



Legal status and function of the prosecutor as state attorney in providing legal assistance to state owned enterprise

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Abstract

This study aims to explain the position and function of the Prosecutor as a State Attorney in providing legal assistance to BUMN, the consideration providing legal assistance to BUMN and the ideal arrangement of the Prosecutor as a State Attorney in providing legal assistance to BUMN. This research used normative juridical methods with a statutory approach, conceptual approach and historical approach. The results of the study showed several consideration of the Prosecutor as a State Attorney providing Legal Assistance to BUMN a) Legal assistance was execute the results analysis that problem was included in the scope of civil or state administration; b) Not indication of conflict of interest with other area such as intelligence and criminal law enforcement; c) Based on the analysis of Strengths, Weaknesses, Opportunities and Threats (SWOT) on the juridical technical analysis of the case from the aspect of various aspect that describe of success and potential weaknesses of legal step; d) Considering not indication of criminal act committed by person occupying positions in BUMN; and e) Aims to recover state financial losses incurred due to dispute between BUMN and third parties. The ideal regulation the Prosecutor as a State Attorney in providing Legal Assistance to BUMN is clarify the position of BUMN as part of the state and government considering that BUMN are status as private legal entities. There is a mechanism that prevent conflict of interest between legal aid and the fields of intelligence and criminal law enforcement as well. Moreover a mechanism for supervision of the implementation of the Prosecutor duties as State Attorney in providing legal assistance to BUMN.

Keywords: The state attorney, legal aid, state-owned enterprise

Introduction

One of function the Prosecutor as State Attorney is represent the legal interest of State-Owned Enterprises (BUMN) both inside and outside the court. BUMN are business entities whose entire or partial capital is owned by the state through direct participation derived from separated state assets. BUMN are private legal entities according to Arifin P. Soeriaatmadja due to the deposit of state capital into companies which resulted in the transformation of law from public finance to private finance. ^[1] The status of the Prosecutor who represent the legal interest of BUMN causes discourse from various parties because the status of BUMN as business entities that capital participation from the state, including in private legal entities.

The first party to agree with the position of the prosecutor as a JPN representing the legal interests of BUMN is based on several reasons, including the position of SOEs in the state that carries out its functions in the economic sector in the context of the interest of the lives of many people. The state institution are used to protect the interest of BUMN in carrying out their functions, including state attorney.

The second party who disagrees with the position of prosecutors as JPN representing the legal interest of BUMN mostly comes from professional advocates. ^[2] There are several reason the parties disagree related to the relationship between BUMN and the state. Although BUMN get capital participation from the state, the separation between state wealth and BUMN wealth has implication for state relation with BUMN only as owner not manager. The position of the state as the owner by including capital in the form of share until that all company activities are the responsibility of the

director as manager not the responsibility of the state. ^[3] The opinion state that the role of the Prosecutor as a state attorney representing interest to BUMN can interfere with the Prosecutor Office function in combating corruption. The Prosecutor Office and BUMN have made cooperation in the form of a Memorandum of Undermatch (MoU) to prevent corruption in the management to BUMN. ^[4] The position of Prosecutor who represent the interest to BUMN in resolving a dispute can cause the Prosecutor to be bound by the interest of BUMN.

This situation will interfere with the independence of the Prosecutor as a law enforcer in carrying out the functions of judicial power. Independence is the soul of law enforcement, so without independence law enforcement is only limited to state institutions that do not have the soul to achieve the purpose of their existence. In addition, amandment the arrangement of the Prosecutor as State Attorney in providing legal assistance, especially representing the legal interest of BUMN. According to the Supreme Court Circular (Sema) Number 7 of 2012 which states that the Prosecutor as a State Lawyer cannot represent BUMN, because have the status of Private legal entities (vide Article 11 of Law No. 19 of 2003 concerning BUMN). ^[5]

In progression, the Supreme Court made amandment to Sema Number 7 of 2012 with the establishment of Sema Number 4 of 2014 which states that the Prosecutor as a State lawyer, based on Article 24 of Presidential Regulation Number 38 of 2010 concerning the Organization and Work Procedures of the Prosecutor's Office of the Republic of Indonesia is authorized and can represent BUMN dand

BUMD.^[6] Based on this problem, that discourse arrangement regarding the Prosecutor the State Attorney in providing legal assistance, especially those representing the legal interest of BUMN. This discourse effecting the position and function to the Prosecutor as a State Attorney considering the dual functions played by the Prosecutor not only in the Civil and State Administration fields but also in the criminal field as investigator and public prosecutor.

