regarding independence continue to occur repeatedly at the Constitutional Court, Ackerman's thoughts are quite often used as supporting ammunition for the Constitutional Court in maintaining the independence of the commission.¹¹ Unfortunately, in 2017 the independence of the commission (KPK) was successfully breached through the House of Representatives'

2 Andrew Ellis, "Indonesia's Constitutional Change Reviewed," in *Indonesia: Democracy and the Promise of Good Governance*, 2007, <https://doi.org/10.1355/9789812304674-006>; Ken Setiawan, *From Hope to Disillusion: The Paradox of Komnas Ham, the Indonesian National Human Rights Commission*, *Bijdragen Tot de Taal-, Land- En Volkenkunde*, vol. 172, 2016, <https://doi.org/10.1163/22134379-17201002>; Simon Butt, "The Rule of Law and Anti-Corruption Reforms under Yudhoyono: The Rise of the KPK and the Constitutional Court," in *The Yudhoyono Presidency: Indonesia's Decade of Stability and Stagnation*, 2015, <https://doi.org/10.1355/9789814620727-013>.

3 This article uses the term "Human Rights Crimes" by referring to the forms of crimes which included in the jurisdiction of ICC. Indonesia, in the Human Rights Court Law, uses the term "Serious Human Rights Violation" by narrowing the scope of crimes in ICC with the omission of War crimes and the crime of aggression. Every mentioning on "Human Rights Crimes" refers to the same meaning as "Serious Human Rights Violation".

4 F. Vibert, *The World of the Unelected. In The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge University Press, 2007), ddoi: 10.1017/CBO9780511491160.002.

5 Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review* 114, no. 3 (2000): 634, <https://doi.org/10.2307/1342286>.

6 Bruce Ackerman.

7 William G. Howell and Terry M. Moe, "The Strongman Presidency and the Two Logics of Presidential Power," *Presidential Studies Quarterly* 53, no. 2 (2023): 145–68, <https://doi.org/10.1111/psq.12830>.

8 Harold J Krent, "Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government," *Northwestern University Law Review* 85, no. 1 (1990).

9 Rachel E Barkow et al., "Articles S Eparation of P Owers and The," 2006, 989–1054.

10 Fatmawati Fatmawati, Muhammad Shuhufi, and Anita Chaturvedi, "Defamation in the New Criminal Code: A Review of Substantive Justice," *Jurnal IUS Kajian Hukum Dan Keadilan* 11, no. 3 (December 28, 2023): 465–80, <https://doi.org/10.29303/ius.v11i3.1288>.

11 See in Decision number 012-016-019/PUU-IV/2006, pp 196. This decision provides the basis for subsequent decisions by confirming the independence of KPK from any power, both institutionally and also in carrying out the functions of criminal justice system.

right to inquire against the KPK, followed by Constitutional Court Decision No. 36/PUU-XV/2017 which changed the position of the KPK to be a commission that is part of the executive branch.

The final culmination of this dramatic series was the revision of Law Number 30 of 2002 concerning the Corruption Eradication Commission (KPK Law) in 2019 which settled the position of the KPK as an executive branch. The institutional changes in the 2019 revision of the KPK Law are the culmination of several agendas to weaken KPK which in previous years were failed attempts.¹² Using the midnight regulation style quite popular in the United States,¹³ the President and the House of Representatives (DPR) used the momentum at the end of their term of office to pass the revision of the KPK Law bill into law.¹⁴ This revision was allegedly a hidden agenda of certain political elites to weaken the existence of the commission by hiding behind the theoretical claims of the unitary executive to facilitate political control over the commission in order to anticipate if at any time there were legal efforts to eradicate corruption which could potentially threaten the interests of the political elite.¹⁵

In the case of Komnas HAM, the lack of clarity in the institutional design and criminal justice system occurs in a more conspiratorial way.¹⁶ Komnas HAM fared worse compared to KPK because it was only given investigative authority, while KPK had a relatively safe position because it had authority from investigation to prosecution and had 'successfully' demonstrated positive performance in the 2003-2017 period.¹⁷ On the other hand, Komnas HAM itself has not had the opportunity to show a satisfactory contribution since the reform era considering that, since the beginning of the formulation of Law Number 26 of 2000 concerning Human Rights Courts (Human Rights Court Law),¹⁸ legislators have tried to build a scenario that will secure perpetrators of human rights violators through The tactic of forming a half-hearted commission because it creates dependence on the executive power (Attorney General) as the determiner of whether a human rights violation case will proceed or not. Therefore, Komnas HAM's dependence on the Attorney General is allegedly a form of institutional subversion strategy that actually starts from within.¹⁹

The results of Komnas HAM's investigative work are also determined by a half-hearted political attitude from the investigation and prosecution of the Attorney General which, again, will depend heavily on the President's commitment in resolving severe human

12 Ahmad Khoirul Umam et al., "Addressing Corruption in Post-Soeharto Indonesia: The Role of the Corruption Eradication Commission," *Journal of Contemporary Asia* 50, no. 1 (2020): 125–43, <https://doi.org/10.1080/00472336.2018.1552983>.

13 Veronique Brito, Jerry & Rugy, "Midnight Regulations and Regulatory Review. Administrative Law Review," no. 08 (2008).

14 The revised KPK Law Bill was passed on September 17, 2019, exactly 13 days before the DPR's term of office ended (October 1) and 33 days before the President's term of office ended (October 20). The Revised KPK Law Bill was signed by the President and officially enacted as law on October 17, exactly 3 days before the term of office ended. Ghina Ghaliya, "BREAKING: KPK Bill Passed into Law," *The Jakarta Post*, 2019, <https://www.thejakartapost.com/news/2019/09/17/breaking-kpk-bill-passed-into-law.html>.

15 Ken M. P. Setiawan, "Vulnerable but Resilient: Indonesia in an Age of Democratic Decline, *Bulletin of Indonesian Economic Studies*, 58, no. 3 (2022): 273–95, <https://doi.org/10.1080/00074918.2022.2139168>.

16 Syamsul Hidayat et al., "Reformulation of Certain Circumstances Indicator as a Prerequisite for the Imposition of Death Penalty in Corruption Crime," *Jurnal IUS Kajian Hukum Dan Keadilan* 12, no. 1 (April 26, 2024): 43–54, <https://doi.org/10.29303/ius.v12i1.1350>.

17 Brian Head & Mohammed Adil Khan Ahmad Khoirul Umam, Gillian Whitehouse, "Addressing Corruption in Post-Soeharto Indonesia: The Role of the Corruption Eradication Commission, *Journal of Contemporary Asia*," *Journal of Contemporary Asia* 50, no. 1 (2018).

18 Imam Asmarudin et al., "Initiating the Reform of Principle Norms in the Formation of Laws in Indonesia," *Jurnal IUS Kajian Hukum Dan Keadilan* 12, no. 2 (August 19, 2024): 208–26, <https://doi.org/10.29303/ius.v12i2.1390>.

19 Ivan Ermakoff, "Law against the Rule of Law: Assaulting Democracy," *Journal of Law and Society* 47, no. S1 (2020): S164–86, <https://doi.org/10.1111/jols.12253>.

rights violations. As we will show in this article, the President's attitude appears to have had a significant influence on the efforts made by the Attorney General to resolve human rights violations so that the President's institutional attention to the case is truly visible.²⁰ On the other hand, if the President does not pay attention, the Attorney General will ignore the results of Komnas HAM's investigative work and play along with the 'back and forth' scheme between the Attorney General and Komnas HAM, which in fact has caused many cases of human rights violations stay in place. In fact, if the Attorney General is truly institutionally independent, then he must work based on the results of Komnas HAM investigation and not depend on the President's political stance that emerged previously.

Through this case, this article argues that Indonesia clearly does not have definite guidelines for determining the institutional design of the commission. Both KPK and Komnas HAM, who hold the title of independent commission, have different models in the criminal justice system.²¹ While KPK is given the authority to inquire, investigate and prosecute, Komnas HAM only has investigative authority. The two were met with the same fate, namely the impact of unitary executive claims operating in certain patterns. The KPK was acquired into the executive branch, while Komnas HAM was made dependent on the executive (Attorney General) in carrying out the investigation process and proceeding cases investigated by Komnas HAM.²² This fact shows that executive domination is supported by the theoretical claim that the unitary executive occurs in Indonesia because in the end the two commissions do not truly operate independently. The incorporation method described by Swire is implemented through legal products which deliberately created to safeguard the interests of certain political elites.

To review and prove this, this article begins with a theoretical study of the unitary executive and independent commission: we will begin an exploration of the legal and political logic behind the rise of a new institutional structure (independent commission) which annuls the classical thinking about the three branches of separation of powers (unitary executive). This description becomes a framework for analyzing the contestation between the unitary executive and independent commissions that occurs in Indonesia through specific patterns: half-hearted institutional formulation and legislative interference towards the existence of commission's independence through the method of incorporating independent commissions into executive power.²³ By examining the operation of the criminal justice system by the KPK and Komnas HAM, we will show how the pattern of merger and dependence on the executive branch of power means that the commission does not have the autonomy needed to operate the criminal justice system.²⁴ In particular, we will conduct a case study to KPK and Komnas HAM to show that the unitary executive's theoretical claims have been adopted as a scientific basis for the President to 'hinder' the run of investigation in corruption cases and disclosure of severe human rights violations in the past. This section will be supported by looking at

20 Ema Mar'ati Sholecha et al., "Justice Collaborator's Position and Function on Witness Protection's Rights as a Suspect from the Perspective of Criminal Law in Indonesia," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, June 30, 2023, 131–43, <https://doi.org/10.24090/volksgeist.v6i1.7246>.

21 Budi Hermawan Bangun, "ASEAN Intergovernmental Commission on Human Rights and Effectiveness of Fulfilling Human Rights Obligations of ASEAN Members States," *Jambe Law Journal* 1, no. 2 (July 12, 2019): 231–49, <https://doi.org/10.22437/jlj.1.2.231-249>.

22 Faisal Faisal et al., "Progressive Consideration of Judges in Deciding Sentencing Under Indonesia New Criminal Code," *Jambe Law Journal* 6, no. 1 (December 4, 2023): 85–102, <https://doi.org/10.22437/jlj.6.1.85-102>.

23 Rohmawati Rohmawati and Ahmad Rofiq, "Legal Reasonings of Religious Court Judges in Deciding the Origin of Children: A Study on the Protection of Biological Children's Civil Rights," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 21, no. 1 (June 30, 2021): 1–20, <https://doi.org/10.18326/ijtihad.v21i1.1-20>.

