

Legal Certainty of The Independence of The Prosecutor's Office In Indonesia

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ABSTRACT

The purpose of this study is to find out the legal certainty of the constitutional regulation of the independence of the Attorney General's Office of the Republic of Indonesia in Indonesia. In the research, the type of research used is a type of research with normative legal research methods. The conclusion in this study is that the independence of the Prosecutor's Office is needed for the benefit of law enforcement by being honest, fair, responsible, and transparent by upholding the principle of fair trial in the principle of equality before the law. Thus, this must be carried out because the prosecutor's institution is a determining factor in the sub-system of legal structure in criminal law enforcement. On the other hand, the constitutional reconstruction of the position of the Attorney General of the Republic of Indonesia should be important, considering that until now the arrangements related to the position of the Attorney General of the Republic of Indonesia have not been implicitly regulated. This has an impact on the independence of the Prosecutor's Office of the Republic of Indonesia which until now is still positioned as part of the judicial power as well as part of the government (executive) institution on the other hand. The constitutional reconstruction of the position of the Attorney General of the Republic of Indonesia can refer to the Constitution of Myanmar and Laos, which in its constitution formulates the regulation of the position, war/function, appointment and removal of the Attorney General in their respective constitutions.

Keywords: legal certainty, independence, Prosecutor's Office of the Republic of Indonesia

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INTRODUCTION

The independence, position and function of the Attorney General's Office of the Republic of Indonesia (hereinafter abbreviated as the Attorney General's Office) are still widely discussed by various legal circles. This is because in terms of its position, the Indonesian Prosecutor's Office is still "placed" as part of the government institution and the judicial power on the other hand exercises state power in the field of prosecution and other authorities based on the provisions of the law. As stipulated in the provisions of Article 1 number 1 of Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia (hereinafter abbreviated as the Prosecutor's Office of the Republic of Indonesia) which stipulates that "The Prosecutor's Office of the Republic of Indonesia, hereinafter referred to as the Prosecutor's Office, is a government institution whose function is related to judicial power that exercises state power in the field of prosecution and other authorities based on the Law".

The inconsistency related to the regulation of the position of the Attorney General of the Republic of Indonesia is because in the long history of its establishment in Indonesia, the existing Attorney General's Office, starting from before Indonesia's independence until now, cannot be separated from the history of power in this country. The construction of the Attorney General's Office of the Republic of Indonesia, both as part of the institution of judicial power

(court), an independent state institution, and in its form as a government institution under executive power, is closely related to how a regime wants to position the Attorney General's Office in the existing constitutional system. This can happen because there is no clear basis for the position of the Indonesian Prosecutor's Office in the constitution in Indonesia (Surachman, 2022).

Constitutionally, the 1945 Constitution of the Republic of Indonesia (hereinafter abbreviated as the 1945 Constitution of the Republic of Indonesia) only explicitly regulates the Attorney General's Office of the Republic of Indonesia in the provisions of Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that "Other bodies whose functions are related to judicial power are regulated by law". So far, the law enforcement institution of the Attorney General's Office of the Republic of Indonesia has been positioned, where this condition has negative implications for the foothold of the Attorney General's Office in the Indonesian constitutional system which is considered to cause ambiguity, because on the one hand the Attorney General's Office of the Republic of Indonesia is seen as part of one of the executors of judicial power in the judicial realm, while on the other hand the Attorney General's Office also has duties and authority within the scope of the executive jurisdiction.

In principle, the importance of a constitution in a country, including in Indonesia, shows how necessary it is to regulate the existence of the position of the Attorney General of the Republic of Indonesia in the constitution, in order to ensure legal certainty and strengthen the institution of the Attorney General's Office, so as to ensure the independence and independence of the state institution. This is because in the criminal justice system in Indonesia, philosophically the Indonesian Prosecutor's Office in carrying out its functions has a role as a single prosecutor. The term single prosecutor system was first introduced in 2006 through the Report of the Analysis and Evaluation Team on the Implementation of the Principle of Opportunity in Criminal Procedure Law which was chaired by H. Andi Hamzah at that time (Banulita, 2023).

