

## Regulating Prosecutorial Independence and Impartiality in The Indonesian Criminal Justice System

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### Article Process Abstract

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This article examines prosecutorial independence in Indonesia by analyzing three key aspects: the status of prosecutors as civil servants, the constitutional position of the Prosecution Service, and the role of prosecutors in the criminal justice system. It applies an interdisciplinary legal research method by reviewing laws, regulations, and relevant theories. Understanding these aspects helps assess whether the current legal framework adequately protects prosecutors from external influence and recognizes them as independent legal actors, similar to magistrates in other jurisdictions. Prosecutorial independence and impartiality ensure fairness in the criminal justice system. In Indonesia, prosecutors work as civil servants, similar to those in many inquisitorial systems. However, the law does not clearly define their role as magistrates with judicial authority. This legal uncertainty makes them vulnerable to political and hierarchical pressure, which can influence their decisions. A strong legal framework must protect prosecutors from external interference and allow them to act independently, as magistrates do in other systems. The findings highlight a critical issue: the law classifies prosecutors as civil servants but does not formally recognize them as independent legal actors. This gap allows political leaders, superiors, and other parties to interfere in prosecutorial decisions. Without strong legal protection, prosecutors struggle to maintain impartiality. This article argues that lawmakers must formally recognize prosecutors as independent legal actors, similar to magistrates. Legal reforms should strengthen prosecutorial independence and prevent undue influence. A clear legal framework will protect prosecutors, enhance public trust, and uphold justice in Indonesia.

**Keywords:** prosecutorial independence, impartiality, prosecutorial staffing, criminal justice system, Indonesia legal reform

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### I. Introduction

As one of the pillars of the rule of law, the Prosecution Service has two main functions that must be balanced, namely maintaining security and public order through crime control and

ensuring the protection of human rights (due process).<sup>1</sup> Therefore, it is reasonable that the “Guidelines on the Role of Prosecutors,” adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from August 27th to September 7th, 1990, clearly state how governments should position and regulate prosecutors, where:

1. shall ensure that: (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned (Section 2,b);
2. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures (Section 7).
3. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status. (Section 9).

In general, the Guidelines on the Role of Prosecutors mandate several measures to guarantee the independence of prosecutors. First, the government must ensure that the criteria for the selection of prosecutors protect candidates from unfair recruitment practices resulting from partiality or unfounded suspicions arising from discrimination based on race, colour, gender, language, religion, political beliefs, or opinions contrary to those of the government. Second, the promotion system for prosecutors must be based on objective factors, specific qualifications, ability, integrity, and experience, which are determined and decided through fair and impartial procedures. Third, prosecutors must be free to form and join professional associations or other organisations to express their interests, promote professional training, and protect their status.

Furthermore, upon closer examination, the urgency for the state to guarantee the independence and impartiality of law enforcement officials, including prosecutors, can also be found in Articles 6 and 36 of the United Nations Convention against Corruption (UNCAC), which has been ratified by the Indonesian government through Law of the Republic of Indonesia Number 7 of 2006 concerning the Ratification of the United Nations Convention Against Corruption, 2003. It is clearly stated that: (1) Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as: a. Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies; Increasing and disseminating knowledge about the prevention of corruption; (2) Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided; (3) Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption; (4) Specialized authorities Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should

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<sup>1</sup> Fachrizal Afandi, *Maintaining Order: Public Prosecutors in Post-Authoritarian Countries, the Case of Indonesia*, (Universiteit Leiden, 2021) 10.

have the appropriate training and resources to carry out their tasks. Both of these international provisions explicitly underline the importance of the government ensuring the independence and impartiality of law enforcement officials in order to guarantee fair prosecution processes and judicial decisions.

Several previous studies have examined the importance of prosecutorial independence and its impact on legal certainty and due process. Voigt and Wulf analyze the institutional determinants of prosecutorial independence, emphasizing the role of press freedom, parliamentary immunity, and legal traditions in shaping prosecutorial autonomy.<sup>2</sup> Castberg provides a detailed account of prosecutorial independence in Japan, highlighting the balance between discretion and accountability within the country's legal framework.<sup>3</sup> Toole explores the tension between prosecutorial independence and accountability in Australia, arguing that an imbalance between the two threatens the rule of law.<sup>4</sup> Michel examines the role of prosecutorial independence in domestic human rights trials, emphasizing the need for strong accountability mechanisms to prevent abuse of power.<sup>5</sup> Lastly, Lundberg comments on the relationship between prosecutorial independence and government accountability, adding to the discourse on how prosecutors navigate their roles within different legal and political contexts.<sup>6</sup> These studies collectively underscore the significance of prosecutorial independence in ensuring justice, maintaining legal integrity, and preventing undue political interference.

In the context of Indonesia, as explained above, the government must strengthen prosecutorial institutions, including those handling corruption cases. As mentioned in several regulations, there are three institutions in Indonesia that handle corruption cases, such as the Corruption Eradication Commission, the Police, and the Prosecutor's Office. Therefore, with the ratification of the United Nations Convention against Corruption (UNCAC), the government should provide these three institutions with the necessary independence and ensure their independence to enable them to perform their functions effectively and free from political influence.<sup>7</sup> Additionally, every employee of these three institutions should receive specialised training and possess the capabilities to carry out their duties.

