

## Position of the Attorney General's Office of the Republic of Indonesia in the Indonesian Constitutional System

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**Abstract.** *The purpose of this study is to determine and analyze the Legal Regulation of the Attorney General's Office of the Republic of Indonesia in the Current Indonesian Constitutional System, to determine and analyze the Position of the Attorney General's Office of the Republic of Indonesia in the Indonesian Constitutional System After Law Number 11 of 2021 concerning the Attorney General's Office of the Republic of Indonesia. The research conducted by the author is a research that falls into the category of doctrinal research. The Attorney General's Office of the Republic of Indonesia has a strategic role in law enforcement, both in the criminal, civil, and state administrative fields, with an institutional position under the executive power but its functions are guaranteed to be independent by law. However, its ambiguous position between the executive and the judiciary poses challenges to its independence, especially regarding the potential for political intervention. The authority of the prosecutor's office as regulated in Law of the Republic of Indonesia Number 11 of 2021 concerning the Attorney General's Office of the Republic of Indonesia is divided into criminal, civil and state administrative law as well as the field of public order and welfare. Therefore, many legal experts have proposed reformulating the institutional position of the Prosecutor's Office, such as including it in the judicial power through amendments to the 1945 Constitution, to strengthen the supremacy of law and ensure the implementation of law enforcement that is free from external influence, transparent and fair.*

**Keywords:** Administration; Prosecutor's; Position.

### 1. Introduction

In the 1945 Constitution of the Republic of Indonesia or abbreviated as UUD NRI 1945, Article 1 explains that the Republic of Indonesia is a unitary state in the form

of a republic whose sovereignty lies in the hands of the people and is implemented according to the Constitution which is a state based on law.<sup>1</sup>

In the study of a democratic legal state. The freedom of the pillars of law and the pillars of democracy is very important to be maintained and cared for in such a way. Because the absolute requirement in the principle of upholding the supremacy of law and justice, namely the independence and freedom of the pillars of law and the pillars of democracy. During the New Order. That the function of judicial power is very limited. Because of the political role of the New Order. Making the judicial function and the Indonesian Attorney General's Office not function effectively, not only the judiciary but also the legislature became the target of the political power of the New Order government.<sup>2</sup>

This is the beginning of the crisis of judicial independence of the Supreme Court and other courts. Under Soeharto's New Order, and brought implications of the bad law and law enforcement in Indonesia. Entering the Reformation era through Law No. 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia where the Attorney General's Office is referred to as a government institution that exercises state power in the field of prosecution and other authorities.<sup>3</sup>The Indonesian Attorney General's Office in this era, still carries out its functions as usual. Namely enforcing law and justice, which is engaged in the field of investigators, investigations and prosecutions, therefore, the Indonesian Attorney General's Office according to some experts and professors of constitutional law, is a quasi-judicial institution, because it carries out part of the judicial power function, moreover it is an independent institution.<sup>4</sup>

The development of the changing conditions of the country towards a better direction should be supported. The pioneering of the leaders of this country, coupled with its apparatus, and its people who work hard, honestly and selflessly, is a must. This also applies in the world of justice which is in line with the

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<sup>1</sup>Muhlashin, State of Law, Democracy and Law Enforcement in Indonesia. *Al-Qadau Journal: Islamic Family Law and Justice*, 8(1), 2021, pp. 87-100.

<sup>2</sup>Muhammad Asrun, *The Supreme Court's Judicial Crisis Under Soeharto*, ELSAM (Institute for Community Studies and Advocates), 2004, pp. 234-236.

<sup>3</sup>In the formation of the Indonesian Attorney General's Office, as a law enforcement institution that stands independently (free from any power), but over time and era, it turns out that the prosecutor's office that is said to be independent. Actually, it is not independent in practice. This means that the authority and function of the prosecutor's office are always in conflict with government (executive) policies, so that the perception that arises across people's minds is that the existence of the prosecutor's office in the state system is under the power and authority of the executive organ, not the judiciary or the legislature.