The Report of the Analysis and Evaluation Team on the Analysis of the Implementation of the Principle of Opportunity in the Criminal Procedure Law states that:

with prosecutorial discretion, it will open up opportunities for prosecutors to catch criminal cases more effectively, before prosecution by suspending prosecution, so that the perpetrator can rehabilitate himself. This was stated by UNAFEI which stated that the benefits of prosecutorial discretion are: 1) It allows effective screening of cases before prosecution; 2) It afford the prosecutions it suspend prosecution in suitable cases thus allowing the accuser himself; 3) It also allows promulgation of criminal policy guidelines at the time. If this authority is distributed to the Public Prosecutor in Indonesia, it will undoubtedly be more guaranteed to create the principle of criminal justice in a fast, simple, and low-cost manner that relies on justice in the legal reform and the era of globalization. The authority in question is in line with the criminal justice system regulated in Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP) and Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia, especially the prosecution is not carried out by the Police, except as intended in Article 205 of the Criminal Code; so that the single prosecution system in Indonesia can be realized in its entirety. As is known, one of the characteristics of the single prosecution system is the discretionary authority of the prosecution, in addition to other characteristics such as: The Prosecutor's Office is independent, the Police do not prosecute, the leadership is not determined based on political considerations and is not under political control (Hamzah, 2010).

Referring to this statement, in principle, in the criminal justice system, the single prosecutor system is absolutely the authority of the Attorney General's Office, where the single

prosecutor system is also in line with the principle of *dominus litis* which has the consequence that the control of prosecution policies in a country must be carried out on the one hand, namely under the control of the Attorney General (Attorney General's Office) as the public prosecutor highest.

Internationally, as stipulated in Article 10 of the United Nations Guidelines on the Role Of Prosecutors adopted at the 8th Crime Congress held in Havana, Cuba on August 27 – September 7, 1990, the institution of the Prosecutor's Office must be expressly separated from the functions of the courts. The position of the Prosecutor's Office which is separate from the Court is clearly important, considering that the Prosecutor's Office in carrying out its prosecution function also plays a negative role in supervising the Court, namely in the event that according to the Prosecutor, the Court Decision has not met the sense of justice or the judge has decided that it is not based on the law, then the Prosecutor can submit legal remedies to a higher court. The checks and balances function carried out by the Prosecutor's Office to the Court certainly cannot be carried out optimally if institutionally, the Prosecutor's Office is under the court.

The urgency or reason for the importance of conducting this research is due to the emergence of various problems caused by the independence of the Indonesian Prosecutor's Office. The structure of the prosecutor's office which is under executive power results in the prosecutor's office being inseparable from the interference of the executive power (government). The independence of the prosecutor's office is needed so that law enforcement is carried out in an honest, fair, independent, responsible, professional and transparent manner that upholds the principles of fair trial and equality before the law. This must be done because the prosecutor's office is a determining factor in criminal law enforcement as an entrance for the prosecution of criminal cases to the court. In addition, the Attorney General's Office as the controller of the case process (*dominus litis*) has a central and strategic position in law enforcement, because only the institution of the Attorney General's Office can determine whether a case can be submitted to the court or not based on valid evidence.

In previous studies, Surachman (2022) highlighted the historical challenges faced by the Attorney General's Office in Indonesia, pointing out the ambiguity in its constitutional position. Ghonu (2015) also explored the importance of the Prosecutor's Office in criminal justice, emphasizing that its independence is crucial for fair law enforcement. Both researchers have pointed out the lack of a clear legal framework for the Attorney General's Office, which has led to persistent issues of interference from external forces, particularly from the executive branch.

The urgency of this study lies in the ongoing issues surrounding the independence of the Attorney General's Office in Indonesia. As the cornerstone of criminal law enforcement, the independence of this institution is vital for ensuring that justice is served impartially. The lack of constitutional recognition and the overlapping roles of the prosecutor's office within both judicial and executive functions have created a complex situation that undermines its ability to act without political interference. Legal certainty, which is essential for the independence of the Prosecutor's Office, must be strengthened to preserve the integrity of the Indonesian criminal justice system.

A significant research gap exists in understanding how the ambiguity in the position of the Prosecutor's Office contributes to its compromised independence. While previous studies have addressed the theoretical aspects of legal certainty and institutional independence, there is a need for an in-depth examination of how constitutional changes could resolve these issues. The current literature lacks a comprehensive comparison of Indonesia's legal framework with other Southeast Asian countries, such as Myanmar and Laos, which have already institutionalized the independence of their Prosecutor's Offices in their constitutions.