Research method

This research is a normative juridical research with a statutory approach (statute approach), historical approach (historical approach) and conceptual approach (conceptual approach).^[7] In this study the statutory approach is used review the system of regulatory norm regarding the Prosecutor as a State Attorney who has the duty to provide legal assistance. This approach is used to examine the ideal arrangement of the Prosecutor as State Attorney by looking suitability with the principles of forming formal and material laws and regulations. The conceptual approach is used to know and explain the nature of the duties and functions of the Prosecutor as a State Attorney in providing legal assistance. The conceptual approach to describe the ideal arrangement of the Prosecutor as the State Attorney in providing legal assistance using the concept of legal aid. This study also used a historical approach to see the historical aspect of the birth of the duties and function of the Prosecutor State Attorney by looking at the background of the birth of norm settings regarding the duties and functions of prosecutors in the civil and administrative fields. Through a historical approach, it can also be known the reasons so that prosecutors are given the power of attorney based on a special power of attorney to represent the government both inside and outside the court.

Results and discussion

The consideration state attorney in providing legal assistance to BUMN

State-Owned Enterprises (BUMN) are one of the authorizing parties to JPN according to Law Number 19 of 2003 concerning State-Owned Enterprises which states that BUMN are business entities whose entire or majority of capital is owned by the state through direct participation derived from separated state asset. Article 1 point 1 of Law Number 19 of 2003 concerning State-Owned Enterprises states that the Company is a state-owned enterprise in the form of a limited liability company whose capital is divided into shares whose entire or at least fifty percent shares are owned by the State of the Republic of Indonesia whose main purpose is to obtain profits As a legal entity who capital come from the state or private, initially BUMN wer'not allowed to use JPN as their legal representative. This is regulated in the plenary formulation of the civil chamber of Supreme Court Circular Number 7 of 2012 which states that the Prosecutor as a state lawyer cannot represent BUMN, because these BUMN are domiciled as private law entities.

In progression, these provision have been amended with the establishment of a plenary formulation of the civil chamber through the Supreme Court Circular Number 4 of 2014 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2013 as a Guideline for the Implementation of Duties in the Court which states that prosecutors as state

lawyers are based on Article 24 of Presidential Regulation Number 3 of 2010 concerning the Organization and Work Procedures of the Prosecutor's Office which states that prosecutors are lawyers the state can represent BUMN and BUMD.

In english literature, the term legal aid according to Black's Law Dictionary is interpreted as "Country wide system administered locally by legal services is rendered to those in financial need and who cannot afford private counsel".^[8] The concept of legal aid that develops in Western countries contains two meanings, namely Legal Aid and Legal Assistance and Legal Service. The term legal aid is narrowly defined as providing legal aid services to someone involved in a case, so the main motivation is to enforce the law by defending the interest of poor people who do'nt understand the legal state.^[9]

According to Godang Riadi Siregar, former Civil Director at the Junior Attorney General for Civil and State Administration who stated that related to the duties and authorities of the prosecutor in the civil and state administrative sector, which stated: The State Attorney is ready to represent BUMN that are in business disputes with other parties and through Sema Number 4 of 2014 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2013 as a guideline for the implementation of duties for the court. For now, JPN has the discretion to receive Power of Attorney from BUMN or BUMD related to business disputes such as bad debts. JPN has also assisted state financial restorers by assisting a number of state-owned banks since 2013.^[10]

Based on this opinion, the provision of legal assistance by the State Attorney to BUMN is carried out solely to assist BUMN in dealing with legal issues including disputes with third parties and also recover state finances due to business disputes and violations committed by third parties, so that BUMN suffer losses due to these action. There are various considerations, the State Attorney provides legal assistance to BUMN including the following. There are various consideration, the State Attorney provides legal assistance to BUMN including the following. The first, Conduct a review of the submitted application to analyze whether the problem falls within the scope of civil or state administration. After receiving a request from a state-owned enterprise, legal assistance occurs, the prosecutor's office according to its level will conduct a study and analysis to determine whether the case of the complained matter falls within the scope of civil or state administrative matters.

