



The existence of advocate immunity rights in the Indonesian judicial system

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Abstract

This study aims to explore how the regulation of advocates' immunity rights in law enforcement, understand and critically analyze the implementation of immunity rights in the implementation of the advocate profession, and determine the formulation of advocates' immunity rights in the Indonesian judicial system. Normative juridical with *the conceptual approach*, *historical approach*, and *statute approach* are utilized in the present study. The findings show that the right to immunity of Advocates is crucial in ensuring independence, protection of client privacy, and justice in the legal system. Regulations on immunity rights are regulated in Advocate Law No. 18 of 2003, which explains that the Code of Ethics guides advocates to carry out the Advocate profession. Furthermore, the criminal justice law regarding criminal procedure regulated by law number 8 of 1981 concerning criminal procedure law in article 85 protects themselves or their clients from providing detrimental information. However, independent law enforcement has not yet realized the implementation of immunity rights in the advocate profession. This is because several challenges and problems hinder the realization of independent law enforcement. It also has an impact on the implementation of advocate immunity rights. Meanwhile, the formulation of advocates' immunity rights in the justice system can be done by re-interpreting the Advocates Law to be more transparent and more assertive in regulating advocates' immunity rights, strengthening the Indonesian advocates' code of ethics with a greater emphasis on advocates' immunity rights, and how to maintain and exercise these rights properly, establishing effective legal protection mechanisms for advocates who experience violations of their immunity rights and strengthening cooperation and coordination between advocates and other law enforcement agencies, to ensure a respectful understanding of advocates' immunity rights in the performance of their legal duties. The findings are expected to provide valuable insights into the existence and role of advocates' immunity rights in the context of the Indonesian judicial system and its contribution to a just law enforcement system.

Keywords: Advocates, excistency, immunity rights, Indonesian judiciary

Introduction

Law enforcement advocates need to be given protection with various rights, just like other law enforcers. As explained by Khambali (2018) ^[11] "One of the fundamental rights granted by Law No. 18/2003 to Advocates is the right to legal immunity, more commonly known as the right to immunity". In Law Number 18 of 2003 on Advocate, it is explained that advocates are free to carry out their professional duties, namely free to express their views or to deliver statements in defending the cases they are responsible for while still being guided by the Advocate Professional Code of Ethics and laws and regulations. Additionally, Panjiatan (2019) declared that "*What is meant by free concerning carrying out the duties of the advocate profession is without pressure and threats, which may cause fear or treatment that undermines the dignity of the advocate profession as (officium nobile)*".

Advocates as law enforcers are better known as *officium nobile*. The advocates have immunity rights, i.e., the right to immunity owned by advocates in carrying out their profession to defend the interests of their clients. In carrying out their profession, the right to immunity has also been guaranteed by the Law of the Republic of Indonesia Number 18 of 2003 concerning Advocates, namely in Article 14, Article 15, and Article 16 as follows:

Article 14: Advocates can express their views or statements defending the cases they are responsible for in court while adhering to the professional code of ethics and laws and regulations.

Article 15: Advocates can freely carry out their professional duties to defend the cases they are responsible for while adhering to the professional code of ethics, laws, and regulations.

Article 16: Advocates cannot be prosecuted civilly or criminally in carrying out their professional duties in good faith to defend the Client in court.

Based on the articles, it means that Advocates are free to express their thoughts or statements in defending the cases they are responsible for in the Court Session. According to Abidin (2022) ^[2] the word "free" means being free from any pressure, threats, or obstacles without fear or treatment that degrades the dignity of the advocate profession. Thus, Sinaga (2020) ^[20] said that the advocates are free to carry out their professional duties to defend the cases they are responsible for while adhering to the Professional Code of Ethics and laws and regulations. Therefore, the advocate cannot be prosecuted civilly or criminally in carrying out his professional duties based on good faith to benefit his client's defense. Based on the explanation stated by Sardinata (2021) ^[19] good faith aims to carry out professional responsibilities for the sake of upholding justice based on the law to defend the interests of their clients at every level of justice in all judicial environments.

Nevertheless, Article 14, Article 15, and Article 16 of the Advocates Law raise problems because they imply that the advocate's immunity right only applies in court sessions. Hence, it raises the question of advocates' immunity rights

outside the court. This is emphasized by the Decision of the Constitutional Court of the Republic of Indonesia Number 26/PUU-XI/2013, which states that Article 16 of the Advocates Law has binding legal force to the extent that was interpreted:

“Advocates cannot be prosecuted civilly or criminally in carrying out their professional duties in good faith for the benefit of the client's defense in or out of court.”