The guarantee of prosecutorial independence in Indonesia can broadly be observed in Article 24 paragraph (3) of the Constitution of the Republic of Indonesia of 1945 (hereinafter referred to as the 1945 Indonesian Constitution) and Law of the Republic of Indonesia Number 16 of 2004 concerning the Prosecution Service of the Republic of Indonesia (hereinafter referred to as the 2004 Indonesian Prosecution Service Law), along with several of its derivative regulations. Furthermore, in 2021, the House of Representatives initiated revisions to several provisions related to the duties and authorities of the Prosecution Service and prosecutors in the 2004 Indonesian Prosecution Service Law.<sup>8</sup> This effort aimed to strengthen the professionalism and performance of prosecutors in handling criminal cases and other mandated tasks under the law. Subsequently, this initiative led to the enactment of Law of the Republic of Indonesia Number 11 of 2021 concerning amendments to Law of the Republic of Indonesia Number 16 of

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<sup>2</sup> Voigt, S., & Wulf, A. J. (2019). What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence. *Journal of Institutional Economics*, 15(1), 99-120. <https://doi.org/10.1017/S1744137417000212>

<sup>3</sup> Castberg, A. D. (1997). Prosecutorial Independence in Japan. *UCLA Pacific Basin Law Journal*, 16(1), 38-87. <https://doi.org/10.5070/P8161022109>

<sup>4</sup> Toole, K. (2024). *Prosecuting crime in the public interest: how tension between independence and accountability threatens the rule of law in Australia* (First edition.). Hart Publishing. <https://doi.org/10.5040/9781509973231>

<sup>5</sup> Michel, V. (2017). The role of prosecutorial independence and prosecutorial accountability in domestic human rights trials. *Journal of Human Rights*, 16(2), 193-219. <https://doi.org/10.1080/14754835.2015.1113864>

<sup>6</sup> Lundberg, A. (2019). Comment on "The Independence of Prosecutors and Government Accountability." *Supreme Court Economic Review*, 27(1), 21-24. <https://doi.org/10.1086/705362>

<sup>7</sup> Ook Mufrohim dan Ratna Herawati, "Independensi Lembaga Kejaksaan sebagai Legal Structure di dalam Sistem Peradilan Pidana (Criminal Justice System) di Indonesia", *Jurnal Pembangunan Hukum Indonesia*, No. 2 (2020): 373-374.

<sup>8</sup> Eko/es, Pembahasan RUU Kejaksaan Siap Terima Masukan dari Masyarakat, dikutip dari laman: <https://www.dpr.go.id/berita/detail/id/32622/t/Pembahasan+RUU+Kejaksaan+Siap+Terima+Masukan+dari+Masyarakat>; accessed on 7 September 2022.

2014 concerning the Prosecution Service of the Republic of Indonesia (hereinafter referred to as the 2021 Indonesian Prosecution Service Law).

One of the interesting aspects of the 2021 Indonesian Prosecution Service Law is its emphasis on the role of the Prosecutor's Office. The Prosecution Service is no longer merely a government institution, as stipulated in Article 2 paragraph (1) of the 2004 Indonesian Prosecution Service Law. Instead, as clarified in Article 1 of the 2021 Indonesian Prosecution Service Law, the Prosecution Service is a government institution whose functions are related to judicial power, executing state authority in the field of prosecution. This assertion about the position of the Prosecution Service as part of the judicial power is also articulated in Article 2 paragraph (1), which states: *"The Prosecutor's Office, in performing its functions related to judicial power, shall act independently."*

The 2021 Indonesian Prosecution Service Law also reformulates the staffing of prosecutors, as can be seen in Article 1 point 2: *"The prosecutor is a civil servant with a functional position that has specialties and carries out its duties, functions, and authorities based on the law."* This regulation indicates that prosecutors are no longer merely civil servants like those in other government institutions but also possess specialties that must be accommodated in the regulations concerning the staffing of prosecutors. According to Article 7A paragraph (2) of the 2021 Indonesian Prosecution Service Law, these regulations will be established through a government regulation.

Based on the above description, this article examines and analyses the regulations on prosecutorial staffing in the 2021 Indonesian Prosecution Service Law in order to guarantee the independence and impartiality of prosecution within the Indonesian criminal justice system. There are two main focuses of this study: first, the urgency of regulating the specificities of prosecutorial staffing, and second, the reformulation of these specificities in order to guarantee the independence and impartiality of prosecution within the Indonesian criminal justice system.

This research was carried out using an interdisciplinary legal research method, involving a critical and in-depth examination of legal doctrines and relevant laws and regulations. One of the approaches includes comparing the 2004 Indonesian Prosecution Service Law with its amendment, the 2021 Indonesian Prosecution Service Law, along with its derivative regulations at the level of Government Regulations, Presidential Regulations, and Prosecutorial Regulations. Initially, a doctrinal approach is used by the researchers to address the issues under investigation through several approaches, such as the statutory approach and the comparative approach. Subsequently, the analysis of the data obtained will not only be conducted through a legal approach but will also be linked with approaches from the administrative and political sciences.

This article contributes to the existing body of research by providing a comprehensive analysis of the reformulation of prosecutorial staffing regulations in the 2021 Indonesian Prosecution Service Law. Unlike previous studies that focus on general prosecutorial independence, this study specifically examines how recent legal amendments impact the practical functioning of prosecutors in Indonesia. By employing an interdisciplinary approach, incorporating legal, administrative, and political analyses, this study offers novel insights into the unique position of prosecutors within Indonesia's criminal justice system and their evolving role under the new legislative framework.

