

## Existence of Attorney as Lawyer in Civil and State Administration Cases

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### ABSTRACT

*One of the important institutions that associated with law enforcement in Indonesia is Attorney. Attorney occupies a central and strategic function in the process of law enforcement. As government agency, Attorney implements state power in the prosecution as well as other authority under Law. Based on the duties and authority in the Attorney Act article 30 paragraph (2), it then come out the term " State Attorney ", a translation of Landsadvocaat Article 3 version of Staatblaad 1922 No. 522 that called " State Attorney " (Jaksa Pengacara Negara/JPN). In fact, the term is not explicitly set either by Act No. 16 of 2004 on the Attorney of the Republic of Indonesia and the Presidential Decree No. 38 of 2010 on the Attorney Structure and Administration of Republic of Indonesia. Therefore it is necessary to formulate the Attorney act made by Parliament with involving constitutional law expert as input, as the affirmation of Attorney authority different fields of civil and state administration, state Attorneys Attorney as well as the State Attorney's Office.*

**Keywords:** Public attorney, the state attorney, state attorney 's office

### INTRODUCTION

Indonesia is a constitutional state based on Pancasila and the Constitution of 1945 Republic of Indonesia (hereafter written as Constitution of 1945) that uphold human rights and guarantee the rights of all Indonesian citizens with equal right and obligations in law.

Associated with the law enforcement in Indonesia, one of the important institutions is Attorney. Attorney has central and strategic function in the law enforcement. In Indonesian judicial system, the attorneys has main role to decide whether a person should be examined by the court or not. It is the attorneys' role to determine whether someone will be sentenced or not according to the quality of indictment and the demands it makes.

Since Attorney has strategic position in the judicial process, then ideally the position should be managed by a qualified and high integrity administrator. Attorney is expected to be independent with capable apparatus to exercise law enforcement in proportionate, professional, and fair manner.

The position of Attorney in the state system as defined in Act of 2004 No. 16, Article 2 paragraph (1) on Attorney of the Republic of Indonesia is: "the government agencies that implement the state power in the prosecution and other authority under Law."

Attorney is a public prosecutor in a criminal case that represents the state and society. On the other hand, the attorney is the main party that representing the state in court and carry the obligation to apply the rules of law.

Since the status and role of the Indonesian Attorney as State institutions to carry out state power through law enforcement, especially in the area of prosecution, then, attorney is demanded to play a greater role in upholding the rule of law, protection of public interest and upholding human rights. In fact, the society promiscuity which based on law relationships may cause disputes of criminal law, civil law and Administrative law. In the scope of

Criminal Law, the attorney has proper role in addressing the problem as set forth in Law No. 16 Year 2004 on the Attorney of the Republic of Indonesia (hereinafter written Attorney Law).

Article 2 Paragraph (1) of the Attorney Act states that:

“Attorney of the Republic of Indonesia which in this Act referred to the attorney is the government agency implementing state power in the prosecution as well as other authority under Law.”

In the event of a dispute of the Civil and Administrative case where one of the involved parties is the State, the Attorney is authorized to act and authorized as a State Counsel in the case. This is confirmed in Article 30 paragraph (2) of the attorney Act, namely:

"In the field of Civil and State Administration, Attorney with a special power of law can act both inside and outside the court on behalf of the State or Government".

More clearly, the Attorney also behaves as State Counsel of State Attorney (JPN) as stated in Presidential Decree No. 38 Year 2010 Article 24 on organizational and administration structures which said that:

“Deputy State Attorney for Civil and State Administration has the duty and authority of law enforcement, legal aid, legal considerations, and other legal actions to the state or government, including the state agencies, institutions of central and local government, State-Owned Enterprises / areas in the field of Civil and State Administration to save, restore state property, enforcing state and governments authority as well as provide legal services to the community.”

In practice, the implementation of State Counsel can also be implemented by an advocate of lawyer, in addition to the position of Attorney in his capacity as the representative of the State, not in the capacity as a public attorney. Thus, the function of Attorney as a State Counsel should lead to global trends and national policy.

Based on the stipulation of Civil and State Administration, Attorney has the authority for and on behalf of the State or the Government as plaintiff or defendant that not only defends the interests of the State or the Government, but also defends and protects the national interests. Therefore, the Attorney can implement the function of Attorney General and also in cases of Civil and State Administration, the Attorney acting as the government representative of legal entity with a special power to carry out their lawful duties both inside and outside the court on behalf of the government and state.

