

THE ADVOCATES' IMMUNITY RIGHTS IN INDONESIA'S CRIMINAL JUSTICE SYSTEM

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Abstract

The purpose of this study is to determine the factors causing the lack of protection of advocates' immunity rights in the criminal justice process, and to analyze the future protection of advocates' immunity rights in the criminal justice system. The approach method used in this research is empirical juridical method. In the future advocate immunity rights can be used adversarial system. Where the inadversarial system can be subject to immunity. That the judge here is only a jury between the advocate and the public prosecutor who is trying to prove the charges and charges filed at trial. if there is a violation of the code of ethics, for example an Advocate is attacked or criminalized by the opposing party, then with this Advesari System the Advocate can prove that what an Advocate does is in accordance with the procedures and rules of law that apply is a system that is a legal umbrella for an Advocate where the Advocate can prove what he does in carrying out his profession in accordance with the law.

Keywords: *Advocates; Criminal; Immunity; Justice; System.*

A. INTRODUCTION

The existence of Advocates as a profession that is free, independent and responsible in carrying out its profession, a profession that is said to be a noble position. This results in the vulnerability of the Advocate profession, because of the noble function of Advocates to carry out the duties of the Law and as a form of protection of human rights, so that Advocates must have immunity rights every time they carry out their functions and duties as

Advocates.¹ That Advocates in carrying out their profession have the right to immunity in defending their clients, and cannot be sued by anyone, the author in this case understands what is stated in the Article above, that Advocates have a very heavy burden in defense, in other words, the authority of Advocates to defend or handle cases from the investigation stage to the implementation of the judge's decision if it is a criminal case, while in civil cases, Advocates must defend with the passive nature of justice, or parties who are more active in the court process. As what the material criminal law in Article 50 of the Criminal Code expressive verb also protects the duties of Advocates in carrying out the laws and regulations as stated in Law Number 18 of 2003 concerning Advocates, Article 50 of the Criminal Code contains the following:

"The person who performs an act to implement the provisions of the law shall not be punished." Rimmelink argues that the act referred to in the article above is an act that has fulfilled the elements of the offense, but this is the basis for the elimination of punishment because the provisions of the offense are formulated broadly so as to include other acts that have actually been regulated in the provisions of other laws and regulations.²

The author's savings in carrying out the orders of this Law can be classified as having legal interests that both regulate different things but at the same time, in this case relating to Article 50 of the Criminal Code concerning Advocates who carry out their duties and based on Law Number 18 Year 2003 concerning Advocates, then *mutatis mutandis* Article 50 of the Criminal Code also protects advocates in carrying out their duties and functions as law enforcement officers. There is a Constitutional Court Decision Number 26/PUU-XI/2013 which emphasizes that advocates cannot be prosecuted criminally or civilly, namely:³

"Article 16 of Law of the Republic of Indonesia Number 18 of 2003 concerning Advocates does not have binding legal force as long as it is not interpreted, Advocates cannot be prosecuted either civilly or criminally in carrying out their professional duties in good faith for the benefit of defending clients inside and outside the courtroom."

This further emphasizes that an Advocate who previously could not be prosecuted either civilly or criminally only in court changed to inside and outside the trial. Advocate who is prosecuted even outside the trial, his/her right to immunity remains attached to the Advocate.⁴ That the protection of Advocates' immunity rights in law enforcement is impartial or free from any

1 Rizki Ananda Utami et al., Tanggung Jawab Profesi Advokat Dalam Pendampingan Hukum Perkara Pidana terhadap Klien, *El-Mujtama: Jurnal Pengabdian Masyarakat*, Vol. 3, No. 3, page. 722-736.

