



# CONSTITUTIONAL GUARANTEES TOWARDS THE PRINCIPLES OF FREEDOM AND INDEPENDENCE OF THE PROSECUTOR'S OFFICE IN THE EXERCISE OF STATE POWER

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## Abstract

This normative legal research examines the constitutional guarantee of implementing the principle of independence by the Prosecutor's Office of the Republic of Indonesia as an institution implementing state power in law enforcement. A previous study by Kindangen (2021) also discusses the independence of the Prosecutor's Office, but from the perspective of prosecutorial authority. Unlike this previous study, this study examines the independence of the Prosecutor's Office as an implementing agent of state power, particularly from the perspective of *trias politica*. In contrast, the previous study emphasised the Prosecutor's Office. For foreign readers, this study provides a description and reference regarding the position of the Prosecutor's Office of the Republic of Indonesia, which can be used for organising an independent Prosecutor's Office in other countries. The study results show that although the Prosecutor's Office is categorised as an implementing agent of state power in the legal field with the principle of independence, its existence is not explicitly regulated in the Constitution. Ideally, the provision of the principle of independence to the Prosecutor's Office must be balanced with constitutional guarantees so that it is not easily intervened in by any institution, especially the executive or legislative bodies. Therefore, the position of the Prosecutor's Office should also be used as part of the material content of the Constitution.

**Keywords:** Independence; Prosecutor; State Power

## Introduction

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 assert that the Prosecutor's Office is a government institution whose position is to carry out the functions of judicial power in implementing state power in the prosecution process and several other authorities granted by law. This formulation is firmly set out in the regulation in question as a legal basis for the Prosecutor's Office in the context of implementing its authority in the field of law enforcement in the country.

Article 2, paragraph (1) of the regulation also states that the authority of the Prosecutor's

Office is exercised independently. The two provisions highlight two essential matters in the process of law enforcement in the country. First, the Prosecutor's Office is recognised as one of the institutions that exercises state power, particularly in prosecution, and some other authorities are granted under related laws. In this context, that the Prosecutor's Office is an institution authorised to implement state power. As a consequence, the Prosecutor's Office should be in the same position as other state institutions.

Second, the Prosecutor's Office is emphasised as an independent institution in carrying out its authority. In principle, the term "independent" in the context of state institutions' authority is always associated with the institution's independence in implementing its respective authority. The Prosecutor's Office has received legal recognition to carry out its authority independently, free from intervention from any party, including the government.

Such a regulatory pattern implies that there is no room for intervention in every implementation of the Prosecutor's authority. The state, through the regulations formed, has emphasised that the Prosecutor's Office is guaranteed independence in executing every authority for the sake of upholding law and justice in the country.

The Prosecutor's Office, as an institution that holds state power in performing its duties, responsibilities, and authorities, is guaranteed independence and is also accompanied by the principle of independence. The implementation of these two principles aligns with the principles of the rule of law. Moreover, so far, Indonesia has positioned itself as a rule of law according to the mandate of the Constitution.<sup>1</sup>

Therefore, the freedom and independence of law enforcement institutions must be appropriately maintained to erect the pillars of the rule of law and guarantee certainty, justice, and legal benefits. In the legal process, efforts to compromise these three objectives are essential, given that a conflict between individuals is almost inevitable. The implementation of the performance of the Republic of Indonesia Prosecutor's Office is very much linked to public law.<sup>2</sup>

Implementing the two principles in question will enable the Prosecutor's Office to perform its duties and responsibilities in supporting the realisation of the principle of a state of law in the country. The Prosecutor's Office has a very strategic and significant role in the law enforcement process.<sup>3</sup>

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1 Fitria Dewi Navisa, "Kewenangan Dan Penyelesaian Sengketa Peradilan Tata Usaha Negara (Perbanding-an Indonesia Dan Korea Selatan)," *Arena Hukum* 16, no. 3 (2023): 583–608, <https://doi.org/10.21776/ub.arenahukum.2023.01603.7>.

2 Rini Maisari and M Zuhri, "Kedudukan Kejaksaan Dalam Sistem Ketatanegaraan Indonesia Sebagai Lembaga Negara Independen," *Jurnal Ilmiah Mahasiswa Bidang Hukum Kenegaraan* 4, no. 2 (2020): 130–37.

3 Nani Widya Sari, "Kewenangan Kejaksaan Dalam Penegakan Hukum Tindak Pidana Korupsi Dihubungkan Dengan Undang-Undang Nomor 16 Tahun 2004 Tentang Kejaksaan Republik Indonesia 1," *Dinamika Masalah Hukum Dan Keadilan* 4, no. September (2017): 174–92.

Moreover, considering that the development of the role of law in national and state life is increasingly complex, it requires the existence of a law enforcement agency that can perform its duties and responsibilities properly. Law regulates and protects while functioning as a means of social control and social change. This capacity then places law as an integrative tool to achieve the goals of the state towards a more democratic national and state life, and in line with the vigour to realise a state of the law in accordance with what is outlined in the legal basis of the state. Establishing a state of law is a complex matter, as it cannot be achieved immediately and requires a lengthy process to perfect the state.<sup>4</sup> Law becomes an effective means of reaching and realising the ideals of the Indonesian nation as desired by its founding fathers. It is appropriate that the ideals in question can be achieved as expected, so that efforts to realise the life dynamics of a more just Indonesian nation are achieved.

