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# Position of witness in the judge power system in Indonesia

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**Abstract.** The prosecutor's position as a government agency that carries out state power in the field of prosecution has resulted in its own legal problems. The Attorney General's Office, on the one hand, is part of a government agency (executive) and is carrying out a prosecution (judicial) function. There is a conflict of norms in the regulation between Article 2 paragraph (1) of Law No. 30 of 2004 concerning the Attorney General's Office of the Republic of Indonesia with Article 38 paragraph (1) and paragraph (2) letter b of Law No. 48 of 2009 concerning Judicial Power. The Prosecutor's Office in carrying out its authority independently and independently in the field of prosecution is difficult to be separated from the influence of the power of the authorities, because the Prosecutor's position is under the executive power.

**Keywords.** Prosecutor's Office, Prosecution, Executive, Judiciary

## Preliminary

Law as a system can play a role properly and correctly in the community if the implementation instrument is equipped with authorities in the field of law enforcement. One of these authorities is the Republic of Indonesia Attorney's office.<sup>1</sup>

Regulations regarding the position of the Republic of Indonesia Attorney's Office in the constitution are very weak because they are not explicitly mentioned. Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (1945 Constitution) states that "other bodies whose functions are related to judicial authority are regulated in statutory regulations.

Article 38 paragraph (1) and paragraph (2) letter b of Law No. 48 of 2009 concerning the authority of the Judiciary sets out the provisions of Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Article 38 paragraph (1) states that "In addition to the Supreme Court and the lower judicial body and the constitutional court, there are other bodies whose functions are related to judicial power". While Article 38 paragraph (2) letter b states that "Functions relating to judicial authority as referred to in paragraph (1) include prosecution. Explanation of the explanation in Article 38 paragraph (1), what is meant by other bodies is the Police, Attorney General's Office, Advocates, and Corrections Institution.

According to Article 1 paragraph (1) of Law No. 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia, a Prosecutor is a functional official authorized by the law to act as a Public Prosecutor and Implementer of a Court Decision that has obtained permanent legal force and other powers based on the law. Article 2 Paragraph (1) explains that

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<sup>1</sup> Marwan Effendy, *Kejaksaan RI: Posisi dan Fungsinya dari Prespektif Hukum*, (Jakarta: PT. Gramedia Pustaka Utama, 2005), p. 1.

the Prosecutor's Office is a government agency that exercises state power in the field of prosecution and other authorities based on the law.

Departing from the above, there is a norm conflict between Article 2 paragraph (1) of Law No. 30 of 2004 concerning the Attorney General's Office of the Republic of Indonesia with Article 38 paragraph (1) and paragraph (2) letter b of Law No. 48 of 2009 concerning Judicial Power. The position of the Prosecutor's Office as a government institution is associated with the authority of the Prosecutor's Office to exercise state power in the field of prosecution independently, there is a contradiction in its regulation (dual obligation). According to Montesquie<sup>2</sup>, the three types of executive, legislative and judicial powers must be separate from each other, both regarding the duties (functions) and the equipment (organs) that carry them out, especially the existence of judicial body freedom, because herein lies the independence of the individual and human rights need to be guaranteed and at stake. The prosecutor's office is a government institution that is under the executive but exercises the power or function of the prosecution in the judiciary.

### **Research Methods**

This research is a normative legal research with a statutory approach and conceptual approach.<sup>3</sup>

### **Discussion**

Almost all modern countries in the world have an institution called the Prosecutor's Office, whose main task is to bring criminal cases to court. Prosecutors in carrying out their functions work on behalf of the people in carrying out their duties to sue someone suspected of committing a crime.<sup>4</sup> The Prosecutors' Office in carrying out its functions in the field of prosecution must work independently and free from any intervention, including from the government. It is very dangerous if the Prosecutor's Office works with the intervention of other parties.<sup>5</sup>

If we look at the portrait of the Prosecutor's Office in various countries, there are attorney institutions in various parts of the world that place the Prosecutor's Office under the Executive, Legislative and Judiciary. Prosecutors who are positioned under the executive, for example, can be found in France, the Netherlands, the Czech Republic, Japan, and including Indonesia. Even though it sounds strange, there are also Attorney institutions which are placed under the Legislature /Parliament. This model can be found in the countries of Hungary and Macedonia. The prosecutor's office which is placed as part of judicial authority (judicative) can be found in the prosecutors' offices in Italy and Bulgaria.<sup>6</sup>

Yusril Ihza Mahendra<sup>7</sup> said that in the 1945 Constitution which was passed on August 18, 1945, we did not find a single word that mentioned the prosecutor's institution, both in the

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<sup>2</sup> Baron de Montesquieu, *The Spirit of Laws ; Dasar-Dasar Ilmu Hukum dan Politik* (diterjemahkan oleh M. Khoiril Anam). (Bandung: Nusa Media, 2005), p. 62.

