

## The Relationship Of The Military Prosecutor General And The Attorney General In The Prosecution Function

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ARTICLE INFO	ABSTRACT
<p><i>Keywords:</i> <i>Law Enforcement in</i> <i>Prosecution Fuction,</i></p> <hr/> <p>Corresponding Author: <a href="mailto:hedwig.adianto.mau@yahoo.com">hedwig.adianto.mau@yahoo.com</a></p> <hr/> <p>The Southeast Asia Law Journal Volume 2 Nomor 1 Juli-Desember 2016 ISSN. 2477-4081 hh. 46-55 ©2015NK. All rights reserved.</p>	<p><i>Law enforcement is a process to translate the wishes of the law into reality. The law enforcement process will culminate in the implementation of laws and regulations by the law enforcement officers themselves. Law enforcement agents in the Indonesian public criminal justice system include: Police, Prosecutors, Judges, Lawyers, and Penitentiaries. Meanwhile, law enforcement agents in the Indonesian armed forces criminal justice system include: Military Judges, Military Prosecutors, Military Police, Military Defense Attorneys, and Military Penitentiaries. Elucidation of Article 57 of Law Number 31 of 1997 stipulates that the Military Prosecutor General in performing prosecution function shall be responsible to the Attorney General of the Republic of Indonesia as the highest public prosecution service in the State of the Republic of Indonesia through the Commander-in-Chief, while in performing duties to develop the Military Prosecution Service, shall be responsible to the Commander-in-Chief. Although the Law Number 31 of 1997 has governed the relationship between the Military Prosecutor General and the Attorney General in performing their duties in technical prosecution function, but in the practice, those duties have not been performed as mandated by a statutory law.</i></p>

## A. INTRODUCTION

Article 7 paragraph (2) of Law Number 34 of 2004 on Indonesian National Armed Forces provides that main duties of the Indonesian National Armed Forces (Tentara Nasional Indonesia ("TNI")) are to uphold the state sovereignty, to maintain the integrity of the territory of the Unitary State of the Republic of Indonesia based on Pancasila (The Five Principles of National Ideology) and The 1945 Constitution of the Republic of Indonesia, and to protect the all of the Indonesian people and land from any threats and disturbances against the integrity of the nation and the state. One of the efforts taken to establish the main duties of TNI is by striving for preventing from the occurrence of violation/criminal offense committed by the soldiers in carrying out their duties. Commitment of TNI to avoid from violation/criminal offense committed by their soldiers is that the carrying out of their duties must be based on applicable legal provisions or prevailing laws and regulations, which constitute characteri-stic of a nation based on the rule of law.

Characteristics and elements used as the support for the administration of a nation based on the rule of law should be led up one purpose of law, i.e. the enforcement of justice because law is basically made and enforced to create justice. Justice will be served if all components of the nation including TNI are able to implement the law enforcement. Law enforcement within the environs of TNI is implemented to ensure the soldiers' discipline and alertness in dealing with any kind of threats against the state's security and safety.

Law enforcement is a very essential and substantial matter in a concept of a nation based on the rule of law, such as Indonesia. According to Edi Setiadi and Kristian (Setiadi, 2017), law enforcement means a part of legal

development which leads to the efforts of operating and applying or concreting the law in real life to reinstate or recover the balance in the order of social life, national life and state life.

Law enforcement is a process to translate the wishes of the law into reality. Therefore, the law enforcement process will culminate in the implementation of laws and regulations by the law enforcement officers themselves. Law enforcement agents in the Indonesian criminal justice system include:

Police, Prosecutors, Judges, Lawyers, and Correctional Institutions. Meanwhile, the law enforcement agents from the environs of TNI include: Military Judges, Military Prosecutors, Military Police, Defense Attorneys, and Military Penitentiaries.

According to Asshiddiqie (Asshiddique, 2015), law enforcement principally is a process to enforce justice values, but not merely to enforce written regulations having textual, formal, positivist, and mechanistic nature. In this case, what must be upheld is nothing but justice as the soul of each legal norm.