<sup>4</sup>Indeed, the existence of the prosecutor's office in our state system. It is not clear whether the prosecutor's office is suitable for us to orientate to the authority of the state institution's power, namely the legislative, executive, and judiciary, but if we use the perspective of Moh. Mahfud MD's thinking, surely I or someone else will say that the prosecutor's office is an institution in the judicial organ's power cluster, we must weigh that opinion, using other thoughts and opinions, for example Yusril's opinion and so on. These two people have different arguments, one does not agree with that and vice versa. In seeing the existence of the prosecutor's office!

development of the world of crime, so the professionalism of law enforcement officers who are willing to work hard, honestly, and selflessly is the answer to the development of crime.<sup>5</sup>

In the criminal justice system, the role of the prosecutor's office is very central because in Article 77 of the Criminal Procedure Code (KUHP) it states that the prosecutor's office is an institution that determines whether a person should be examined by the court or not. The prosecutor also determines whether a person will be sentenced or not through the quality of the indictment and the demands he makes. The position of the prosecutor is so important for the law enforcement process that this institution must be filled by people who are professional and have high integrity. The existence of the prosecutor's office in Indonesia is regulated in Law Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia. The law states that the authority to exercise state power in the field of prosecution is carried out by the prosecutor's office.<sup>6</sup>

In general, the Criminal Procedure Code (KUHP) does not give the prosecutor's office the authority to conduct investigations, thus Indonesia can be said to be the only country where prosecutors or prosecutors generally do not have the authority to conduct investigations even if they are incidental in nature.<sup>7</sup>This can be seen in Article 1 point 1 of the Criminal Procedure Code (KUHP) which states that "Investigators are police officers of the Republic of Indonesia or certain civil servants who are given special authority by law to conduct investigations". Prosecution is only carried out by public prosecutors in accordance with their authority.<sup>8</sup>

In addition to playing a role in criminal justice, the prosecutor's office also has other roles in the fields of law, civil and state administration, namely representing the state and government in civil and state administration cases. The prosecutor as the executor of this authority is given the authority to act as a public prosecutor and to implement court decisions and other authorities based on statutory provisions.<sup>9</sup>

It is very clear the existence of the prosecutor's office, in the state system, although the prosecutor's office is said to be a law enforcement institution and is

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<sup>5</sup>La Dee. "The Position of the Prosecutor's Office in the Constitutional System of the Republic of Indonesia According to Law No. 16 of 2004 Concerning the Prosecutor's Office of the Republic of Indonesia." *Linear: Journal of Educational Sciences* Vol. 2, No. 1 (2018), p. 18

<sup>6</sup>Rusman Sumadi. "Pretrial as a Means of Control in Protecting the Human Rights (Ham) of Suspects." *Sasana Law Journal*, Vol 7. No. 1 (2021). Pg 76

<sup>7</sup>According to KBBI, Identential is something that happens or is done only on certain occasions or times; not regularly or routinely; at any time.

<sup>8</sup>Andi Hamzah. *Regulator of Indonesian Criminal Procedure Law*. (Jakarta: Ghalia Indonesia, 1990), p. 70.

<sup>9</sup>Ni Kadek Erna Dwi Hapsari, And I. Dewa Gede Dana Sugama. "Mediation Efforts by Prosecutors as State Attorneys in the Settlement of Civil Disputes for Default on State Electricity Payment Arrears." *Kertha Wicara: Journal of Legal Studies* Vol. 8. No. 11 (2019): pp. 1-17.

independent, but on the one hand it is determined based on a presidential decree on the recommendation of the Attorney General, meaning that the method of appointment is through government decrees and regulations, and also its dismissal. This means that the prosecutor's office is a quasi-institution in the executive realm, because the prosecutor's office is a state apparatus, if the prosecutor's office is said to be a state apparatus in that article, it means that it carries out the executive function completely.<sup>10</sup>

Therefore, the background of this problem highlights the need for further study regarding the position of the Attorney General's Office of the Republic of Indonesia in the Indonesian constitutional system after the enactment of Law Number 11 of 2021. This position is needed to ensure that the Attorney General's Office of the Republic of Indonesia can carry out its duties effectively, independently, and in accordance with the principles of democracy and the supremacy of law in order to maintain justice in Indonesia.