The novelty of this study lies in its comparative analysis of Indonesia's situation with Myanmar and Laos, offering a fresh perspective on the potential for constitutional reform in Indonesia. By investigating how other countries have addressed the constitutional position of their Prosecutor's Offices, this study will propose a legal framework for strengthening the independence of the Indonesian Attorney General's Office. The proposal aims to align with international standards for judicial independence and provide a sustainable solution to the current challenges.

The objectives of this study are to critically assess the constitutional uncertainty surrounding the position of the Prosecutor's Office in Indonesia and to explore how constitutional reconstruction could improve its independence. The benefits of this research are multifaceted: it will contribute to the ongoing legal reform efforts in Indonesia, provide a roadmap for constitutional amendments, and ultimately ensure that the Prosecutor's Office can function as an independent institution free from political or executive interference. By enhancing the independence of the Prosecutor's Office, this study will help strengthen the rule of law and the integrity of Indonesia's criminal justice system.

METHOD

Departing from the existence of constitutional uncertainty and ambiguity of regulations in the Prosecutor's Law (conflict of norms) which ultimately results in the unclear position of the prosecutor's office, namely the body related to judicial power (judicial realm) or precisely the power of the government which is subordinate to the power of the President (executive realm), this study uses a type of normative legal research. Normative *legal research* is research that is conducted by examining applicable laws and regulations or applied to a certain legal problem. Normative legal research examines law from an internal perspective with the object of research being legal norms (Diantha, 2017).

RESULTS AND DISCUSSION

The Essence of the Independence of the Prosecutor's Office of the Republic of Indonesia Perspective on Legal Certainty of the Constitutional Position of the Prosecutor's Office in Indonesia

Conceptually, according to Artidjo Alkostar, independence has two meanings, namely institutional/institutional independence and functional independence. Institutional/institutional independence is an independent institution and must be free from intervention by other parties outside the system. Meanwhile, functional independence, namely independence in carrying out its duties and functions. One of the factors that greatly affects independence, both institutional/institutional and functional, is its position in the institutional structure (Alkostar, 2011).

In this context of independence, the independence of an institution in its institutional structure and function is the main thing. The Attorney General's Office of the Republic of Indonesia in the long history of the Indonesian Nation, is still a product of interests, which from time to time the arrangements related to its institutions are still adjusted and cannot be separated from the history of power in this country. This is because since before independence or before the amendment of the 1945 Constitution of the Republic of Indonesia until the amendment to the 1945 Constitution of the Republic of Indonesia, there has been no formulation of norms in the 1945 Constitution of the Republic of Indonesia that formulates the independence of the Attorney General's Office of the Republic of Indonesia, in contrast to the Police and the Judicial Power (court).

The lack of legitimacy should weaken the position and function of the Indonesian Prosecutor's Office as a determining part of the criminal justice system in Indonesia. The independence of the Prosecutor's Office is urgently needed for the sake of law enforcement by

being honest, fair, responsible, and transparent by upholding the principle of fair trial in the principle of *equality before the law*. Thus, this must be carried out because the prosecutor's institution is a determining factor in the sub-system of legal *structure* in criminal law enforcement (Ghonu, 2015). The ambiguity of "positioning" the position and function of the Attorney General's Office both in its part as part of the government (executive) institution and part of the judicial power is wrong, considering that each sub-system in the criminal justice system is an institution that is "independent and independent" in exercising its independence. In line with this, John Mc Kechnie QC, an Australian supreme court judge revealed that in relation to the independence of the prosecutor's office, that:(Koloway, 2023)

The potential for ultimate dismemberment of the office by a government is so obvious it barely needs stating. If a government or a parliament really wishes to destroy a prosecution service, each is capable of doing so. Parliament can abolish courts. Governments can withhold funding. Ministers can decline to reappoint troublesome directors who are therefore not immune from destruction . If the government or parliament really wants to destroy the prosecution service, each is capable of doing so. Parliament can remove the courts. The government can withhold funds. The Minister may refuse to reappoint a problematic director who is therefore not immune from destruction).

John Mc Kechnie's expression above shows that the prosecutor's office is an institution that is prone to intervention from various parties. As an example given, if the executive or the legislature really wants to destroy the prosecutor's office, then it is easy for both institutions to do so. The legislature can play through the formulation of laws, while the executive can play in the administrative area, for example withholding funds or even dismissing the attorney general. The same is true if the Attorney General's Office of the Republic of Indonesia is positioned in its position as part of the Judicial Power, as stated by Yusril Ihza Mahendra, who stated that:

The Prosecutor's Office is indeed related to judicial power, but placing the Prosecutor's Office under the judicial sphere is not entirely appropriate. If we look at the philosophy of criminal law, criminal law is part of public law whose problem is a clash of interests between norm violators and the interests of the general public (Azahry, 2015).