## II. Research Problems

The independence and impartiality of prosecutors are very important to ensure fairness in the Indonesian criminal justice system. However, the current legal system does not fully protect prosecutors from political influence, making it unclear whether they can make decisions freely. Although prosecutors are part of the judicial system, they are still civil servants, meaning they must follow government rules and orders. This situation can reduce their independence and create risks of unfair prosecution. In addition, the process of appointing and promoting prosecutors is not always based on clear and fair criteria, which can weaken their role as neutral law enforcers.

One major problem is how to change the rules for prosecutors so that they can work more fairly and independently. In other countries that use the inquisitorial system, prosecutors have a role like magistrates and have more freedom to decide legal matters. However, in Indonesia, prosecutors are still under strict administrative control, limiting their ability to make decisions without outside pressure. This can lead to unfair legal processes and decisions that are influenced by politics.

To fix this issue, Indonesia needs new legal rules that clearly protect prosecutors from outside interference. This leads to two important questions: *First*, How can Indonesia create a legal system that makes sure prosecutors stay independent but still accountable; *Second*, What legal changes are necessary to ensure prosecutors are chosen, promoted, and supervised fairly to maintain professionalism and impartiality.

### III. Research Methods

This study employs an interdisciplinary legal research method, integrating doctrinal legal analysis with insights from administrative and political science. The research is conducted through a critical and in-depth examination of legal doctrines, statutory provisions, and regulatory frameworks that govern prosecutorial independence and impartiality in Indonesia.

A doctrinal approach is initially adopted to analyze legal issues by examining primary and secondary legal sources. This includes a statutory approach, which involves the interpretation of relevant laws and regulations, and a comparative approach, which assesses differences and similarities between legal provisions over time. Specifically, this study compares Law No. 16 of 2004 on the Indonesian Prosecution Service with its amendment, Law No. 11 of 2021, as well as derivative regulations at the levels of Government Regulations, Presidential Regulations, and Prosecutorial Regulations. The objective of this comparative analysis is to evaluate the evolution of prosecutorial governance and identify the extent to which legislative reforms have strengthened or weakened prosecutorial independence.

Beyond doctrinal legal analysis, this study extends its scope by incorporating administrative and political science perspectives. This interdisciplinary approach is necessary to contextualize the legal framework within the broader institutional, bureaucratic, and political environment in which prosecutors operate. By linking legal provisions with administrative and political dynamics, the research aims to offer a more comprehensive understanding of the structural and practical challenges affecting prosecutorial independence.

The combination of doctrinal and interdisciplinary approaches ensures that the study not only provides a legal assessment of prosecutorial regulation but also critically examines the extent to which legal norms are implemented in practice and influenced by administrative and political considerations.

### IV. Result And Discussion

#### 1. Prosecutorial Independence and Hierarchical Constraints: A Comparative Analysis

In almost all countries, prosecutors hold a significant role or position within the criminal justice system. They act as filters in the criminal justice system to prevent all cases from proceeding to court.<sup>9</sup> This considerable role of prosecutors leads some countries to establish guarantees of their independence through staffing systems.<sup>10</sup> In countries that follow the inquisitorial system, such as the Netherlands, prosecutors hold dual positions as civil servants

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<sup>9</sup> Peter J Tak, *Tasks and Powers of the Prosecution Services in the Eu Member States : Research Program: Administration of Justice*; Gelsthorpe and Padfield, *Exercising Discretion: Decisionmaking in the Criminal Justice System and Beyond* (Nijmegen: Wolf Legal, 2005) 2.

<sup>10</sup> Jerg Gutmann and Stefan Voigt, "The Independence of Prosecutors and Government Accountability", *Supreme Court Economic Review*, No. 1 (2019): 27.

and as magistrates or judicial officers.<sup>11</sup> This dual role results in prosecutors having quasi-judicial functions, granting them substantial authority to dismiss or set aside cases without court approval, although such dismissal decisions can be submitted for review by the court.<sup>12</sup>

Although the regulations regarding prosecutors in Indonesia differ from those in other countries, certain principles and norms regarding the institutional regulation of the Prosecution Service and the prosecutorial staffing regulation share common characteristics. These can be traced to the legal systems adopted, whether the Continental European Legal System (Civil Law) or the Anglo-Saxon Legal System (Common Law), or can be seen from the history of colonialism that inevitably influences the legal systems of post-colonial countries.<sup>13</sup> Therefore, in this article, the author chose to compare the institutional regulation of the Prosecution Service and the prosecutorial staffing regulation in Indonesia and the Netherlands.<sup>14</sup> In general, several differences and similarities can be observed in the comparison of prosecutors and the Prosecution Service in Indonesia and the Netherlands.

**Table 1.** Comparison of Prosecutors in Indonesia and the Netherlands

No	Comparative Aspects	Indonesia	The Netherlands
1.	System	Hybrid-Inquisitorial	Inquisitorial
2.	Principle of Opportunity	Attorney General	All Prosecutors
3.	Position of the Prosecutor's Office	Executive under the President	Semi-Judicial (administration under the Minister of Justice, prosecution work is part of judicial power/RO)
4.	Head of the Prosecutor's Office	Attorney General (The Highest Public Prosecutor)	Council of Attorneys General
5.	<i>Een en ondeelbaar</i> (One and Inseparable)	Interpreted as militaristic (plan of indictment, plan of prosecution, etc.)	Related to the consistency of demands in the form of policies and power procedures in court
6.	Prosecutorial Staffing	Civil Servants (known as <i>Pegawai Negeri Sipil</i> in Indonesia, or PNS) and Functional Prosecutors. There is a dual obligation for prosecutors	Civil Servants and <i>Magistraat</i> (Judicial Officers)
7.	Prosecutor Training	The Education and Training Agency of the Prosecutor's Office	Integrated with Judges' Training
8.	Position of the Prosecution Service in the Constitution	Implicitly regulated in the 1945 Indonesian Constitution	The Dutch Constitution regulates the Prosecution Service as follows: <sup>15</sup> <ol style="list-style-type: none"> <li>a. The term of office for the Attorney General who is placed in the Supreme Court is appointed for life.</li> </ol>

<sup>11</sup> Tony Paul Marguery, *Unity and Diversity of the Public Prosecution Services in Europe A study of the Czech , Dutch , French and Polish sytems* (Groningen: 2008) 120.