Furthermore, the existence and position of the principle of independence in law enforcement by the Prosecutor's Office is closely associated with the freedom of not submitting to any power in performing its functions<sup>5</sup>, duties, or authorities. The Prosecutor's Office as an institution cannot be intervened in by any power, including the government, in performing its duties. Such independence is vital to ensure that the Prosecutor's Office truly makes the law a reference and basis in conducting every legal process.

The principle of independence for law enforcement institutions is one of the most crucial principles in achieving a state of law. This essence aligns with Montesquieu's view that attaches the principle of independence to the judiciary as a law enforcement institution. He further stated that the principle of independence must be attached to the judiciary to allow the courts to work to protect and uphold individual rights, especially in the context of fighting the interests and pressures of the state and other branches of power. In practice, the judicial power is ultimately united with the legislative power, raising concerns that it may shift its role to become a rule maker or shaper. Based on other considerations, if the judiciary power is united with the executive power, the possibility is that the judiciary's position may shift into an oppressive institution that will ultimately only become a mouthpiece for the interests of the rulers and the state. Such a position is very contrary to the concept of a state of law and is even prone to eliminating the essence of the law itself to realise the pillars of law.

Such concerns eventually led some experts to formulate their views on the importance of the three main branches of state power being in separate scopes from each other. This concept is often termed *trias politica* or the separation of powers. Each state's power is placed separately and does not interfere with another's power. Through the position of separate and independent

4 Gita Santika Ramadhani, "Peran Kejaksaan Mewujudkan Keadilan Restoratif Sebagai Upaya Penanggulangan Kejahatan," *PROGRESIF: Jurnal Hukum* 16, no. 1 (2021): 77–91, <https://doi.org/10.33019/progresif.v16i1.1898>.

5 Jeffrey Bellin, "The Power of Prosecutors," *New York University Law Review* 94, no. 2 (2019): 171–212.

law enforcement institutions, the process of achieving justice in law enforcement is expected to be more optimal.

Of course, it must be admitted that in its development, the concept of separation of powers has shifted towards a system of division of powers, but it should not allow law enforcement agencies to have their authorities mixed up. In other words, law enforcement agencies should ideally remain in a separate scope from the powers of different institutions.

If the concept of division of powers is unavoidable, such a concept is more likely to be only implemented in the other two main branches of power: the executive and legislative. As for the judiciary, it should be placed separately, considering that this institution has an inherent principle of independence in the implementation of every authority it has. In the end, if institutions related to judicial power cannot be placed separately, this has the potential to undermine the principles of independence inherent in the institutions concerned.<sup>6</sup> This is the primary consideration to be used as a reason for maintaining the separation of powers in the context of judicial power.<sup>7</sup>

The Prosecutor's Office, as an institution tasked with carrying out authority related to judicial power, should also receive the same treatment as the judiciary itself. If the Prosecutor's Office is not given space for recognition to be placed separately from other branches of power, it may face obstacles in realising the independence of the implementation of authority.

A fundamental problem that urgently requires study is the constitutional guarantee of the institution's freedom and independence as the executor of state power. The regulation of the institution of the Prosecutor's Office has not been fully accommodated in the state Constitution, including the Constitutional Court and the Supreme Court, as with other institutions which receive constitutional guarantees for the implementation of their authority.<sup>8</sup> To comprehensively answer this matter, it is necessary to delve deeper into how the Prosecutor's Office is regulated according to the 1945 Constitution of the Republic of Indonesia as the legal basis of the state.

Referring to all the provisions contained in the Constitution, not a single article seemingly accommodates the existence of the Prosecutor's Office in real terms. Based on such conditions, the constitutional basis of the Prosecutor's Office institution has so far been obtained through various interpretations.

The dominant interpretation is achieved by examining the article's formulation regarding the regulation of judicial power. Such a formulation will always refer to Article 24, especially

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6 Muh Ridha Hakim, "Tafsir Independensi Kekuasaan Kehakiman Dalam Putusan Mahkamah Konstitusi / Interpretation of Judicial Power Independence in Constitutional Court Decisions," *Jurnal Hukum Dan Peradilan* 7, no. 2 (2018): 279, <https://doi.org/10.25216/jhp.7.2.2018.279-296>.

7 Brian Richardson, "The Imperial Prosecutor?," *American Criminal Law Review* 59, no. 39 (2022): 39–94.

8 Tanto Lailam, "Perbandingan Desain Pengujian Konstitusional Pada Mahkamah Konstitusi Federal Jerman Dan Indonesia," *Arena Hukum* 16, no. 02 (2023): 274–301, <https://doi.org/10.21776/ub.arenahukum.2023.01602.4>.

paragraph (3) of the 1945 Constitution of the Republic of Indonesia. This provision asserts that “Other bodies whose functions are related to judicial power are regulated by law.” This provision is deemed to be a constitutional answer to recognise the existence of the Prosecutor’s Office from the perspective of the country’s legal basis.