Theoretically, legal experts have long been worried about the interference of political forces in *law enforcement*. Especially for the Indonesian Prosecutor's Office, these legal experts believe that when the law is faced with political power, the law will lose more. This problem occurs a lot in Indonesia, so often law enforcement is helpless when faced with political elites, officials or fellow law enforcers themselves (Thalhah, 2005). In fact, if the official or law enforcer himself violates the law, then the punishment should be heavier, by looking at such conditions, then ideas arise from various parties to include the prosecutor's institution under judicial power so that it can be independent. However, this opinion also still raises various debates.

Understanding independence from the perspective of independence, it is further said that basically independence is divided into 2 (two) aspects, namely; (1) Institutional (institutional) independence; and (2) functional independence. Institutional independence means that the prosecutor's office is in an institutionally independent position, the prosecutor's office is in a place that is institutionally independent and independent from the power of other parties, while functional independence is that the prosecutor is free and independent in carrying out his duties to prosecute or not prosecute. These two bases are very important, both institutional independence and functional independence, because the position of the prosecutor's office in the Indonesian government system is very easy to get the influence of independence and a professional attitude in carrying out the authority and duties of the prosecutor's office, for that

it is necessary to pay attention to the prosecutor's institution in order to create an honest justice that is not intervened by outside parties (Sinulingga, 2016).

The Prosecutor's Office is the *legal representative* of the police because this institution has the authority to provide information and explanations in the form of the results of investigations that have been carried out by the police in court. In addition, the prosecutor's office also has a role to take on the role of a legal consultant (*domestic legal adviser*) who has the authority to provide legal advice or legal opinions to the police regarding law enforcement procedures. Another thing is that the prosecutor's office is also the main party in applying laws and regulations to cases that go through the prosecution process. Whether as a public body that fulfills executive duties or judicial power, this creates a dilemma in the prosecutor's office.

If you look at the function of the Prosecutor's Office in functioning as the Public Prosecutor, then the prosecutor determines whether people can be processed legally or not so that the prosecutor carries out the execution of the punishment for the defendants after a decision from the panel of judges (Yuhdi, 2014). If the prosecutor in terms of prosecuting is not independent, then the verdict handed down by the judge also has implications of not being independent, because the verdict handed down by the judge to the defendant is based on what the prosecutor has indicted the defendant. The judge is not allowed to decide outside of what the prosecutor charged at the trial, ideally it is the actual act that occurred that is charged and the *perbutana* is also proven. It is true that if *the dominus litis* is the one representing the State, the prosecutor is allowed to prosecute only one act, even though the act committed by the defendant is more than one (Rumadan, 2014).

Efforts to strengthen and guarantee the constitutional independence of the prosecutor's office are urgent or urgently needed in Indonesia. This legitimacy should be expressly stated in the constitution and revealed in a relevant law and regulations. So if there are certain parties, especially the executive, who intervene in the implementation of the authority and duties of the prosecutor's office, with this the prosecutor's office has a strong juridical prosecutor's office to refuse. The existence of the prosecutor's office which is only given legitimacy through laws and regulations is not appropriate, it should be remembered that as an institution that has the authority to prosecute, the prosecutor's office should need protection that can maintain the integrity of the prosecutor's office and the independence of the prosecutor's office itself. When compared to other components in the *criminal justice system*, the ones who are given constitutional legitimacy are the Police and the Judiciary (Adji, 2009).

Regarding the independence of the prosecutor's office, Marwan Effendy argued. *First*, the prosecutor's office must be established as an independent and independent legal entity with the task of exercising state power in prosecution and other authorities granted by law. *Second*, the Attorney General should be appointed by the President in his position as head of state based on the approval of the House of Representatives. *Third*, the Prosecutor's Office should account for its duties and authorities in law enforcement to the public, and report it to the House of Representatives. *Fourth*, the Attorney General can be accountable to the President in his position as head of state when representing the state in certain cases both in the realm of public and civil law because by the Attorney General's Law he can become a representative of the state or a public representative in court if given a power of attorney. *Fifth*, the prosecutor's accountability in judicial technicalities will come down to the Supreme Court as "*the last corner stone*" of law enforcement (Effendy, 2005).