24 Ridwan Arifin, Rodiyah Rodiyah, and Fitria Puspita, "A Comparative Analysis of Indonesia's KPK and Hong Kong ICAC in Eradicating Corruption," *Jambe Law Journal* 2, no. 2 (January 28, 2020): 163–79, <https://doi.org/10.22437/jlj.2.2.163-179>.

the role of the Constitutional Court - which actually has the opportunity to fix a number of existing problems - but tends to 'hide its hands' and actually makes the institutional structure of independent commissions to become increasingly uncertain.²⁵ This article closes with proposals for improvement based on consistent independence in the institutional structure and processes of the criminal justice system which currently implemented.

We are of the opinion that political intervention in the institutional design of the independent commission that runs the criminal justice system is carried out openly through law. Even though the used/given nomenclature is 'commission', the definition of commission is developed but is not truly independent because the law uses the method of 'incorporation' of commissions into executive power through various forms: inserting them into the executive family and creating institutional dependence of the commissions on branches of executive power when carrying out its functions, making it increasingly paralyzed in practice.²⁶ This article aims to open the discourse on the reorganization of independent commissions by re-emphasizing the essence of institutional independence in everything from institutional design to carry out its functions. Loyalty to an independent commission is a reasonable choice rather than a unitary executive that supports the classic trias politica separation of powers because it does not have strong historical roots in Indonesia and is vulnerable to being hijacked by political elites who use democratic vehicles to advance pragmatic political interests and maintain the culture of impunity.²⁷

This research uses the Socio-Legal method, which aims to understand legal phenomena by looking at the relationship between law and the social, political, and economic context that surrounds it. This method not only analyzes existing legal norms, but also looks at how the law functions in practice and is influenced by evolving socio-political dynamics.²⁸ The use of this approach becomes relevant in the context of this research, because the main focus of this article is on the development of crime prosecution institutions in Indonesia,²⁹ which cannot be fully understood only from the perspective of formal law, but must also take into account the influence of executive power, political dynamics, and public response to such changes.³⁰

The Socio-Legal approach allows researchers to identify how the establishment of institutions such as the Corruption Eradication Commission (KPK) and the National Human Rights Commission (Komnas HAM) is not only a positive legal product, but also a reflection of Indonesia's socio-political dynamics after reform. In this study, the Socio-Legal method is used to analyze the process of formation, operationalization, and challenges faced by the KPK and Komnas HAM in carrying out the function of

25 S. See Butt, *Court-Imposed Constraints*. In *The Constitutional Court and Democracy in Indonesia* (Brill | Nijhoff, 2015), <https://doi.org/10.53955/jhcls.v4i2.263>.

26 Wawan Andriawan, "Pancasila Perspective on the Development of Legal Philosophy: Relation of Justice and Progressive Law," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 5, no. 1 (June 29, 2022): 1–11, <https://doi.org/10.24090/volksgeist.v5i1.6361>.

27 Ridwan Arifin et al., "A Discourse of Justice and Legal Certainty in Stolen Assets Recovery in Indonesia: Analysis of Radbruch's Formula and Friedman's Theory," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, December 27, 2023, 159–81, <https://doi.org/10.24090/volksgeist.v6i2.9596>.

28 Muhammad Mutawalli Mukhlis et al., "Democratization or Extra-Constitutionalism: Ideas for Limiting the Term of Office for Chairmen of Political Parties in Indonesia," *Jambura Law Review* 6, no. 2 (July 24, 2024): 367–402, <https://doi.org/10.33756/jlr.v6i2.24116>.

29 Moh. Fadhil et al., "Navigating the Tensions Between Sharia and Human Rights in Regional Legislation," *De Jure: Jurnal Hukum Dan Syaria'h* 16, no. 2 (December 30, 2024): 406–31, <https://doi.org/10.18860/j-fsh.v16i2.29031>.

30 Atikah, Ika, et al. PENGANTAR METODE PENELITIAN HUKUM SOSIO-LEGAL. Edited by Jaelani, Elan, CV WIDINA MEDIA UTAMA, 2024.

prosecuting crimes.³¹ This approach also helps to understand how the interaction between independent and executive institutions is made, as well as how changes in legal policy affect the performance and institutional independence of the two institutions.

The data in this study was obtained through a literature review of laws and regulations, court decisions, annual reports of related institutions, as well as case studies on the role of the KPK and Komnas HAM in prosecuting corruption crimes and human rights violations. This data is then analyzed qualitatively using legal and political theories, to understand how institutional weaknesses and political interventions affect the development of crime prosecution institutions in Indonesia. This approach is important in providing a comprehensive picture of the changes experienced by the prosecution institution, both in terms of law and in terms of its social practices.³²

Through the use of the Socio-Legal method, this research is expected to make a theoretical contribution to the understanding of the relationship between law and politics in the context of crime prosecution, as well as provide policy recommendations to strengthen the independence of law enforcement agencies in Indonesia.

2. ANALYSIS AND DISCUSSION

2.1. Unitary Executive and Independent Commission

The fact that corruption and human rights crimes occur in various forms is the main force that drives collective awareness within the international community to form agreements on international conventions. Although there are several international conventions that contain ideal institutional frameworks that can support the eradication of corruption and human rights crimes,³³ such conventions only contain general principles that require Member States to adopt further actions at the national level. Southern countries generally interpret international conventions as political projects by establishing special commissions that work independently to deal with specific crimes.³⁴ Indonesia chose a different path by establishing commissions to deal with these crimes by formally including them in the executive branch of power and (informally) creating a pattern of dependency on independent commissions. This pattern is identical and falls within the qualifications of the United States unitary executive which rejects the expansion of the President's power to independent commissions.

Supporters of the unitary executive emphasize their view that they only recognize state institutions that regulated in the constitution (*constitutionally entrusted power*).³⁵ Calabresi, for example, believes that if the President's powers have been confirmed in and through the constitution—as head of state and head of government—then law makers must not reduce or change his executive authority in any form.³⁶ In this context,

31 Putu Eva Ditayani Antari, "The Interpretation of Misconduct Act as A Reason to Dismiss President: An Ethical Approach," *De Jure: Jurnal Hukum Dan Syar'iah* 13, no. 1 (July 28, 2021), <https://doi.org/10.18860/j-fsh.v13i1.12122>.

32 Cecep Mustafa, "The Influence of Sunni Islamic Values on Rehabilitation as Judicial Decision for Minor Drug Users in Indonesian Court," *Ijtihad : Jurnal Wacana Hukum Islam Dan Kemanusiaan* 20, no. 1 (June 10, 2020): 79–96, <https://doi.org/10.18326/ijtihad.v20i1.79-96>.

33 See in Article 6 and 11 of the *United Nations Convention Against Corruption* which requires the independence of institutions for the prevention and eradication of corruption. For human rights institution, see *The Paris Principle* as well as *Rome Statute Of The International Criminal Court*. Crouch calls the emergence of such commission as a trend of 'Asian legal transplant'. Also see Melissa Crouch, "Asian Legal Transplants and Rule of Law Reform: National Human Rights Commission in Myanmar and Indonesia," *Hague Journal on the Rule of Law* 5, no. 2 (2013): 146–77, <https://doi.org/10.1017/S1876404512001108>.

34 Luciana Ballestrin, "The Global South as a Political Project Written by Luciana Ballestrin," 2020.

35 Steven G Calabresi and Saikrishna B Prakash, "The President's Power to Execute the Laws Article The President's Power To Execute the Laws," *The Yale Law Journal* 104, no. 3 (1994): 541–665.

36 Steven G Calabresi and Saikrishna B Prakash.

the constitution is interpreted in a limited way to only cover 3 branches of power and the position of the President must be able to control the implementation of all laws.³⁷ Geoffrey Miller and Stephen Carter gave support to the unitary executive, saying the President had full control over all implementation of the law.³⁸ Empirical situations that encourage certain needs do not open up opportunities for parliament to change the constitutional structure of the President through laws, especially delegating some of his powers to other institutions. Parliament only has the freedom to form laws that support the President's position in optimizing his power. In the unitary executive perspective, the President is allowed to delegate his powers in certain ways according to the President's needs, not through laws drafted by the lawmaker.³⁹ The essence of Calabresi's thoughts in rejecting the presence of a new branch of power consists of 2 things: to whom they swear the oath because the constitution only recognizes 3 officials (executive, congress and judiciary) and the constitution does not determine powers other than the three main powers.

The full support for the unitary executive by Calabresi, Miller and Carter is in sharp contrast to what was stated by Lessig and Sunstein who considered the loyalty of the unitary executive and the originalist interpretation to not have strong historical roots because the claim was a creation of the 20th century, and not the 18th century. Lessig and Sunstein called this idea a myth because it ignored the thoughts of the founders of the constitution who never imagined a clear executive hierarchy with the President. The founders of the constitution also never considered the presence of independent federal administrative officers, making historical interpretation even more biased.⁴⁰ Poulsen adds to the historical criticism by examining Alexander Hamilton's opinion about the unitary executive in Federalist No. 70, which according to him, Hamilton interpreted the unitary executive not as an exclusive executive branch since he was talking more about the need for the position of President to be filled by a single person and not by many people.⁴¹ Based on Poulsen's opinion, Crouch is very confident that the discussion about the unitary executive is very different from 200 years ago.⁴²

Even though it is far from its historical significance, the unitary executive continues to be developed as a constitutional framework for the President, especially in the field of supervision. Calabresi and Rhodes describe three mechanisms that the President can use to exercise control over officials: removal, acting in their place and overturning an official's actions if the President does not approve.⁴³ This mechanism is based on the unitary executive concept because these officials are appointed by the President so that they can control legal administration through the President's power. Andrias provided support by stating that the President must expand intervention because there is a need to coordinate and rationalize the network of laws and set broad policy directions on issues

37 Steven G Calabresi and Saikrishna B Prakash.

38 Geoffrey P. Miller, "Independent Agencies," *The Supreme Court Review* 1986 (January 1986): 41-97, <https://doi.org/10.1086/scr.1986.3109519>; Stephen Carter, "The Independent Counsel Mess," 1988, <http://hdl.handle.net/20.500.13051/1532>; David P. Currie, "The Distribution of Powers after Bowsher," *The Supreme Court Review* 1986 (1986), <https://doi.org/10.1086/scr.1986.3109518>; Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107, no. 6 (1994), <https://doi.org/10.2307/1341842>; Krent, "Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government."