The second, if the results of study are found to indicate conflict of interest with other field such as: the field of intelligence, and the field of special crime, the application can be rejected accompanied by written statement. If the results of the review do'nt find any conflict of interest, then the application is accepted and accompanied by written statement to proceed the stage of signing the power of attorney to provide legal assistance by the State Attorney. Third, conduct a Strengths, Weaknesses, Opportunities and Threats (SWOT) analysis of the juridical technical analysis of the case from the aspect of the provisions of laws and regulations, legal doctrine, jurisprudence, or related court decisions that can describe the success and potential weaknesses of legal steps that can be taken, including the authority of the prosecutor's office in conducting legal conflict.

Fourth, considering the absence of indication to criminal act that occur in the future committed by people who are in the organ of BUMN. The potential for criminal act such as corruption can occur in the management of BUMN carried out by the organ in them, considering that BUMN execute business and business activities that have the potential to misused or utilized by people who position in them for personal interest. ^[11] Fifth, to recover state financial losses incurred due to disputes between BUMN and third parties. In the management of BUMN such as banking there are various problems that occur in relationships with customers such as bad loans, so that problem cause losses to BUMN finance which are considered part of losses to state finance. Disputes with customers require the role of lawyers/advocates as legal assistance in resolving the dispute both in court and outside the court. The position of BUMN as part of the state or government, then BUMN can then give power to state lawyer in solving these problem.

The role ideal on prosecutor as state attorney in providing legal assistance to BUMN

In carrying out its functions in the civil and administrative fields, the prosecutor's office is given the authority and position as a state attorney. The existence of the State Attorney is a necessity in government administration activities, both in public activities, as well as civil and state administrative activities. Through legal aid activities by prosecutors, BUMN that carry out economic and business activities where most of the capital comes from the state, require the role and function of state lawyers in order to deal with legal problems both in litigation and non-litigation against third parties.

First, Law Number 16 of 2004 and Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the Attorney General of the Republic of Indonesia do not expressly list the authority of the Prosecutor as a State Attorney. The regulation on prosecutor as state lawyers in the provisions of the law, especially in providing legal assistance to BUMN, is not explicitly mentioned. Article 18 of Law Number 11 of 2021 states that: 1) The Attorney General shall be the highest Public Prosecutor and state attorney in the Unitary State of the Republic of Indonesia; 2) The Attorney General with special powers or because of his position and position acts as the State Attorney, in the civil and administrative and constitutional fields in all judicial environments, both inside and outside the court for and on behalf of the state or government or public interest;

The Attorney General as the highest leader in the power structure of the Attorney General is given the position of Supreme Public Prosecutor and State Attorney. The position of the Attorney General as State Attorney hierarchically also applies to the power structure under him, both the Chief Prosecutor and the Chief District Attorney in accordance with the position and scope of his work area. In execute his function as State Attorney, the Attorney General by virtue of special powers may act on behalf of the state, government and public interest both inside and outside the court when facing civil, administrative and constitutional case. If related to the provisions in the previous law, namely Law Number 16 of 2004 concerning the Attorney General of the Republic of Indonesia. Article 30 Paragraph 2 of Law Number 16 of 2004 states that "In the civil and administrative fields, prosecutor with special power may act both in and out of

court for and on behalf of the state or government". After the amendment of Law Number 16 of 2004 with the establishment of Law Number 11 of 2021, Article 30 paragraph (2) was maintained, but the position of the State Attorney was affirmed in Article 18 paragraphs (1) and (2) of Law Number 11 of 2021 which stated that: 1) The Attorney General shall be the highest Public Prosecutor and state attorney in the Unitary State of the Republic of Indonesia; 2) The Attorney General with special powers or because of his position and position acts as the State Attorney, in the civil and administrative and constitutional fields in all judicial environments, both inside and outside the court for and on behalf of the state or government or public interest;

Article 30 paragraph 2 of Law Number 16 of 2004 only regulates in general that the subject referred to as a state lawyer is the prosecutor's office in general without leading to a certain position in the prosecutor's structure. In Law Number 11 of 2021, it has been clearly stated that the position in the prosecutor's power structure as a state attorney is the Attorney General, which hierarchically applies to other chief prosecutors such as the Chief High Prosecutor and the Chief District Attorney. Article 30 paragraph (2) of Law Number 16 of 2004 does not explicitly mention the term State Attorney because only the term "special power" and the term "acting both inside and outside the court for and on behalf of the state or government" are not explicitly mentioned. The term when viewed functionally is indeed the duty and function of advocates or lawyers in providing legal assistance to client or justice seekers who want to use their service.