This becomes the subject of further study in this research, specifically examining the constitutional guarantee for the implementation of the principles of freedom and independence in the Prosecutor’s Office’s authority. This means that efforts to interpret the Prosecutor’s Office regulations in the Constitution can only be made through a broad interpretation of the provisions in the Constitution because no provisions explicitly regulate the Prosecutor’s Office in the Constitution. This study also aims to gain insight into the guarantee provided by the Constitution for the Prosecutor’s Office, enabling this institution to exercise its authority freely and independently. Based on this perspective, the essence of the Prosecutor’s Office as one of the institutions that performs the task of enforcing the law is expected to play a further role in upholding the law and justice itself, including in the context of eradicating corruption.<sup>9</sup>

This study employed a normative legal research method. The main material in normative legal research was obtained through literature studies. In line with that, this study used several legal materials as references to address the problems in the study. These legal materials comprise primary legal materials, such as statutory laws and regulations, including the 1945 Constitution of the Republic of Indonesia and the Law governing the Prosecutor’s Office of the Republic of Indonesia. Secondary legal materials were also used to supplement the main materials, including reference books, journals, and other relevant legal sources. This research used statutory and conceptual approaches. All the materials were analysed qualitatively to obtain the results that serve as the basis for drawing conclusions and providing research suggestions.

Based on the results of the search for previous studies, it was found that some discuss the independence of the Prosecutor’s Office. One of the most relevant studies is entitled Constitutional Guarantee of the Independence of the Prosecutor’s Office in Exercising Prosecutorial Authority, written by Kindangen.<sup>10</sup> The main similarity between these two studies is that both discuss the independence of the Prosecutor’s Office. However, these two studies also have several differences. First, this study discusses the freedom and independence of the Prosecutor’s Office as an institution implementing state power, especially in the concept of *trias politica*. In contrast, the previous study emphasises the independence of the Prosecutor’s Office as a prosecution institution.

9 Ratna Sari Dewi Polontalo, “Independensi Jaksa Sebagai Penuntut Umum Dalam Tindak Pidana Korupsi Menurut Undang-Undang Nomor 16 Tahun 2004 Tentang Kejaksaan Republik Indonesia,” *Lex Crimen* VII, no. 6 (2018): 35–41.

10 Henry Yoseph Kindangen, “Jaminan Konstitusional Terhadap Kemandirian Kejaksaan Dalam Melaksanakan Kewenangan Penuntutan,” *Masalah-Masalah Hukum* 50, no. 4 (2021): 398–408, <https://doi.org/10.14710/mmh.50.4.2021.398-408>.

Second, this study profoundly examines the principles of freedom and independence inherent in the Prosecutor's Office institution, whereas the previous study focuses more on the scope of the prosecutor's authority. Third, this study is strengthened by a more comprehensive discussion accompanied by a discussion of efforts to maintain the good name of the Prosecutor's Office institution through the implementation of more qualified and integrated performance. In contrast, the previous study does not mention this matter at all as part of their discussion. Based on the explanation above, this research is expected to make a contribution that complements and perfects previous research and adds references in efforts to organise state institutions, especially the institution of the Prosecutor's Office as one of the executors of state power, both for Indonesia and other countries that wish to organise the position of the Prosecutor's Office as one of the state institutions.

## Discussion

### A. General Study on the Principles of Freedom and Independence in Law Enforcement

One of the main principles in the concept of a state of law that is principal in law enforcement is the principle of independence, which also applies to independence in executing the power of law enforcement itself. The principle of independence means that law enforcement agencies carry out their authority without pressure or intervention from any party. The pressure can come from internal or external circles of the institution concerned.

This means that there is no possibility of any interference that could disrupt the law enforcement process.<sup>11</sup> No one should be allowed to put pressure on law enforcement officers to achieve the ultimate goal of the law enforcement process itself.

The law must be the sole source of reference and guideline in the framework for enforcing the law. When law enforcement is hampered by a situation full of pressure, then such a situation is no different from placing the law as a mere formality.

Furthermore, the term independence can be interpreted as the state of being independent and free to manage all the state's affairs, whether external or internal, without control by other countries.<sup>12</sup> In general, a country or institution can be considered independent when it has the freedom to manage and implement all its existing affairs. Free in the sense involves no form of either external or internal intervention. The word independence can be interpreted as a condition of standing alone, independently, or freely, without any ties, pressure, or influence from other parties in determining an action. Theoretically, the characteristics of the independence of a

11 Mukmin Muhammad, "Independensi Yudisial Sebagai Pilar Dari Suatu Negara Hukum," *Meraja Journal* 1, no. 1 (2018): 1–8.

12 Garner, *Black's Law Dictionary*, Seventh Ed (West Group, 1999), 74.

state institution can be seen from several aspects, including the mechanism for dismissing its officials, leadership,<sup>13</sup> and the pattern of accountability inherent in the position concerned.

The independence of the Prosecutor's Office as a law enforcement apparatus<sup>14</sup> has not been properly implemented, as the Prosecutor's Office is highly dependent on the power of the president. This is evident in the mechanism for dismissing the prosecutor as the highest leader and the model of their accountability to the president.

So far, the process of appointing and dismissing the prosecutor has been equated with the mechanism applicable to filling the position of state minister, in which the president holds the full authority in the position assignment.<sup>15</sup> This process shows that the position of the Prosecutor's Office is more or less the same as the position of a state ministry since the position in the state power structure remains under the auspices of the president as the holder of executive power. On that basis, in its development, the Prosecutor's Office has always been identified with executive power, although the tasks and authorities performed intersect with judicial power.