39 Calabresi and Prakash nd.

40 Lawrence Lessig and Cass R. Sunstein, "The President and the Administration," *Columbia Law Review* 94, no. 1 (1994): 1, <https://doi.org/10.2307/1123119>.

41 J Hamilton, A., Madison, J., Jay, *The Federalist Papers* (New York: The New American Library, 2009).

42 Jeffrey Crouch, Mark J. Rozell, and Mitchel A. Sollenberger, "The Law : The Unitary Executive Theory and President Donald J. Trump," *Presidential Studies Quarterly* 47, no. 3 (2017): 561-73, <https://doi.org/10.1111/psq.12401>.

43 Calabresi and Prakash nd.

of national interest.⁴⁴ The thoughts of Calabresi, Rhodes and Andrias at the next stage of development were annulled by the opinion of the Supreme Court which gave support to Congress who expanded constitutional authority by establishing quasi legislative or quasi judicial agencies and limiting the dismissal by the President towards officials of these institutions to protect their independence in performing special functions.⁴⁵ According to the Court, this institution is completely separated from the executive power.⁴⁶ The Court proposed the doctrine of ‘*illimitable power of removal*’ which emphasized that the constitution never grants unlimited power to the President.⁴⁷

The theoretical claim of the unitary executive that desires for an exclusive and powerful President will become increasingly visible when it is compared with the function of the criminal justice system. The unitary executive claims that the President—is the only one—who has the authority and power to carry out criminal justice functions, especially in carrying out investigations and prosecutions.⁴⁸ Political intervention in the criminal justice system has the potential to occur, but that is not a reason to rule it out because prosecutions carried out by the executive branch of power have strong historical roots in which the President is the executor of the law when state law is violated.⁴⁹ President Washington explained that the President’s duties are ‘*execution clause duties*’, where he said that “it is the duty of the Executive to take care that such criminal proceedings should be suppressed [and] the offenders brought to justice, all lawful means will be strictly put in execution for securing obedience to the laws”.⁵⁰

The Founders of the constitution were well aware of the dangers of using criminal law hence this became the motivation for the birth of a clear separation of powers in the constitution.⁵¹ The Founders of the constitution were afraid of the emergence of a tyranny of the majority that oppresses its opponents with the support of criminal law, therefore the constitutional structure was formed with a strict separation of powers by placing the executive as the prosecutor and the judiciary as the judicial institution (judge and jury).⁵² The state’s power is at its peak when enforcing criminal law because the consequences of abuse are very high in the criminal justice system process where individuals can lose their freedom and even their lives. Barkow emphasized that these consequences require strict loyalty to the separation of powers to ensure the state acts appropriately towards individuals, so he firmly rejects the blending of the executive branch of power with new powers (independent commissions) in the process of criminal justice system.⁵³

The exclusivity and autonomy of the United States’ unitary executive was finally broken through by the legislature and judiciary which supported the presence of an independent commission. Ackerman strongly opposes the originalist interpretation on the separation of powers supported by the unitary executive with the question “*separating*

44 Andriawan, W. (2022). Pancasila Perspective on the Development of Legal Philosophy: Relation of Justice and Progressive Law. *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, 5(1), 1–11.

45 “Humphrey’s Executor vs United States,” 2023, <https://www.oyez.org/cases/1900-1940/295us602>.

46 R. Fallon, Jr, *Executive Power. In The Dynamic Constitution: An Introduction to American Constitutional Law and Practice* (Cambridge: Cambridge University Press, 2013), <https://doi.org/10.1017/CBO9781139108867.014>.

47 “Humphrey’s Executor vs United States.” nd.

48 Barkow and Rachel., nd.

49 Barkow, Rachel E., Separation of Powers and the Criminal Law. *Stanford Law Review*, 2006, NYU Law School, Public Law Research Paper No. 05-14.

50 “Proclamation of March 24, 1796,” 2003, <http://www.yale.edu/lawweb/avalon/presiden/proclamations/gwproc09.htm>.

51 M Anwar Nawawi et al., “Harmonization of Islam and Human Rights: Judges’ Legal Arguments in Rejecting Child Marriage Dispensation in Sukadana, Indonesia,” *Ijtihad : Jurnal Wacana Hukum Islam Dan Kemanusiaan* 22, no. 1 (September 1, 2022): 117–34, <https://doi.org/10.18326/ijtihad.v22i1.117-134>.

52 Barkow and Rachel., nd.

53 Barkow and Rachel.

power on behalf of what?”⁵⁴ According to him, this blind loyalty actually hinders the project of advancing the noble ideals of the constitution in a more substantive way because the state was formed to fulfill them, not to be loyal to a static, classical structure. Classic separatism actually invites citizens to invest their desires and attention in the personality of the President, not in the principles that should be guided by and produce broader benefits.⁵⁵ Executive power was finally distributed to new branches of power who are independent and autonomous with the support of the doctrine of delegation of power as a constitutional basis for the separation of powers to state commissions outside conventional state institutions.⁵⁶

Ackerman called the commission's presence a distributive justice branch designed to overcome complex and different implementation problems. Shane criticized this doctrine on the grounds that it creates a biased executive and could be a hidden agenda for law makers to reduce the level of Presidential power. Finally, Shane offers a test tool as a supporting framework for delegating power through the theory of legitimacy embodied in the Constitution.⁵⁷ Delegation of power must take into account a combination of two things: the extent to which the government pursues a strong vision of political freedom and political equality; and the extent to which government is actually effective and competent in meeting national needs. If the distribution of power undermines democracy and weakens the competence of the national government, then it is reasonable to judge the delegation to be unconstitutional, whereas if it supports this, then the delegation is legal and constitutional.⁵⁸ Vibert supports the presence of an independent commission by referring to the 'democratic overhead' theory, which according to him the main power functions can be delegated to new institutions without losing the basic meaning of democracy due to the presence of 'unelected institutions' which functions as a supporting agent for democracy.⁵⁹

The historical milestone in the establishment of independent commissions in the United States began with the formation of the Interstate Commerce Commission (1887) by Congress.⁶⁰ Later, the emergence of an independent commission was also supported by the United States Court Decision in 1935 in the case of *Humphrey v. United States*,⁶¹ and the case of *INS v. Chadha* in 1983.⁶² The rise of independent commissions is an international phenomenon,⁶³ since entering the year 2000, England had 650 public bodies that were free from the power of the central government, Sweden had more than 100 commissions that were free from the executive branch of power and Ireland had 60 commissions that were regulated by law.⁶⁴ In his research in several countries, Vibert shows that commission functions are divided into five categories:⁶⁵ (1) special service providers such as central banks; (2) risk assessor to monitor and manage risks that

54 Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review* 113, no. 3 (2000): 633–729.

55 Bruce Ackerman,.

56 David Schoenbrod, "Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine," *The American University Law Review* 36 (1987).

57 Peter M. Shane, "Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State," *Harvard Journal of Law and Public Policy* 33, no. 1 (2010): 103–10.

58 Peter M. Shane.

59 F. Vibert, *Adapting Traditional Approaches. In The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge: Cambridge University Press, 2007), <https://doi.org/10.2307/j.ctt9qgmh3.7>.

60 Kirti Datla and Richard L. Revesz, "Deconstructing Independent Agencies (and Executive Agencies) Recommended Citation DECONSTRUCTING INDEPENDENT AGENCIES (AND EXECUTIVE AGENCIES)," *Cornell Law Review* 98, no. 4 (2013): 769.

61 Fallon, Jr, *Executive Power. In The Dynamic Constitution: An Introduction to American Constitutional Law and Practice*.

62 U.S. Supreme Court, *INS v. Chadha*, 462 U.S. 919 (1983) (n.d.).

63 Vibert, *The World of the Unelected. In The Rise of the Unelected: Democracy and the New Separation of Powers*.

64 Vibert

65 Vibert.

may arise in people's daily lives; (3) overseer of vital aspects on the boundary between state and market; (4) inquisitors to conduct audits; and (5) inspection and investigation of certain legal violations and non-judicial efforts to resolve disputes without going to court.

The institutional design of the independent commission was formed in stages, namely that the commission was headed by an odd number of collegians who were usually referred to as commissioners whose terms of office used a *staggered terms* scheme.⁶⁶ The collegial leadership of this independent commission is aimed at preventing the entry of hidden interests through the leadership. Pierce, for example, offers a stronger concept in building the resilience of the commission's leadership with a distributed selection of commissioners: the executive has the authority to select several and the legislature has the authority to select several.⁶⁷ Ackerman stated that the independent commission exists as an 'integrity branch' that examines the government for corruption and similar violations so that the commission is not within the executive department but is accountable to parliament.⁶⁸ Political interference is the main and biggest challenge for independent commissions, so legal warranty for the commission's independence are the main key to its success.⁶⁹ Swire shows political intervention towards the commission comes through the method of 'incorporation' of independent commissions into the executive branch which will directly interfere with its independence: the President issues legal products that bind the commission so that it must be obeyed under the pretext of increasing policy coordination that supports the President, demanding excessive accountability of the commission which can destroy the confidentiality of the commission's work, or depending on the executive for the proceeding of the commission's functions and reducing the budget for the commission to disrupts the commission's performance.⁷⁰ The 'incorporation' method put forward by Swire is a form of resistance to the commission because it has received a lot of legal protection, one of which is the prohibition of dismissal of commissioner by the President.⁷¹

2.2. KPK: Borrowing The Unitary Executive's Claim To Weaken Independence

Studies of the legal and political weakening of the Indonesian KPK have colored much academic discourse both in domestic and abroad,⁷² but even so, it is difficult to find studies on the institution of the commission and its relationship to the theoretical claims of the unitary executive.⁷³ The Corruption Eradication Commission (KPK) is a strategic institution that become people's hope in eradicating corruption in various elements of state power. They target key politicians in the executive cabinet, members

66 Jr Richard J. Pierce, "SAVING THE UNITARY EXECUTIVE THEORY FROM THOSE WHO WOULD DISTORT AND ABUSE IT: A REVIEW OF THE UNITARY EXECUTIVE BY STEVEN G. CALABRESI AND CHRISTOPHER S. YOO," *JOURNAL OF CONSTITUTIONAL LAW* 12, no. 2 (2010): 1–6.

67 Jr Richard J. Pierce.

68 Ackerman, 'The New Separation of Powers,' *nd*.

69 Ackerman, 'The New Separation of Powers,' *nd*; see also See also, The rationale behind Humphrey's Executor is that the desire to develop scientific expertise can justify the independence of such bodies from contamination by the political process. Peter P. Swire, 'Incorporation of Independent Agencies into the Executive Branch', *The Yale Law Journal*, 94.7 (1985), p. 1766, doi:10.2307/796221.