<sup>12</sup> Henk van de Bunt, and Jean-Louis van Gelder, "The Dutch Prosecution Service", *Crime and Justice* (2012): 117-120.

<sup>13</sup> John Jupp, "Legal transplants as tools for post-conflict criminal law reform: justification and evaluation", *Cambridge Journal of International and Comparative Law*, No. 3, (2014): 381-383.

<sup>14</sup> Bunt and Gelder (n 11).

<sup>15</sup> Academic Manuscript on the Draft Bill of the Republic of Indonesia concerning the Amendment to Law of the Republic of Indonesia Number 16 of 2004 on the Prosecutor's Office of the Republic of Indonesia, 36.

- b. In the Netherlands, there are five Attorneys General at the Court of Appeal who join the Council of Attorneys General, with one of them appointed as the Chair.
- c. In the Netherlands, prosecutors are part of the Public Prosecution Service (*Openbaar Ministerie/OM*), as stipulated in Article 116 paragraph (4) of the Constitution. The Minister of Justice can intervene in the OM, but this must be done in writing

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Source: Processed by the Author

Based on the comparison table above, there are several differences in the regulations between the prosecutor's offices in Indonesia and the Netherlands. For instance, in Indonesia, the form of prosecutorial staffing is Civil Servants (PNS) who hold functional positions as Prosecutors, whereas in the Netherlands, prosecutors serve as both Civil Servants and Magistrates (Judicial Officers).<sup>16</sup> Another difference lies in the regulation of the authority of prosecutors in Indonesia and the Netherlands, particularly concerning the principle of opportunity. In Indonesia, the Attorney General has the duty and authority to set aside cases for the public interest, namely, the interests of the nation and state and/or the wider community,<sup>17</sup> a discretion possessed only by the Attorney General as the highest public prosecutor. This differs from the regulations in the Netherlands, where the principle of opportunity is held by every prosecutor, who initiates criminal prosecutions only when there is a public interest as specified in specific regulations.<sup>18</sup>

According to Professor Jan Crijns, a distinguished professor of Criminal Law at Leiden University, the position of prosecutors as quasi-judicial officers implies that while the Prosecutor's Office, as part of the executive power, is subject to government policies, in carrying out their duties and functions in concrete cases, prosecutors must be regarded as part of the independent judicial power.<sup>19</sup> The position of prosecutors as magistrates is a consequence of the principle of *dominus litis*, which prosecutors hold as public prosecutors who control criminal cases at the pre-adjudication stage.<sup>20</sup> Because their authority to determine whether a case is worthy of prosecution must be exercised professionally and fairly, prosecutors must be granted independence in deciding the prosecution process, in line with the *dominus litis* principle. This means that the staffing system for prosecutors must also be designed to strengthen their role as independent magistrates.

If we examine the regulation of prosecutors in Law of the Republic of Indonesia Number 8 of 1981 concerning the Criminal Procedure Code (hereinafter referred to as the Indonesian Criminal Procedure Code), we find that the authority of prosecutors in Indonesia is significantly different from their counterparts in the Netherlands. Indonesian prosecutors cannot actively supervise police investigations from the beginning because the definition of prosecution is limited to the actions of the Public Prosecutor to submit a case to the competent District Court in

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<sup>16</sup> Peter J.P. Tak, *The Dutch Criminal Justice System: Organization and Operation* (Boom Juridische Uitgevers, 2003) 47.

<sup>17</sup> Article 35(c) of Law of the Republic of Indonesia Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia.

<sup>18</sup> Peter J.P. Tak, *Methods Of Diversion Used By The Prosecution Services In The Netherlands And Other Western European Countries'* (135th International Senior Seminar Visiting Experts, 2008) 54.

<sup>19</sup> J. H. Crijns, *De strafrechtelijke overeenkomst. De rechtsbetrekking met het Openbaar Ministerie op het grensvlak van publiek- en privaatrecht*, (Universiteit Leiden, 2010) 316.

<sup>20</sup> Managay Reddi, "Criminal Procedure", *South African Journal of Criminal Justice*, No. 1 (2021): 30-31.

the manner prescribed by criminal procedure law, requesting that it be examined and decided by the judge at the court hearing.<sup>21</sup>

Apart from that, another issue within the prosecution system is the command structure, which limits the prosecutor's prosecutorial authority, an issue not explicitly found in the Indonesian Criminal Procedure Code. This militaristic regulation of prosecutorial staffing is outlined in the Prosecution Service Law and its derivative regulations, including Attorney General's Regulations, Circulars, and internal guidelines that bind the Prosecutor's Office.<sup>22</sup> This system is based on a command structure that internalises military culture within the Prosecutor's Office, which results in prosecutors being transformed from independent magistrates (judicial officers) into soldiers who are subjected to and controlled by their leaders. Due to this military culture and system, prosecutors do not have the authority to independently assess and decide on the cases they handle.<sup>23</sup>