Specifically, the provisions on Military Prosecutor as one of law enforcement agents within the military court, are governed in Law Number 31 of 1997 on Military Court. Article 1 paragraph 2 stipulates that "Office of Military Prosecutors, Office of Military Appellate Prosecutors, Office of Military Prosecutor General, and Office of Military Combat Prosecutors, hereinafter referred to as Military Prosecution Service, means an organ within the environs of the Armed Forces of Republic of Indonesia exercising state government power in prosecution and investigation function based on the delegation of the Commander-in-Chief of the National Armed Forces of the Republic of Indonesia. Furthermore, paragraph 8 provides that the Prosecutor General of the the National Armed Forces of the Republic of Indonesia, here -

referred to as Military Prosecutor General, means the highest general prosecutor within the environs of the National Armed Forces, the highest leader and person-in-charge of Military Prosecution Service controlling the performance of the duties and competence of the Military Prosecution Service.

Elucidation of Article 57 of Law Number 31 of 1997 stipulates that the Military Prosecutor General in performing prosecution function shall be responsible to the Attorney General of the Republic of Indonesia as the highest public prosecution service in the State of the Republic of Indonesia through the Commander-in-Chief, while in performing duties to develop the Military Prosecution Service, shall be responsible to the Commander-in-Chief.

If in the military criminal justice system, an organ determined within the environs of Armed Forces of the Republic of Indonesia to exercise the state government power in prosecution and investigation function based on the delegation from the Commander-in-Chief of the Armed Forces of the Republic of Indonesia is Military Prosecution Service, then in the criminal justice system, Public Prosecution Service is a governmental institution exercising the state power in prosecution function and other authority based on the law, as affirmed in Article 2 paragraph (1) of Law Number 16 of 2004 on Public Prosecution Service of the Republic of Indonesia.

In performing prosecution function, Public Prosecution Service is led by by an Attorney General, as provided for in Article 18 paragraph (1) stipulating that an Attorney General is the leader and the highest person-in-charge of Public Prosecution Service who leads and controls the performance of the duties, and the competence of Public Prosecution Service. Furthermore, elucidation of Article 18 paragraph (1) affirms that, bearing in mind that the Attorney General is the leader and the highest person-in-charge of Public Prosecution Service who

leads and controls the performance of the duties, and the competence of Public Prosecution Service, then the Attorney General is also the leader and the highest person-in-charge in the prosecution function.

Despite that Law Number 31 of 1997 and Law Number 16 of 2004 have expressly governed the authority of the Armed Forces Prosecutor and the Attorney General in prosecution function, accountability of the Military Prosecutor General to the Attorney General in technical prosecution function up to this present time is not exercised. This is the same thing as the authority possessed by the Attorney General as the highest public prosecutor towards the development of technical prosecution function by Military Prosecutors within the scope of Military Court. In performing technical prosecution function, the Attorney General should have a very central role as the highest public prosecutor in the improvement of human resources in order to produce Military Prosecutors as well as Public Prosecutors who are reliable, professional, having integrity and discipline, so that they will be able to perform the their prosecution and investigation functions.

## **B. Problem Formulation**

1. How is the functional accountability mechanism of Military Prosecution Service applied within the environs of the Indonesian Armed Forces in performing the prosecution function for military criminal offenses?
2. How is the relationship of the Military Prosecutor General and the Attorney General in the prosecution function?

## **C. Research Method**

The method adopted in this research is normative law research (Soekanto, Soerjono and Sri Mamuji, 1979), with its main approach adopting normative legal research. For this reason, the approach method adopted herein is normative legal research i.e. by reviewing various applicable legal principles

(positive law) relating to the authority of the Military Prosecution Service and Public Prosecution Service.