The principle of independence is closely related to the position of the Prosecutor's Office as an impartial institution. Such a position equally treats everyone who deals with and is related to the authority of the Prosecutor's Office according to the applicable legal mechanism. Independence is a key prerequisite for law enforcement institutions, which involves creating a truly fair process that can be upheld in every applicable legal process. All law enforcement institutions, including the Prosecutor's Office, must demonstrate their independence to ensure the legal process runs as it should, thereby fostering the public trust necessary for each institution.

**Nicholas Cowdery** suggested that the principle of independence of the Prosecutor's Office should be formulated and practised in compliance with the following standards:

1. A regulation must be formulated as a law that clearly and firmly regulates the function and position, and is related to the accountability of the Prosecutor's Office institution.
2. A formulation must be found relating to the term of office for the prosecutor by adopting the process of filling the position of judge. This approach leaves no room for arbitrary dismissal by the executive.
3. Resource support must also be provided to prosecutors to ensure proper execution of duties and responsibilities.
4. Various adequate training and preparation must also be provided to prosecutors, allowing them to maintain and realise competent professional performance.

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13 Zainal Arifin Mochtar, *Independent State Institution* (Jakarta: Rajawali Press, 2016).

14 Rudi Pradiseta Sudirdja, Topo Santoso, and Febby Mutiara Nelson, "Independence of the Prosecutor in Conducting Prosecutions Viewed From the United Command Principle," *Journal of Namibian Studies : History Politics Culture* 33, no. March (2023), <https://doi.org/10.59670/jns.v33i.521>.

15 Ferry Ardiansyah and Romli SA, "Independensi Kewenangan Kejaksaan Republik Indonesia," *Hukum Ketatanegaraan* 1, no. 1 (2022): 97–114, <https://doi.org/https://doi.org/10.19109>.

5. A general guideline must be established, which can then serve as a measure of whether the Prosecutor's Office's performance meets standards.
6. Various parties, including political elites, must respect every rule, especially in the context of implementing the Prosecutor's functions, such as prosecution, and maintain accuracy in providing assessments for any actions that contravene the rules.<sup>16</sup>

The independence of state institutions is paramount in fulfilling the needs of the state. The existence of independent state institutions in the constitutional structure of the Republic of Indonesia is inseparable from efforts to achieve what has been stipulated as the state's goals in the Preamble of the 1945 Constitution of the Republic of Indonesia. Objectives to protect all levels of the nation are set out in the Constitution to advance public welfare, educate the nation's life, and encourage participation in implementing a world order based on freedom, eternal peace, and social justice.

The study reveals that the nature of independence that a state institution must possess covers at least two main areas. These include structural independence and functional independence. Structural independence is closely related to institutional independence. This means that the independence of a state institution can be seen further from the existence of the institution, which does not allow the intervention of other institutions, especially in realising justice.<sup>17</sup> In simple terms, the existence of the institution in question, horizontally, is equal to that of other institutions.

The possibility of other institutions intervening in the institution concerned shows that it is impossible to categorise the Prosecutor's Office as an independent institution. The most likely institutional intervention usually comes from the executive body. The Prosecutor's Office has recently handled many corruption cases,<sup>18</sup> where the perpetrators come from executive circles. Discovering more about an institution's independence may also require examining the institutional relationship to the executive body.

Second, functional independence can be explained as independence measured from the perspective of implementing the function of the institution concerned. For instance, from a functional perspective, an institution with authority that welcomes no intervention can be referred to as an independent institution.<sup>19</sup> In this regard, some may view that not being institutionally independent for the Prosecutor's Office should not be an issue as long as there is freedom and independence in its function. This allows the Prosecutor's Office to carry out its

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16 Indriyanto Seno Adji, *Humanisme Dan Pembaruan Penegakan Hukum*, Pertama (Kompas, 2009), 112.

17 Restu Permadi and Fifiana Wisnaeni, "Tinjauan Hukum Kemandirian Dan Independensi Mahkamah Agung Didalam Sistem Ketatanegaraan Indonesia," *Jurnal Pembangunan Hukum Indonesia* 2, no. 3 (2020): 399–415, <https://doi.org/10.14710/jphi.v2i3.399-415>.

18 Slamet Tri Wahyudi and Salsabila, "Peran Kejaksaan Dalam Penyelesaian Perkara Tindak Pidana Korupsi Menggunakan Pendekatan Restorative Justice," *Jurnal Masalah-Masalah Hukum* 51, no. 1 (2022): 61–70.

19 Siradjuddin and Winardi, *Dasar-Dasar Hukum Tata Negara Indonesia*, Edisi Pert (Setara Press, 2015), 191.

duties and responsibilities independently.<sup>20</sup>

Both functional and institutional perspectives are expected to run simultaneously to ensure no obstacles hamper the implementation. An independent institution should be able to account for its independence from both structural and functional perspectives.

Referring to the developments that have occurred so far, other views often examine from the perspective of the duties of independent institutions, so that later classifications are made as regulatory institutions and also institutions that perform advisory functions. It is called a regulatory institution when the function of the institution is to execute the authority to form regulations. At the same time, in the context of an advisory institution, the institution performs the task of providing advice, counsel, and input to the government.