## **2. Research methods**

The research conducted by the author is a research that falls into the category of doctrinal research or in Indonesia is often referred to as a normative research method. Doctrinal legal research is research on laws that are developed and conceptualized on the basis of the doctrine adopted by the conceptualizer and/or developer.<sup>11</sup> The data analysis used in this study is a qualitative analysis, namely data that has been obtained from field studies and literature studies will be collected and grouped systematically according to the facts and characteristics of the objects being studied precisely and then analyzed qualitatively with the aim of obtaining a conclusion from the research problem.<sup>12</sup>

## **3. Results and Discussion**

### **3.1. Legal Regulation of the Attorney General's Office of the Republic of Indonesia in the Current Indonesian Constitutional System**

The state as an organization of power has the authority to impose its will on its citizens. The imposition of this will has the aim of ensuring order and security in living together in an organization of power. Article 1 paragraph (3) of the 1945 Constitution emphasizes that the Indonesian state is a state of law, meaning that all aspects of national, social and state life are based on law.

The statement of the rule of law was then marked by the existence of a Judicial institution tasked with enforcing the rule of law. Although the position of the Prosecutor's Office in the Indonesian state system is not specifically mentioned in

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<sup>10</sup>Al. Amin, Amiruddin, Andi Arfan Sahabuddin, Legal Analysis of the Position of the Prosecutor's Office in the Constitutional System of the Republic of Indonesia 1945, Civil Law Journal Execution Study, Vol 1 Issue 2, 2024, pp 1-16

<sup>11</sup> Soetandyo Wignjosoebroto, Varieties of Legal Research, in Sulistyowati Irianto and Shidarta, ed., 2013, Legal Research Methods: Constellation and Reflection, Second Printing of Yayasan Pustaka Obor, Jakarta, pp. 121-141.

<sup>12</sup>Sudarwan Denim, Becoming a Qualitative Researcher, Pustaka Setia, Bandung, 2012, p. 62.

the amended 1945 Constitution,<sup>13</sup> However, the Prosecutor's Office remains important because the Prosecutor's Office is an institution that exists in every state system in any country in the world, thus the Indonesian Prosecutor's Office cannot be set aside in its position and role in law enforcement in Indonesia, and de facto has taken its role since the proclamation of independence outside the Ministry of Justice, and then on June 30, 1961, Law Number 15 of 1961 concerning the Main Provisions of the Prosecutor's Office of the Republic of Indonesia was issued. In its journey, the Law has undergone several changes, namely Law Number 5 of 1991 concerning the Prosecutor's Office of the Republic of Indonesia, which was then replaced by Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia, then replaced by Law Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia.

The position of the Prosecutor's Office in the Constitution of the Republic of Indonesia today (after the amendment to the 1945 Constitution) according to Law Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia is part of the Civil Criminal and State Administrative Justice system. While de jure the existence of the prosecutor's office since Indonesia's independence in 1945 has been protected by laws and regulations. One of the important things written in the amended 1945 Constitution is the statement of Indonesia as a state of law as stated in Chapter 1 and Sovereignty, Article 1 paragraph (3). Indonesia as a state of law (*rechstaat*) not as a state based on power (*machstaat*) gives rise to logical consequences for the application of the basic principles of the state of law both from the basis of conventions agreed upon by constitutional experts in Indonesia and abroad, including theories of the state of law that have been recognized. The regulation of Indonesia as a state of law can be seen from the ideal and factual levels, namely how Indonesian constitutional laws should be in accordance with the principles of a state of law in regulating national and state life from a legal aspect. In the body of the 1945 Constitution, legal issues are only listed in Chapter IX on Judicial Power, namely in Articles 24 and 25.

The Prosecutor's Office is the Public Prosecutor in criminal cases representing the State and society. On the other hand, the Prosecutor's Office is the main party in representing the State in court and carrying out its obligations to implement legal regulations. The position and role of the Prosecutor's Office of the Republic of Indonesia as a State Institution that exercises State power through law enforcement, especially in the field of Prosecution, is expected to play a greater role in upholding the supremacy of law, protecting public interests, and enforcing human rights. However, in practice, social interactions based on legal relations often cause disputes, both in terms of Criminal Law, Civil Law and State Administrative Law, so since 1991 the Prosecutor's Office has been given additional duties and authorities, namely in the field of Civil and State

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<sup>13</sup>Muhammad Salam Madkur, *Justice in Islam*, translated by Imron AM, Surabaya: PT. Bina Ilmu, 1993, p. 31.