#### 4. Discussion:

The implementation of Military Justice System is based on the existence of specificity or peculiarity in the life of the soldiers, by not excluding the legal interest. In the implementation of Military Justice System, specific principles which constitute norms in the order of military life are applicable. The principles in Military Court (Sumapermata, 2007) are as follows:

- a. Principle of Unity of Command. In the military life with its organizational structure, a commander has a central position and is fully responsible for the unity and his members. Therefore, a commander is authorized to refer a case to a forum in the settlement of criminal case. In accordance with the said principle of unity of command, it is not known habeas corpus and pre-prosecution in military criminal procedural law . However, in military criminal procedural law and military administrative procedural law, a compensation and rehabilitation institution is recognized.
- b. Principle of a Commander is Responsible for His Members. In the life order and organizational characteristic of Armed Forces, a commander is functioned as a chief, teacher, father, and coach, so that a commander should be fully responsible for the unity and his members.
- c. Principle of Military Interest. To administer the state defense and security, military interest must be prioritized over the group and individual interests. Specifically, however, in the judicial process, military interest is always balanced with legal interest.

Specific principles in Military Justice System is applied because the military institution is a unique institution as the consequence of its

typical role and position in the constitutional structure. As the back-bone of the state defense, a military institution is demanded to be able to guarantee the discipline and alertness of its soldiers in facing any form of threats against the state security and safety. In the implementation of state defense function, the principle of military interest must be more prioritized than the group or individual interests.

Although the existence of the prosecution institution (Public Prosecution Service) is not expressly governed in The 1945 Constitution, but if it is carefully examined, the position of prosecution institution is implied in the provisions in Article 24 of The 1945 Constitution governing judicial power, particularly paragraph (3) stating “Other institutions whose functions have a relation with the judicial powers shall be regulated by law. As the follow up of such Article 24 of The 1945 Constitution, Law Number 48 of 2009 on Judicial Power, particularly Article 38 paragraph (1) provides that other than the Supreme Court and its lower judicial bodies and Constitutional Court, there are other bodies whose functions have a relation with the judicial powers”. Other bodies referred herein are among others Police, Public Prosecution Service, Advocate, and Penitentiaries.

Hence, other than Supreme Court and Constitutional Court, and National Police RI which have been governed in The 1945 Constitution, there are still other body, the amount of which is more than one, whose functions have a relation with the judicial powers. Other bodies referred herein are among others Public Prosecution Service previously under the draft of amendment to The 1945 Constitution stated as one of the institutions proposed to be governed in a Chapter on Judicial Powers, but it was not agreed so that the provisions in The 1945 Constitution is negated (Nn, 2016). However, although it is not explicitly provided for in The 1945 but they have constitutional

importance in the constitutional system based on The 1945 Constitution.

Lawrence M. Friedman (M. Friedman, 1975) stated that the legal system consists of three components which are:

a. Structure.

The legal structure according to Friedman is as follows:

*“To begin with, the legal system has the structure of a legal system consist of elements of this kind: the number and size of courts; their jurisdiction ...Structure also means how the legislature is organized ...what procedures the police department follow, and so on. Structure, in way, is a kind of cross section of the legal system...a kind of still photograph, with freezes the action.”*

Structure is a pattern which indicates how the law is implemented by the law enforcement institutions, in particular the institution that performs the law enforcement duties in prosecution function. In Indonesia, the institution performing prosecution function is the Public Prosecution Service for public criminal offense, Military Prosecution Service for military criminal offense, and Anti-Corruption Commission. These three institutions are perform prosecution function together although their scope of duties are different from one another.

b. Substance

Legal substance according to Friedman is as follows:

*“Another aspect of the legal system is its substance. By this is meant the actual rules, norm, and behavioral patterns of people inside the system ...the stress here is on living law, not just rules in law books”.*

Another aspect of the legal system is its substance; substance means actual rules, norms, and behavioral patterns of people inside the system. Therefore, the legal substance involves all of applicable laws and

regulations having force to bind and to be the guidance for the law enforcement officers.

c. Legal Culture

With respect to culture, Friedman is of the opinion:

*“The third component of legal system, of legal culture. By this we mean people’s attitudes toward law and legal system their belief ...in other word, is the climate of social thought and social force which determines how law is used, avoided, or abused”.*

Legal culture involves legal culture which constitutes people's attitude (including legal culture of its law enforcement officers) towards the law and the legal system. As good as the arrangement of legal structure to implement the prescribed rules of law and as good as the the quality of legal substance made without being supported by legal culture by the people involved in the system and the people, the law enforcement will not be running effectively.