2 Gabriel Christopher Tumiwan., Tindak Pidana Menarik-Alih Barang Sitaan Menurut Pasal 231 Kitab Undang-Undang Hukum Pidana, *Lex Administratum*, Vol. 11, No. 2, 2023, page.1-9

3 Constitutional Court Decision Number 26/26.PUU-XI/2013

4 Muh Nasir., Analisis Hukum Terhadap Kriminalisasi Advokat Dalam Menjalankan Profesinya Yang Termuat Dalam Pasal 16 Undang Undang No.18 Tahun 2003 Tentang Advokat, *Nobel Management Review*, Vol. 2, No. 4, 2021, page.523-531.

pressure, because the protection of Advocates in order to maintain their immunity rights must be in accordance with applicable laws and regulations. Looking at the article above, it seems to the author that the immunity rights of Advocates will indirectly decrease, with the criminalization of Advocates who defend in court, this will have an impact on the role and burden of Advocates in handling cases, the regulation regarding the criminalization of Advocates is regulated in the chapter on criminal acts against the trial process (Contempt of Court).

Fenny Cahyani's research in a journal entitled "The Position of Advocate Immunity Rights in Indonesia" found that "The application of advocate immunity rights must touch three legal components in the form of legal structure, legal substance and legal culture so as to realize law enforcement that is just, certain and beneficial to the wider community. The application of advocate immunity rights must also be able to bring law enforcement towards justice, benefit and certainty. The obstacle in the application of advocate immunity rights in Indonesia is that between law enforcers a symbiotic relationship of mutualism is not created in a positive sense."⁵ Another study from Cinthia Wijaya in a journal entitled "Government Efforts to Protect Advocates' Immunity Rights in Performing Work" found that "Immunity rights are very important for advocates in carrying out their functions and duties as law enforcement officials for the creation of justice, certainty and expediency. Thus, the advocate's immunity right is not only given in court sessions, but also applies outside the trial with a note that outside the trial is an integral part of the judicial process."⁶

Based on the description of the background above, the purpose of this study is to determine the factors causing the lack of protection of advocates' immunity rights in the criminal justice process, and to analyze the future protection of advocates' immunity rights in the criminal justice system.

B. RESEARCH METHODS

The approach method used in this research is empirical juridical method. Empirical juridical research is legal research on the enactment or implementation of normative legal provisions in action on each specific legal event that occurs in society.

In this study using secondary data obtained from primary and secondary legal data. The data collection method is interviews, namely this technique is used to obtain detailed and detailed information on the object under study, where the interview process is carried out in the field and observation, namely this collection technique is a technique used by making direct observations in the field to see the facts that occur in the field.

5 Fenny Cahyani et al., Kedudukan Hak Imunitas Advokat Di Indonesia, *Jurnal USM Law Review*, Vol. 4, No. 1, 2021, page.146-160

6 Cinthia Wijaya et al., Usaha Pemerintah Melindungi Hak Imunitas Advokat Dalam Melakukan Pekerjaan, *Resam: Jurnal Hukum*, Vol. 5, No. 1, 2019, page.40-56

C. RESULTS AND DISCUSSION

1. Factors in the Lack of Protection of Advocates' Immunity Rights in the Criminal Justice Process

Speaking of the legal profession, the legal profession is a job with special expertise that fulfills extensive knowledge and responsibility in carrying out its duties related to the field of law. Attributed to the honorable profession (noble position), namely Advocates, Notaries, Prosecutors, and Judges where each profession has its own Law and Code of Ethics which aims to provide legal protection to their respective professions. The reality of law enforcement practices by advocates in Indonesia, although both are law enforcers, the roles and functions of these law enforcers are different from one another. The independence and freedom of a person who works as an Advocate must be followed by the responsibilities of each Advocate and the professional organization that oversees it. As stipulated in Law No. 18/2003 on Advocates, the Advocate Organization is obliged to develop a code of ethics for advocates to maintain the dignity of the advocate profession as a noble and honorable profession.