Understanding from the point of view of legal certainty, the importance of legitimizing the Attorney General's Office in the constitution should aim to maintain the "independence" of the Attorney General's Office itself. Legal certainty (*rechtssicherheit*) is one of the three basic values in law to achieve the legal goals in principle as stated by Gustav Radbruch. According to Gustav Radbruch, there are 4 (four) basic things that have meaning with legal certainty:

- a. Law is a positive thing which means that positive law is legislation;

- b. The law is based on a fact, meaning that the law is made based on reality;
- c. The facts contained or listed in the law must be formulated in a clear way, so that it will avoid errors in terms of meaning and interpretation and can be easily implemented;
- d. Positive laws cannot be easily changed (Afdhali & Syahuri, 2023).

Referring to his opinion, according to Gustav Radbruch, positive laws that govern human interests in society must always be obeyed even though positive laws are not fair. Certainty in the theory of legal certainty, has the meaning of "provisions, determinations", while if the word certainty is combined with the word law to become legal certainty, it means "the legal apparatus of a country that is able to guarantee the rights and obligations of every citizen" (Indonesia, 2013). The theory of legal certainty according to M. Yahya Harahap has 2 (two) meanings. The two definitions are:

- a. Every citizen knows about what legal acts are allowed and what are not allowed (prohibited).
- b. Every citizen can (feel) obtaining legal security from the arbitrariness of government apparatus as a result of knowing what legal acts are allowed and what are not.

Furthermore, the understanding related to the theory of legal certainty was put forward by Sumardjono, who stated that normatively, legal certainty requires the availability of a set of laws and regulations that operationally and support its implementation (Sumardjono, 1997). Empirically, the existence of laws and regulations needs to be implemented consistently and consequentially by the human resources that support them. In relation to the need for the legitimacy of the Attorney General's Office in the context of the theory of legal certainty, this provides an understanding that in order to ensure the independence of the Attorney General's Office, a set of laws and regulations is needed that operationally and supports its implementation.

In addition to needing strong legitimacy in the constitution, the prosecutor's office must also make changes to the culture of militarism in the prosecutor's own body because it greatly interferes with the independence of justice seekers. Here we see a uniform culture, a way of respect, and a decision-making process, for example in the preparation of a prosecuting plan, all of which depend upwards and in some ways depend on the Attorney General. With such conditions, it is not surprising that there is rarely a successful cadre in the prosecutor's body because from an early age they have been trained to always submit to their superiors. In fact, a good prosecutor should be a prosecutor who is able to act and decide things in an autonomous, free and independent work climate.

According to Nicholas Cowdery, the independence of the prosecutor's office must be manifested in many practical ways and meet several standards as follows:

1. There must be clear laws governing the functions and accountability of the prosecutor's office.
2. There must be a certain term of office for prosecutors, and it should be equated with the term of office of judges. This is to provide protection against arbitrary dismissal.
3. Appropriate resources must be provided to prosecutors to be able to carry out their functions effectively and efficiently.
4. Proper leadership, training and support must be provided to prosecutors so that they are able to achieve and maintain high professional standards.
5. The available general guidelines must be published to the public as a benchmark to provide an assessment of the performance of the prosecutor's office.
6. Politicians and public commentators should learn and respect the rules surrounding the performance of the prosecution function and refrain from giving inappropriate attacks either directly or indirectly.

In this study, the concept of independence in question is the concept of independence of the prosecutor's office in the context of the position of the prosecutor's office as an independent institution not only related to releasing this institution from executive power but also related to how the prosecutor's office can carry out its duties in terms of prosecution in the criminal justice system. The position of the Prosecutor should be an independent institution with a reference *to a pivotal position* in the *criminal justice system*. The prosecutor's job is to prosecute a suspect based on the legal *guilt* that exists in the suspect, the prosecutor is a law enforcement officer who has a *pivotal position*, so that the prosecutor can determine whether a suspect can be detained or continued with prosecution in court or can only be released (Mufrohim & Herawati, 2020). As Weigend points out that:

Now prosecutors do not simply act as an intermediary between the police and the courts, deciding whether or not a case that has been investigated should also be prosecuted. Their powers extend well beyond these core responsibilities. Under certain circumstances, prosecutors may be the sole decision makers to determine whether a criminal sanction will be imposed. They may also determine, or negotiate with the offender, the nature and severity of the sanction be imposed.