Further, according to Jimly Asshiddiqie in his book, (Asshiddiqie, 2006) as a unity of the system, there are; 1. Institutional element; 2. Instrumental element; 3. Behavioral element of the legal subject bearing rights and obligations determined by the norm of the rule (subjective and cultural elements). These three elements of legal system cover activities of law making, law administrating, and law adjudicating. Commonly, the last activity is called as law enforcement activity in narrow meaning. In a criminal case, it involves the role of police, public prosecution service, advocates, and judges; or in civil case, it involves the role of advocates (lawyers) and judges. In addition, there are other activities people often forget, which are: law socialization and law education in the broadest sense that also relate to law information management as the supporting activity.

Elucidation of Article 57 of Law Number 31 of 1997 stipulates that the Military Prosecutor General in performing prosecution function

shall be responsible to the Attorney General of the Republic of Indonesia as the highest public prosecution service in the State of the Republic of Indonesia through the Commander-in-Chief, while in performing duties to develop the Military Prosecution Service, shall be responsible to the Commander-in-Chief. The said elucidation of Article 57 affirms that in performing duties of prosecution, a synergy between the Military Prosecutor General and the Attorney General must be established.

However, in the implementation thereof, the responsibility of the Military Prosecutor General to the Attorney General in technical prosecution function has not been exercised so far. On the other hand, for the duties to develop Military Prosecution Service, the Military Prosecutor General should be responsible to the Commander-in-Chief of TNI, but in the implementation thereof, the Military Prosecutor General is responsible to the Head of Indonesian National Armed Forces Legal Development Service and General Counsel (Babinkum TNI). This is in line with the provision in Article 4 paragraph (1) of Regulation of the Commander-in-Chief of TNI Number 20 of 2017 on Organization and Duties of Indonesian National Armed Forces Legal Development Service and General Counsel (Babinkum TNI) that governs; Babinkum TNI is tasked to assist the Commander-in-Chief of TNI in the implementation of legal and human rights development within the environs of the Indonesian National Armed Forces (TNI), development in the administration of Military Prosecution Service, and Military Penitentiaries within the environs of Military Court. Babinkum TNI is a central executive organ in the level of Headquarter of TNI designated directly under the Commander-in-Chief of TNI.

To strengthen the provisions in Article 4 paragraph (1) above, Article 28 of the Commander-in-Chief of TNI re-governs that the Military Prosecutor General is a technical legal executive organ of Babinkum TNI

performing duties in investigation and prosecution function, and executing the court decree or court judgment, in the development of the administration of Military Prosecution Service under the Babinkum TNI and technically and legally under the supervision of the Attorney General RI through the Commander-in-Chief.

Article 39 paragraphs (2) and (3) again affirm the position of the Military Prosecutor General as the highest public prosecutor within the environs of the Indonesian National Armed Forces (TNI) as follows:

Paragraph (2) : In its position as the Highest Public General Prosecutor within the environs of TNI, the Military Prosecutor General shall be responsible to the Attorney General RI as the Highest Public Prosecutor within the State of the Republic of Indonesia through the Commander-in-Chief.

Paragraph (3) : The Military Prosecutor General shall be responsible for the implementation of duties to develop the administration of Military Prosecution Service to the Chief of Babinkum TNI.

Provisions in Law Number 31 of 1997 and Regulation of the Commander-in-Chief of TNI Number 20 of 2017 provide affirmation on the existence of relationship between the Military Prosecutor General and the Attorney General in prosecution function.