70 Swire, "Incorporation of Independent Agencies into the Executive Branch," June 1985.

71 Swire.

72 Abdil Mughis Mudhoffir, 'The Limits of Civil Society Activism in Indonesia: The Case of the Weakening of the KPK', *Critical Asian Studies*, 55.1 (2023), pp. 62–82, doi:https://doi.org/10.1080/14672715.2022.2123019; Next, also see Butt Op.cit; Marcus Mietzner, 'Indonesia's Democratic Stagnation: Anti-Reformist Elites and Resilient Civil Society', *Democratization*, 19.2 (2012), doi:10.1080/13510347.2011.572620; and Umam and others; More specific, Munjani discusses the weakening in the eradication of corruption in the era of President Joko Widodo. See Saiful Munjani and R. William Liddle, 'Indonesia: Jokowi Sidelines Democracy', *Journal of Democracy*, 32.4 (2021), pp. 72–86, doi:10.1353/jod.2021.0053.

73 Arifin et al., "A Discourse of Justice and Legal Certainty in Stolen Assets Recovery in Indonesia: Analysis of Radbruch's Formula and Friedman's Theory."

of parliament, court judges, and including regional officials and business people.⁷⁴ In the history of KPK, the existence of KPK has dramatically created anxiety among predatory political elites so it is not surprising that there have been many ‘counterattacks’ launched against the KPK. This section limits the discussion to the period leading up to the revision of KPK Law in 2017-2019 which was preceded by a series of controversies and the involvement of legal experts who used the unitary executive as ammunition in promoting the method of incorporating commissions into the executive branch of power in Indonesia.

Disagreements such as Calabresi and Ackerman have also occurred among Indonesian scholars since the revision of KPK Law in 2019. Titon Slamet Kurnia, for example, sided with the unitary executive theoretical claim by stating that KPK is part of the executive;⁷⁵ against Zainal Arifin Mochtar who sided with the theoretical claim of independent agency which stated that KPK was the fourth branch of power outside the executive.⁷⁶ We believe that the drafters of the law adhere to the theoretical claims of the unitary executive in order to strengthen the autocratization of power and support the hidden agenda behind the revised changes to the KPK Law,⁷⁷ and this gives rise to the insinuation that the ruling class wants to reaffirm the position of the executive branch of power as the main force with the authority to carry out inquiry, investigation and prosecution of criminal acts.⁷⁸

The controversy began with the disclosure of a mega-corruption case involving Miryam S. Haryani, a former member of the DPR in the 2014-2019 period who is currently designated by KPK as a convict of E-KTP megacorruption. In 2017, he also asked for protection from the DPR because he felt pressured/intimidated during an investigation by the KPK. This was (one of) the triggers for the formation of the Special Committee on DPR Inquiry Rights against KPK in 2017. This Special Committee consists of 16 members from 5 political party factions, namely PDIP, Golkar, PPP, Nasdem, and Hanura, which all of them are political parties supporting Jokowi’s administration. When the Special Committee was operating, its main target was to summon the KPK leaders and check whether there were any procedural errors in the examination of Miryam S. Haryani so that the Special Committee on Inquiry Rights against KPK to open the results of the examination recordings to parliament. The KPK rejected this request and argued that the examination recordings were confidential documents of the investigation process because this process was part of an independent pro-justice effort which resulted in tension between the KPK and parliament.⁷⁹ A new fact was recently revealed, when the former Chairman of KPK Agus Rahardjo—who directly handled the E-KTP megacorruption case—was once summoned by President Jokowi and ordered him to stop the investigation. In his interview with Rosianna Silalahi on Kompas TV, Agus Rahardjo rejected President Jokowi’s request on the pretext of the KPK’s independence which is not bound to any authority.⁸⁰ This series of facts made the

74 Kurnia Ramadhana, “Menyoal Kinerja KPK: Antara Harapan Dan Pencapaian,” *Jurnal Antikorupsi INTEGRITAS* 5, no. 2 (2019): 151–63.

75 Raden Rara et al., “Jurnal Discretie : Mekanisme Penerbitan Surat Keputusan KPK Nomor 625 Tentang Alih Status Kepegawaian Sesuai Dengan Perundang-Undangan Jurnal Discretie : Kepegawaian Termuat Dalam Peraturan Pemerintah Nomor 63 Tahun 2005 Tentang Sumber Daya” 3, no. 1 (2022): 14–24.

76 Ilhamdi Putra and Khairul Fahmi, “Karakteristik Ne Bis In Idem Dan Unsurnya Dalam Hukum Acara Mahkamah Konstitusi,” *Jurnal Konstitusi* 18, no. 2 (2021): 345, <https://doi.org/10.31078/jk1824>.

77 Dirk Tomsa, *Indonesia Presidential Politics and Democratic Regression* (Routledge, 2022).

78 Mustafa, C., The influence of sunni Islamic values on rehabilitation as judicial decision for minor drug users in Indonesian court, *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 20(1), 2020, 79-95

79 Gibran Maulana Ibrahim, “Ini Sederet Alasan DPR Gulirkan Hak Angket KPK,” *detik News.*, 2017.

80 KOMPASTV., “He Made a Shocking Statement, When Agus Rahardjo—Who Formerly Held Position as the Chief of KPK—Was Interviewed by Rosianna Silalahi in Kompas TV. See in: KOMPASTV. Eks Ketua KPK Ungkap Kinerja Firli Hingga Pernah Diperintah Jokowi Hentikan Kasus Setnov,” 2023.

legislators of the law to be very aggressive in weakening the independent commission and repositioning it under the executive branch of power.

The controversy over the offensive stance by the Special Committee on Inquiry Rights against KPK sparked strong criticism from academics and civil society coalitions because it was deemed to have created disruption to the agenda for eradicating corruption. The efforts made by the Special Committee to stem these attacks were by summoning legal experts to justify political steps designed to paralyze the KPK. Parliament asked for the help of Yusril Ihza Mahendra, an influential legal expert, to appear and give statement at the Special Committee meeting with an attitude of approving the DPR's questionnaire against KPK. Yusril's conclusion was that "the questionnaire against KPK was legal because it was established by law. KPK is categorized as an executive agency, where the task of inquiry, investigation and prosecution is the executive's task."⁸¹ Outside the parliament office, a group of civil society members who are members of the Legal and Constitutional Study Forum (FKHK) are questioning the DPR's actions against the KPK by testing the provisions on the right to inquiry in Article 79 paragraph (3) of the Law on the People's Consultative Assembly, House of Representatives, Regional Representatives Council and Regional House of Representatives through the Constitutional Court (MK). The plaintiffs hope that their constitutional efforts at the Constitutional Court can thwart the DPR's action of carrying out the right to inquiry against the KPK. However, the Constitutional Court rejected this request through MK decision 36/PUU-XV/2017, which had implications for justifying the efforts made by the Special Committee on Inquiry Rights against KPK institution. In this case, Yusril Ihza Mahendra again emerged as an expert in legal battles at the Constitutional Court to influence the judgment of the majority of MK judges to abandon their position in the previous decision by stating that the KPK was an independent commission and to reorganize the KPK to be a commission within the executive branch.⁸²

The MK's examination through its decision has caused further uproar because this means the MK has revised the precedent in its decision which placed the KPK as an independent institution.⁸³ The Constitutional Court's stance regarding KPK as an executive authority refers to the investigative and prosecution functions which are considered to be the executive's domain; where "KPK is an institution in the executive branch which carries out the duties of inquiry, investigation and prosecution in cases of criminal acts of corruption which actually is the authority of the Police and/or Prosecutor's Office."⁸⁴ Yusril's theoretical claims regarding KPK as a branch of executive power along with MK decision number 36/PUU-XV/2017 are the basis for further changes through institutional revisions in Article 3 of the 2019 KPK Law which states that the KPK is "a state institution within the executive power branch that carry out the task of preventing and eradicating Corruption Crimes in accordance with this Law".⁸⁵ The repositioning of KPK into the executive branch is also supported by the theoretical claim of the unitary executive which emphasizes that only the executive has

81 Yusril Ihza Mahendra's statement, during a session with the Special Committee on Inquiry right against KPK in DPR on 10 July 2017, at 14.00-17.00 WIB. See in Laporan Utama :Kasubag Medsos, "Edisi : 154 TH. XLVII 2017," 2017, 1-80.

82 Mahkamah Konstitusi Republik Indonesia, "36/PUU-XV/2017," 2017.

83 Mochtar Z.A., Rishan I., Dewi, A.A., Indonesian Judicial Commission in Appointment Ad Hoc Judges: In Search of Constitutional Modality, *De Jure: Jurnal Hukum dan Syar'iah* 14(2), 2022, 211-225

84 Mochtar Z.A., Rishan I., Dewi, A.A..

85 Article 3 of "Undang-Undang Nomor 30 Tahun 2002 Tentang Komisi Pemberantasan Tindak Pidana Korupsi," Pemerintah Republik Indonesia § (2002). "The Corruption Eradication Commission is a state institution which in carrying out its duties and authorities is independent and free from the influence of any power".

the authority to carry out functions in the criminal justice system.⁸⁶ Swire marked that scenario as the ‘Incorporation of Independent Agencies into the Executive Branch’.⁸⁷ Herlambang also believes that the revision of the KPK Law marks a dramatic change in Indonesian political history because it creates structural and institutional challenges for the independence of the judiciary.⁸⁸

Conceptually, Yusril’s claim that the investigative and prosecution functions are the executive’s duties is not novel in academic discussions, considering that Calabresi and Barkow have conveyed the same issue as Yusril by referring to the theoretical claim of the unitary executive which does not allow delegation of power to an independent commission. In Indonesian context, we consider that Yusril’s claim as the basis for the 2019 KPK Law is wrong because it tends to narrow and ignore facts in the history of the classic separation of powers.⁸⁹ First, Yusril uses the conventional unitary executive constitutional model which paves the way for the revival of autocracy in the hands of the President through sole command of law enforcement. Thus, this claim is contrary to the popular spirit of distribution and limitation of Presidential power since the constitutional reform in Indonesia was replaced by a unitary executive basis to undermine the existence of the commission, that investigation and prosecution are the most classic executive tasks.

