

Juridical Analysis Of Advocacy Switching Reviewed From Advocate Law

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Abstract

This study aims to determine and analyze the mechanism for taking the Advocate's oath after the issuance of the Letter of the Chief Justice of the Supreme Court Number 73/KMA/HK./IX 2015, as well as analyzing the suitability of the Letter of the Chief Justice of the Supreme Court Number 73/KMA/HK.01/IX/2015 in accordance with Article 28 paragraph (1) of Law Number 18 of 2003 concerning Advocates. This type of research is included in the typology of normative legal research, which is a research based on legal materials, both primary and secondary legal materials.

Second, The provisions of Article 28 of Law Number 18 of 2003 concerning Advocates emphasize that there is only one organization of Advocates with the aim and purpose of improving the quality of the advocate profession but in fact the purpose of the establishment of Law Number 18 of 2003 concerning Advocates is to limit the Advocate Organization to only one the organization has changed so that there is no longer a limit on the organization of advocates, so that the organization of advocates becomes more and more controlled as a result of the enactment of the Chief Justice of the Supreme Court Number: 073/KMA/HK.01/IX/2015

Keywords : *Letter of the Chief Justice of the Supreme Court, Swearing of Advocates, Organization of Advocates.*

1. Introduction

The position of advocates as legal aid providers for legal services to the public (clients) who face legal problems, their existence is very much needed by the community, along with the increasing legal awareness of the community and the complexity of legal issues. Advocates in carrying out their duties and functions act as companions, provide advice, or become legal representatives for and on behalf of clients. In providing legal assistance to the community, an advocate can do it for free (Prodeo) or on the basis of getting an honorarium (Lawyer Fee) from his client.

Advocates are noble professions, because they can be mediators for the parties to a dispute regarding a case, whether related to criminal, civil or state administrative cases, decisions in the Constitutional Court. In addition, advocates can also become facilitators in finding the truth and upholding justice to defend human rights and provide legal defenses that are free and independent.

Satjipto Rahardjo argues that: "The role played by a defender is as a guard (guard) of court power. In this case, the defense is tasked with ensuring that legal officials do not commit abuses so as to harm the rights of the suspect/defendant."¹

With the enactment of the Law on Advocates, the role of the State or Government is static, because all the implementation of the interests of advocates is carried out by

¹ Satjipto Rahardjo, 1976, *Hukum Masyarakat dan Pembangunan*, Alumni, Bandung, p. 104.

the Advocates Organization without any intervention from the government. The Advocate profession is very functional for the sake of upholding justice based on the law for the benefit of the justice-seeking community, including efforts to empower the public to realize their fundamental rights before the law.

Article 1 paragraph (3) of the 1945 Constitution expressly stipulates that the State of Indonesia is a state of law. The rule of law is a state based on law and justice for its citizens. The point is that all powers and actions of state equipment or authorities are solely based on law or in other words regulated by law. Another understanding of the rule of law in general where its power is limited by law in the sense that all attitudes, behavior and good deeds carried out by the authorities or state apparatus as well as those carried out by citizens must be based on the law.²The principle of the rule of law demands, among other things, the guarantee of equality for everyone before the law (equality before the law).³

The Advocate profession includes human elements with certain qualities and qualifications who are treated to carry out their professional duties. In addition, advocates are also seen as professional institutions or organizations that are responsible for managing the advocate profession and ensuring that each advocate has the quality and qualifications that have been determined. The Advocate profession has been universally known as "Officium Nobile" which means a noble task, because Advocates are tasked with devoting themselves, and are obliged to participate in upholding human rights. Besides that, advocates are free to defend, bound to the client's orders and do not discriminate against who the client is against, Advocate's attachment to the client is evidenced by a power of attorney explaining that the Advocate represents the client's interests in the defense. The advocate profession will always take a position to defend clients to fight for justice and truth, in achieving justice and legal truth, a free, impartial, independent judiciary is needed. Advocates to achieve such a trial, it is absolutely necessary to have a free Advocate profession.⁴