Administrative Law, namely to act on behalf of and represent the State or government both outside and inside the court.

If it occurs within the scope of Criminal Law, then it is appropriate that the role of the Prosecutor's Office in handling the problem should be regulated in Law Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia. Article 2 paragraph (1) of Law Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia states that: "The Prosecutor's Office of the Republic of Indonesia, hereinafter referred to in this Law as the Prosecutor's Office, is a government institution that exercises state power in the field of prosecution and other authorities based on the Law."

The Prosecutor's Office, according to Article 30 paragraphs (1), (2), and (3), has duties and authority in the Criminal field (including carrying out prosecutions), Civil and State Administrative fields (can represent the Government in State Administrative Courts), as well as duties and authority for public order and security.<sup>14</sup>

At the beginning of its formation, all prosecutorial institutions, both in the eastern and western parts of the world, were not independent. This means that a prosecutor who was responsible for the prosecution at that time was not free from the influence of the powers around him, especially the power of the king/ruler who entrusted him with the task. In other words, it can be agreed that initially the prosecutorial institution was indeed born from the womb of the king's power (executive).<sup>21</sup> Now that countries have developed into modern legal states, the question of where the prosecutorial institution should be located cannot be answered convincingly. The constitutional practice of democratic countries in the world also cannot answer this question completely, in fact, it makes the answer even more vague. When we have the position of the prosecutorial institution in various parts of the world, we are increasingly confused because there is no uniform unity of practice. It turns out that the institution is under the executive, legislative and judiciary.

The position of the Prosecutor's Office in the executive realm has given rise to much debate, whether the Prosecutor's Office as a law enforcement institution that should be in the judicial realm but in practice is placed in the executive realm is in accordance with the perspective of constitutional law or not. Looking at Article 24 paragraph (3) of the 1945 Constitution, it is stated that "Other bodies whose functions are related to judicial power are regulated by law". Based on this article, many parties are of the opinion that the Prosecutor's Office is one of the bodies whose functions are related to judicial power, so many assume that the Prosecutor's Office should be in the judicial realm and the position of the Prosecutor's Office should be free from executive influence. The provisions of Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia are

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Ghonu, I, Independence of the Prosecutor's Office in the Criminal Justice System in Indonesia. *Justitia*, Vol.31, (No.2), 2015. Page 21

further strengthened in Article 38 paragraph (1) of Law of the Republic of Indonesia Number 48 of 2009 that what is meant by "other bodies" include the Police, Prosecutor's Office, Advocates and Correctional Institutions. In addition, if we look at the provisions of Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, it does not state that "other bodies" must be included in the judicial domain, but only states that the provisions of these bodies are regulated in the Law. Meanwhile, in the law regulating the Prosecutor's Office, it is emphasized that the Prosecutor's Office of the Republic of Indonesia is a government institution that exercises state power in the field of prosecution and other authorities based on the law.

Harkriastuti Harkrisnowo said that the prosecutor's office must be independent, Harkristuti did not mention the independence of the Attorney General. In her opinion, the Prosecutor's Office as a law enforcement tool must be firmly reformulated in the 1945 Constitution and its organic laws for the independence of the Prosecutor's Office.<sup>15</sup> Realizing that the power of prosecution is part of the judicial power, the definition of judicial power outlined in the 1945 Constitution amendment becomes very necessary to be reviewed. Judicial power in the field of criminal law enforcement is in fact in an integrated criminal law enforcement system. This integration mutually influences and controls each other against institutions in the criminal law enforcement system. Therefore, it is necessary to place the investigative power, the prosecutorial power in the chapter on Judicial Power in the 1945 Constitution if in the future there will be a fifth amendment.