Yusril’s claim also strengthens the President’s position in commanding law enforcement because he was given space to be involved in the recruitment of KPK commissioners. Merging the commission into the executive branch has institutional implications since the subjugation of the KPK requires KPK employees to have the status of civil servants who have a hierarchical culture and are easily controlled by the executive branch.⁹⁰ One manifestation of this is the tragedy in the dismissal of 51 KPK employees through the National Knowledge Test scenario held by the KPK together with the State Civil Service Agency (BKN) as implementation to the Corruption Eradication Commission Regulation Number 1 of 2021 which was formulated by involving various ministries from the executive branch.⁹¹ This increasingly has the potential to facilitate intervention from the executive branch in KPK prosecutions, who broke through Public Prosecutor personnel sent from the Prosecutor’s Office of the Republic of Indonesia to be given duty as public prosecutors at the KPK, which currently numbers 155 personnel.⁹²

Most importantly, Yusril has ignored the fact that the way the KPK operates in the legal arena cannot be separated from contentious political contestations because the KPK has been known to have a wide reputation for bringing in corruptors from among the influential political elite.⁹³ Directly, this kind of thinking model will pave the way and facilitate the President being trapped in authoritarian behavior. Reflecting on the United

86 Ibrahim.,*nd.*

87 Swire.,*nd.*

88 H. P Wiratraman, “Constitutional Struggles and the Court in Indonesia’s Turn to Authoritarian Politics,” *Federal Law Review* 50, no. 3 (2022), <https://doi.org/https://doi.org/10.1177/0067205X221107404>.

89 Fence M Wantu, “Shifting the Paradigm of the Indonesian Judicial System from The Influence of the Anglo-Saxon Judicial System,” *Jambura Law Review* 5, no. 1 (January 29, 2023): 118–35, <https://doi.org/10.33756/jlr.v5i1.17927>.

90 Fence M Wantu.

91 Kelanjutan Polemik Tes Wawasan Kebangsaan: Pimpinan KPK dan Kepala BKN Melanggar Hukum, Etika, dan Melawan Perintah Presiden Joko Widodo!. ICW. Antikorupsi.org. Published 2021. Accessed November 17, 2023. <https://antikorupsi.org/id/article/kelanjutan-polemik-tes-wawasan-kebangsaan-pimpinan-kpk-dan-kepala-bkn-melanggar-hukum-0>

92 Yogi Ernes, “KPK Angkat 66 Jaksa Jadi Penyelidik-Penyidik,” *Detik.com*, 2023, <https://news.detik.com/berita/d-6814753/kpk-angkat-66-jaksa-jadi-penyelidik-penyidik>.

93 Deny Noer Wahid, Isdian Anggraeny, and Samira Echaib, “The Urgency of Returning the People’s Consultative Assembly Authority in Determining the Outlines of the Nation’s Direction,” *Yuridika* 38, no. 3 (September 1, 2023): 539–64, <https://doi.org/10.20473/ydk.v38i3.36885>.

States' version of the unitary executive, for example,⁹⁴ George W. Bush took advantage of this claim to form a military commission - without Congress' approval - designed to prosecute Al-Qaeda sympathizers under the pretext of a unitary executive which gives the President unlimited power to take steps to defend the country and the war on terror campaign.⁹⁵ Donald Trump did something more concerning; he fired James Comey in 2017 for reasons beyond common sense, one of which was because Comey refused the President's orders to stop the investigation into General Michael Flynn and imprison journalists who published state secrets.⁹⁶ Ginsburg and Huq describe this series of cases as a form of presidential control over personnel favored by supporters of the unitary executive that accelerated the decline of liberal democracy. The unitary executive also facilitates the President to become a single command that operates within the executive, parliament and courts.⁹⁷ The exclusivism and structural rigidity of the unitary executive which wants the President to command all components of state administration, according to Ginsburg and Huq, creates unexpected consequences which are called '*a facade for undemocratic behaviour*'.⁹⁸

It has been revised according to the feedback. The conventional unitary executive model defended by Yusril ignores the new style of constitutionalism which presents new 'unelected' government actors but makes a positive contribution to certain constitutional goals.⁹⁹ The history of government in various countries shows that investigative and prosecutorial authority continues to experience evolution in a historical trajectory that moves away from executive duties.¹⁰⁰ The Public Prosecutor plays a vital role in criminal justice because he acts to prosecute someone who has committed a certain criminal act and protects the judges in imposing sanctions against him. In the classic history of the United States, public prosecutor was originally placed as a minor actor in the judicial process, hence he had a quasi-judicial character whose task was to assist the judge.¹⁰¹ However, in 1859, the office of public prosecutor was defined as a strategic position at the local level with executive functions separate from the courts.¹⁰² According to Jacoby, the emergence of public prosecutor's office as a newcomer actor in Anglo-American history is a response to the increasing passivity of juries in exploring material truths in the case process.¹⁰³ Attempts to legitimize the institution of public prosecutors as part of the executive branch of power were strengthened by the Supreme Court in 1926 in the case of *United States v. Chemical Foundation* (1926) which emphasized that the results of prosecution by public prosecutor must be considered true due to the consequences of the separation of powers and part of the executive function.

Several states in the United States such as Massachusetts, New Jersey, Maryland, Virginia and Georgia show structural differences regarding the position of public

94 Crouch, Rozell, and Sollenberger., *nd*.

95 Jane Mayer, "The Hidden Powers" (NEW YORKER, 2006); Elizabeth Drew, "Power Grab" (N.Y. REV. BOOKS, 2006).

96 Paulina Firozi, "Press Freedom Group Rips Trump for Suggesting Comey Jail Reporters.," The Hill, 2017, <https://thehill.com/homenews/news/333746-press-freedom-group-rips-trump-for-suggesting-comey-jail-reporters/>.

97 Patrick R. O'Brien, "The Historical Presidency: A Theoretical Critique of the Unitary Executive Framework: Rethinking the First-Mover Advantage, Collective-Action Advantage, and Informational Advantage," *Presidential Studies Quarterly* 47, no. 1 (2017): 169–85, <https://doi.org/10.1111/psq.12351>.

98 Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018, 2018).

99 Vibert, *Adapting Traditional Approaches*. In *The Rise of the Unelected: Democracy and the New Separation of Powers*, *nd*.

100 Joan E Jacoby, "The American Prosecutor in Historical Context The American Prosecutor From Appointment to Elective Status," *Journal Prosecutor*, no. 32 (1843).

101 Joan E Jacoby

102 Joan E Jacoby.

103 John H. Langbein, "The Origins of Public Prosecution at Common Law," *The American Journal of Legal History* 17, no. 4 (1973): 313, <https://doi.org/10.2307/845098>.

prosecutor in the constitutional design which places the Attorney General under judicial power in its constitution and is not part of the executive.¹⁰⁴ France, which applies Montesquie's thinking, places public prosecutor in the family tree of executive branch under the control of the Ministère Public, but the resulting situation is not as simple as imagined because until now there have been various extensive domestic political dynamics.¹⁰⁵ Apart from that, the fact that France and the United States also have significantly different legal systems cannot be ignored. According to Taleb, apart from the independence factor, one of the superior parameters that can be used to assess the institution of public prosecutors is the workload and the employed prosecution model, whether the acquisitive or inquisitorial methods.¹⁰⁶ This presence shows that there is no strong relation between the separation of powers and the prosecutorial function of the executive because both in the United States and France are very dynamic and have experienced a long evolution.¹⁰⁷

With the history of world development, which historical aspect does Yusril refer to that the executive is the branch of power that is synonymous with the prosecutorial function? This kind of question seems reasonable because Indonesia does not have strong historical roots regarding the separation of powers and this model was only created and implemented during the 1999-2002 constitutional reform. Indonesian history actually shows different facts as stated by Yusril's claim. Afandi, for example, said that in the early phases of independence there was a transformation of prosecutors from government officials (executive ambtenaar) to magistrates which could be traced to Law no. 7/1947, Law no. 19/1948 and Emergency Law no. 1/1951.¹⁰⁸ The Attorney General's Office and the Supreme Court are regulated under one law, similar to the history of the United States that places public prosecutor as a minor actor in the court. There is no single historical fact that shows that public prosecutor's institution is a stagnant institution, but rather dynamic and evolves according to the complexity of politics and law enforcement.

Second, the disruption of the independence of criminal prosecutions is a global phenomenon that occurs in several countries and the next stage in the evolution of public prosecutors is to increase institutional independence in various forms. Yusril clearly ignores political and law enforcement phenomena at the national and global levels, especially with regard to public prosecutors.¹⁰⁹ Public prosecutors who are in the next stage of evolution in the executive branch face tough structural and institutional challenges. According to Voigt and his colleagues, public prosecutor's office is often used as a weapon to advance executive or partisan interests.¹¹⁰ Several countries have shown this. Public prosecutors are under strong executive pressure when running investigation on the party funding scandal involving former German Chancellor Kohl in the oil refinery

¹⁰⁴ Jacoby., *nd*.

¹⁰⁵ Robert Vouin, "The Role of the Prosecutor in French Criminal Trials," *The American Journal of Comparative Law* 18, no. 3 (1970): 483, <https://doi.org/10.2307/839340>.

¹⁰⁶ Akila Taleb and Thomas Ahlstrand, "The Public Prosecutor, Its Role, Duties and Powers in the Pre-Trial Stage of the Criminal Justice Process - A Comparative Study of the French and the Swedish Legal Systems," *Revue Internationale de Droit Penal* 82, no. 3-4 (2011): 523-40, <https://doi.org/10.3917/ridp.823.0523>.

¹⁰⁷ Jacoby, "The American Prosecutor in Historical Context The American Prosecutor From Appointment to Elective Status." *nd*.

¹⁰⁸ F Afandi, *The Justice System Postman: The Indonesian Prosecution Service at Work*. In M. Crouch *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia* (Cambridge: Cambridge University Press, 2019), <https://doi.org/10.1017/9781108636131.004>.

¹⁰⁹ Saiful Risky, Sholahuddin Al-Fatih, and Mabarroh Azizah, "Political Configuration of Electoral System Law in Indonesia from State Administration Perspective," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, June 30, 2023, 119-30, <https://doi.org/10.24090/volksgeist.v6i1.7940>.