From the stipulation, it can be withdrawn the definition of the State Attorney Office is the institution of attorney authorized in Civil and State Administration affair and to act inside and outside the court on behalf of the State or Government. Thus the fact remains firm in question the authority of the Attorney in the Civil and Administrative areas of the country. In the future it is expected that RI Attorney Act more strictly regulate the Attorney authority in the field of Civil and Administrative. In the field of Civil, Administrative, Attorney is authorized to act as the State Attorney Office both inside and outside the court to represent the interests of the state or government and the public interest which pursuant to an Act or by virtue of a Special Power.

## **LEGISLATION GOVERNING DUAL FUNCTION OF PROSECUTOR AS GENERAL AND STATE ATTORNEY**

Based on the assessment of several important aspects related to existence, history, legislation, Attorney constitutional system of the Republic of Indonesia, the advent of legislation

governing the dual function of the prosecutor as the general and state Attorney is strongly influenced by:

1. Historical aspects background of Attorney legislation over time since Majapahit Empire, the Dutch East Indies colonial government era, until the time of independence of the Old Order, New Order, and Reform Order. All laws and regulations in Indonesian Attorney since 1945 until now (2014) is strongly influenced by the Adhyaksa system Majapahit Kingdom Era in King Hayam Wuruk and Netherlands Kingdom laws that applied in the Dutch East Indies.
2. Consequences of Indonesia to choose the constitutional system of the Attorney position that placed Attorney under executive, not judiciary has affected all areas of legislation concerning Attorney legislation which published later.
3. The ambivalence of position and functions of the Attorney in national legislation has impact on the functionality of attorney judicial practice. It has role as the prosecution, but from perspective of structurally organizational, the Attorney is under the executive territory that is under President control. It demonstrates that the position of Attorney unconstitutional system of the Republic of Indonesia is not perfect.
4. The authority delegation of Attorney “to act both inside and outside the court on behalf of the state or government “when the government requires a representative institution in the dispute with community in the civil and administrative areas is lack of foundation. It is for purposes for the practical and efficient purposes. Attorney has personnel that distributed into the counties and cities, and it has capability in the court that facilitate the attorney to run a legal defense to represent the state or government in front of the administration courts as stipulated in the Act No. 5 of 1986 concerning State Administration Court.

Attorney system has existed since Majapahit Empire Era, that several positions called Dhyaksa, Adhyaksa, and Dharmadhyaksa. The Mahapatih Gajah Mada has role as Adhyaksa and implementers of king regulations and reporting the difficult case to court. Gajah Mada's role is comparable with the Attorney' duty at this time. Gajah Mada's role is the representative of the king or state in terms of reporting cases to court, so it can be concluded that Attorney since the time has position as an apparatus of the state and has accountability to the current head of state e.g. King Hayam Wuruk.

Since the days after, in the history of Indonesia in Dutch East Indies colonial government, we recognize the existence of an institution called the term “officer van justitie” with the task of prosecuting someone to court in a criminal assault. The term “Attorney” is generally used to translate the term “officer van justitie”, since it has similarity to the sultanates system in Java e.g. to prosecute person suspected of committing a crime before the court, to have trial carried out by the police or judge. The term “attorney” was then officially used during the Japanese occupation to replace the term “officer van justitie” for officers in charge to prosecute cases in court of Japanese military government.

In Dutch East Indies administration, attorney is not merely dealing with the prosecution of criminal cases to court. The provisions of Herzeine Indonesich Reglement (HIR) which expanded by Regerings Reglement Stb 1922 No. 522 mentions that attorney has duties not only as “officer van justitie” but also as advocaat and landsadvocaat (state Attorney) that represents the interests of the Dutch East Indies government in civil cases. In performing the role as public attorney (openbaar aanklager) the attorney also did not just accept the results of the investigation of criminal cases granted by the police, but authorities to conduct further

investigations to deepen the results of the investigation in order to sharpen indictments preparation to court. After Indonesia's independent, the HIR provisions changed into the Updated Reglement Indonesia (RIB).