The purpose of good faith in these provisions is that Advocates carry out their professional duties based on the law to defend their clients for justice. Meanwhile, the court session means every level of court in all scopes of justice. Therefore, if there is bad faith on the part of the Advocate, the Advocate's right to immunity does not apply. For instance, the Advocate encourages the Client to describe things that they have not experienced and not by the facts that existed during the court proceedings. If the Advocate does this, the right to immunity or immunity owned by the Advocate becomes invalid. On the other hand, if the Advocate advises his client in good faith, then the Advocate's immunity will apply.

According to Chairani (2018) ^[6] advocates' right to immunity is not given absolutely. The advocate is not immune to the law. Therefore, the advocate can still be held accountable. Besides, Khambali (2017) ^[13] said advocate immunity is freedom for comfort and independence in performing professional duties, but it is limited by good faith. This is, of course, because the Advocate profession is not only a law enforcer but also legal. It provides legal services based on legal knowledge and skills that are still in line with the legal profession's ethics and the role of each law enforcer following the laws and regulations.

The concern of this research is that Article 16 of the Indonesian Advocates Law, which states that "Advocates cannot be prosecuted either civilly or criminally in carrying out their professional duties in good faith for the benefit of the Client's defense in a court session", creates several normative ambiguities in the context of law enforcement. In the framework of the theory of justice, this raises questions about the extent to which advocates' immunity rights follow the principles of justice that support equality under the law. This right of immunity is designed to protect advocates in performing their duties. Additionally, Syahri (2015) ^[21] explained there is a potential conflict with justice if this right is abused or applied in an absolute manner. In practice, however, there must be a careful balance between protecting advocates' rights and the interests of justice. The courts should have an effective mechanism to assess whether or not cases involving advocates qualify for immunity by considering principles of justice that are fair to all parties involved. As such, the theory of justice highlights the importance of maintaining a balance between advocates' rights and the principles of justice in evaluating and applying the norms in Article 16 of the Advocates Law.

Based on the explanation above, some critical issues that encourage the expansion of research on advocate immunity rights in Indonesia are that advocate immunity rights can conflict with the interests of justice when advocates are involved in criminal acts committed by their clients. This right may hinder investigation and truth-telling in some cases. Regulations and supervisory mechanisms concerning advocates' immunity in Indonesia are still unclear, which can lead to uncertainty and potential abuse. Hence, there is a need for further consideration of the balance between

advocates' immunity rights and their ethical and also moral obligations in carrying out their profession as legal defenders.

Research Question

Referring to what has been described previously, therefore the researcher formulated several research questions as follows:

1. How are Advocate immunity rights regulated in law enforcement?
2. How does the right to immunity of advocates realize the independent enforcement of the law?
3. How are Advocate immunity rights formulated in the Indonesian judicial system?

Methodology

This study utilized the normative juridical method by studying three layers of legal science: legal dogmatics, legal theory, and the philosophy of law. Besides, three main approaches were used in this research, i.e., conceptual approach, historical approach, statute approach, and legal philosophy).

There are primary law materials and secondary law materials. The prior law materials were comprised of Law No. 18 of 2003 on Advocates, Law, Law of the Republic of Indonesia No. 48 of 2009 on Judicial Power, Law of the Republic of Indonesia No. 8 of 1981 on Criminal Procedure, Constitutional Court Decision No. 26/PUU-XI/2013, and other laws and regulations related to this research. These laws were collected and analyzed. Then, the data is analyzed through several stages of analysis, namely description, systematization, and explication.

Finding and Discussion

The Regulation of Advocate Immunity Rights in Law Enforcement

The regulation of Advocate immunity rights in law enforcement in Indonesia includes the following:

a. The advocate law (Law No. 18 Year 2003)

Since the implementation of Law No. 18/2003 on Advocates, among the four sub-systems of the criminal justice system, Advocates have had a significant role in the criminal justice system in Indonesia. Article 1 point 1 of the Advocate Law states that an Advocate is a person whose profession is to provide legal services both inside and outside the court and who meets the requirements based on the provisions of the law. Meanwhile, in the Indonesian Criminal Procedure Law context, Harlen (2011) ^[22] states that an Advocate is a person who represents their client to take legal action based on a power of attorney given for defense or prosecution in court proceedings or court proceedings.