Currently, the Advocate profession is one of the most sought after professions by law scholars in Indonesia, although it is widely criticized because it is difficult to unite as a single organization. So far, the organization of advocates has always been hit by divisions. One of the factors that caused the split is the absence of an Advocates Law that regulates this so that it results in everyone being able to establish an Advocates organization. A country is said to be successful if it is in development if it is able to reduce poverty.⁵

The dynamics of the administration of local government in Indonesia have always experienced changes in the politics of constitutional law which have undergone several changes, namely the old order, new order and the current reform order.⁶

² Didi Nazmi, 1992, *Konsepsi Negara Hukum*, Angkasa Raya p. 20.

³ Andry Rahman Arif. , 2016, *Eksistensi wadah tunggal Organisasi Advokat dalam system Peradilan di Indonesia*. Bandar Lampung: Tesis Universitas Lampung, p. 1.

⁴ Frans Hendar Winarta, S.H. 1995 *Advokat Indonesia Citra, Idealisme, dan Keprihatinan*, Pustaka Sinar Harapan, Jakarta, p. 14.

⁵ Sri Kusriyah (2016). Kebijakan Pengelolaan Zakat Sebagai Upaya Penanggulangan Kemiskinan di Kabupaten Demak". *Masalah – Masalah hukum*. 45(2):140

⁶ Sri Kusriyah (2016). "Politik Hukum Penyelenggaraan Otonomi Daerah dalam Perspektif Negara Kesatuan Republik Indonesia". *Jurnal Pembaruan Hukum*, III(1):2

Based on the description above, this study aims to identify and analyze the mechanism for taking the Advocate's oath after the issuance of the Letter of the Chief Justice of the Supreme Court Number 73/KMA/HK./IX 2015, as well as analyzing the suitability of the Letter of the Chief Justice of the Supreme Court Number 73/KMA/HK.01/IX/ 2015 is in accordance with Article 28 paragraph (1) of Law Number 18 of 2003 concerning Advocates.

2. Research Methods

This type of research is included in the typology of normative legal research, which is a research based on legal materials, both primary and secondary legal materials. Normative legal research aims to obtain normative knowledge about the relationship between a regulation and other regulations and their application in practice.

Data collection is carried out by extensive or intensive literature study in order to study, research, and trace secondary data,⁷both primary legal materials and secondary legal materials have been carried out in this study. The primary legal materials used consist of the 1945 Constitution of the Republic of Indonesia and the Letter of the Chief Justice of the Supreme Court Number 73/KMA/HK.01/IX/2015 Regarding the Swearing of Advocates. Secondary Legal Materials in the form of relevant literature books, articles, journals and so on. The data collection technique used is by studying the laws and regulations, literature books and articles. The data obtained were analyzed descriptively-qualitatively by referring to theories, concepts and laws and regulations.

3. Discussion

3.1. Mechanism of taking the Advocate's oath after the issuance of Circular Letter of the Chief Justice of the Supreme Court Number 73/KMA/HK.01/IX/2015.

With the issuance of the letter from the chairman of the Supreme Court of Justice No.73/KMA/HK.01/IX/2015 concerning the swearing in of advocates, it is a phenomenon that occurs in the world of law enforcement in Indonesia, about how the enforcement mechanism or the process of advocates in appointing advocates so that someone can be said to be an advocate .

Advocates are one of the front lines to protect the legal interests of citizens, both citizens who need legal services and legal protection from advocates or lawyers, as well as citizens who according to the provisions of laws and regulations are obliged to be accompanied by advocates, Article 54 and 55 Criminal Procedure Code, the suspect or defendant has the right to receive legal assistance from an advocate at every level of examination, and the suspect or defendant has the right to choose their own advocate, article 56 of the Criminal Procedure Code, the suspect or defendant is threatened with imprisonment 5 years or more or a death penalty or an incapacitated suspect or defendant who is threatened with a five-year sentence,the official concerned at each level of examination is obliged to appoint an advocate free of charge.⁸

⁷ Bambang Waluyo, 2001, *Penelitian Hukum dalam Praktik*, Sinar Grafika, Jakarta, p. 18.