¹¹⁰ Anne Van Aaken, Eli Salzberger, and Stefan Voigt, "The Prosecution of Public Figures and the Separation of Powers. Confusion within the Executive Branch - A Conceptual Framework," *Constitutional Political Economy* 15, no. 3 (2004): 261-80, <https://doi.org/10.1023/B:COPE.0000040432.45537.3f>.

sales case involving leading conglomerates,¹¹¹ while Italian Prime Minister Berlusconi is also carrying out legal maneuvers to make public prosecutors more dependent on the executives before taking action. Israel showed political tension when choosing a new Attorney General, because there was contestation between political supporters and political opponents of Prime Minister Sharon, who was seen to have committed many violations of the law.¹¹² Indonesia also shows that the President's intervention to public prosecutor occurred when handling a major criminal case. President Habibie—who succeed Soeharto—fired Attorney General Soedjono C. Atmosudirdjo for initiating an investigation into a corruption case against Soeharto.¹¹³ The fact of such intervention by the President through the public prosecutor is clearly the main reason that drives the initiative of democratic governments to propose the creation of new institutions in the agenda of eradicating corruption in various countries.¹¹⁴

Anti-corruption agencies (ACAs) are the new actors in eradicating corruption in the form of commissions in various countries.¹¹⁵ This commission is generally permanent with a special mission to combat corruption and reduce the structure for corruption opportunity through prevention and enforcement measures. For example, Singapore has The Corrupt Practices Investigation Bureau (CPIB) which was founded in 1952—the oldest in the world today—as the legacy of British colonial rule with a mission to eradicate corruption. Since 1974, Hong Kong has had an Independent Commission Against Corruption (ICAC) who works on the eradication of corruption independently, separated from any powers, starting from conducting investigations up to prosecution.¹¹⁶ CPIB Singapore and ICAC Hong Kong are the most effective anti-corruption commissions and are role models for many countries in the world.¹¹⁷ Since 1959, Malaysia has had several anti-corruption institutions with different functions, only in 1967 were some of these institutions liquidated to become the Malaysian Anti-Corruption Commission (MACC) which operates independently from inception to prosecution.¹¹⁸ While China also has the National Supervisory Commission (NSC) as a relatively young anti-corruption commission which was formed in 2018. The formation of the NSC in China is part of institutional reforms aimed at taking over the task of eradicating corruption from the previously existing institutions and transferring it to a stronger and more integrated special agency.¹¹⁹

Lee believes that the agenda for dealing with corruption requires a certain level of institutional independence and that is (one of the reasons) why China abandoned the classical constitutional structure and created the Five Powers Constitution/*Wuquan Xianfa*.¹²⁰ The President must not interfere in their decisions in any form, nor is the

111 Jhon Goetz, Conny Neumann, and Oliver Schröm, *Allein Gegen Kohl, Kiep & Co: Die Geschichte Einer Unerwünschten Ermittlung*, 3rd ed. (Berlin: Ch. Links Verlag, 2000).

112 Jacoby.,*nd*.

113 Afandi.,*nd*.

114 Afandi.

115 Luís de Sousa, "Anti-Corruption Agencies: Between Empowerment and Irrelevance," *Crime, Law and Social Change* 53, no. 1 (2010), <https://doi.org/10.1007/s10611-009-9211-3>.

116 See Cap. 204 Independent Commission Against Corruption Ordinance

117 Michael Johnston, "13 A Brief History of Anticorruption Agencies," in *The Self-Restraining State*, 2022, <https://doi.org/10.1515/9781685854133-014>.

118 See Malaysian Anti-Corruption Commission Act 2009 and Malaysian Anti-Corruption Commission (Amendment) Act 2018

119 James WC Lee, "Anti-Corruption in a Party-State: Constitutional Implications of China's Supervisory Reform," *Asian Journal of Comparative Law* 18, no. 3 (December 8, 2023): 389–406, <https://doi.org/10.1017/asj-cl.2023.25>; Shiping Hua, "China's Fifth Constitutional Amendment: A Reversal of Reform?," *Asian Survey*, 2020, <https://doi.org/10.1525/AS.2020.60.6.1172>; Ke Li, "Embedded Courts: Judicial Decision-Making in China," *Contemporary Sociology: A Journal of Reviews* 48, no. 2 (2019), <https://doi.org/10.1177/0094306119828696bb>.

120 Kwai Hang Ng and Xin He, *Embedded Courts: Judicial Decision-Making in China*, 2017, <https://doi.org/10.1017/9781108339117>; Lee, "Anti-Corruption in a Party-State:

President permitted to use a Trojan horse scenario by infiltrating interests through commission actors to weaken the performance and independence of the commission.¹²¹ The Supreme Court of the United States through the phenomenal case of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) contributed through the doctrine of 'free from executive control' to protect the presence of the commission by severing ties with the executive branch in any form.¹²² This doctrine is commonly used as a basis for law formulators in compiling the commission's legal framework.

In the case of Indonesia, during the initial period of reform, drastic differences emerged among the law formulators. KPK was formed as an independent commission to carry out inquiries, investigations and prosecutions, but otherwise under Law 16/2004, the prosecutor's office is designed to be politically dependent on the president and its powers remain the same. This means that the bureaucratic and militaristic culture that has existed since the New Order authoritarian regime continues to persist in a democratic political climate. At that time, the government succeeded in blocking Prosecutor's Law bill proposed by the DPR and replaced it with its own draft.¹²³ According to Voigt, this legislative ambition is common because the executive has the desire to control cases accordingly to his desire.¹²⁴

Overall, we think that Yusril and the law makers in parliament are trying to revive the classic Indonesian constitutional structure that gives the President the opportunity to control law enforcement. The theoretical claim of the unitary executive is identical to Sahardjo's classic concept of 'protection,' where this concept views the supremacy of law as the wisdom of a leader and this concept also places the president as the highest leader and the wisest person in society.¹²⁵ In the past, Sukarno and Soeharto used public prosecutor as a government 'weapon' to secure their political interests. Attorney General Singgih admitted that Soeharto's first message to him before being appointed in 1990 was that he should use the Subversion Law to prosecute all of those who opposed the policies of his authoritarian regime.¹²⁶ Before Singgih, the President did not hesitate to appoint military actors as Attorney General to strengthen the President's political interests.¹²⁷ This Presidential command over law enforcement reappeared in the reforms period; As stated by Mujani and Liddle, the repositioning of KPK into the executive branch is a tactic to control KPK so that it does not disrupt and hinder economic development which is often accompanied by the practice of corruption, collusion and nepotism in the government's business cooperation.¹²⁸

2.3. The Komnas HAM: Tactic of Dependency in the Proceeding of Human Rights Case Towards the Attorney General

Constitutional Implications of China's Supervisory Reform"; Hua, "China's Fifth Constitutional Amendment: A Reversal of Reform?"

121 Kirti Datla and Richard L. Revesz, "Deconstructing Independent Agencies (and Executive Agencies) Recommended Citation DECONSTRUCTING INDEPENDENT AGENCIES (AND EXECUTIVE AGENCIES)." *Op.Cit*

122 "Humphrey's Executor vs United States."

123 Crouch, *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia* (Cambridge: Cambridge University Press, n.d.).

124 Aaken, Salzberger, and Voigt., *Op., Cit.*

125 Fachrizal Afandi, *The Justice System Postman: The Indonesian Prosecution Service at Work. THE POLITICS OF COURT REFORM Judicial Change and Legal Culture in Indonesia* (Cambridge: Cambridge University Press, 2019); and see also Antari, P.E.D., *The Interpretation of Misconduct Act as A Reason to Dismiss President: An Ethical Approach*, *De Jure: Jurnal Hukum dan Syar'iah* 13(1), 2021, 14-31

126 Fifik Wiryani, Febriansyah Ramadhan, and Mokhammad Najih, "Indigenous People's Land Rights in Post-Soeharto Indonesia The Continuing Problem of Land Grabbing," *International Journal on Minority and Group Rights*, 2024, <https://doi.org/10.1163/15718115-bja10152>.

127 Fifik Wiryani.

128 Mujani and Liddle, "Indonesia: Jokowi Sidelines Democracy." *Op.Cit*

Indonesia is still shrouded with the past sins of human rights crimes in the period 1965-1998 which categorized into 3 types: mass violence/murder resulting from the Cold War ideological conflict, violence aimed at maintaining the country's territorial integration, and violence against opposition groups.¹²⁹ This reality encourages constitutional reform to introduce transitional justice projects in order to uncover the truth of the past and bring justice to victims in the hope of avoiding '*circular time*': the repetition of past injustices in the future.¹³⁰ Indonesia's stance is to refuse to make peace with the past and to achieve transitional justice. Therefore, Indonesia applies, one of them, a judicial mechanism through the institution of human rights courts. The process of resolving human rights crimes in Indonesia in the Human Rights Court Law involves 3 'cross-power' institutions: Investigations carried out by Komnas HAM (independent branch), investigations and prosecutions carried out by the Attorney General (executive branch) and trials by the Human Rights Court (judicial branch).¹³¹ With the disintegration of judicial process regarding human rights violations, it causes the transitional justice project to be trapped in technical matters and avoid legal traps through bureaucratic political machinations.¹³²

We provide support for Herlambang's study by deepening the evidence that today's regime also deliberately perpetuates a culture of impunity through the tactics of Komnas HAM's dependence on the Attorney General, which has resulted in several cases of past human rights crimes never being prosecuted.¹³³ This kind of case is similar to what happened in Chile, where a regime transition accompanied by a wave of legal reform offered the drafters the opportunity to design institutions and rules of the game that protected the old interests entrenched in Pinochet's military government.¹³⁴ In particular, the phenomenon of democratic transition allows coalitions of old interests and predatory elements from previous authoritarian regimes to find conducive opportunities in relatively open and free regimes.¹³⁵ In Indonesia, old people such as Prabowo Subianto, Hendro Priyono, Wiranto and other military officers who were 'allegedly' responsible for human rights crimes in the past,¹³⁶ were able to adapt more smoothly to the new regime in a conducive and sustainable manner.¹³⁷ They changed into enthusiastic democrats and reformers without being disturbed by revealing the truth of the past because the investigative system and judicial channels through Komnas HAM were well consolidated by making the proceeding of investigations to be dependent to the Attorney General so that it was difficult to proceed the cases for trial.

The Human Rights Court Law creates a scenario for Komnas HAM investigations to be dependent on the Attorney General. Even though it normatively has the title of being independent, Komnas HAM cannot necessarily carry out coercive measures

129 Edward Aspinall, *Opposing Suharto: Compromise, Resistance, and Regime Change in Indonesia* (Stanford: Stanford University Press, 2005).

130 Elizabeth F. Drexler, "Impunity and Transitional Justice in Indonesia: Aksi Kamisan's Circular Time," *International Journal of Transitional Justice* 16, no. 3 (2022): 298-313, <https://doi.org/10.1093/ijtj/ijac010>.