Free translation:

Now prosecutors don't just act as intermediaries between the police and the courts, deciding whether or not a case that has been investigated should be prosecuted. Their authority goes far beyond this core responsibility. In certain circumstances, the prosecutor may be the sole decision-maker to determine whether criminal sanctions will be imposed. They can also determine, or negotiate with the perpetrator, the nature and severity of the sanctions to be imposed.

Constitutional Reconstruction of the Position of the Prosecutor's Office of the Republic of Indonesia

The existence of the Indonesian Prosecutor's Office constitutionally in Indonesia is still experiencing "ambiguity". Constitutionally, the position of the Attorney General's Office of the Republic of Indonesia gains its legitimacy as part of the judicial power as stipulated in the provisions of Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which regulates "Other bodies whose functions are related to judicial power are regulated in law." The phrase "other bodies" was then constructed as the legitimacy of the Attorney General's Office of the Republic of Indonesia in the 1945 Constitution of the Republic of Indonesia.

The provisions of Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, are then clarified by the provisions of Article 38 paragraphs (1), (2), and (3) of Law Number 48 of 2009 concerning Judicial Power (hereinafter abbreviated as the Judicial Power Law), which stipulates that in addition to the Supreme Court and judicial bodies under it, as well as the Constitutional Court, there are also "other bodies" whose functions are related to judicial power such as the Police, **The Prosecutor's Office**, and other bodies regulated by law.

The position of the Prosecutor's Office as part of the judicial power is based on the original intention of the formulation of Article 24 of the 1945 Constitution of the Republic of Indonesia, that the formulation of "Other bodies whose functions are related to judicial power are regulated in the law" including the Attorney General in the Supreme Court (as applied in 1945-1959) (Maringka, 2022). In that year, in terms of independence, both judges and prosecutors were under the roof of the justice department. Meanwhile, after 1959, since 1969 the Prosecutor's Office has been independent and has its own body independent of the Department of Justice, but its independence has been lost, this is because the Attorney General is no longer the "Attorney General at the Supreme Court", but a minister or a member of the Cabinet

(assistant to the president) is not a retired at the age of 65, with other provisions that can be replaced at any time by the President.

This lack of clarity of legitimacy further weakens the independence of the Indonesian Prosecutor's Office. In addition, if it is related to the consideration of considering letter a of the Judicial Power Law, the meaning of judicial power based on the law is:

that judicial power according to the Constitution of the Republic of Indonesia of 1945 is an independent power exercised by a Supreme Court and judicial bodies under it in the general judicial environment, the religious justice environment, the military judicial environment, the state administrative judicial environment, and by a Constitutional Court, to conduct the judiciary to uphold law and justice.

Referring to these considerations, it is understood that the prosecutor's institution is not part of the judicial power, but nevertheless this is contrary (contradictory) to the provisions of Article 38 paragraph (2) of the Judicial Power Law which regulates functions related to judicial power, one of which is the prosecution function inherent in the institution of the Prosecutor's Office of the Republic of Indonesia. In principle, it can be stated that the Judicial Power Law only clarifies the function of the Prosecutor's Office as a "prosecution" institution, not its position in terms of institutions or institutions. This understanding is clarified by the definition of the Attorney General's Office as stipulated in the provisions of Article 1 number 1 of the Attorney General's Law of the Republic of Indonesia which explains "The Prosecutor's Office of the Republic of Indonesia, hereinafter referred to as the Prosecutor's Office, is a government institution whose function is related to judicial power that exercises state power in the field of prosecution and other authorities based on the Law".

In line with this understanding, citing an opinion put forward by Saldi Isra who said that "clarity of the position of the prosecutor in the constitution is considered necessary. Given the results of studies on hundreds of other countries' constitutions, where the prosecutor's office is an institution that is strictly regulated by the majority of the country's constitutions, the constitution of Southeast Asian countries is no exception". Meanwhile, it was further stated that "the idea can only be realized by encouraging the fifth amendment to the 1945 Constitution. So, in the future, the prosecutor's office can be used as an institution explicitly mentioned in the Constitution. To realize it is not an easy job, it takes serious effort". The idea conveyed by Saldi Isra is supported by the thoughts put forward by Yos Johan Utama who stated:

The absence of a constitutional guarantee for the position of the Prosecutor's Office makes the position of the Prosecutor's Office subject to change depending on the political configuration at that time. For this reason, the clarity of the position of the Prosecutor's Office in the constitution is felt to be appropriate considering that in addition to affirming the existence and function of the prosecution institution which is permanent, it is also to ensure the independence of the Prosecutor's Office which is independent of political influence in carrying out its duties.