⁸ Cetakan I, 2010, *Kitab Undang-undang Hukum Acara Pidana*, Pustaka Mahardika, h. 190

Prior to the circular letter of the chairman of the supreme court No. 73/KMA/HK.01/IX/2015 regarding the oath of lawyers⁹ issued, since the enactment of Law no. 18 of 2003 concerning advocates, there are problems related to the legality of advocates or lawyers to be able to speak or convene in front of the panel of judges, there are many advocates who still have not taken an oath before the head of the high court, because they come from an advocate organization outside the advocate organization of the Advocates Association. Indonesia (PERADI) which has the legality of oath or who is entitled to be sworn in before the head of the high court based on the circular letter of the chairman of the supreme court no. 089/KMA/VI/2010.¹⁰

Although it finally brought up new problems after the letter from the Chief Justice of the Supreme Court No. 73/KMA/HK.01/IX/2015 concerning the oath of advocates were issued, such as refusals from organizations that were previously considered the sole forum of the advocate or lawyer profession, refusals that were also well-founded and had their own arguments from the organization concerned, it was feared if they were -Give freedom, the legal world will be increasingly tarnished because of the absence of strict supervision and strict selection of prospective advocates, so that the quality of advocates will be low because they are not standardized, and also supervision of advocates who deviate from the code of ethics will be increasingly difficult to handle with the emergence of many advocate organizations.

3.2. The Letter of the Chief Justice of the Supreme Court Number 73/KMA/HK.01/IX/2015 is not in accordance with Article 28 paragraph (1) of Law Number 18 of 2003 concerning Advocates.

Of every policy issued, of course, there will be implications behind the policy issued, not least with the issuance of a letter from the Chief Justice of the Supreme Court No. 73/KMA/HK.01/IX/2015 concerning the oath of lawyers which also raises pros and cons in its implementation. so that of course it will bring up various kinds of responses, both positive and negative from the circular letter of the chairman of the Supreme Court no. 73/KMA/HK.01/IX/2015 concerning the oath of lawyers.

Article 30 paragraph (2) of the Law on Advocates has determined that every advocate appointed under the Law on Advocates is obliged to become a member of a professional organization, and in another article it is also stipulated that the organization of advocates that must be formed under the Law on Advocates is singular so that is the only forum for the advocate profession that is free and independent with the aim of improving the quality of the advocate profession.¹¹

If we look more closely, the Letter of the Chief Justice of the Supreme Court No. 73/KMA/HK.01/IX/2015 issued on September 25, 2015 by Prof. Dr. M. Hatta Ali, SH., MH (as the Chief Justice of the Supreme Court) addressed to all Chief Justices of the High Courts in Indonesia based on the juridical reasons below:

⁹Supreme Court, 2015, Circular Letter of the Chief Justice of the Supreme Court No. 73/KMA/HK.01/IX/2015

¹⁰Supreme Court, 2010, Circular Letter of the Chief Justice of the Supreme Court No. 089/KMA/VI/2010.

¹¹Law number 18 of 2003 concerning advocates, article 32 paragraph (4). h. 9

- The number of letters that have entered the Supreme Court from various administrators of advocate organizations, individual advocates, and state institutions related to the oath of lawyers;
- Regarding the existence of a letter from the chairman of the Supreme Court Number 089/KMA/VI/2010 dated June 25, 2010 regarding the oath of
- Advocate Jo. Letter of the Chairman of the Supreme Court No. 052/KMA/HK.01/III/2011 dated March 23, 2011 regarding the Elucidation of the Letter of the Chief Justice of the Supreme Court Number 089/KMA/VI/2010; and
- Related to the Constitutional Court Decision Number 101/PUU-VII/2009 dated December 29, 2009.

With this in mind, it is a fact that the phrase Advocate Organization has been manipulated by various parties, thus allowing the emergence of various Advocate Organizations claiming to be legitimate and authorized as the executor of the authorities regulated in the Advocates Law. These advocate organizations include: the Indonesian Advocates Association (PERADIN), the Indonesian Advocates Association (PERADRI), the Indonesian Advocates Congress (KAI), the Indonesian Bar Association (PERARI), the Federation of Advocates of the Republic of Indonesia (FERARI), the Indonesian Advocates Association (PARI) , etc.