### **3.2. Position of the Attorney General's Office of the Republic of Indonesia in the Indonesian Constitutional System After the Enactment of Law Number 11 of 2021 concerning the Attorney General's Office of the Republic of Indonesia**

In the Indonesian constitutional system, law as a system can play a good and proper role in society if its implementing instruments are equipped with authorities in the field of law enforcement, one of which is the prosecutor's office or public prosecutor. The prosecutor's office itself is actually one of the constitutionally important institutions because this institution is the only one that has duties and authorities in the field of prosecution (*dominus litis*) which acts as a law enforcer and the only institution that implements criminal decisions (*executive ambtenaar*) in the judicial jurisdiction.<sup>16</sup>

Based on the 1945 Constitution, the Prosecutor's Office is under executive power. However, the position of the Prosecutor's Office as a law enforcement institution

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<sup>15</sup>Harkristuti Harkrisnowo, *The Attorney General's Office in the Institutional System* (Surabaya: Pustaka Kartini 2007), p. 7

<sup>16</sup>Brando Aiba, *Position and Independence of the Prosecutor's Office in the Constitutional System of the Republic of Indonesia*, *Lex Administratum*, Vol. IX, No. 2, 2021, pp. 210-220

that exercises judicial power raises questions about its independence.<sup>17</sup> Various changes in the state system in Indonesia certainly resulted in various developments within the body of the Prosecutor's Office. Starting at the beginning of independence, which placed the position of the Prosecutor's Office under the coordination line of the Department of Justice and the issuance of the Prosecutor's Law which stated that the Prosecutor's Office is a state law enforcement tool and a revolutionary tool that has the task of being a public prosecutor.<sup>18</sup>

The Prosecutor's Office is the Public Prosecutor in criminal cases representing the State and society. On the other hand, the Prosecutor's Office is the main party in representing the State in court and carrying out its obligations to implement legal regulations. The position and role of the Prosecutor's Office of the Republic of Indonesia as a State Institution that exercises State power through law enforcement, especially in the field of Prosecution, is expected to play a greater role in upholding the supremacy of law, protecting public interests, and enforcing human rights. However, in practice, social interactions based on legal relations often cause disputes, both in terms of Criminal Law, Civil Law and State Administrative Law, so since 1991 the Prosecutor's Office has been given additional duties and authorities, namely in the fields of Civil and State Administrative Law, namely to act on behalf of and represent the State or government both outside and inside the court.

The position of the Prosecutor's Office in the executive realm has given rise to much debate, whether the Prosecutor's Office as a law enforcement institution that should be in the judicial realm but in practice is placed in the executive realm is in accordance with the perspective of constitutional law or not. Looking at Article 24 paragraph (3) of the 1945 Constitution, it is stated that "Other bodies whose functions are related to judicial power are regulated by law". Based on this article, many parties are of the opinion that the Prosecutor's Office is one of the bodies whose functions are related to judicial power, so many assume that the Prosecutor's Office should be in the judicial realm and the position of the Prosecutor's Office should be free from executive influence. The provisions of Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia are further strengthened in Article 38 paragraph (1) of Law of the Republic of Indonesia Number 48 of 2009 that what is meant by "other bodies" include the Police, Prosecutor's Office, Advocates and Correctional Institutions. In addition, if we look at the provisions of Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, it does not state that "other bodies" must be included in the judicial realm, but only states that the provisions of these bodies are regulated in the Law. Meanwhile, in the law regulating the Prosecutor's Office, it

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<sup>17</sup>Dalihan Na Tolu. *The Position of the Prosecutor's Office in the State Administration from the Perspective of Constitutional Law*, STAIN Bengkalis, Bengkalis, 2023, p.72.