Of course, the advice is usually not fully binding on the agency or institution that is authorised. That is, any follow-up to the advice is returned to the agency that received it.

Based on these views, the principle of independence covers some fairly broad aspects. The scope of independence in law enforcement can be seen from the side of independence in deciding cases, independence related to the term of office and filling of positions, independence from work superiors, and independence in terms of budgeting work institutions. All these aspects serve as the basis and considerations in reviewing the principle of independence of an institution, including state institutions.

Given that the duties performed include the law enforcement environment, no one should try to influence the performance of the Prosecutor's Office for any reason or power. When the Prosecutor's Office is affected by various forms of interests, including the interests of those in power, it spoils the nature of freedom and independence that should be the main principles of the Prosecutor's Office as the implementer of state power in law enforcement. The dignity of the Prosecutor's Office as an institution implementing state power will be greatly determined by how far the institution's ability is in realising the main principles of its institution.

Efforts to maintain the principles of freedom and independence of the Prosecutor's Office are not solely the duties and responsibilities of the institution concerned; they must be guarded and monitored by every element of the nation to guarantee the performance of the institution. All state institutions must also be able to limit themselves from entering and being involved in law enforcement affairs, thereby supporting the principle of the state of law as outlined in the Constitution and fulfilling the expectation of the nation's founders. The affirmation of the independence of the Prosecutor's Office began to be stipulated in the regulations governing the Prosecutor's Office before the enactment of Law Number 11 of 2021. This concern is

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20 Dian Rosita, "Kedudukan Kejaksaan Sebagai Pelaksana Kekuasaan Negara Di Bidang Penuntutan Dalam Struktur Ketatanegaraan Indonesia," *Jurnal Ius Constituendum* 3, no. 1 (2018): 27, <https://doi.org/10.26623/jic.v3i1.862>.

mentioned in Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia. Based on Article 2, paragraph (2) of the Law, the implementation of state power by the Prosecutor's Office is carried out independently. Affirmation of the principle of the independence of the Prosecutor's Office is stipulated in Article 37, paragraph (1), outlining that the prosecution process performed by the Prosecutor's Office must be carried out independently for justice based on law and conscience.

Then, in the Explanation Section of the statutory law above, it is further stated that the renewal of the law on the Prosecutor's Office of the Republic of Indonesia is intended to further strengthen the position and role of the Prosecutor's Office of the Republic of Indonesia as a state government institution that exercises state power in the field of prosecution that must be free from the influence of the power of any party.

In line with that, the Prosecutor's Office, as a government institution that exercises state power in the field of prosecution, exercises that state power independently. Therefore, the prosecutor's office, in carrying out its functions, duties, and authorities, should be without any intervention of the government power or other powers. The following provisions also confirm that the Prosecutor is responsible for the prosecution carried out independently for justice based on law and conscience. Thus, the Prosecutor, as the head of the Prosecutor's Office, should fully formulate and control the direction and policy of handling cases for the success of the prosecution and other authorities, including matters of handling civil cases and state administration.<sup>21</sup>

Regarding the principle of independence for the Prosecutor's Office, there have been efforts to make the Prosecutor's Office an independent legal entity free from intervention in implementing state power in prosecution and other authorities granted by laws and regulations. To enable them, the Prosecutor should be appointed and dismissed by the President in his capacity as the head of state after first obtaining approval from the legislative body. In addition, ideally, the Prosecutor's Office should also be accountable for the implementation of its duties and authorities in law enforcement to the wider community and report its performance to the legislative body.

Moreover, to strengthen independence, the Prosecutor is expected to be responsible for the President in his capacity as the head of state. This will be possible considering the position of the Prosecutor's Office in performing the task of a state prosecutor. As a consequence, the Prosecutor's Office must provide a report to the head of state, where, according to the Indonesian government system, the function of head of state and the function of head of government are

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21 Ismail Koto, "Kewenangan Jaksa Dalam Melakukan Penggabungan Perkara Korupsi Dan Money Laundering (Studi Kejaksaan Tinggi Sumatera Utara)," *Iuris Studia: Jurnal Kajian Hukum* 2, no. 2 (2021): 156–62, <https://doi.org/10.55357/is.v2i2.103>.

held by the President.

This formulation model can be considered for its capacity to establish a free and independent Prosecutor's Office institution in performing its duties and authorities. Such a concept may serve as the best alternative to reformulate the position of the Prosecutor's Office and uphold the principles of freedom and independence in the institution.

Ideally, an institutional relationship is then built with the Supreme Court as one of the judiciary bodies holding judicial power that intersects with the Prosecutor's Office. Then, a pattern of technical judicial relationships can be formed. Such a concept would allow the Prosecutor's Office to position itself as an independent institution and provide a great opportunity to obtain practical justification.

The Prosecutor's Office, as one of the institutions that runs the function of law enforcement, should be equipped with the principles of freedom and independence. However, without the freedom to perform duties independently, the tasks of law enforcement will not optimally function. This condition should serve as a reference to properly realise the independence of the Prosecutor's Office institution in performing its duties.