This is clearly stated in Article 8 paragraph (2) of the 2021 Indonesian Prosecution Service Law, which outlines the hierarchical responsibility of prosecutors in carrying out their functions and duties. This hierarchical structure affects prosecutorial policies, requiring prosecutors to draft prosecution plans. The Public Prosecutor must submit these prosecution plans in stages, starting with the prosecutor's proposal, followed by obtaining opinions from the Head of the Criminal Section at the District Prosecutor's Office, and ultimately reaching the Attorney General. Furthermore, the prosecutor's indictment plan procedure is criticised for hindering the judicial process, which fundamentally should be conducted quickly and simply, resulting in a lack of protection and legal certainty for those seeking justice.<sup>24</sup>

The centralization of prosecution also applies to the authority to set aside cases in the public interest, which is exclusively held by the highest leadership of the Prosecutor's Office, namely the Attorney General, as stipulated in Article 77 of the Indonesian Criminal Procedure Code and Article 35(c) of the 2021 Indonesian Prosecution Service Law. This exclusive authority of the Attorney General in Indonesia prevents other prosecutors from applying the principle of opportunism, unlike prosecutors in the Netherlands, which makes prosecution in the Netherlands more effective and efficient.

However, in the 2021 Indonesian Prosecution Service Law, there are new provisions regarding guaranteeing independence and delegating certain authorities from the Attorney General to prosecutors in the regions. The changes in prosecutorial regulations can be seen, for example, in Article 2 of the 2021 Indonesian Prosecution Service Law, which emphasises the independence of the Prosecution Service as part of judicial power and states that in carrying out its functions related to judicial power, it operates independently, unified, and inseparable.<sup>25</sup> The explanation of this article clarifies that the definition of independence means that in performing its functions, duties, and authorities, the Prosecution Service is free from the influence of government power and other external powers. Unfortunately, the mechanism for the appointment of the Attorney General by the president without needing approval from the House of Representatives, as stipulated in Article 19 paragraph (2) of the 2021 Indonesian Prosecution Service Law, remains unchanged. This provision has the potential to undermine the independence of the Prosecutor's Office, considering that the Attorney General, as the highest public prosecutor, is vulnerable to intervention by the government.<sup>26</sup> Consequently, in carrying out their law enforcement duties, the Attorney General may be influenced by the political

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<sup>21</sup> Article 1 point 7 of Law of the Republic of Indonesia Number 8 of 1981 concerning the Criminal Procedure Code.

<sup>22</sup> Afandi (n 4) 74-78.

<sup>23</sup> Fachrizal Afandi, *The Justice System Postman: The Indonesian Prosecution Service at Work*. In M. Crouch (Cambridge University Press, 2019) 95.

<sup>24</sup> Adam Ilyas, "Independensi Penuntut Umum dalam Kebijakan Rencana Tuntutan Berjenjang untuk Menentukan Tuntutan Pidana", *Jurnal Pandadecta No. 1*, (2021): 120-123.

<sup>25</sup> See Article 2 paragraphs (1) and (2) of Law of the Republic of Indonesia Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia.

<sup>26</sup> Riri Nazriyah, "Pemberhentian Jaksa Agung Dan Hak Prerogatif Presiden", *Jurnal Konstitusi*, No. 7 (2010): 30-31.

interests of the president, ultimately affecting the independence of the prosecution and impacting judicial decisions based on the charges brought by the prosecutor.<sup>27</sup>

Therefore, to ensure that the decisions of the Attorney General, as the highest public prosecutor, are entirely free from pressure, a clearer mechanism concerning the term of office and appointment process of the Attorney General must be established. This mechanism should involve the legislative body. Such measures could reduce the potential for the president, as a political figure, to intervene in the functioning of the Prosecutor's Office's law enforcement duties for personal or certain group interests.<sup>28</sup>

From the above discussions, the independence of the Prosecution Service must be understood as both individual and institutional independence. On one hand, prosecutorial independence is a state of mind that allows each prosecutor to make rational and impartial decisions based on law and evidence without external pressure or fear of coercion, including from their leaders.<sup>29</sup> On the other hand, prosecutorial independence must also encompass institutional independence, meaning that the state must establish a system that allows the Prosecution Service to fulfil its responsibilities properly and impartially.<sup>30</sup>

## **2. The Constitutional and Institutional Position of the Indonesian Prosecution Service: Balancing Judicial and Executive Functions**

As stated in Article 1 paragraph (1) of the 2021 Indonesian Prosecution Service Law, the Prosecution Service is a governmental institution whose functions are related to judicial power. This indicates that the Prosecution Service stands atop both executive and judicial powers. Therefore, philosophically, the institutional independence and impartiality of prosecutors are crucial to reaffirming the existence of the Prosecution Service as an institution that is free from the influence of any power and enforces the law independently, which upholds the rule of law and human rights in accordance with the values of Pancasila and the 1945 Indonesian Constitution. Implicitly, the position of the Prosecution Service in the 1945 Indonesian Constitution is regulated in Article 24 paragraph (3), which states that "other bodies whose functions are related to judicial power shall be regulated by law."

This means that the Prosecution Service plays an important role as a guardian of the constitution and as a protector of state sovereignty in the field of prosecution. It holds a central position in the legal system in Indonesia because, in addition to its role as the controller of case handling (*dominus litis*), prosecutors also have the authority to execute court decisions that have obtained permanent legal force (*executief ambtenaar*).