131 Febriansyah Ramadhan, Xavier Nugraha, and Patricia Inge Felany, "Penataan Ulang Kewenangan Penyidikan Dan Penuntutan Dalam Penegakan Hukum Pelanggaran Ham Berat," *Veritas et Justitia* 6, no. 1 (2020): 172-212, <https://doi.org/10.25123/vej.3514>.

132 Drexler., *nd*.

133 STEVEN LEVITSKY and DANIEL ZIBLATT, "How a Democracy Dies," *New Republic* 249, no. 1/2 (2018).

134 P Posner, "Popular Representation and Political Dissatisfaction in Chile's New Democracy," *Journal of Interamerican Studies and World Affairs* 41, no. 1 (1999): 59-89, <https://doi.org/10.2307/166227>.

135 Vedi Hadiz, *Localising Power in Post-Authoritarian Indonesia: A Southeast Asia Perspective* (Redwood City: Stanford University Press, 2010), <https://doi.org/https://doi.org/10.1515/9780804773522>.

136 Tenggara Strategic, "Analysis: Ghosts of Victims of Human Rights Violations Still Haunting Indonesia.," *The Jakarta Post*, 2023, <https://www.thejakartapost.com/opinion/2023/01/23/analysis-ghosts-of-victims-of-human-rights-violations-still-haunting-indonesia.html>.

137 Mia Hadiati and Febriansyah Ramadhan, "Observing The Differences in Constitutional Court Decision About the Legal Age of Marriage," *Jurnal Konstitusi* 19, no. 3 (2022), <https://doi.org/10.31078/jk1937>.

such as checking letters, searching/seizing evidence, inspecting locations and including bringing in experts.¹³⁸ These types of measures require Komnas HAM to obtain preliminary approval from the Attorney General before carrying out the proceeding. This process was deliberately designed to be so complicated with the aim of reducing the quality of Komnas HAM's investigation, which created an opportunity for the Attorney General to return the case on the grounds that it 'did not provide sufficient preliminary evidence.'¹³⁹ This complexity gave the impression that it was designed to maintain a culture of impunity for past human rights crimes.¹⁴⁰

Despite being the main supporter of Soeharto's authoritarian regime for more than three decades, Golkar still remains in the main stream of Indonesian politics. Under the reform government, Golkar remained the main vehicle for New Order elites to act as democratic politicians in an open political system.¹⁴¹ For example, only a few years after the fall of Soeharto, two prominent Golkar politicians, Wiranto and Prabowo Subianto—who were suspected to be involved in the events of human rights violations and maintaining close relations (and kinship) with Soeharto—entering the candidate market for the election of the Chairman of Golkar Party in 2004.¹⁴² Apart from Golkar, it is worth noting that the formulation of the Human Rights Court Law also 'still' involved the TNI/Polri faction where they also represent the main perpetrators that responsible for many human rights crimes in the past, even though this faction was not formally involved in the drafting team of the Human Rights Court Law. The involvement of the TNI/Polri faction in parliament is an institutional implication of the 'dual function of the military' which still maintained in the transition from authoritarian to reform. One of Golkar's operational methods in protecting its old elites from being tried by the Human Rights Court Law, is by using one of its cadres, namely Akil Mochtar - who has a legal background - as part of the team drafting the Human Rights Court Law, which is always in line with the TNI/Polri faction which represented by Suenarto and I Ketut Astawa.

Collaboration between Golkar and the TNI/Polri faction began when they were used as the election machines to support President Soeharto throughout the New Order regime,¹⁴³ and this kind of symbiotic relationship seems to still exist in the parliament which is now relatively democratic.¹⁴⁴ Here, Akil Mochtar played a key role in the formulation and became the central figure who determined the flow of discussion of the Human Rights Court Law bill.¹⁴⁵ The collaboration between Golkar and the TNI/Polri faction ran smoothly because it was supported by the rush to formulate the Human Rights Court Law due to international pressure to prepare the national legal framework to resolve human rights crimes in the past.¹⁴⁶ The drafters of the law also closed the

138 See in Article 19 of Human Rights Court Law.

139 Febriansyah Ramadhan and Ilham Dwi Rafiqi, "Study of Constitutional Court Decisions Cancelling All Norms in the Law," *Legality: Jurnal Ilmiah Hukum* 29, no. 2 (2021), <https://doi.org/10.22219/ljih.v29i2.15434>.

140 Ramadhan, Nugraha, and Felany.*nd*.

141 Leo Suryadinata, "The Decline of the Hegemonic Party System in Indonesia: Golkar after the Fall of Soeharto," *Contemporary Southeast Asia* 29, no. 2 (2007): 333–58, <https://doi.org/10.1355/cs29-2f>.

142 Anggi Kusumadewi, "Munas, Sejarah Panjang Perpecahan Golkar," CNN Indonesia - Politik, 2014, <https://www.cnnindonesia.com/nasional/20140827131929-32-1889/munas-sejarah-panjang-perpecahan-golkar>.

143 Sri Lestari Wahyuningroem, "Breaking the Promise: Transitional Justice between Tactical Concession and Legacies of Authoritarian Regime in Indonesia," *International Journal of Transitional Justice* 16, no. 3 (November 18, 2022): 406–21, <https://doi.org/10.1093/ijtj/ijac021>. *Op.Cit*

144 Suryadinata, "The Decline of the Hegemonic Party System in Indonesia: Golkar after the Fall of Soeharto." *nd*.

145 Sholecha, E. M., Saiful, A., Yunika, S., Hariyanto, H., & Unsil, N. (2023). Justice Collaborator's Position and Function on Witness Protection's Rights as a Suspect from the Perspective of Criminal Law in Indonesia. *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, 6(1), 131–143

146 Ilham Dwi Rafiqi Deny Noer Wahid, "Manifestation of Eastern Cultural Values by Re-Arranging Normon Insulting the President and Vice President," *Hang Tuah Law Journal* 6, no. 1 (2022): 61–76.

opportunity for protest and public participation in the formulation of the Human Rights Court Law bill under the pretext of international pressure that demanded time efficiency to be promulgated immediately possible so that the International Criminal Court would not take over cases of human rights crimes in Indonesia. Yusril Ihza Mahendra—who represented the government in the formulation—convinced the parliament by saying that “... yet, one truth that we put forward legally and academically, still can be defeated with political votes and this can be subject to international pressure.”¹⁴⁷

The Human Rights Court Law which was formed by the old elites of the New Order created a legal scenario to weaken and complicate the investigative work of Komnas HAM. First, Komnas HAM is charged with providing ‘sufficient preliminary evidence.’ This means that the process of inquisition on cases of human rights violations conducted by Komnas HAM is required to provide sufficient initial evidence, which is in contrary to the concept that has been adopted in the Criminal Procedure Code where sufficient initial evidence is the scope of investigative work as a basis for determining someone as a suspect and arresting the suspect.¹⁴⁸ Komnas HAM who only has the status of an investigator, to examine an ‘incident’, they must meet the qualifications of sufficient initial evidence to proceed to the prosecution stage. If sufficient initial evidence—at least 2 pieces of evidence—is not met then Komnas HAM cannot submit the results of the investigation to the Attorney General’s prosecutors.

With a scenario like that, Komnas HAM has actually gone beyond the work of investigators who only examine events and must also find the person suspected as the perpetrators of human rights crimes.¹⁴⁹ The scenario of sufficient preliminary evidence was proposed by Akil Mochtar who said that “the investigation is also related to the question on sufficient preliminary evidence”;¹⁵⁰ a proposal that clearly contradicts the Criminal Procedure Code. However, the proposal offered by Akil Mochtar was supported by Suenarto, who came from the TNI/Polri faction, who wanted the Komnas HAM investigation to be carried out extra strictly by surrounding it with sufficient preliminary evidence before it was escalated to the investigation and prosecution stage.¹⁵¹ Ironically, there was no serious debate on this issue during the formulation of the Human Rights Court Law bill and Akil Mochtar’s proposal, which received support from the TNI/Polri faction, was adopted in the Human Rights Court Law.

Second, the heavy workload of Komnas HAM investigations is not supported with the freedom to carry out coercive measures. To carry out coercive measures, Komnas HAM must first obtain permission from the Attorney General as investigator. Approval from the Attorney General is an initial scenario for the commission’s dependence on the executive branch. Komnas HAM’s burden of having to obtain sufficient initial evidence is not accompanied by the freedom to carry out coercive measures such as checking letters, conduct searches and confiscations, local inspections of houses or other premises and bringing in experts to support the investigation. Komnas HAM must also obtain initial approval from the Attorney General to perform these actions, and if there is no clearance from the Attorney General, then Komnas HAM is not allowed to do it. On

147 Minutes of Meeting (Official) on the Drafting of Human Rights Court Law, which involved Government, DPR, Academia and Civil Organisation on 5 June-31 October 1999. Minutes of Meeting (Official) was obtained by authors via application in <https://portal.dpr.go.id>. on October 2023

148 See in Article 1 number 14 and Article 17 Criminal Procedure Code.

149 See explanation of Article 20 paragraph (1) of Human Rights Court Law.

150 Minutes of Meeting (Official) on the Drafting of Human Rights Court Law, which involved Government, DPR, Academia and Civil Organisation on 5 June-31 October 1999. Minutes of Meeting (Official) was obtained by authors via application in <https://portal.dpr.go.id>. on October 2023

151 Minutes of Meeting (Official) on the Drafting of Human Rights Court Law, which involved Government, DPR, Academia and Civil Organisation on 5 June-31 October 1999. Minutes of Meeting (Official) was obtained by authors via application in <https://portal.dpr.go.id>. on October 2023

the other hand, if Komnas HAM carries out coercive measures without the approval of the Attorney General, the results of its work will be assessed as legally invalid by the Attorney General because it did not obtain preliminary permission. Legal obstacles of this kind, however in practice, have made it difficult for Komnas HAM to gather evidence to support investigations into human rights crimes, which has been demonstrated by several attempts to apply for permission to the Attorney General to carry out coercive measures which have never been approved.¹⁵² Suenarto from the TNI/Polri faction is strictly bordering Komnas HAM from being on an equal footing with investigators so that the authority for coercive measures is not given to Komnas HAM, as they say „don't let the authority of investigators be the same as the authority of inquisitors“.¹⁵³