Basically, the main task of a legal advisor or what we usually call an advocate (advocate) is a noble position. It is said to be noble because the purpose of the advocate profession is to help clients or power of attorney who trust them to defend and fight for their rights in a predetermined forum. An advocate must adhere to the principle of equality before the law and the principle of "presumption of innocence", so that in his daily defense and duties he dares to carry out his profession and function effectively. Moreover, if he or she is equipped with adequate legal knowledge, then there is no reason why he or she should be afraid of facing any case, no matter how serious it is.⁷

Law enforcement in the criminal justice system is a series consisting of sub-systems between state institutions, Muladi stated that in the criminal justice system the criminal justice system as a system is an open system, namely: SPP in motion will always experience interface (interaction, interconnection). and interdependence) with the environment at the level of society: economy, politics, education, and technology, as well as the SPP subsystem itself (criminal justice system subsystem).⁸ From what Muladi stated above, it can be concluded that advocates as law enforcement officials will naturally intersect with society and certain economic activities to support the ongoing criminal justice system. disturbing order and threatening the sense of security of the

7 Solehodin, *Kewenangan Advokat dalam Sistem Peradilan Pidana dan Perdata*, Thalibul Ilmi Publishing, Gresik, 2023, page.12

8 Mulyadi Alrianto, *Sistem Peradilan Pidana*, PT. Nasya Expanding Management, Pekalongan, 2023, page.5

community, is one of the community's efforts to control crime so that it is within the limits of tolerance, acceptable.⁹

Advocates are an independent profession that is not bound by any state institution such as Judges, Prosecutors and Police, in their daily lives Advocates always deal directly with people who need legal assistance. Another problem arises when viewed from the empirical facts that advocates or advocates in handling cases only understand their profession as legal counsel for clients and put aside their profession as law enforcement officers.

So that he easily accepts bribes in any form from his clients and even enters into agreements with other law enforcement officials. This is an interesting issue to study considering the power relations that occur in the criminal justice process have a significant influence on the position of advocates. The author argues that advocates are representatives of citizens while the state is represented by judges, prosecutors and police, resulting in a conflict between citizens and the state resulting in an imbalance in the law enforcement process. The state actually has the legitimacy to process and prosecute citizens who commit criminal offenses. The power relations towards advocates who represent the interests of citizens in the criminal justice system in Indonesia are widely felt by more or less advocates, this is reinforced by the mention of legal counsel or advocates, advocates who are theoretically not recognized as law enforcement officers (law enforcement agencies). Talking about law enforcement cannot be separated from the factors of the applicable laws and regulations. Friedman theoretically suggests that there are factors related to law enforcement, the first is the substance factor or law, the second is the law enforcement apparatus factor and the third is the legal culture factor of a particular community.¹⁰

Regarding the laws governing advocates in Indonesia, it can be seen that the duties and powers of advocates contained in the Advocates Law are not much different from those regulated in the Criminal Procedure Code.¹¹ That advocates in their duties to defend the cases they handle, advocates can also carry out the duties and powers of advocates in the Advocates Law such as obtaining information, data and documents for the benefit of their defense, Article 16 of Law Number 18 Year 2003 expressly states that:¹²

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- 9 Harmoko Harmoko., Kode Etik Profesi Advokat Dalam Menjaga Eksistensi Advokat Sebagai Profesi Terhormat (officium Nobile), IUS: *Jurnal Ilmiah Fakultas Hukum*, Vol. 10, No. 2, 2022, page.184-193
- 10 Muhammad Adam., Lemahnya Penegakan Hukum Di Indonesia, *Jurnal JISH*, Vol. 1, No. 1, 2017, page.57-68.
- 11 Muten Nuna at al, Code of Ethics and the Role of Advocates in Providing Legal Aid to the Poor, *Indonesian Journal of Advocacy and Legal Services*, Vol. 1, No. 2, 2020, page.259-274
- 12 Law Number 18 Year 2003 on advocates

"You are not subject to civil or criminal prosecution for exercising your profession in good faith for the purpose of defending yourself in court."