The right to immunity in the advocate profession can be interpreted as the immunity rights possessed by advocates in carrying out their profession to defend the interests of their clients. This is further elaborated in Article 16 of Law No. 18/2003 on Advocates, which explains that advocates cannot be prosecuted civilly or criminally in carrying out their professional duties in good faith for the benefit of client defense. The right to immunity for advocates cannot be interpreted broadly, as it can lead to wrong perceptions and social impacts. In addition, Frank (2023) ^[7] mentioned that society may assume that an advocate is a privileged citizen who cannot be legally challenged.

The Law of Advocates regulates the advocate profession in Indonesia. According to Article 18 of the Advocates Law, advocates have the right and responsibility to maintain the confidentiality of the relationship between the advocate and his/her client, including the confidentiality of information and documents provided by the client.

The regulation of advocates' immunity rights in Article 14 to Article 19 of Law Number 18 Year 2003 in Article 16 does not contain the limitations of what good faith looks like, when the trial is over or when the prosecution has not yet begun is good faith to defend the interests of the client. Article 16 can still be said to be ambiguous and has many perspectives, and anyone can interpret it. Meanwhile, Pratiwi *et al.* (2019) ^[16] said many pros and cons of the draft Advocate Law from several legal experts in Indonesia indicate that the Advocate Law is not appropriate and needs to be re-interpreted. The draft proposal on Advocates was submitted by the Association of Advocate Organizations to the House of Representatives.

The explanation of Article 16 of Law Number 18 of 2003 stated that what is meant by good faith is "carrying out professional duties for the sake of upholding justice based on the law". Good faith is etymologically interpreted from the Latin *fide* (good faith), which means an honest intention. Article 16 of the Advocates Law is based on granting advocates immunity. There has been a blurring of legal norms. It is due to the conflict with constitutional rights as referred to in Article 28D paragraphs (1), (2), and Article 28H (2) of the 1945 Constitution. An essential right for advocates is the freedom to serve as legal counsel. In connection with freedom, Winata (2020) justifies if an advocate should not be punished or threatened with punishment, be it criminal law, civil law, administrative, economic, or other sanctions or intimidation in defending and advising clients.

Law 48 of 2009 on Judicial Power: Broadly speaking, the Judicial Power Law does not mention advocates' immunity rights. However, this immunity right was recognized by the Constitutional Court (MK) in the Constitutional Court Decision Number 26/PUU-XI/2013. Advocates' Immunity Rights have been expanded in the scope of the courtroom and outside the courtroom. When carrying out their profession, advocates are given immunity rights guaranteed by the Advocate Invitation Law Number 18 of 2003. The Constitutional Court emphasized that advocates' immunity rights are not absolute but must be based on good faith and subject to the advocate's professional code of ethics.

The advocate professional in providing legal services in the Constitutional Court Decision Number 26/PUU-XI/2013 provides an understanding of legal services as legal consultation, legal assistance, exercising power of attorney to represent, accompany, defend, and take other legal actions for the legal interests of clients can be done both inside and outside the court. The implications of the Constitutional Court Decision Number 26/PUU-XI/2013 can be viewed from:

a. Juridical Aspect

Article 16 of the Advocates Law is contrary to the 1945 Constitution. It has no binding legal force insofar as it is interpreted as "Advocates should not be prosecuted either civilly or criminally in carrying out their professional duties in good faith for the benefit of the client's defense inside and outside the court session".

b. Practical Aspect

Based on Constitutional Court Decision No. 26/PUU-XI/2013, advocates are protected inside and outside the court, and clients cannot easily sue an advocate either civilly or criminally. A legal relationship (*rechtsbetrekkingen*) is a relationship between two or more legal subjects regarding the rights and obligations on one side vis-à-vis the rights and responsibilities on the other.

According to Musnandar (2007) ^[14] the advocate's immunity right is essential to ensure the smoothness and effectiveness of the advocate profession in carrying out its duties. This right is recognized and protected by the Advocates Act and the Judicial Power Act. However, this right must be exercised responsibly and in good faith so it is not abused.

b. The Criminal Procedure Law (Law No. 8 of 1981)

The Criminal Procedure Law protects advocates from being obliged to provide information that could harm themselves or their clients. Although the Criminal Procedure Code does not explicitly regulate advocates' immunity rights, provisions in the Criminal Procedure Code, especially in the chapter on legal aid, protect advocates in carrying out their professional duties. The rights to prevent self-harming testimony, the obligation to maintain the confidentiality of the advocate-client relationship, and the protection against coercion to provide testimony are principles that protect the independence and freedom of advocates in law enforcement.