Civil functions have been implemented by the Attorney since the time of Dutch East Indies colonial government set forth in the various provisions of BW and various ordinances and civil records regulations. Therefore, the operationalization of civil functions as the State Attorney (Landsadvocaat) has existed in KB provisions (Koninklijk Besluit) Gazette 1922 No. 522, entitled "Vertegenwoordiging van den Lande in Rechten."

Although we are free and have a Constitution that was ratified on August 18, 1945 and recognized the term "State Attorney", but at the beginning of independence, we have yet to have specific laws governing the status, duty and authority of the attorney. To overcome the legal vacuum, then the Government of Indonesia keeps the old legislation e.g. the Dutch government regulation. The legal basis for the use regulations of the colonial legacy is the Transitional Provisions Act 1945 Article II of stated that " all state and regulatory agencies are in direct effect, as long as it has not been held for the new legislation under this Act".

Attorney is a state agency (staatsorgan) that existed before Indonesia's independence, as well as the rules. Thus, the Attorney General, basically continue the old regulation of Indische Staatsregeling set, the Colonial Constitution of Dutch East Indies, which put the Attorney General side by side with the Supreme Court. While administratively, both the attorney and the court is under the Ministry of Justice. That is why, in a PPKI meeting (Committee for Indonesian Independence) dated August 19, Professor Supomo reported that the scope of the Ministry of Justice is to be set up to handle administrative matters the Court, Attorney, Prison, Marriage, Divorce and referred as well as handling Endowments and zakat problems. While the legal basis for the Attorney to carry out duties and responsibilities fully based on the Dutch legislation, Het Herzeine Indonesich Reglement (HIR) as expanded by Regering Reglement Stb 1922 No 522. HIR is then converted into a RIB (The updated Reglement Indonesia). Until now Gazette 1922 No. 522 has not been repealed so that the Statute formally valid, according the opinion of the Supreme Court that the State Gazette 1922 No. 522 " mutatis mutandis " is still valid and Ex Officio Attorney representing the government in civil cases.

In 1961 it was published Law No. 15 Year 1961 on Basic Provisions Attorney of the Republic of Indonesia. The Attorney under this Act has position as a state law enforcement apparatus. In Chapter I, Article 1, paragraph (1) stated that, " Attorney of the Republic of Indonesia hereinafter called the State Attorney is a tool that is primarily in charge of law enforcement. " this Act does not explicitly refer the Attorney functions in civil law, but Article 2 paragraph (4) states that the Attorney " carry out other tasks assigned to him by a state regulation."

Although Law No. 15 of 1961 has been published, but the regulatory of Dutch Government Gazette 1922 No. 522, 1941, State Gazette No. 44, Het Herziene Indonesish Reglement Article 123 paragraph (2), and next era legislation, namely Law Emergency law No. 1 of 1951 give legal basis Attorney in civil functions shall remain valid. Since the rise of Act No. 15 of 1961 the Attorney General is not longer appointed by Minister of Justice but appointed directly by the President, because the Attorney General here is the member of the cabinet who is responsible directly to the President.

In 1991, it was published Law No. 5 of 1991 on the Indonesian Attorney replacing the Law No. 15 of 1961. The new Act in Part Two - Position Article 2 paragraph (1) mentioned the position of the Attorney that " Attorney is a government agency that implements state power

in the prosecution. " and then, the attorney has duties and responsibilities not only to the field of crime, public order, but also the civil and administrative cases. Article 27 paragraph (2) stated that :

“In the field of civil and state administration, Attorney with a special power can act both inside and outside the court on behalf of the state or government.”

Article 27 paragraph (2) is in response to the issuance of Law No. 5 of 1986 on the State Administrative Court, as the anticipation to the possibility of a conflict of interest, disagreement, or dispute between the Board and Administrative Officer with citizens that may impede the course of development.

Attorney position also explained in the Law No. 16 of 2004 on Attorney of Republic of Indonesia which replaces Law No. 5 of 1991 on Attorney of Republic of Indonesia. Section 2 article (1) stated, that “Attorney is a government agency implementing state power in the prosecution as well as other authority under Law.” In the new Act, the Attorney function in civil and administrative areas has been emphasized by existence of “special powers ”. In Article 30 paragraph (2) states: “in civil and state administration, with a special power, Attorney can act both inside and outside the court on behalf of state or government. “The Article 30 paragraph (2) of Law No. 16 of 2004 became the referral “State Attorney (JPN)”. The existence of institutions that represent the power become very necessary, especially for small government institutions which only supported by a limited number of personnel, capabilities, and budgets.