In my opinion, the phrase defense in court has too broad a meaning, so that advocates who carry out the orders of this law often experience excessive anxiety or lack of legal certainty. Advocates cannot be identified with their clients in defending their clients' cases by the authorities and/or the public. This means that an advocate in providing legal services or assistance to his/her client should not be equated in both attitude and behavior.

The right to immunity attached to each individual advocate often encounters several obstacles related to its protection, in this case relating to information obtained by advocates in the context of carrying out their profession, Article 19 of Law Number 2003 concerning Advocates states that:¹³

"Advocates are entitled to confidentiality of their relationship with clients, including protection of their files and documents against seizure or inspection and protection against interception of Advocates' electronic communications."

The right to immunity relating to Article 19 above is a right attached to advocates who receive confidential files and information from their clients, but in the construction of Article 19 above there is no provision relating to the right to kinship as a whole expressive verb. In this article, the advocate's right to immunity is often ignored by law enforcement officials representing the state, advocates who carry out their profession in accordance with laws and regulations and professional codes of ethics.

The authority and duties of advocates are also found in criminal procedure law, that in KUHAP the definition of advocate is understood as a legal advisor, according to the author's opinion, the meaning of the word legal advisor is that an advocate only has the nature of advising clients in criminal justice, so that criminal responsibility is still delegated to the client and his client as the object of criminal justice examination. In contrast to an advocate who is an advocate who defends the interests of a client in a civil case, in this case the civil client gives absolute power of attorney to the client and the object of dispute is land, or other property rights.

2. Immunity Protection for Future Advocates in the Criminal Justice System

The role of advocate, advocate or advocate is not subjective, or a role that is only desired by a handful of people who work as advocates.

¹³ Law Number 18 Year 2003 on advocates

The role is needed and needed objectively.¹⁴ This is expressly recognized in the weighing part of letter b of Law Number 18 Year 2003 on Advocates which states: "that the judicial power which is free from any interference and external influence, requires a free, independent and responsible advocate profession, for the implementation of an honest, fair and legal certainty for all justice seekers in upholding the law, truth, justice and human rights". Article 1 paragraph (1) of the Advocates Law also states that, "An advocate is a person whose profession is to provide legal services, both inside and outside the court who fulfills the requirements under this law". Furthermore, it is emphasized in Article 5 paragraph (1) of the Advocates Law that "Advocates are law enforcers, free and independent, guaranteed by laws and regulations". It has thus been expressly stated that the position of advocates is the same as that of the police, prosecutors and judges as members of the law enforcement family.¹⁵ In connection with this, it is clear that advocates are a family of law enforcers who are entitled to be protected by immunity rights equal to other law enforcers.

The role of advocates in carrying out their duties and profession as law enforcers and advisors has noble duties and strategies in the implementation of legal aid, especially to realize the principle of equality before the law and the principle of presumption of innocence. Article 37 of Law No. 14 of 1970 and Article 56 paragraph (2) of KUHAP stipulate that "legal counsel as a party providing legal aid is a party to the provision of legal aid". The duty of an advocate is to uphold the law advocates in carrying out their duties must be in accordance with what they do.¹⁶

In accordance with the presentation of the results of the author's interviews with several advocates, it can be concluded that an advocate does have immunity rights as long as he carries out his profession in accordance with the corridors and provisions of the code of ethics and good faith. It should be emphasized that there must be efforts to implement Law No. 18/2003 on Advocates where technically efforts must be made regarding the immunity rights attached to an advocate. In addition, according to the source Lanang Kujang Pananjung, there is a need for a "single bar" the source also agreed with the existence of a single bar, there are clearly limits for advocates determined by the Advocate Organization. There is one Advocate who is in an Advocate Organization that violates the code of ethics cannot be nominated to