Article 18 paragraph (1) and paragraph (2) of Law Number 11 of 2021 the term state lawyer is mentioned explicitly and clearly with its function to act on behalf of the state or government as well as public interests both inside and outside the court in the civil, state administrative and constitutional. The article expands the scope of the field under which the state attorney's attorney has authority, not only in the civil and administrative fields, but also in the constitutional field. In addition, the subject of using the services of state lawyers is also extended not only to the state and government but also to general importance.

The State Attorney in providing legal assistance to BUMN is implement professionally. The meaning of professional is implementation of legal aid in accordance with laws and regulation, standard operating procedures regulated as guidelines for the implementation of legal aid. In addition, legal assistance is also provided in a quality manner by assigning tasks to prosecutors who have qualifications and competence in the field whose problems are faced to BUMN.

The implementation of legal assistance by the State Attorney to represent the interests of BUMN must also be held in an accountable manner where the results of the implementation of activities must be accountable both technically, administrative and technical, juridical. Legal aid as a process of resolving case both in court and outside the court must certainly be in accordance with the provisions of the applicable procedural law and administrative provisions, so that legal assistance is able to provide benefits and be carried out in an orderly and legal certainty. The provision of legal assistance to BUMN must also not cause conflicts of interest with the handling of ongoing criminal cases or there are strong indications of criminal acts in the future.

This is necessary because prosecutors institutionally and functionally are also given the authority to investigate, investigate and prosecute certain criminal acts such as corruption crimes that can potentially be carried out by people in BUMN institution. The provision of law to BUMN must also be carried out optimally and with quality, so that the assigned Prosecutor has competence related to formal law and material law in the civil and state administrative fields by considering the results of legal aid activities that have been made on the same issue. The State Attorney also in providing legal assistance cannot choose to only handle cases that have a high success rate or reject cases based on analysis is likely to be defeated, so the Prosecutor must make optimal efforts to strive for success in a case.

There are several ideal arrangement for the Prosecutor as State Attorney in providing legal assistance to BUMN. The first, clarify the position of BUMN as part of the state and government so that the State Attorney can represent them in facing legal problems in the Civil and State Administrative fields both in court and outside the court. Although Prosecutor's Regulation Number 7 of 2021 states that BUMN are part of the state or government which are subjects that can use the services of the State Attorney, in state finances the position of BUMN is quite problematic. Teleologically, the provision of legal assistance by the State Attorney to BUMN because of their position as part of the state and the losses of BUMN are considered as state financial losses. This is if referring to Article 2 letter g of Law Number 17 of 2003 concerning State Finance which states that "State finance includes state wealth / regional wealth managed alone or by other parties in the form of money, securities, receivables, goods and other rights that can be assessed with money, including wealth separated from state companies / regional companies". Based on the article, BUMN finances are part of state finances, so that when BUMN experience losses it also results in losses in state finances.^[12]

There are different opinions that state the finances in BUMN are not state finances because based on the provisions of Article 11 of Law Number 19 of 2003 which states that "For State-owned enterprises, the Company is subject to the provisions of the State-owned enterprises Law and the Limited liability company Law". So that all activities within BUMN are considered as activities of a company with the principle of separate legal entity. So all state assets that have been included in the Company BUMN are no longer state-owned but have become the property of legal entities or BUMN themselves. So efforts are needed to synchronize related to the position of BUMN financial losses with state finances as referred to in the State Finance Law, State-owned enterprises Law and Limited Liability Company Law, so to provide clarity on the financial position of BUMN as part of state finance.

Second, there is a mechanism that can prevent conflicts of interest between legal aid activities against BUMN and the fields of intelligence and criminal law enforcement. The Prosecutor Office is an institution given a dual function, namely as the holder of prosecution power in criminal cases and state lawyers in civil and administrative cases. In execute this dual function, it has the potential to cause conflicts of interest between the two fields, especially in providing legal assistance to BUMN, because on the other

hand there is a potential for criminal acts such as corruption in the management of BUMN.