<sup>3</sup> Astria Yuli Satyarini Sukendar, Amanda Raisaa dan Tomy Michael, Penjualan Rogodi (Roti Goreng Mulyodadi) Sebagai Usaha Bisnis Dalam Meningkatkan Usaha Mikro Kecil (UMK) Di Desa Mulyo-dadi, Kabupaten Sidoarjo, Jurnal Hukum Bisnis Bonum Commune Volume 3 Nomor 1 Februari 2020.

<sup>4</sup> Komisi Hukum Nasional dan Masyarakat Pemantau Peradilan Indonesia, *Pembaharuan Kejaksaan: Pembentukan Standar Minimum Profesi Jaksa*, (Jakarta: KHN dan MaPPI, 2004), p. 3

<sup>5</sup> Dio Ashar Wicaksono, "Kedudukan Kejaksaan RI Dalam Sistem Hukum Tata Negara Indonesia", *Fiat Justitia*, Vol. 1 No. 1 Maret 2013, p. 3

<sup>6</sup> Independensi Institusi Kejaksaan, <https://gugumridho.wordpress.com/2012/09/19/independensi-institusi-kejaksaan/> April 12, 2020.

<sup>7</sup> Ilham Mahendra, *Memaknai Independensi Kejaksaan di Indonesia (Kekuasaan Penuntutan)*, <https://ilhamendra.wordpress.com/2008/05/27/kekuasaan-penuntutan/>, April 12, 2020

Body and its Explanation. Likewise after the 1945 Constitution there were four changes in the Reformation Era. In the Constitution of the United Republic of Indonesia and the 1950 Provisional Constitution which adheres to the parliamentary system of government, the word Prosecutor's Office is also not found, except for the word "Attorney General in the Supreme Court" (Article 106 Provisional Constitution of 1950), but only in the context of high state officials who can only be tried by the Supreme Court as the first and last court if they were indicted in a criminal case. This provision only regulates the "privilegium forum" which has absolutely nothing to do with the position of the Prosecutor's Office in the domain of state power. Because there is not a single word in the 1945 Constitution that mentions the Prosecutor's Office, it is only natural that academics and politicians are figuring out where is the right place for this institution".<sup>8</sup>

According to Jimly Asshiddiqie<sup>9</sup>, the Attorney General's Office was not regulated explicitly in the 1945 Constitution of the Republic of Indonesia. Although this was originally proposed in the draft amendment to the 1945 Constitution, until the fourth amendment was passed in the 2002 MPR Session, it did not get an agreement. In connection with the provisions of Article 24 paragraph (3) of the 1945 Constitution, the Prosecutor's function is closely related to the authority of the Judiciary. The Prosecutors' Office can be said to be one of the bodies referred to, which is also constitutionally important (*constitutionally important state institution*).

Further interpretation of this matter is mentioned in Article 38 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power; that *"In addition to the Supreme Court and its lower judicial body and the Constitutional Court, there are other bodies whose functions are related to judicial authority"*. Elucidation of Article 38 paragraph (1) of Law No. 48 of 2009 states that what is meant by *"other bodies"* includes the Police, Attorney General's Office, Advocates, and Penitentiary. Such provisions were previously also regulated in Article 41 of Law No. 4 of 2004 concerning Judicial Power which states the same thing, that is, ". Other bodies whose functions are related to judicial power include the Indonesian National Police, Attorney General of the Republic of Indonesia, and other bodies regulated in law. Such a position is what in theory and practice constitutionality raises problems. According to Tatiek Sri Djatmiati, in the aspect of law enforcement, the dualism of the position can cause juridical problems, if not followed by clear legal rules, both regarding institutions, duties and authority, professionalism, and so on. Former Attorney General Basrief Arief<sup>10</sup> stated that the constitutional uncertainty and ambiguity of the regulation resulted in the unclear position of the Prosecutor's Office, which is the body associated with the power of the Judiciary or the power of the government which is subordinate to the power of the President. This situation gives rise to independence which is philosophically determined in Law No. 16 of 2004 concerning the Public Prosecution Service could not proceed as it should.