14 Sardinata Sardinata et al., Hak Imunitas Advokat Dalam Menangani Perkara, *Journal of Lex Generalis*, Vol. 2, No. 3, 2021, page.1074-1086

15 Kharunnisa Kharunnisa et al., Peran Organisasi Profesi Advokat terhadap Anggotanya yang Berhadapan dengan Hukum, *As-Syar'i: Jurnal Bimbingan & Konseling Keluarga*, Vol. 5, No. 2, 2023, page.364-371

16 Ristan BP Simbolon et al., Tanggungjawab Organisasi Profesi Advokat Terhadap Anggotanya yang Berhadapan Dengan Hukum Didalam Menjalankan Profesinya Dengan Iktikad Baik, *Jurnal Pro Hukum: Jurnal Penelitian Bidang Hukum Universitas Gresik*, Vol. 11, No. 3, 2022, page.161-169

another Advocate Organization in the sense of being blacklisted. Now how can our profession really be called a noble profession if person A commits a violation in one Advocate Organization, he is punished and blacklisted then he runs to another Advocate Organization and he is accepted then given a KTA and again allowed to do the event again which then makes a latah. If it is the advice from the source to enforce this code of ethics that is important, then for the issue of immunity rights this is definitely guaranteed as long as we do not violate the rules and we act according to our corridor as advocates, that is our right. What is meant by a single stem here refers to the provisions of Article 28 paragraph (1), it is clear that the Advocates Law only requires one Advocate Professional Organization that oversees Advocates in Indonesia. This means that the Advocates Law itself clearly adheres to the single bar system, which is fully represented explicitly. This means that the Advocate Organization actually already has a fairly clear arrangement regarding the code of ethics regulated by the Advocate Organization.¹⁷ The function of this organization should be that if an advocate is violated then the right of immunity is that this advocate organization must be able to protect under a legal umbrella other than the applicable law.

Looking at the opinions of several Advocates who have been interviewed regarding the immunity rights of Advocates, the current state of Advocates is indeed textually with the existence of Law Number 18 Year 2003 is considered sufficient, but technically it is felt that there is still a lack of Advocate Immunity rights in him. The author analyzes that to achieve real goals regarding the implementation of advocate immunity rights, it is necessary to change the existing system both in the trial and outside the trial. Changing the system is a noble goal to protect advocates for their immunity rights, because advocates are part of a group of law enforcers who need to be protected in carrying out their profession.

The author here analyzes that there is a need for system change. The author here analyzes that there needs to be a system change with the United States model, namely the Adversarial System, namely that the way the case is handled by conferring or negotiating with the parties between the defendant and the public prosecutor, is an integral part of the entire law enforcement system in force. So this method is a formal and legal procedure. This practice is known as the "bargaining system". Inadversary system, in handling criminal cases the plaintiff is the state representing victims and the interests of society, and the defendant is the accused. The defendant is usually represented by a defense attorney, while the state is represented by a public prosecutor. The party whose job it is to seek the truth of the facts and be impartial is usually

17 Hutabalian, Maslon., Dampak Dualisme Kepengurusan Organisasi Perhimpunan Advokat Indonesia (PERADI) Terhadap Penegakan Hukum, *Jurnal Justiqqa*. Vol. 2, No. 1, 2020, page.54-60

represented by a jury. In the event that the defendant refuses to be tried by a jury, the judge is also tasked with finding the truth from the facts presented at trial.¹⁸

In the adversary system, the principles used in the criminal justice system are as follows: Criminal proceedings should be a "dispute" between the accused and the prosecutor on an equal footing before the court; The main purpose of the procedure is to resolve disputes arising from crimes; The use of objections or statements (defenses) and the existence of guarantees and negotiation institutions are not only a necessity, but actually very important. It reinforces contestation between parties and properly demarcates the rules of the game in the criminal justice system; The parties have autonomous and clear functions, i.e. the prosecution conducts the prosecution, the defendant rejects or denies the charges. The public prosecutor determines which facts must be proven along with supporting evidence, the defendant determines what facts are presented at trial that are favorable to his position; The role of the judge as a neutral arbitrator in the dispute is to comply with the rules of the game. The judge is only active when one of the parties raises objections to the arguments presented; More oriented towards protecting someone who is innocent.