Several law professors in Indonesia, such as Prof. Indriyanto Seno Adji and Prof. Yusril Ihza Mahendra, have even proposed the idea of emphasising the position of the Prosecution Service in the Constitution, given its significant role as the prosecutorial institution in Indonesia's criminal justice system. Prof. Yusril Ihza Mahendra explained that the reason behind excluding the Prosecution Service from the Constitution during the drafting of the 1945 Indonesian Constitution was due to a limited understanding of judicial power as pertaining only to the judiciary, not within the context of the entire criminal justice system.<sup>31</sup> Consequently, discussions and debates regarding the status of the Prosecution Service as part of independent judicial power were never addressed.<sup>32</sup> This includes the current interpretation in Indonesia, where judicial power (*rechterlijke macht*) is limited to courts and judges, excluding criminal justice administrators (*strafrecht-spleging*), such as the Prosecution Service and prosecutors, which are integrated into the system differently than in the Netherlands. In the Netherlands, judicial power

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<sup>27</sup> EQ.RM. Surachman, *Eksistensi Kejaksaan Dalam Konstitusi di Beberapa Negara* (ed. 1, Sinar Grafika, 2018) 117.

<sup>28</sup> Rommy Patra, "Urgensi Kejaksaan Diatur oleh Konstitusi", *Hasanuddin Law Review*, No. 1, (2015): 400-405.

<sup>29</sup> Rudi Prasetya Sudirja, "Penguatan Kewenangan Penuntut Umum Melalui Pengesampingan Perkara Pidana Dengan Alasan Tertentu" *Jurnal Litigasi*, (2019): 305.

<sup>30</sup> Surachman (n 20) 117.

<sup>31</sup> Riri Nazriyah, "Pemberhentian Jaksa Agung Dan Hak Prerogatif Presiden", *Jurnal Konstitusi*, (2016): 13-33.

<sup>32</sup> Surachman (n 20) 49-50.

is comprehensively regulated under the Judiciary Organisation Act (*Wet Op de rechterlijke organisatie*, or RO).<sup>33</sup>

However, if we examine the historical regulation of the Prosecution Service and prosecutors in Indonesia, it appears that the system largely follows the inquisitorial framework inherited from the Netherlands. Prosecutors' staffing, which has evolved since independence, continues to place them as both civil servants and magistrates. Additionally, the Prosecution Service is maintained as part of the executive power, with functions related to judicial power. This is evident from the preambles of various laws, such as Law of the Republic of Indonesia Number 15 of 1961 concerning the Basic Provisions of the Prosecution Service of the Republic of Indonesia, which references Article 24 of the 1945 Indonesian Constitution that regulates Judicial Power; Law of the Republic of Indonesia Number 5 of 1991 concerning the Prosecution Service of the Republic of Indonesia, which explicitly references Law of the Republic of Indonesia Number 14 of 1970 concerning the Basic Provisions of Judicial Power; Law of the Republic of Indonesia Number 16 of 2004 concerning the Prosecution Service of the Republic of Indonesia, as amended by Law of the Republic of Indonesia Number 11 of 2021, which explicitly references Article 24 paragraph (3) of the 1945 Indonesian Constitution and also references Law of the Republic of Indonesia Number 4 of 2004 concerning Judicial Power.

The first institutional regulation of the Prosecution Service can be found in Law of the Republic of Indonesia Number 7 of 1947 concerning the Structure and Authority of the Supreme Court and the Attorney General's Office, which implicitly positions both prosecutors and judges as magistrates. Similarly, Law of the Republic of Indonesia Number 19 of 1948 concerning the Structure and Authority of Judicial Bodies, which was never enacted, implicitly placed prosecutors as judicial officers. This positioning continued with the enactment of Emergency Law of the Republic of Indonesia Number 1 of 1951 concerning Temporary Measures to Organise for the Unification of the Structure of Authority and Procedure of Civil Courts.

It was only after the enactment of Law of the Republic of Indonesia Number 15 of 1961 concerning the Basic Provisions of the Prosecution Service of the Republic of Indonesia and Law of the Republic of Indonesia Number 16 of 1961 concerning the Establishment of the High Prosecution Service that the position of prosecutors shifted from judicial officers to civil servants, following the institutional transformation of the Prosecution Service into a department at the ministerial level. However, it is important to note that none of these regulations explicitly define the position of prosecutors within the civil service system in Indonesia.

Explicit provisions regarding the position of prosecutors first appeared in Law of the Republic of Indonesia Number 5 of 1991 concerning the Prosecution Service of the Republic of Indonesia (hereinafter referred to as the 1991 Indonesian Prosecution Service Law):

*"A prosecutor is an official authorised by this law to act as a public prosecutor and to execute court decisions that have obtained permanent legal force (Article 1 paragraph 1)."*

*"The functional position of a prosecutor is a technical expert position within the organisation of the Prosecution Service that, due to its function, facilitates the smooth execution of the duties of the Prosecution Service (Article 1 paragraph 4)."*

It was only in the 1991 Indonesian Prosecution Service Law that the regulations regarding prosecutorial staffing were detailed. This includes the requirements to become a prosecutor, the recruitment process, and the procedures for dismissal, which are generally similar to the civil service provisions as outlined in Article 9, Article 14, and other related articles concerning the prosecutorial staffing. This law firmly established the position of prosecutors as having functional roles within the civil service framework.

These provisions did not change significantly after the reform era. The 2004 Indonesian Prosecution Service Law continued to maintain the position of prosecutors merely as functional roles within the executive branch's civil service structure. However, there was a change in the pattern of prosecutor recruitment. Regulation of the Minister of Administrative and Bureaucratic

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<sup>33</sup> Surachman (n 20) 47.