As an effort to reconstruct the independence of the Attorney General's Office of the Republic of Indonesia constitutionally, several legal comparisons were made with other countries that have legitimized the position and function of the Attorney General's Office in their respective countries' constitutions. As well as Myanmar and Laos which have regulated the position of the Prosecutor's Office in their respective countries' constitutions.

Myanmar is one of the countries in Southeast Asia that regulates the position, appointment, and removal of the Attorney General in the Myanmar Constitution, from the first Constitution (independence in 1948) to the last, the Myanmar Constitution of 2008. Under Myanmar's Constitution, the Attorney General is appointed by the President after receiving approval from parliament. The term of office of the Attorney General for 5 (five) years is the same as the term of office of the President. Provisions related to the impeachment of the Attorney General are

also regulated in the Constitution of Myanmar. The Attorney General can be impeached through *the impeachment process*, which mutatis mutandis follows the impeachment process of the President, Vice President, and Ministers.

Meanwhile, in other countries in Southeast Asia, Laos also regulates the role and position of the Attorney General and the Attorney General in the Lao Constitution. The provisions governing the Prosecutor's Office and the Attorney General in the Lao Constitution are regulated in the provisions of Articles 72 to 74.

Article 72	<p>The Prosecutor's Office consists of the Attorney General's Office, provincial, city, and district prosecutor's offices, and military prosecutors' offices.</p> <p>The Prosecutor's Office has the following rights and obligations:</p> <ol style="list-style-type: none">1. To supervise compliance and uniformity of law enforcement by all ministries, organizations attached to the government, social organizations, local governments, companies; civil servants and all citizens.2. To exercise the right of public prosecution.
Article 73	<p>The Attorney General presides over the functions of all Prosecutor's Office institutions in the Lao People's Democratic Republic.</p> <p>The Deputy Attorney General is appointed or dismissed by the Standing Committee of the National Assembly.</p> <p>Provincial prosecutors and provincial, city, and district deputy prosecutors and military prosecutors are appointed or dismissed by the Attorney General.</p>
Article 74	<p>In carrying out its duties, the Prosecutor's Office is only subject to the law and instructions from the Attorney General.</p>

Moving on from the comparison made, the existence of the Attorney General's Office of the Republic of Indonesia is constitutionally very necessary. This is in line with the idea put forward by the Constitutional Commission in 2003 as realized from Decree No. 1/MPR/2002, in which the Constitutional Commission put forward 4 (four) things as considerations to include the institution of the Prosecutor's Office in the constitution, which include:

1. Both the constitutions of countries with *continental law* traditions and the constitutions of countries with *common law* establishments contain provisions regarding the prosecutor as a *public prosecutor*. In Southeast Asia, there are 9 (nine) countries that include the institution of the prosecutor's office in their Constitutions, except Indonesia.
2. Seen from the point of view of the history of the Indonesian constitution, in the colonial era the prosecutor's office was attached to the Supreme Court. (It is quite possible that the Constitutional Commission's intention was that for that era, when a legal instrument mentioned the Supreme Court, the prosecutor's office was also included in it).
3. In the meetings of the Drafting Team and the Coordinating Team, several members of the Constitutional Commission stated the importance of the prosecutor's office being enshrined in the constitution. At the peak, in the Plenary Meeting of the Constitutional Commission, it was unanimously approved to accommodate the proposal in question.
4. Organizational reconciliation and affirmation of the independence of the prosecutor's office are needed to respond to the severe challenges, namely eradicating corruption, collusion, and nepotism. This affirmation is the prosecutor's antidote to external intervention.

Therefore, the Constitutional Commission proposes two main things, namely first, the independence of the prosecutor's function; second, the procedure for the appointment of the Attorney General by the President after receiving approval from the House of Representatives (DPR).