In accordance with the author's theory that the author has described above, the hostile system can be subject to immunity. The author analyzes that the judge here is only a jury between the advocate and the public prosecutor who is trying to prove the charges and charges filed at trial. The author analyzes that if there is a violation of the code of ethics, for example an Advocate is attacked or criminalized by the opposing party, then with this Advesari System the Advocate can prove that what an Advocate is doing is in accordance with the procedures and rules of law that apply is a system that is a legal umbrella for an Advocate where the Advocate can prove for himself what he does in carrying out his profession in accordance with the law. In the theory put forward by John Kenedi, it is stated that law enforcement is the process of implementing efforts to enforce or function norms as the basis for legal behavior in society and the state. The law enforcement system is related to the harmony between legal values and rules and real human behavior. In accordance with this theory, it is stated that "The law enforcement system is related to the harmony between legal values and principles with real human behavior". The theory states the values and principles with real human behavior if it is analyzed whether the Advocate in carrying out his duties and authority is in accordance with the applicable values, norms and code of ethics, therefore it is necessary to have real supervision of the duties and authority of the advocate.

18 Herdino Fajar Gemilang, and Rosalia Dika Agustanti, Penggunaan Plea Bargaining dalam Sistem Peradilan Pidana: Menyeimbangkan Efisiensi dan Keadilan, *Jurnal Interpretasi Hukum*, Vol. 4, No. 3, 2023, page.422-431

In addition, to create legal protection for real immunity rights, it is necessary to emphasize the application of the Advocates Law. Advocate organizations must play an active role in protecting their members in carrying out their duties if there is a violation of immunity rights, the Advocate Organization is obliged to assist its members.¹⁹ The author's analysis is reinforced by the opinion of other advocates, namely Advocate Michael Agung B. Kaparang, S.H (KAI Solo) who stated that according to the source regarding the regulation of immunity rights for advocates in the future, this immunity right must, for example, there must be take and give to the extent to which we carry out our duties whether in accordance with the corridor or not, or whether we as advocates also violate the rules, then strict supervision is needed. If there is no strict supervision, there could be abuse of immunity rights. There may be violations of immunity rights. The author analyzes supervision here in the sense of analyzing the tasks carried out by Advocates in accordance with applicable procedures and laws or not.

D. CONCLUSION

In accordance with the discussion above, basically advocates are not above the law according to the principle of equality before the law, but advocates have immunity, namely the right to immunity. Advocates in carrying out their professional duties are given legal protection, namely in the Advocates Law, Legal Aid Law, Constitutional Court Decisions and in the KEAI (Indonesian Advocate Code of Ethics), but sometimes there are still many advocates who are dragged to court because they lose the right to immunity for negligence or intentional abuse of authority, what he should have. The advocate's obligation is to uphold the law advocates in carrying out their duties must be in accordance with what they do. The author here concludes that in the future advocate immunity rights can be used adversarial system. Where the inadversarial system can be subject to immunity. That the judge here is only a jury between the advocate and the public prosecutor who is trying to prove the charges and charges filed at trial. The author analyzes that if there is a violation of the code of ethics, for example an Advocate is attacked or criminalized by the opposing party, then with this Advesari System the Advocate can prove that what an Advocate does is in accordance with the procedures and rules of law that apply is a system that is a legal umbrella for an Advocate where the Advocate can prove what he does in carrying out his profession in accordance with the law.

19 Mariske Myeke Tamp., Hak Imunitas Advokat Dalam Menjalankan Profesi, *Law Review*, Vol. 18, No. 1, 2018, page.90-110

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