<sup>18</sup>Adjudication. *Dynamics of the Legal Position of Prosecutors as State Attorneys After the Amendment to the Prosecutor's Law*, Singaperbangsa University, Karawang. Karawang, 2022. p.127



is emphasized that the Prosecutor's Office of the Republic of Indonesia is a government institution that exercises state power in the field of prosecution and other authorities based on the law.<sup>19</sup>

The existence of the Prosecutor's Office continues to experience development and dynamics gradually and gradually over time and renewal of the government system. The existence of the Prosecutor's Office as one of the institutions in law enforcement is required to be independent and self-sufficient. This means that this law enforcement institution must be free from intervention from outside parties. The independence and self-reliance are intended so that the law enforcement process for the sake of law enforcement itself can be carried out fairly, honestly, and transparently and is able to present the true objectives of the law. The Prosecutor's Office is required to uphold the principles of law enforcement, namely the principle of the presumption of innocence (fair trial) in the principle that considers equal before the law (equality before the law).<sup>20</sup>

The Prosecutor's Office is a tool for law enforcement, protection and community protection which has an obligation to ensure compliance with legal regulations in Indonesia.<sup>21</sup> Meanwhile, the Prosecutor has duties, functions and authorities based on the law. Law enforcement is a way to realize ideas about the purpose of the law, namely justice, legal certainty and social benefits into reality. Law enforcement carried out by the Prosecutor's Office is not only related to criminal law, but also includes civil and state administration.<sup>22</sup>

The position and role of the Attorney General's Office of the Republic of Indonesia as a State Institution that exercises state power through law enforcement, especially in the field of Prosecution, is expected to play a greater role in upholding the supremacy of law, protecting public interests, and enforcing human rights. However, in practice, social interactions based on legal relations often give rise to disputes, both in terms of Criminal Law, Civil Law and State Administrative Law, so since 1991 the Attorney General's Office has been given additional duties and authorities, namely in the field of Civil and State Administrative Law, namely to act on behalf of and represent the State or government both outside and inside the courts.<sup>23</sup>

#### **4. Conclusion**

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<sup>19</sup>Marwan Effendy, *Indonesian Attorney General's Office: Position and Function from a Legal Perspective*, Putra Tunggal, Surabaya, 2007, p. 7

<sup>20</sup>Ismail Ghonu, *Independence of the Prosecutor's Office in the Criminal Justice System in Indonesia*, *Justitia Et Pax Jurnal Hukum*, Vol. 31, No. 2, 2015, p. 12

<sup>21</sup>Ook Mufrohimi and Ratna Herawati, *Independence of the Prosecutor's Office as a Legal Structure in the Criminal Justice System in Indonesia*, *Indonesian Legal Development Journal*, Vol. 2, No. 3, 2020, p. 382.

<sup>22</sup>Satjipto Rahardjo, 1987. *Problems of Law Enforcement*, Sinar Baru, Bandung, p. 43

<sup>23</sup>Nia Gabriella Kaihena (et. al.), *Position and Function of the Prosecutor's Office in the State System in Indonesia*, *Lex Administratum*, Vol. 11, No. 2, 2023, pp. 1-10

The Attorney General's Office of the Republic of Indonesia has a strategic role in the state system as a government institution that exercises state power in the field of prosecution as well as civil law and state administration. Although institutionally it is under the executive branch, in its function as a public prosecutor, the Attorney General's Office has a guarantee of independence based on Article 2 paragraph (2) of Law No. 11 of 2021, which emphasizes that the implementation of prosecution must be free from external influences, including the government. However, this position creates a contradiction with the law enforcement function which is ideally in the judicial branch. Various academic views suggest repositioning the institution of the Attorney General's Office to increase its independence, including the possibility of including the Attorney General's Office in the judicial power through an amendment to the 1945 Constitution. This aims to strengthen the supremacy of law and ensure the integrity of law enforcement that is free from political intervention or executive interests. The Attorney General's Office of the Republic of Indonesia has a strategic position as a state institution that exercises power in the field of prosecution and law enforcement, both criminal, civil, and state administration. Although institutionally it is under the executive branch, the prosecutor's function of prosecution is regulated to remain independent in accordance with the principle of fair and intervention-free law enforcement. However, the ambiguous position of the prosecutor's office as a government institution but closely related to the judicial power poses challenges in maintaining independence, especially in the context of political intervention. Various views of legal experts suggest the need for reformulation of the position of the prosecutor's office to be more in line with the principles of the rule of law, for example by placing it under the judicial power to ensure its independence. Therefore, further regulations, including the possibility of amending the 1945 Constitution, are needed to strengthen the institutional position of the prosecutor's office as a pillar of independent and effective law enforcement.

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