Reform Number 197 of 2012 required the Prosecution Service to form a civil service recruitment committee and involve independent human resources consultants in the recruitment process.

However, the push to reposition the functions of the Prosecution Service and prosecutors to be more independent and impartial continues to be echoed by many parties. One notable instance is the lawsuit filed by a prosecutor serving at the Corruption Eradication Commission, who sought a judicial review of the Regulation of the Minister of Administrative and Bureaucratic Reform Number 35 of 2018. This regulation pertains to the status of prosecutors as civil servants, requiring them to relinquish their prosecutorial functions when serving outside the Prosecutor's Office. In Decision Number 30 P/HUM/2020, the Supreme Court opined that the provisions regarding staffing adjustments outlined in the Ministerial Regulation cannot automatically bind prosecutors, who have specialised as law enforcement officers.

These prosecutorial staffing arrangements changed in the 2021 Indonesian Prosecution Service Law, which introduced several amendments to strengthen their position as magistrates to ensure prosecutorial independence. Key changes include:

1. Prosecutors as part of the Judicial Power.<sup>34</sup>
2. Prosecutors are civil servants with a functional position that has specificities.<sup>35</sup>
3. The Prosecution Service performs its functions independently and as a single, inseparable entity.<sup>36</sup>
4. The element of prosecutorial staff consists of prosecutors and non-prosecutor civil servants.<sup>37</sup>

The changes in staffing and institutional arrangements for prosecutors in the Indonesian Prosecution Service Law highlight several clarifications regarding the position of prosecutors as civil servants with functional positions who have specificities as officials whose functions relate to judicial power (*magistraat*). Additionally, there are several new regulations concerning the authority of the Prosecution Service in carrying out prosecutorial duties and other tasks related to the position of prosecutors as State Attorneys, asset recovery, law enforcement intelligence, and broader law enforcement support functions.

The prosecutorial staffing model impacts the management of prosecutors and the quality of their human resources.<sup>38</sup> However, this specificity cannot function effectively without derivative regulations that are aligned with the 2021 Indonesian Prosecution Service Law.

As discussed in the previous sub-section, the position of the Prosecution Service in the state administration is unique because it is a government institution that exercises state authority in the field of prosecution-related judicial power:<sup>39</sup>

- a. As a government institution, the Prosecution Service is part of the government element that is subject to and responsible to the President and follows the criminal prosecution policy broadly determined by the President.
- b. Functionally, when conducting prosecutions as part of judicial power, prosecutors are bound by legal principles and independent law enforcement regardless of the interests of power and should not be interfered with by power to uphold the principles of the Rule of Law.

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<sup>34</sup> See Article 1 point 1 of Law of the Republic of Indonesia Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia.

<sup>35</sup> See Article 1 point 2 of Law of the Republic of Indonesia Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia.

<sup>36</sup> See Article 2 paragraphs (1) and (2) of Law of the Republic of Indonesia Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia.

<sup>37</sup> See Article 7A of Law of the Republic of Indonesia Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia.

<sup>38</sup> Asep Mulyana, *Ambiguitas Profesi Jaksa Dalam Rumpun Aparatur Sipil Negara*, (PT. RajaGrafindo Persada, 2021) 7.

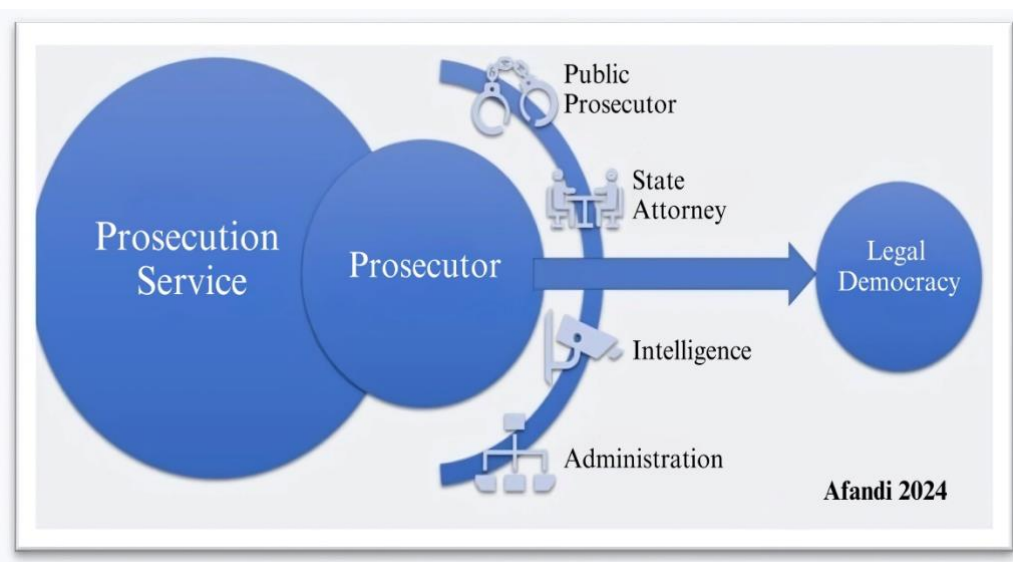
<sup>39</sup> Academic Manuscript on the Draft Bill of the Republic of Indonesia concerning the Amendment to Law of the Republic of Indonesia Number 16 of 2004 on the Prosecutor's Office of the Republic of Indonesia, 90.