Third, investigations and prosecutions of human rights crimes are carried out by the Attorney General. This condition means that the success of Komnas HAM's investigative work will depend heavily on the approval given by the Attorney General. One of the main causes of this obstacle is because the Human Rights Court Law creates a 'cross-power' scheme between the actors involved in the inquiry, investigation and prosecution process. This model is the first to be implemented in the Indonesian criminal justice system. When this model was formulated, the NGO KontraS, which was enthusiastic about monitoring law enforcement against human rights violations in Indonesia, demanded that the law establish an independent prosecutor who would investigate and prosecute cases of human rights crimes so that it would be sterile from executive influence. However, this radical proposal was strongly protested by the drafters of the law on the grounds that cases of human rights violations involve issues of high politics, so they still retain this authority with the Attorney General. I Ketut Astawa from the TNI/Polri faction, for example, believes that the Attorney General remains professional and has the necessary capacity to carry out inquisitions and prosecutions and is in accordance with the principles of the Criminal Procedure Code.¹⁵⁴

KontraS' concerns can be said to be reasonable considering that the Attorney General is quite vulnerable to political interference and has proven to be not progressive enough when proceeding the work of Komnas HAM. In Indonesia's presidential system, the Attorney General is placed as one of the government cabinets, making him more vulnerable to the President's political stance in determining the proceeding of cases.¹⁵⁵ For example, in the case of Paniai human rights case, the Attorney General was quite responsive in his efforts to continue the results of the investigation by Komnas HAM because previously there was a political stance from the President who requested that the Paniai case should be processed.¹⁵⁶ This attitude shows that the President and the Attorney General as law enforcement institutions are not distant.¹⁵⁷ The President is in command to determine whether the Attorney General will work on the case or not. If there is no initial political stance from the President, it is possible that the Attorney General will be reluctant to take progressive steps to proceed the work of Komnas HAM. Borrowing Obama's opinion, the President should keep his distance from concrete criminal cases so that prosecutors can truly play their role independently.¹⁵⁸

The legal scenario played by the Attorney General to counter the results of Komnas HAM investigation was by assessing that the results of the investigation did not 'satisfy sufficient preliminary evidence' so that it became the basis for returning the investigation results documents to Komnas HAM for completion. Until 2021, Komnas

¹⁵² Source: Commissioner of Komnas HAM, Chairul Anam, on 22 September 2022.

¹⁵³ Minutes of Meeting (Official) on the Drafting of Human Rights Court Law, which involved Government, DPR, Academia and Civil Organisation on 5 June-31 October 1999. Minutes of Meeting (Official) was obtained by authors via application in <https://portal.dpr.go.id>. on October 2023

¹⁵⁴ Minutes of Meeting (Official) on the Drafting of Human Rights Court Law, which involved Government, DPR, Academia and Civil Organisation on 5 June-31 October 1999. Minutes of Meeting (Official) was obtained by authors via application in <https://portal.dpr.go.id>. on October 2023

¹⁵⁵ Afandi, *The Justice System Postman: The Indonesian Prosecution Service at Work. THE POLITICS OF COURT REFORM Judicial Change and Legal Culture in Indonesia*.

¹⁵⁶ Kadek Melda Luxiana, "Mahfud Cerita Jokowi Minta Kasus HAM Berat Paniai Dibawa Ke Pengadilan," detik News., 2022.

¹⁵⁷ Dian Ekawaty Ismail, Avelia Rahmah Y Mantali, and Mohamad Rivaldi Moha, "The Concept of Revitalizing Traditional Institutions in the Criminal Law System to Realize Restorative Justice," *Jambura Law Review* 5, no. 2 (June 3, 2023): 220–34, <https://doi.org/10.33756/jlr.v5i2.11682>.

¹⁵⁸ Barack Obama, "THE PRESIDENT'S ROLE IN ADVANCING CRIMINAL JUSTICE REFORM," *Harvard Law Review* 130, no. 3 (2017): 811–66.

HAM has submitted 12 cases resulting from investigations to be proceed by the Attorney General.¹⁵⁹ Even though it is motivated by different background in each case, all of the cases have the same reason which rests on the failure to fulfill the preliminary evidence. In practice, Komnas HAM received the return, and discovered the fact that they had to complete it hastily with all existing limitations and send it back to the Attorney General for reprocessing. For example, one of the most controversial cases handled by Komnas HAM is the Trisakti gross human rights violations case involving the shooting of student activists before the fall of the New Order regime in 1998. Although this case has attracted the attention of various parties, there has been no thorough effort to resolve the problem. The Attorney General deliberately delayed the completion of the Trisakti case by returning the investigation files conducted by Komnas HAM 7 times since 2002.¹⁶⁰

The process expected by Komnas HAM is actually that - when the results of the investigation are submitted to the Attorney General, the Attorney General can use his authority to carry out coercive measures such as confiscating and examining the files related to the case,¹⁶¹ because in every incident of serious human rights violations the perpetrators generally use state budget whose budget allocations and amounts are well recorded, which can help explain the matter in question. However, in reality the Attorney General did not follow up and instead threw it back at Komnas HAM. From all the back and forth on this case, the Attorney General gave instructions to Komnas HAM to fulfill:¹⁶²

1. Submission of the results of investigations on serious human rights cases to DPR;
2. Conduct Investigation to perpetrators;
3. Attaching the *visum et repertum* result from corpses and victim of torture;
4. Finding Evidence that support witness statement;
5. Supplementing the result of investigations with evidence;
6. Examining and attaching Minutes of Investigation on the perpetrators or reported suspect;
7. Finding additional evidence to fulfill preliminary sufficient evidence;
8. Investigators have not taking vow;
9. Conduct investigations on witnesses from military and police;
10. The minutes of the examination of witnesses and experts contain names who are not included in the organizational structure of the Ad Hoc Investigative Team in accordance with the Team Decree;
11. The expert examination report does not include the Attorney General's order; and
12. Request for additional information and data related to autopsy results, correspondence, examinations and/or visits to locations suspected of being the victim's temporary detention location.

The rejection of files from the Attorney General asking Komnas HAM to take extra steps beyond its capabilities and authority, such as *inter alia*: conducting an examination of the perpetrator, summoning and examining the perpetrator and attaching a post

159 Fadhil, M., Herman, Wagner, I., Simbolon., S., Harefa, S., Navigating the Tensions Between Sharia and Human Rights in Regional Legislation, *De Jure: Jurnal Hukum dan Syaria* 16(2), 2024, p. 406-431

160 "Resume of the Executive Summary of the Results of the Investigation of Serious Human Rights Violations by Komnas HAM. See in Merawat Ingatan Menjemput Keadilan: Ringkasan Eksekutif Peristiwa Pelanggaran HAM Yang Berat," (Jakarta, 2020).

161 Sirajuddin Sirajuddin, Febriansyah Ramadhan, and Ilham Dwi Rafiqi, "Urgensi Pemisahan Penyelenggaraan Pemilihan Umum Serentak Nasional Dan Lokal," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 4, no. 2 (December 1, 2021): 233-47, <https://doi.org/10.24090/volksgeist.v4i2.5224>.

162 Sirajuddin Sirajuddin, Febriansyah Ramadhan, and Ilham Dwi Rafiqi,.

mortem visum et repertum from the findings in the corpse and torture victim.¹⁶³ By looking further at the request from the Attorney General, it is safe to say that all of these requests are consistent with the authority that the Attorney General has as an investigator looking for the perpetrator, not to mention the incident.¹⁶⁴ In practice, there is hidden relational tension between Komnas HAM and the Attorney General, where the Attorney General refuses to be ordered by Komnas HAM to complete technical matters that have not been completed and throws them back to Komnas HAM. This is a structural implication of the ‘cross-power’ design created by the Human Rights Court Law, which, as stated by Aileen, anything that involves cross-power often creates tension because each power tends to resist pressure from other branches.¹⁶⁵ Ultimately, the cross-power design in prosecutions by the Attorney General for human rights crimes makes efforts designed to uncover cases of human rights violations potentially ineffective.

3. CONCLUSION

KPK and Komnas HAM are institutions that have the title of independent commission in accordance with their respective laws. This fact makes it difficult for independent commissions to neutralize themselves from ever-changing political dynamics. As discussed in this article, although the commission was initially created in the spirit of liberal democracy which emphasized the distribution of power to new branches of power to ensure accountability—such a concept may change as there is a growing ‘illiberal’ political consensus that reverses democratic conditions towards autocracy. On the other hand, with the absence of independent commission provisions in the constitution, this condition further weakens the position of independent commissions from being exploited by political actors to advance their interests. They can freely dismantle the commission’s design for seemingly democratic reasons in order to seek various justifications other than constitutional reasons.¹⁶⁶ Positive legitimacy regarding the distribution of power can be replaced by new ‘made-up’ justifications to strengthen the desire for centralization of power.¹⁶⁷

The distribution of power to independent commissions is a rational step as long as it is carried out consistently, starting from guaranteeing the independence of the institution to the independence of the process which does not depend on any branch of power. We are of the opinion that Indonesia needs to reorganize independent commissions so that a uniform model of independent commissions is created, especially those that handle criminal cases, such as acquiring the entire inquiry, investigation and prosecution process by the commission. This is necessary because of the basic nature of the presence of an independent commission in handling crimes so that it being sterile from political

¹⁶³ Sirajuddin Sirajuddin, Febriansyah Ramadhan, and Ilham Dwi Rafiqi,.

¹⁶⁴ Komnas HAM Indonesia, “Laporan Laporan Tahunan,” 2022, n.d.; and also see Arifin, R., Wulandari, C., Muliadi, M., Utari, I. S., & Munandar, T. I. (2023). A Discourse of Justice and Legal Certainty in Stolen Assets Recovery in Indonesia: Analysis of Radbruch’s Formula and Friedman’s Theory. *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, 6(2), 159–181.

¹⁶⁵ Aileen Kavanagh, “The Constitutional Separation of Powers”, in David Dyzenhaus, and Malcolm Thorburn (Eds), *Philosophical Foundations of Constitutional Law* (Oxford, 2016; Online Edn, Oxford, 2016).

¹⁶⁶ Sarah Repucci and Amy Slipowitz, “Authoritarians on Offense,” *Journal of Democracy*, 2022, <https://doi.org/10.1353/jod.2022.0017>.

¹⁶⁷ Aileen Kavanagh, “The Constitutional Separation of Powers,” in *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016), 221–40, <https://doi.org/10.1093/acprof:oso/9780198754527.003.0012>.

pressure and confident when dealing with certain political elites in investigating crimes.¹⁶⁸ This article ultimately encourages future researchers to carry out further examination of issues related to the constitutionalization of independent commissions and their duties and functions.

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