## **B. Legitimacy of the Principles of Freedom and Independence of the Prosecutor's Office in the Constitution**

As previously emphasised, the formulation regarding the Prosecutor's Office is not found explicitly in the Constitution. Therefore, let alone efforts to strengthen the principles of freedom and independence of the Prosecutor's Office in the Constitution, its institution itself has never been mentioned in any of the articles in the legal basis of the state. Nevertheless, the Prosecutor's Office has become part of a subsystem in the country's law enforcement mechanism.<sup>22</sup>

Such conditions should not have happened. On the other hand, the Prosecutor's Office is one of the institutions that must exist in the law enforcement process, especially in criminal law.<sup>23</sup> Without the Prosecutor's Office, it is impossible for the legal process, especially criminal law, to operate properly. This matter is also set out in some statutory laws, asserting that the Prosecutor's Office is an institution that exercises state power in prosecution and other law enforcement authorities. The spirit of recognising the Prosecutor's Office as a state institution should align with its provisions in the legal basis of the state. So far, it has been common practice that every institution exercising state power ideally obtains constitutional legitimacy. Its institutional position has always been part of the material content of the Constitution. The

22 Abvianto Syaifulloh, "Peran Kejaksaan Dalam Pengembalian Kerugian Keuangan Negara Pada Perkara Tindak Pidana Korupsi," *Indonesian Journal of Criminal Law* 1, no. 1 (2019): 47–64, <https://doi.org/10.31960/ijocl.v1i1.147>.

23 Muhammad Rony, Erna Dewi, and H S Tisnanta, "Prosecution Paradigm in the Indonesian Criminal Justice System," *Russian Law Journal* 11, no. 5 (2023): 3078–85, <https://www.russianlawjournal.org/index.php/journal/article/view/3234>.

same thing also needs to be done to reformulate the Prosecutor's Office in the legal basis of the state.

The only regulatory instrument governing the existence of the principles of freedom and independence attached to the Prosecutor's Office is a statutory law, while it is absent in the Constitution. This regulatory instrument has been implemented so far to position the Prosecutor's Office as one of the institutions that is considered free and independent in performing its duties.

The current condition of the Prosecutor's Office of the Republic of Indonesia, in which its independence is only guaranteed under statutory laws, indicates that such independence may be fragile. This situation leaves room for the executive and legislative powers to easily undermine the power of the Prosecutor's Office through the implementation of the authorities of the two institutions in question. The legislative power can shift its role through the legislative function to alter the formulation of the Prosecutor's Office's position. This is likely to occur if, ultimately, the legislative institution perceives interference from institutional interests in the Prosecutor's Office's performance.

If that happens, then there is a space for the legislature to intervene in the implementation of the Prosecutor's Office's duties and authorities. Moreover, if, for instance, a case handled by the Prosecutor's Office is related to the legislature, it is almost certain that institutional intervention might take place, which will ultimately eliminate the Prosecutor's Office's freedom and independence in practice.

Likewise, with the existence of the executive institution, executive power can move the role through the administrative domain by disrupting the funding system that affects the Prosecutor's budget in performing its duties. In a more extreme case, it can occur when the executive power changes the structure of the highest leadership of the Prosecutor's Office by replacing the position of the Prosecutor with parties who are considered to align with the wishes and desires of the executive. For instance, the president may change the position of the Prosecutor simply because he is considered not to align with the president's desire and expectation. The Prosecutor's Office should be free from intervention and granted the independence of the judicial power.<sup>24</sup>

The history has witnessed that government interests once hampered the performance of the Prosecutor's Office, during the New Order government under the leadership of President Soekarno. Back in 1959, the President dismissed Prosecutor **Soeprapto**. Likewise, Prosecutor Goenawan was also dismissed from his position around 1962 for unknown reasons. In a similar case, President BJ. Habibie once dismissed the Prosecutor, who had only served for a few months. Such dismissals have been strongly linked to the Prosecutor's interests that were

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24 Roni Sulistyanto Luhukay, "Independensi Kekuasaan Kehakiman Pasca Amandemen Undang-Undang Dasar Tahun 1945 Dan Relevansinya Bagi Penegakan Hukum Yang Berkeadilan Di Indonesia," *Jurisprudentie : Jurusan Ilmu Hukum Fakultas Syariah Dan Hukum* 6, no. 1 (2019): 135–54, <http://journal.uin-alauddin.ac.id/index.php/Jurisprudentie/article/view/7973>.

incongruous with the government's political interests. Certain facts, however, have led to various interpretations among the public, as they have been perceived as closely related to the Prosecutor's efforts to follow up on the legal case that implicated the executive circle at that time.

A number of these cases show that concerns about the intervention of executive power when the Prosecutor's Office is placed under the auspices of the institution in question have been proven to be true. Departing from these facts, it is reasonable to question the position of the Prosecutor's Office placed in the domain of executive authority. This condition will certainly ruin the principles of freedom and independence inherent in the Prosecutor's Office institution.

The President, as the holder of executive power, can intervene in the Prosecutor's Office at any time because the law provides space for this, as if it were allowed. Such a condition must be anticipated early on so as not to damage the law enforcement system in the future.

The interference of power and politics will ultimately damage the future order of law enforcement. The practice has shown that when the law is faced with political pressure, the law is likely to always be overwhelmed in dealing with it. The law enforcement process will cause oddities along with various pressures from a number of parties, especially in the name of power and political power. This means that the law will lose its dignity, and the enforcement process will deviate greatly from its initial objective to underpin the pillars of law enforcement. For example, if law enforcers positioned under executive power are considered not in line with the interests of the government, then such a conflict could disrupt the independence of law enforcement.