Law Number 48 of 2009 on Judicial Power, particularly Article 38 paragraph (1) provides that other than the Supreme Court and its lower judicial bodies and Constitutional Court, there are other bodies whose functions have a relation with the judicial powers”.

According to Jan S. Marinka (Marinka, 2017), both Law Number 48 of 2009 on

Judicial Power and the amended of The 1945 Constitution RI more emphasize and highlight the definition of judicial power in narrow meaning. In this case, the judicial power is identified by the judiciary power or power to adjudicate. Limitation to the definition of judicial power in narrow meaning should be reviewed as basically, judicial power is the state in the enforcement of law. With the board sense on the definition of judicial power as noted above, judicial power can be meant not merely a power to adjudicate, but also as the power to enforce the law in the law enforcement process, including Public Prosecution Service as an institution exercised judicial power in criminal prosecution function.

Paulus E. Lotulong,(Hamzah, 2003) this freedom or independent judicial power is universal. Article 10 of the *The Universal Declaration of Human Rights* stipulates that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and in any criminal charge against him. In connection with that, Article 8 provides that everyone is entitled to an effective tribunal by national judges having the power to the rape of basic rights, bestowed to him by the constitution or by the law).

According to Bagir Manan (Manan, 2003), there is a kind of general belief that “an independent judicial power is a prerequisite for upholding justice and truth”. It is no doubt that without an independent judicial power, for sure there will be no guarantee that the justice and truth will be upheld. In any circumstances, however, it does not mean that independent judicial power will always be identical with truth and justice

According to Jimly Asshiddiqie (Asshiddiqie, 2006), in the judicial power structure, there are several functions institutionalized both internally and externally. With respect to the external judicial positions, there are also legal officials, which are; investigator officials,

public prosecution officials and advocates acknowledged as the law enforcement officers. Within the environs of investigation officers, there are police officers, persecutors, investigators of Anti-Corruption Commission (KPK); and civil servant investigators, which are currently having approximately 52 types of investigation officers in Indonesia. Those who perform the prosecution function are: Public prosecutors, and Anti-Corruption Commission (KPK). Meanwhile, within the internal court organization, three functional offices are expressly differentiated to judges, court clerks, and other administrative officers.

As to the institutions administering judicial power, for the purpose of acquiring legality in the performance of the duties, it is necessary to regulate each institution’s authority, specifically Public Prosecution Service and Military Prosecution Service performing the prosecution function. The authority referred herein means the authority provided for in laws and regulations (positive law).

According to H.D. Stoud,(HR, 2008) presenting the definition of authority as quoted by Ridwan HD, authority means the whole rules relating to acquisition and exercise of governmental competence by the subject of public law in the relations of public law.

There are two elements contained in the definition of the concept of authority presented by H.D. Stoud, which are:

1. the existence of the rule of law; and
2. the nature of legal relations.

Prior to the delegation of authority to the institution which will exercise it, it is necessary to first determine in the laws and regulations, in the form of statutory law, government regulations or lower rules. Nature of legal relations is the nature relating to and having involvement or bond or relationship or in association with law. Its legal relations are both public and private.

According to Prajudi Atmosudirjo (Atmosudirdjo, 1981), authority is called as

formal power, i.e. power acquired from legislative power (mandated by the law) or from executive/administrative power. Authority is a power against a group of certain person or power against certain governmental field (or fields) which is integral. In the authority, there are competences. Competence is a power to perform something in association with public law.

Meanwhile, according to Miriam Budiarjo, (Budiarjo, 1998) power is an ability of an individual or a group of people to affect behavior a person or another group so that people act or behave in accordance with the wishes of those who have power in such way so that the behavior is in accordance with the desire and purpose of the people or the state. Authority is part of power because essentially authority is an institutionalized power or a formal power. Authority is a power acquired constitutionally in view that the power can also be acquired unconstitutionally.