The Immunity Rights of Advocates in Independent Law Enforcement

Advocate Immunity Rights are needed to uphold a legal system. Recognizing advocates' immunity rights in Indonesia still faces several challenges in its maximum implementation. Although advocates' immunity rights are identified in the applicable laws and regulations, several problems affect their existence. Several things affect the recognition of advocates' immunity rights in Indonesia, as follows:

- a. The authorities may abuse their power by not respecting or ignoring advocates' immunity rights. This may happen in the context of intervention, pressure, or intimidation of advocates in performing their duties.
- b. Unclear Limits of Immunity Rights. Several cases may involve uncertainty regarding the boundaries of an advocate's immunity rights. For instance, whether immunity protects the advocate from legal or criminal action and what context the immunity applies. This ambiguity can lead to conflict or abuse of the advocate's immunity rights.
- c. The protection may not always be adequate despite advocates' immunity rights being recognized in regulations. In line with that, Winata & Hendra (2013) ^[24] explained that sometimes, sanctions against violations of advocates' immunity rights are not effective enough or do not provide a deterrent effect for perpetrators.

Independent law enforcement has not yet realized the implementation of immunity rights in the advocate profession. This is because several challenges and problems hinder the realization of independent law enforcement. It also has an impact on the implementation of advocate immunity rights. A number of reasons can cause this, including:

- a. Intervention and pressure from interested parties. Advocates may face pressure or intimidation from parties who feel threatened by the case being handled. It can include attempts to ignore or violate an advocate's immunity rights, such as seizing documents without proper procedures.
- b. Lack of understanding and awareness of advocates' immunity rights. Some relevant parties, including law enforcement officials, may not understand or recognize advocates' immunity rights. This could result in improper treatment or violation of advocates' rights in their duties.
- c. Limited resources and infrastructure. Advocates face challenges accessing the resources and infrastructure necessary to carry out their professional duties properly. Lack of adequate support and facilities may affect advocates' ability to exercise their immunity rights effectively.
- d. Ethics violations by advocates themselves. In some instances, advocates may commit violations of professional ethics, which may affect independent law enforcement. Such actions may damage the reputation of the advocate profession and affect the protection of their immunity rights.

Efforts involving all relevant parties, including the government, legal institutions, advocate organizations, and society, are needed to achieve independent law enforcement and strengthen the implementation of advocates' immunity rights. It is necessary to increase the understanding and awareness of advocates' immunity rights, enhance regulation and supervision, and provide adequate support and resources for advocates to perform their duties independently and professionally.

The Formulation of Advocate Immunity Rights in the Justice System

Formulation means the process or steps to formulate, organize, or arrange something systematically and in detail. In a wider context, Handayani & Rachmi (2015)^[9] said that formulation refers to the thinking, planning, or drafting process that aims to achieve a goal or address a problem. In the context of legislation, formulation refers to the process or steps to formulate and regulate the content of a regulation. It involves writing and drafting a clear, detailed, and understandable text to regulate a particular legal or policy issue.

Basyir & Abdul stated in formulating laws and regulations, some common steps usually carried out include identifying the legal needs or issues that the regulation seeks to regulate, information gathering, analysis, and research to understand the context, implications, and impacts of the proposed regulation. Furthermore, the formulation of the concept or initial draft of the regulation is based on the results of research and analysis. Moreover, the formulation also involves various parties, such as legal experts, stakeholders, and the public, in a consultation process to obtain input and feedback on the proposed regulations. Afterward, draft the regulation by paying attention to clarity, technical accuracy, and the right choice of words to achieve the desired legal objectives. Conduct a review and Re-interpretation of the draft regulations to ensure suitability and accuracy in formulating effective rules. It also aims to conduct a harmonization and coordination

process with other relevant laws and regulations to avoid overlaps or conflicts between regulations.