In fact, the Indonesian Advocates Congress was only established on May 30, 2008 as seen from Article 3 of the Deed of Establishment of the Organization of the Indonesian Advocates Congress (KAI) Number 08 which was made by Notary Rini Syahdiana, a Notary in Jakarta, on October 28, 2008.¹²

The Association of Advocates of the Republic of Indonesia (Peradri) interprets that Peradri has the authority to carry out the powers of the existing Advocates Organization regulated by the Law on Advocates. In fact, Peradri was only established on August 17, 2014.¹³

Chief Justice of the Supreme Court, Prof. Dr. HM Hatta Ali, SH, MH, as Chairman of the Institution of the highest Judicial Power Holder, has also been mired in misinterpreting the Advocate Organization referred to in the Advocates Law, as referred to in point 6 of the Letter of the Chief Justice of the Supreme Court Number 073/KMA/HK.01/IX /2015 dated September 25, 2015 which reads:

"That for Advocates who have not made an oath or promise, the Chairperson of the High Court has the authority to swear an oath against Advocates who meet the requirements in Article 2 and Article 3 of Law No.

As for some examples of a professional organization (Open Legal Policy) such as the original intent that has been realized by the legislators in the norms of several positive laws at that time, such as:

- Law number 29 of 2004 concerning medical practice has determined and limited the medical profession to only one professional organization, namely the Indonesian Doctors Association (IDI) as stipulated in article 1 point 12 of law number 29 of 2004 concerning medical practice. The consideration for the formation of the law is to provide legal protection and certainty to recipients of health services and to doctors themselves.

¹²KAI website <https://www.kai.or.id>.

¹³Peradri website <https://www.peradri.org>

- Law number 11 of 2014 concerning engineering.
- Law number 2 of 2014 concerning amendments to Law number 30 of 2004 concerning Notary Positions
- Law number 36 of 2014 concerning health workers.

Decision Number 103/PUU-XI/2013 in the Court's Opinion which reads: "PERADI as the only forum for the Advocate profession is basically a state organ in a broad sense that is independent (independent state organ) which also carries out state functions.¹⁴PERADI in question is PERADI which was established by 8 Advocates' Organizations within a period of 2 years from the enactment of the Advocates Law.

Constitutional Court Decision Number 014/PUU-IV/2006, Constitutional Court Decision Number 101/PUU-VII/2009, Constitutional Court Decision Number 66/PUU-VIII/2010, Constitutional Court Decision Number 103/PUU-XI/2013, Court Decision Constitution Number 112/PUU-XII/2014, and Constitutional Court Decision Number 36/PUU-XIII/2015. Even in its latest ruling, the Constitutional Court has maintained its stance that Peradi is the only professional advocate organization as referred to in Law Number 18 of 2003 concerning Advocates.¹⁵

Hans Kelsen in his theory called Stufenbau theory defines that "every rule of law is an arrangement of rules (stufenbau des rechts) at the top of Stufenbau there are basic rules of a national legal system which are fundamental rules. This basic rule is called grundnorm or ursprungnorm. Grundnorm are legal principles that are abstract, general and hypothetical, then move to the generallernorm (general rule), which is then posited into a concrete norm (concrettenorm).

4. Conclusion

The provisions of Article 28 of Law Number 18 of 2003 concerning Advocates emphasize that there is only one organization of Advocates with the aim and purpose of improving the quality of the advocate profession, but in fact the purpose of the establishment of Law Number 18 of 2003 concerning Advocates is to limit the Advocate Organization to only one the organization has changed so that there is no longer a limit on the organization of advocates, so that the organization of advocates becomes more and more controlled as a result of the enactment of the Chief Justice of the Supreme Court Number: 073/KMA/HK.01/IX/2015 This creates a conflict of norms between Law no. 18 of 2003 concerning Advocates with a higher position with a letter from the chairman of the Supreme Court, then legally the letter from the head of the Supreme Court Number 073/KMA/HK.01/IX/2015 in addition to contradicting Article 28 paragraph (l) of Law 18 of 2003 concerning Advocates, it is also contrary to the principle of Lex superior Derogat Lex Inferiori, causing legal uncertainty.