Article 2 paragraph (1) of Law No. 16 of 2004 concerning the Republic of the Public Prosecutor's Office stated that the Prosecutor's Office is a government agency that exercises state power in the field of prosecution and other authorities based on the law. What can be emphasized from this article is that the Prosecutors' Office is a government institution, so that the Prosecutor's position in the Indonesian constitution is part of the government. Such opinion is also strengthened by Bagir Manan's statement which states that "the Prosecutor's Office is a

<sup>8</sup> Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar*, (Yogyakarta: Liberty, 2008), p. 160.

<sup>9</sup> Jimly Asshiddiqie, *Perkembangan & Konsolidasi Lembaga Negara Pasca Reformasi*, (Jakarta: Siar Grafia, 2012), p. 187

<sup>10</sup> Adhyaksa Indonesia, *Quo Vadis Kejaksaan RI : Eksekutif atau Yudikatif*, Jurnal Adhyaksa Edisi Khusus Tahun I Juli 2014, p. 5

government body, thus the leader is also the leader of a government body, and is interpreted to mean that the government body is executive power.

The authority of the Prosecutor's Office in the field of prosecution is very important and strategic in carrying out the criminal justice system that serves in Indonesia according to the purpose of justice itself. The Prosecutor's Office in carrying out its duties and functions occupies a central role in making the judicial system clean and authoritative must be encouraged by placing the Prosecutor's Office in accordance with the ideal character of the state which has been mandated by the Constitution. The constitution has the function of organizing power so that it cannot be used forcefully and arbitrarily.

The provision of independence based on popular sovereignty carried out by the Prosecutor's Office is the background for the birth of the conception that the constitution is not only a national document, but also a tool to shape the political system and legal system of a country. The formulation policy in order to strengthen the position of the Prosecutor's Office of the Republic of Indonesia as a law enforcement agency, primarily through a clean criminal justice system must begin with a clear and independent position of the Prosecutor's Office. It is clear here that the Prosecutor's Office is part of the judiciary that carries out the prosecution function, freely, independently and there is no intervention from any institution to uphold law and justice. The Prosecutors' Office must be repositioned from its position as an executive institution. According to Marwan Effendy, Law No. 16 of 2004 places the Attorney General's position in an ambiguous position. On the one hand, the Prosecutor's Office is demanded to carry out its functions, duties and authority independently, on the other hand, the Prosecutor's Office is put under a position because the position is under executive power. According to Barda Nawawi Arif, the Prosecutor's position is ideally in the position of Justice. This is in accordance with the spirit construction in Law No. 16 of 2004 concerning the Republic of Indonesia Prosecutor's Office and Law No. 48 of 2009 concerning Judicial Power which confirms that the Prosecutors' Office is a core part of an independent Judicial authority.<sup>11</sup>

Departing from the explanation above, it can be emphasized that in the context of strengthening the position of the prosecutor's office in the future, it can be done in two ways, namely:

1. Must immediately amend the fifth 1945 Constitution of the Republic of Indonesia, where the position of the prosecutor's office must be contained and regulated in the constitution and it must be explicitly stated that the prosecutor's office is one of the actors of judicial power or part of the judicial authority. If the Prosecutors' Office has become part of the judiciary, Law No. 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia will be revised to adjust the rules contained in the constitution.
2. As an alternative step because the constitutional amendments that require quite a long time because they are still dependent on the *political territory* of the MPR members which may not necessarily occur in the near future, the alternative step is to revise the provisions of Law No. 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia and asserted that the prosecutor's office is part of the judicial authority and also governs the position of attorney general independently.

### **Closing**

The placement of the Attorney General's Office of the Republic of Indonesia as part of the judicial authority is in the context of strengthening the position of the prosecutor's office

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<sup>11</sup> Taufiqurrahman Syahuri, *Hukum Kosntitusi: Proses dan Prosedur Perubahan UUD di Indonesia 1945 Serta Perbandingannya Dengan Konstitusi Negara lain di Dunia*, (Bogor: Gahlia Indonesia 2004), p. 37

as a law enforcement agency in the field of prosecution that is free and independent. For this reason, the next step is to include the AGO (Attorney General's Office) in the content of the constitution in the chapter on judicial power.

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