The formulation of advocate immunity rights in the justice system can be done by:

- a. Re-interpreting the Advocates Law. Re-interpreting the Advocates Act to more clearly and firmly regulate advocates' immunity rights. This re-interpretation may include more detailed arrangements regarding protecting advocates' immunity in their professional duties and functions.
- b. Strengthening the Indonesian Advocates Code of Ethics with greater emphasis on advocates' immunity rights. A strong Code of Ethics will provide clear guidelines for advocates in carrying out their duties and protect their right to immunity.
- c. Establishing effective legal protection mechanisms for advocates who experience violations of their immunity rights. This may include clear procedures for reporting violations, fair investigations, and strict sanctions for violators.
- d. Strengthening cooperation and coordination between advocates and other law enforcement agencies, such as the police and prosecutors, to ensure a respectful understanding of advocates' right to immunity in performing their legal duties.

Re-interpretation of the Advocates Act to more clearly and firmly regulate advocates' immunity rights is very important because a more explicit and firmer re-interpretation of advocates' immunity rights will provide legal certainty for advocates in carrying out their duties and functions. Based on the explanation given by Asrori & Nadzib (2018)^[3] Advocates will know their rights and obligations and the applicable limitations so they can carry out advocacy practices confidently and without fear of unfair legal action or abuse of power. Advocate immunity is essential to protect the interests and integrity of advocates in carrying out their profession. A more transparent and firmer re-interpretation will strengthen the protection of advocates from unauthorized pressure or intervention so that advocates can work independently and without fear of adverse consequences.

Advocates' immunity rights play an essential role in maintaining the independence of advocates in carrying out their duties. They must be able to work independently without any interference or pressure from other parties that could compromise their integrity and professionalism. Through clearer and firmer re-interpret, advocates will feel safer and more empowered to carry out their duties without fear of possible interference or intervention.

The clear and unequivocal immunity rights in the Advocates Law also help maintain the integrity of the advocate profession. The advocates protected by appropriate immunity rights will feel more empowered in performing their duties with high professional ethics and standards. It will encourage quality, transparent, accountable advocacy practice and avoid abuse.

A clearer and firm re-interpretation of regulating advocates' immunity rights can help increase public confidence in the profession. The public will see that advocates have adequate protection and can work independently to defend the interests of their clients. This will strengthen the positive image of the advocate profession and increase public confidence in the legal services advocates provide. Thus, re-

interpretation of the Advocates Act to more clearly and firmly regulate advocates' immunity rights is essential in ensuring advocates' protection, legal certainty, and independence in carrying out their duties.

Conclusions and Recommendations

Conclusions

Based on the findings of the present study, the researchers concluded that:

- a. Advocates' immunity rights are regulated in Law Number 18 of 2003 concerning Advocates' Immunity Rights, Law No. 48 of 2009 on Judicial Power, and Law No. 8 of 1981 on Criminal Procedure. This regulation interprets advocates' immunity rights in Article 16 of the Advocates Law. Based on the Constitutional Court Decision No. 26/PUU-XI/2013, advocates' immunity rights have been expanded to cover both inside and outside the courtroom when carrying out their profession. The advocates are granted immunity rights guaranteed by the Advocates Law No. 18/2003.
- b. Implementing immunity rights in the advocate profession has not yet been realized as independent law enforcement. It is because several challenges and problems hinder the realization of independent law enforcement, which also affects the implementation of advocate immunity rights. Several factors can be the cause, among others, such as 1) intervention and 2) pressure from parties who have an interest, 3) lack of understanding and awareness of advocates' immunity rights, 4) limited resources and infrastructure, and 5) ethical violations by the advocates concerned.
- c. Establishing advocates' immunity rights in the justice system can be done by re-interpreting the Advocates Law. This re-interpretation could include more detailed arrangements regarding protecting advocates' immunity in carrying out their professional duties and functions and strengthening the Indonesian Advocates Code of Ethics, emphasizing advocates' immunity rights. Furthermore, establishing an effective legal protection mechanism for advocates who experience violations of their immunity rights. It could include clear procedures for reporting violations, fair investigations, and strict sanctions for violators.

Recommendations

Several recommendations can be considered in this study, such as:

- a. It requires serious attention and collaborative efforts from many stakeholders. Through clear legislation, advocate awareness, and inter-agency cooperation, the advocate's immunity right can function optimally in maintaining the integrity and independence of advocates in carrying out their professional duties for the sake of justice and truth.
- b. A suitable formulation of legislation is needed. Therefore, the justice system can uphold and support advocates' immunity rights. By providing independent supervision mechanisms, consultation with professional organizations, and protection against threats, advocates' immunity rights can function optimally in supporting fair and equitable law enforcement.

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