In addition, freeing the Prosecutor's Office from the possibility of presidential intervention with its executive power will also have a positive impact on the performance and position of the President. So far, when the Prosecutor's Office handles cases involving executive officials and when the legal process concerned is not in line with the expectations of the wider community, accusations of intervention by the President become inevitable. In this case, the President is considered to have intervened in the legal process, rendering it less optimal. However, this is not necessarily always the case.

This means that the opportunity for presidential intervention in law enforcement, as performed by the Prosecutor's Office, also raises suspicions of intervention by the holder of executive power. These suspicions will ultimately erode public trust in law enforcement institutions in the country. The president, with his power, can intervene through the process of changing the leadership of the Prosecutor's Office.

The attachment of the principles of freedom and independence to the Prosecutor's Office is to ensure that the Prosecutor's Office, as a law enforcement institution with its strategic role,

can work in line with the expectations of law enforcement. Institutionally, strategic functions are attached to the Prosecutor's Office institution. On the one hand, the Prosecutor's Office can be categorised as legal counsel for the police institution. It is called so because the Prosecutor's Office is an institution that has the authority to explain the results of investigations conducted by the police during the trial process in court. In addition, the Prosecutor's Office can also function as an advisor or legal consultant for the police through the implementation of the role of law enforcement procedures in handling a case. The Prosecutor's Office should serve as a filter for the investigation process and the case examination process in court.<sup>25</sup>

The Prosecutor's Office plays a key role in prosecuting cases and implementing the law to handle legal matters effectively. These roles place the Prosecutor's Office in a very strategic and central position in the law enforcement process, making it very vulnerable to intervention from various parties.<sup>26</sup>

Based on such considerations, it is very reasonable for the Prosecutor's Office to be placed as a free and independent institution in performing its duties and executing its authorities. Such an independent position is essential to ensure that the Prosecutor's Office enforces the law in compliance with applicable regulations without influences, pressures, and interventions from any party, let alone the interventions from the power of other state institutions.

The Prosecutor's Office, as a state institution, must have its legal standing regulated, and its position in relation to other institutions must be known.<sup>27</sup> Legal treatment between state institutions will ultimately affect the performance of the institution in question. This means that the classification of state institutions based on the legal basis for their formation will also affect the implementation of independence in their institutional tasks.

In practice, the existence of the Prosecutor's Office is within a more conventional bureaucratic scope. The character of the Prosecutor's Office bureaucracy tends to be bureaucratic, centralistic, and hierarchical. This situation will significantly impact efforts to foster independence in performing each task. A hierarchical bureaucracy ultimately struggles to act independently and perform daily tasks and responsibilities. Such conditions pose a challenge in themselves, requiring serious attention to enhance the Prosecutor's Office's future performance.

Based on the current conditions, a hierarchical bureaucracy also tends to find it difficult to make breakthroughs to realise the objectives of the law as outlined to achieve certainty, justice, and legal benefits. This happens because the performance of law enforcement will only

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25 Imman Yusuf Sitingjak, "Peran Kejaksaan Dan Peran Jaksa Penuntut Umum Dalam Penegakan Hukum," *Jurnal Ilmiah Maksitek* 3, no. 3 (2018): 15–27, <http://garuda.ristekbrin.go.id/documents/detail/1599773>.

26 Ook Mufrohim and Ratna Herawati, "Independensi Lembaga Kejaksaan Sebagai Legal Structure Didalam Sistem Peradilan Pidana (Criminal Justice System) Di Indonesia," *Jurnal Pembangunan Hukum Indonesia* 2, no. 3 (2020): 373–86, <https://doi.org/10.14710/jphi.v2i3.373-386>.

27 Isharyanto, *Hukum Kelembagaan Negara*, Edisi Pert (Yogyakarta: Deepublish, 2016), 7.

try to fulfil the previously determined procedural chain. Therefore, the likelihood of realising substantial justice can be very low, since certain conditions or procedures do not allow it to deviate from the established path.

Regardless of the possible problems, the Prosecutor's Office should have strong legitimacy and the strategic role inherent in the institution, as in the judicial institution, which plays an essential role in supporting a country's existence.<sup>28</sup> The legitimacy in question can be very decisive for the realisation of freedom and independence in performing the institution's duties. The Prosecutor's Office needs constitutional protection as the legal basis of the state to avoid various pressures from other institutions. The constitutional legitimacy of the Prosecutor's Office is one of the requirements expected to establish the Prosecutor's Office at the level of an institution that is capable of independently enforcing the law according to the functions it performs.

Of course, when the Prosecutor's Office has been adequately and constitutionally legitimate to realise the principle of freedom and independence in the law enforcement process, all Prosecutor's Office personnel are highly expected to maintain the good name of their institution. This can be done by maintaining performance accordingly. In other words, the protection for the Prosecutor's Office institution under the Constitution should maximise the institution's performance in the future.

However, illicit conduct committed by Prosecutor's Office personnel remains. Bribery practices and various other violations of the code of ethics seem difficult to eradicate from the Prosecutor's Office arena.<sup>29</sup> If this culture remains, an adequate constitutional basis for guaranteeing the freedom and independence of the Prosecutor's Office will not be of maximum benefit in improving the performance of the Prosecutor's Office.