¹⁴See Court Decision Number 066/PUU-II/2004

¹⁵Constitutional Court Decision Number 35/PUU/XVI/2018 filed by the Petitioners (Bahrul Ilmi Yakup, SH, MH, H. Shalih Mangara Sitompul, SH, MH, Gunadi Handoko, SH, M. Hum., Rynaldo P. Batubara, SH, MH, Ismail Nganggon, SH, and Iwan Kurniawan, S, Sy) related to the Review of Law Number 18 of 2003 concerning Advocates which was submitted on 23 April 2018 which was received by the Registrar of the Constitutional Court on 25 April 2018.

5. Reference

Book

- [1] Satjipto Rahardjo, 1976, *Hukum Masyarakat dan Pembangunan*, Alumni, Bandung.
- [2] Didi Nazmi, 1992, *Konsepsi Negara Hukum*, Angkasa Raya.
- [3] Andry Rahman Arif. , 2016, *Eksistensi wadah tunggal Organisasi Advokat dalam system Peradilan di Indonesia*. (Bandar Lampung: Universitas Lampung.
- [4] Frans Hendar Winarta, S.H. 1995 *Advokat Indonesia Citra, Idealisme, dan Keprihatinan*, Pustaka Sinar Harapan, Jakarta.
- [5] Winarno Surakhmad, (Ed.), 1990, *Pengantar Penelitian Ilmiah : Dasar, Metode dan Teknik*. Tarsito, Bandung.
- [6] Bambang Waluyo, 2001, *Penelitian Hukum dalam Praktik*, Sinar Grafika, Jakarta.
- [7] Cetakan I, 2010, *Kitab Undang-undang Hukum Acara Pidana*, Pustaka Mahardika.

Journal

- [1] Sri Kusriyah (2016). Kebijakan Pengelolaan Zakat Sebagai Upaya Penanggulangan Kemiskinan di Kabupaten Demak". *Masalah – Masalah hukum*. 45(2):140
- [2] Sri Kusriyah (2016). "Politik Hukum Penyelenggaraan Otonomi Daerah dalam Perspektif Negara Kesatuan Republik Indonesia". *Jurnal Pembaruan Hukum*, III(1):2

Legislation

- [1] Supreme Court, 2015, Circular Letter of the Chief Justice of the Supreme Court No. 73/KMA/HK.01/IX/2015
- [2] Supreme Court, 2010, Circular Letter of the Chief Justice of the Supreme Court No. 089/KMA/VI/2010.
- [3] Law number 18 of 2003 concerning advocates, article 32 paragraph (4). h. 9
- [4] Strengthened in the legal considerations of Constitutional Court Decision Number 014/PUU-IV/2006, Constitutional Court Decision Number 66/PUU-VIII/2010, Constitutional Court Decision Number 112/PUU-XII/2014 and Constitutional Court Decision Number 36/PUU-XIII/ 2015.
- [5] See Court Decision Number 066/PUU-II/2004
- [6] See Court Decision Number 066/PUU-II/2004
- [7] Constitutional Court Decision Number 35/PUU/XVI/2018 filed by the Petitioners (Bahrul Ilmi Yakup, SH, MH, H. Shalih Mangara Sitompul, SH, MH, Gunadi Handoko, SH, M. Hum., Rynaldo P. Batubara, SH, MH, Ismail Nganggon, SH, and Iwan Kurniawan, S, Sy) related to the Review of Law Number 18 of 2003 concerning Advocates which was submitted on 23 April 2018 which was received by the Registrar of the Constitutional Court on 25 April 2018.

Website

- KAI website <https://www.kai.or.id>.
Peradri website <https://www.peradri.org>