The idea related to the mechanism for appointing the Attorney General as referred to in the proposal of the Constitutional Commission should reflect *checks and balances* and be transparent. This proposal will put the Attorney General in a firm position before the President/Government, this position is indispensable to strengthen his independence, this arrangement is in line with the provisions for the appointment and dismissal of the Attorney General based on the Constitution of Myanmar.

In addition, to strengthen the independence of the Indonesian Attorney General's Office, Bruce Ackerman, an expert in constitutional law who serves as a Professor at Yale Law School, introduced a new theory of separation of powers known as *The New Separation of Powers*, as the title of his work (article) with the same title in 2000.

Bruce Ackerman concludes in his writing, which is based on the development of the constitutional system in the United States which no longer adopts Montesquieu's *trias politica* system, that in the United States the constitutional system has developed there are at least 5 (five) branches of power, including independent state commissions (*independent agencies*). As Bruce Ackerman put it:

The American system contains (at least) five branches: House, Senate, President, Court, and independent agencies such as the Federal Reserve Board. Complexity is compounded by the bewildering institutional dynamics of the American federal system. The crucial question is not complexity, but whether we Americans are separating power for the right reasons.

The American system consists of (at least) five branches: the House of Representatives, the Senate, the President, the Courts, and independent institutions such as the Federal Reserve Board. This complexity is compounded by the confusing institutional dynamics of the American federal system. The crucial question is not complexity, but whether we Americans are separating power for the right reasons).

Functionally, the axes of power from *the theory of the new separation of power* are the legislature (House of Representatives, and the Senate), the executive (President), the judiciary (the Supreme Court, and independent state commissions). Meanwhile, institutionally, the institutions that are included are, the DPR, DPD, the President, the Supreme Court, the Constitutional Court, and independent state commissions such as the KPK, the Ombudsman, and others. In general, independent state institutions, quoting from Zainal Arifin Mochtar state stated the basic characteristics of independent state institutions, including:

- a. The institution that is born and placed does not become part of the existing branch of power, although at the same time it becomes an independent institution that performs tasks that were previously held by the government.
- b. The selection process is through selection and not by *Political appointee* or in a special rule not through a monopoly of one particular branch of power. It can also be left entirely to certain segments of the public to choose their representatives, essentially not involving political power.
- c. The process of selection and dismissal can only be carried out based on the mechanism determined by the rules.
- d. The election process and reporting on its performance are brought closer to the people, either directly or through the people's representatives in parliament.
- e. Leadership is collegial in making every institutional decision related to its duties and functions.
- f. Have more authority *devolutive* that is *Self-regulated* In the sense that it can issue its own rules that also apply in general have a basis of legitimacy in the rules, both the constitution and/or the law.

In principle, independence cannot be interpreted as an institution that is independent of supervision. In the conception of independent state institutions, the accountability system must

be strengthened. The internal supervision mechanism (*self-control*) is strengthened to minimize the need for external supervision. This is because improper external supervision can lead to interventions that will reduce the independence of the state institutions.

CONCLUSION

The nature of the independence of the Prosecutor's Office of the Republic of Indonesia, the perspective of legal certainty of the constitutional position of the Prosecutor's Office in Indonesia is based on an understanding of the importance of the Prosecutor's Office in carrying out its functions in terms of prosecution in the criminal justice system in Indonesia. The independence of the Prosecutor's Office is urgently needed for the sake of law enforcement by being honest, fair, responsible, and transparent by upholding the principle of fair trial in the principle of equality before the law. Thus, this must be carried out because the prosecutor's institution is a determining factor in the sub-system of legal structure in criminal law enforcement.

On the other hand, the constitutional reconstruction of the position of the Attorney General of the Republic of Indonesia should be important, considering that until now the arrangements related to the position of the Attorney General of the Republic of Indonesia have not been implicitly regulated. This has an impact on the independence of the Prosecutor's Office of the Republic of Indonesia which until now is still positioned as part of the judicial power as well as part of the government (executive) institution on the other hand. The constitutional reconstruction of the position of the Attorney General of the Republic of Indonesia can refer to the Constitution of Myanmar and Laos, which in its constitution formulates the regulation of the position, war/function, appointment and removal of the Attorney General in their respective constitutions. This arrangement should be in line with the proposal submitted by the Constitutional Commission which proposes two main things in the "amandemen of the Constitution of the Republic of Indonesia of 1945", namely first, the independence of the prosecutor's office; second, the procedure for the appointment of the Attorney General by the President after receiving approval from the House of Representatives (DPR).

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