Recently, there have been thoughts and efforts to improve the institutional and implementation of the authority of the Prosecutor's Office. One of the efforts that has been continuously rolled out is building the Prosecutor's Office reform through the integrity zone program. This program aims to raise awareness among all personnel of this institution about participating in efforts to enhance performance and initiate mental reform, ultimately restoring the reputation of the Prosecutor's Office. This means that if the Prosecutor's Office has been given regulatory space in the Constitution, it is highly expected that the institution can maintain this mandate with the ability to maintain the name of the institution.

Of course, completing such steps can be challenging. After all, changing the long-established

28 Sundusiyah Sundusiyah and Erie Hariyanto, "Implementasi Peraturan Mahkamah Agung Tentang E-Court Untuk Mewujudkan Asas Sederhana, Cepat Dan Biaya Ringan Di Pengadilan Agama Pamekasan," *Arena Hukum* 15, no. 3 (2022): 471–98, <https://doi.org/10.21776/ub.arenahukum.2022.01503.2>.

29 Imam Rahmaddani, "Pengawasan Kode Etik Jaksa Oleh Komisi Kejaksaan Guna Terwujudnya Jaksa Yang Profesional Dan Berintegritas," *Journal Presumption of Law* 5, no. 1 (2023): 18–34, <https://doi.org/10.31949/jpl.v5i1.4403>.

culture is never easy. Steps taken to build an integrity zone may face obstacles, as many groups may have been involved in hidden legal violations related to this law enforcement institution.

In addition, a reward system and welfare development efforts for employees within the Prosecutor's Office have also been developed. Such policies are expected to reduce inappropriate attitudes and behaviours that are contrary to the law enforcement objectives. All of these steps should be appreciated and welcomed to accelerate performance reforms, with the hope that public trust in law enforcement institutions can be regained.

The steps to improve integrity are very much in line with the idea of nurturing a civilised legal culture since appropriate conduct determines the success of the establishment of a legal system. Good legal culture aligns with the improvement of other subsystems that encompass legal substance and legal structure. Legal culture is one of the main factors that greatly influences the success or failure of the law enforcement process. Legal culture will be reflected in the behaviour of law enforcement officers.

A guarantee of independence for the Prosecutor's Office under the Constitution is in vain when law enforcers lack integrity.<sup>30</sup> This underlies that building the integrity of law enforcers is paramount. This measure encourages the proper use of authority among law enforcers within the institution.

Finally, it is essential to recognise that there are numerous factors and reasons to continue encouraging the Prosecutor's Office to improve over time. One of the main reasons is the existence of the Prosecutor's Office as a law enforcement agency that is in direct contact with the interests of the community.<sup>31</sup> Moreover, if it is connected with efforts to achieve legal certainty and law enforcement, this is one of the main factors in organising national and state life.

Obtaining constitutional legitimacy that allows the Prosecutor's Office to completely reach the principles of freedom and independence in performing its duties and responsibilities is a crucial aspect to build a better state of law. However, such efforts must also be balanced with improvements in the performance of the Prosecutor's Office as a whole to ensure the realisation of the law enforcement process that supports the ideals of the nation's struggle.

## Conclusion

The Prosecutor's Office has been positioned as an institution authorised to implement state power in the field of law enforcement, with its functions related to judicial power. Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the Prosecutor's

30 Jordan A Sklansky, "The Nature and Function of Prosecutorial Power," *The Journal of Criminal Law & Criminology* 106, no. 3 (2016): 474–520, <https://scholarlycommons.law.northwestern.edu/jclc/vol106/iss3/2>.

31 Rudi Pradiseta Sudirdja, "Pemanfaatan Teknologi Cloud Computing Dalam Reformasi Birokrasi Guna Mewujudkan Kejaksaan Yang Profesional, Komunikatif Dan Akuntabel," *Jurnal Hukum & Pembangunan* 50, no. 4 (2021): 828, <https://doi.org/10.21143/jhp.vol50.no4.2854>.

Office asserts that the Prosecutor's Office is a free and independent institution to implement its authority. However, the Constitution does not guarantee the implementation of the principles of freedom and independence for the Prosecutor's Office. This is because the Prosecutor's Office is not provided with any explicit regulatory space in the legal basis of the state. Such a loophole places the Prosecutor's Office in a position susceptible to intervention by both the legislative body through the process of changing the law governing the Prosecutor's Office and the executive through the process of dismissal and appointment of the Prosecutor by the president or in the form of internal shifts within the scope of the Prosecutor's Office institution.

In this regard, it is necessary to provide stronger legitimacy for the Prosecutor's Office by regulating it in the state Constitution. The position of the Prosecutor's Office urgently needs redesigning, which requires it to be governed under the 1945 Constitution of the Republic of Indonesia, given that the institution concerned exercises state power in the law enforcement process. Through such a regulatory model, it is hoped that the Prosecutor's Office will obtain strong legitimacy to exercise its authority freely and independently without intervention by any institution, especially by the executive and legislative bodies. Providing adequate regulatory space through the Constitution must, of course, also be balanced with the ability of all Prosecutor's Office personnel to maintain the good name of the institution by demonstrating competent performance in the law enforcement process in the country to foster the state of law as mandated by Article 1, paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

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