With the task of attribute authority granted by the Act, the Attorney General for Civil and Administrative and the State Attorney’s Office can be called to provide legal services to the state or government institutions that require legal services provided by the Attorney. As the State Attorney’s Office, the same legal services provided by the Law Office. The main difference is the client that served by the State Attorney’s Office is limited to state institutions, the government or its officials.

Attorney has the duty or authority to represent the state government in court. The model was also adopted by countries other than Indonesia, including the United States, Japan, South Korea, China, Australia, Singapore, Malaysia, Brunei, Thailand, India, Sri Lanka, and so forth. Thus, viewed from the historical aspects of legislation of Indonesia since the time of independence both in the Old Order, New Order, and Order Reform is likely to put the Attorney General Office (AGO) as a government institution or executive authority similar to the kingdom of Majapahit and constitutional system of the Netherlands.

### **Juridical Implications for the Dual Function Copies of Attorney**

However, the juridical implications with reference to the State Attorney and the State Attorney’s Office are certainly cannot set aside the advocate legislation, namely Law No. 18 of 2003 on Advocates. This Act is the legal basis for the profession of lawyer in Indonesia, both lawyers in the country and foreign lawyers who practice in Indonesia.

In essence, the fundamental reason of attorney was given a role in the field of civil and administrative courts because the conditions that require the attorney’s role in the field. Related to the position of the State Attorney in handling civil and administrative cases, then the State Attorney must make changes in the mental attitude first. Considering his capacity as Attorney General, the Attorney should establish the attitude mental as executor of state power in deemed of "higher" than the others.

## **Ideal Laws on Attorney**

In context of non-state power, there is no centralization of power in one group or institution, especially centered to individual atmosphere. In the Old Order and New Order there are tendency of centralization of political and leadership that bring the Attorney system placed under executive (the President).

Ideally, based on the principles and characteristics of Indonesia as the country of law (rechtstaat) not as a state power (machtstaat), the constitutional spirit of powers separation in Indonesia is the check and balance spirit and the repositioning of Attorney is an option of reform agenda. However, the Attorney General as a part of the judicial power must be controlled in the context of checks and balances. For the Netherlands's attorney System, it is under the executive, but the appointment conducted by the Prime Minister based on a proposal from the Minister of Justice. In the United States, the Attorney is put under the executive, but before appointment of Attorney General, the U.S. President should consult first to Congress. The most ideal change for Attorney in Indonesia is to repositioning Attorney in Indonesian constitution considering the possibilities and functions of both organizations in the area of the executive but still under legislative control. This is possible with the following alternatives :1). Amendments Act of 1945. 2). Judicial Review of Attorney Acts, especially in terms of Attorney position in Indonesian constitutional order. 3). Revision of Attorney Act, especially regarding the solidness of Attorney authority in Civil and State Administration, State Attorney, and as the State Attorney's Office.

## **CONCLUSION**

There are some conclusions:

1. The reposition of State Attorney to guarantee the independence should be under the executive with legislature control. It required a regulated umbrella that made carefully in the House with inputs of law expert.
2. The State Attorney as Public Prosecutor has a strong legal basis eg Law No. 16 of 2004 of Prosecutor of the Republic of Indonesia in Article 30, paragraph 1. Whereas, public attorneys can represent the government or the State in the areas of civil and administrative with legal ground of Article 30, paragraph 2 of the Law No. 16 of 2004. However, it is concluded that the term state attorney or public Attorney still require a stronger legal basis.
3. Since the State Attorney Office is under the authority of the executive / Attorney power, therefore, it required a special Act or a kinds of Republic of Indonesia Attorney Act. By having the legislation, the State Attorney Office is no longer subject to the Law No. 18 of 2003 on Advocates for the adage *lex applies a derogat legi generali* (a specific law is override general law).

## **RECOMENDATIONS**

Therefore, it is recommended that:

1. Good will from the government, parliament, and the Attorney for the Attorney repositioning within the national law reform framework.
2. The government and/or college to foster academic assessment about repositioning of State Attorney and Public Attorney
3. Proposing the State Attorney Bill, Public Attorney Bill and State Attorney office Bill to the House of legislative.

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