The Prosecution Service, as one of the pillars of the rule of law, has two main functions that must be balanced: first, maintaining security and order through crime control, and second, ensuring human rights protection (due process).<sup>40</sup> Furthermore, Prosecutors, as Magistrates, have the obligation to uphold the principles of the rule of law, which guarantee justice, utility, and legal certainty. In handling cases, prosecutors must be impartial, even though they are bound by organisational policies; they must ensure independence in handling cases concretely. Therefore, unlike civil servants in general, the performance of prosecutors cannot be measured solely based on the productivity and efficiency of case handling.

Hence, there is a need for specificity in regulating prosecutorial staffing that adjusts the position of prosecutors as Civil Servants and also as Judicial Officers (*Magistraat*). This aligns with the history of prosecutors originating from the concept of *Adhyaksa/Dhyaksa* adopted in many kingdoms in the *Nusantara* (the Indonesian Archipelago), including Cirebon, which referred to their seven judicial officers as "*Jaksa Papitu*" (the Seven Prosecutors).<sup>41</sup>

The following are the concepts proposed by the author to strengthen prosecutorial independence through the staffing system:

**Figure 1.** The Concept of Prosecutorial Staffing



Source: Creation by Author

As stated in the figure, it can be seen that, like in other inquisitorial countries, the Prosecution Service is part of the executive power. This means that prosecutorial policies and other duties are bound by policies and regulations issued by the government. The Prosecution Service is subject to regulations on staffing, finance, and other technical matters within the scope of the executive power, including how prosecutorial funds and human resources are used to support the government's policy direction. However, in terms of staffing, prosecutors have two functions: not only as civil servants bound by the institutional policies of the Prosecution Service as part of the executive power, but also specifically as judicial officers as part of the judicial power, where their impartiality and independence in carrying out prosecutorial duties are guaranteed, and they are not entirely subject to their superiors.

<sup>40</sup> Zangari, J. (2023). Doing Justice: A Prosecutor's Thoughts on Crime, Punishment, and the Rule of Law. *Criminal Justice* (1986), 38(1), 35-35.

<sup>41</sup> Afandi (n 4).

The four functions of prosecutors – as a public prosecutor in the criminal justice system, a state attorney in civil and state administrative cases representing the government, a judicial intelligence officer supporting prosecutorial tasks and case handling, and an organisation administrator controlling bureaucratic processes – must be understood in line with the position and function of prosecutors as civil servants with a specialisation as part of the judicial power. This is ultimately aimed at enabling prosecutors to play a role in realising Legal Democracy, which places the principles of the Rule of Law, or *Rechtsstaat*, as a guide to democracy in a country.

To achieve this, the Prosecution Service should redesign the staffing of prosecutors as magistrates (quasi-judicial) by deconstructing the military-style command system in the Prosecution Service as well as strengthening the independence and accountability of prosecutors as legal experts (lawyers) who are professionals. This can be done by creating an equal staffing management system by ensuring good salary incentives for functional prosecutors and structuring a professional support system (management staff).

To create specialisation among prosecutors based on their professional functions, it is necessary to arrange the qualifications of prosecutors since Education and Training for Prosecutors Formation (known as *Pendidikan dan Pelatihan Pembentukan Jaksa* in Indonesia, or PPPJ). This involves ensuring alignment with the chosen functions, minimising cross-appointments, and regulating the pattern of prosecutor education and training to promote more independence and impartiality in handling cases. Additionally, there must be guarantees of promotion and transfer processes based on a merit and talent system.

Based on the above, the reformulation of the prosecutorial staffing regulations, which emphasises their specificities as judicial officers, can be included in amendments to the law or can also be regulated in government regulations as an explanation of the prosecutorial staffing regulations in the 2021 Indonesian Prosecution Service Law.

## V. Conclusion

Based on the discussion above, it can be concluded that Indonesia must strengthen prosecutorial independence while ensuring accountability. The law should clearly define prosecutors as magistrates who are independent legal actors, not just civil servants. This change will protect them from political pressure and ensure they make decisions based on law and evidence. The current hierarchical system limits their independence and must be reformed. Prosecutors should have the authority to decide cases without undue interference.

An independent prosecutorial council should oversee the selection, promotion, and discipline of prosecutors. This council must ensure that all appointments and promotions are based on merit, professional competence, and ethical standards. The President should not appoint the Attorney General without legislative approval. A transparent and fair process will reduce political influence and strengthen the integrity of the prosecution service.

Indonesia must also improve prosecutorial training. Prosecutors should receive continuous education on ethics, human rights, and legal professionalism. They should have the freedom to join professional organizations that protect their independence and improve their skills. Stronger legal protections must prevent external forces from interfering in their work. The law should clearly state that prosecutors operate independently and are accountable only to legal principles, not to political leaders or superiors.

The criminal justice system must give prosecutors greater control over investigations. The law should ensure that prosecutors lead case assessments without unnecessary delays or restrictions. This will improve fairness and efficiency in the legal process. The prosecution service should also reform its internal structure. The current military-style hierarchy restricts prosecutorial discretion and creates unnecessary layers of approval. Prosecutors should be able to make independent legal decisions while following clear accountability mechanisms.

To maintain professionalism and fairness, Indonesia must base prosecutor recruitment and career progression on clear and objective criteria. Promotions should depend on expertise and

integrity, not political connections or seniority. A fair evaluation system should assess their performance and ethical conduct. By reforming its legal and institutional framework, Indonesia can build an independent, professional, and accountable prosecution service. These changes may strengthen public trust, uphold justice, and improve the rule of law.

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