Article 8 paragraph (2) of Law Number 12 of 2011 on Establishment of Laws and Regulations stipulates that the existence of the laws and regulations is acknowledged and they have binding legal force to the extent they are ordered by the laws and regulations or established based on an authority. The authority granted or possessed by an institution or an official can be in the form of attributive authority, delegative authority, as well as mandatory authority. (Sinamo, 2016)

Ateng Syafrudin, (Syarifudin, 2000) presented definition of competence. He said that;

*“There is different definition between authority and competence. We should differentiate between authority (gezag) and competence (bevoegheid). Authority means what is called as a formal power; a power derived from the power given by the law, while competence only associates with certain parts (“onderdeel”) of the authority (rechtsbevoegdheden). Competence is the scope of acts under public law, scope of*

*governmental competence, not only covering competence to make any government decision (bestuur), but covering competence for the purpose of performing the duties, and delegating the competence and distributing the competence, mainly to be determined in the laws and regulations”.*

Authority is a power acquired constitutionally. This means that the source of authority is the rule of law applicable to a country in accordance with the constitutional system prevailing in the said country. However, in details, the source of authority can be seen from the types of authority. In general, the experts classify the competence into three (3) types, which are: attribution, delegation, and mandate.

With respect to the attribution, delegation, and mandate concept, J.G. Brouwer and A.E. Schilder, said: (Brouwer & Schilder, 1998)

- a) *With attribution, power is granted roan administrative competence by an independent legislative body. The power is initial (originair) which is to say that is not derived from a previously existent power. The legislative body creates independent and previously non-existent powers and assigns them to a competence.*
- b) *Delegations is a transfer of an acquired attribution of power from one administrative competence to another, so that the delegate (the body that the acquires the power) can exercise power in its own name.*
- c) *With mandate, there is not transfer, but the mandate giver (mandans) assigns power to the body (mandataris) to make decision or take action in its name.*

Meanwhile, Philipus M. Hadjon, (M. Hadjon, 1998) divides means to acquire competence into two, as follows:

- a. Attribution. It is a competence to make any decision (*besluit*) directly sourced from the law in material meaning. Attribution is also deemed as a normal way to change the



governmental competence. Therefore, It seems clear that the authority acquired through attribution by governmental organ is an original authority, as the authority is directly acquired from the laws and regulations (specifically, The 1945 Constitution).

- b. Delegation. It is construed as a delegation of competence to make decision (*besluit*) by government officials (state administrative officials) to such other party. As to the word of delegation, this means that there is a transfer of responsibility from the person who transfers the delegation to the party who accepts the delegation.

## 5. CONCLUSION

Elucidation of Article 57 of Law Number 31 of 1997 affirms that the Military Prosecutor General in performing prosecution function shall be responsible to the Attorney General of the Republic of Indonesia as the highest public prosecution service in the State of the Republic of Indonesia through the Commander-in-Chief, while in performing duties to develop the Military Prosecution Service, shall be responsible to the Commander-in-Chief.

Provisions in Law Number 31 of 1997 above create legal consequence to be implemented. This relates to the implementation of law enforcement in prosecution function. Relationship of the Military Prosecutor General and the Attorney General in prosecution function, if it is viewed from the legal system aspect is highly relevant to the existence of Military Prosecution Service and Public Prosecution Service as the institutions/bodies in prosecution function.

Reviewed from the judicial power aspect, both Law Number 48 of 2009 on Judicial Power as well as the amended 1945 Constitution RI more emphasize and highlight the definition of judicial power in narrow sense. In this case, the judicial power is identified by the judiciary power or power to adjudicate. Limitation to the definition of judicial power in narrow meaning should be reviewed as basically, judicial power is the state in the enforcement of law.

Furthermore, the most important matter in the implementation of law enforcement in prosecution function is to implement the same based on the authority granted by the laws and regulations, in the nature of attribution, delegation, as well as mandate

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