In the Attorney General's Regulation Number 7 of 2021, it has been stipulated that before giving approval to requests for legal aid from the state or government and BUMN, the State Attorney according to his level must first see whether there is a potential conflict of interest between these legal aid activities and other fields such as intelligence, general criminal and special crime. If a potential conflict of interest is found, the Prosecutor as the State Attorney may refuse to provide legal assistance to BUMN. Third, a regulation is need that can maintain the independence of the Prosecutor as the executor of the prosecution power, considering that on the other hand the Prosecutor also carries out duties and functions in providing legal assistance to BUMN.

The Prosecutor Office is the only institution that is given a dual position as the exercise of prosecution power and also as the State Attorney. Although the authority is exercised by different structures and fields, namely the general criminal and special criminal fields as well as the civil and state administrative fields, it is necessary to have an arrangement that can maintain the independence of the Prosecutor in carrying out his main duties as the executor of prosecution power.

Fourth, there needs to be an arrangement that clarifies the authority of the Prosecutor as a State Attorney in order to strengthen the existence of the Prosecutor as a State Attorney in providing legal assistance to BUMN. This is because in practice there are parties who challenge the granting of special powers by BUMN to the State Attorney.^[13] Fifth, it necessary to regulate the supervision mechanism for the implementation of the Prosecutor's duties as State Lawyers in providing legal assistance to BUMN. Every authority granted by law certainly requires a monitoring mechanism so that the exercise of that authority is in accordance with the objectives and there is no abuse of authority and conflicts of interest that lead to deviation.

Implementation the duties and authorities of the Prosecutor as State Attorney, Attorney General Regulation Number 20 of 2021 has indeed stipulated that if legal assistance to civil and state administrative law issues is considered important, the head of the work unit that will carry out legal assistance must report to the Junior Attorney General for Civil and State Administration in stages. Then, the head of the work unit will determine the need for a tiered case exposure to determine the steps in the legal aid process.

In this provision, reports that are mandatory hierarchically to the Junior Attorney General for Civil and State Administration are regulated in the implementation of legal aid, but these mandatory reports only apply to matters that are considered important, while ordinary and not categorized as important legal aid has no obligation to report to the leadership hierarchy. The internal supervision mechanism need to regulated that the provision of legal assistance by State Attorney can achieve the desired goals and there is no abuse of authority in the implementation of legal assistance.

The State Attorney in implementation his function as legal representative of BUMN his authority is only limited to what has been regulated in a special power of attorney and must not exceed the authority that has been given. The supervision mechanism can be carried out internally in accordance with the position structure and duties and functions that exist in the prosecutor's institution. Given that

the duties and functions of the State Attorney are included in the Civil and State Administration fields, the highest supervisor of the implementation of these duties is with the Junior Attorney General for Civil and State Administration. Such supervision can be carried out through a periodic reporting mechanism for ongoing legal aid efforts.

Conclusion

There are several considerations for the Prosecutor as a State Attorney to provide Legal Assistance to BUMN. The considerations are a) The legal assistance is carried out on the basis of the results of the analysis that the problem falls within the scope of civil or state administration; b) In the absence of indications of conflicts of interest with other fields such as: the field of intelligence, and the field of special crimes, the application can be rejected accompanied by a written statement; c) Based on the analysis of Strengths, Weaknesses, Opportunities and Threats (SWOT) on the juridical technical analysis of the case from the aspects of various aspects that describe the likelihood of success and potential weaknesses of legal steps that can be taken; d) Considering the absence of indications of criminal acts that occur in the future committed by persons occupying positions in BUMN; and e) Aims to recover state financial losses incurred due to disputes between BUMN and third parties. The ideal regulation for the Prosecutor as a State Attorney in providing Legal Assistance to BUMN are: a) Explain the position of BUMN as part of the state and government considering that SOEs are also domiciled as private legal entities; b) The existence of a mechanism that can prevent conflicts of interest between legal aid activities and the field of intelligence and criminal law enforcement; c) The need for regulations that maintain the independence of the Prosecutor as the executor of the prosecution power, considering that on the other hand the Prosecutor also carries out duties and functions in providing legal assistance to BUMN; d) The existence of regulations that clarify the authority of the Prosecutor as a State Attorney in order to strengthen the existence of the Prosecutor as a State Attorney in providing legal assistance to BUMN; e) There is a supervisory mechanism for the implementation of the Prosecutor's duties as State Attorney in providing legal assistance to BUMN.

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