

Immunity and Rights of Advocate Based on the Law on Advocate

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Abstract :

The status of Advocate as law upholder has the equal position with other law upholders in the case of upholding the law. In the Law No.18 of 2003 concerning Advocate, it states that in defending the case that becomes his responsibility, both in and out of Court, Advocate is free to give his opinion or statement as long as the performance of such freedom can be accounted for, namely it is allowed by Code of Ethics of Advocate Profession and laws and regulations rule the Advocate. Such principle of law causes immunity right for the advocate in performing his/her profession duty that cannot be protected or claimed and therefore, it must be respected by anyone imperatively.

Keywords : *immunity, rights of advocate, Laws of Advocate*

1. Introduction

Profession of Advocate is a noble profession (*officium nobile*) which is nowadays becomes the desired profession. By quantity, the numbers of devotees may be seen from the examination on advocate candidate held by PERADI on 4th February 2006 which were participated by around 6.371 participants from all over Indonesia. Whereas, by quality, the noble position of Advocate profession within the public

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reflected by news in the mass media concerning determination and perseverance of Advocates in rendering legal aids for their clients who badly seek for justice and legal protection.

At the beginning, advocate profession was believed not to have any prestige, even considered as not having profession idealism and was not an honorable profession as it was tend to merely take advantages over other people difficulties. At the bureaucratic circle, specifically in legal field, lies impression that advocate was private profession that may become a rival and even hindrance to then so that in the event that advocates were to engage to them, advocates shall received unprofessional and improper treatment.

In the course of time and the more dynamic and the more legal complexity matters experienced by people or in other field of activities such as economic, politic, social and culture, has bring to a momentum that advocate is a highly needed profession and shall not be separated from the effort to develop legal certainty in this country. On the other hand, within this globalization era, legal certainty becomes a non-negotiable matter for immediate realization, including for Indonesia. Legal certainty becomes one of numbers unconditional requirements for Indonesia to take part in global dynamic. As illustration, the Indonesian international economic cooperation will find difficulties should international parties were in doubt to the Indonesian legal certainty. Advocate profession is one link to the effort in creating legal certainty environment. Within the civil community, legal certainty shall not merely depend on government

role, but the role of community members shall be involved in. Advocate profession becomes one form of community members' role in the development of legal certainty, and within it lie idealism of advocates profession.

The more endorsed environment has placed advocate profession to a more important and honorable profession within the community members. The successful story of the advocates in this country proven that the success they gained comes from the result of their intellectual struggle and idealism, and was not a coincidental factor or opportunism. Advocate becomes a challenging profession as it provides a promising opportunity as far as it is conducted in accordance with professionalism and idealism. More people, whether they are old or young desire to devote their life as an advocate.

Similar to other profession, advocate profession has its legal umbrella. The Law on Advocate established after the reformation was the result of a 39 years struggle, and more strengthen the position of advocate profession. The Law on Advocate has comprehensively provided matters concerning: requirements to become an advocate, Special Education for Advocate Profession, internship, appointment, Ethical Code of Advocate, supervision, measurement and development of organization in the future.

2. Immunity and Rights of Advocate.

a) Immunity.

The law on Advocate stipulated that an Advocate shall be a person having a profession rendering legal service, either inside or outside of Court meeting requirements based on this Law. What is meant by legal services shall be:

“services rendered by Advocates in the form of consultation, acting as proxy, to represent, assist, defend, and perform other legal actions for the Client’s interest (Teguh Samudera, 2004:30).

And what is meant by a client is “individual, legal entity, or other institution receiving legal services from Advocates (Teguh Samudera, 2004: 30).

Immunity in general means immunity; the form of immune; in the position of immune from (law, disease, claim, prosecution); immunity; free from outside attack (KBBI, 1997:375), where as in legal field, immunity (*immuun; onschendbaar/Dutch; immune/Eng*) means immune; compare to immunity for members of Corps Diplomatic who are immune from the prevailing laws in the country where they are posted for representing their countries. Whereas *immunitéit/Dutch; Immunity/Eng* means immune, uncontestable. In legal field, immunity means a person who cannot be sued or be prosecuted (Yan Pramadya Puspa, 1977: 467, 507).

The Law on Advocate stipulate provision of Immunity and Rights of Advocate in:

(1) Article 14:

“Advocates shall be free and fearless to state opinions or statements in court to defend cases being in their responsibilities in courts and shall uphold the profession ethical code and regulations” (underlined by the writer).

Elucidation: “free” means without pressure, threath, hindrance, without fear feeling, or treatment that downgraded profession dignity”. Such freedom shall be conducted in accordance with Ethical Code Profession and regulations.

This is the immunity of advocate profession which is irreversible, since in performing their duties, advocates must uphold the Ethical Code in accordance with the law and regulations (Teguh Samudera, 2003:7).

The Ethical Code Profession and laws and regulation shall become the basis of the freedom of Advocate. So long as the application of the freedom is accountable, it shall be valid in accordance to the law and to the Ethical Code of Profession and it shall be further fully respected.

In response to how advocates’ immunity outside the courts, we shall observe thoroughly provision of Article 15 that balances provision of Article 14 which provided for the principles of freedom (freedom in stating opinions or statements in court to defend cases being in their responsibilities) as explained above. Further, it is provision of Article 15 that becomes the immunity right of the advocates in performing their profession duties outside the courts.

(2) Article 15 clearly stated as follows:

“Advocate shall be free in conducting their profession duties to defend cases being in their responsibilities and shall uphold the profession ethical code and regulation.

In line with the description of its elucidation, it is obvious that provision of Article 15 of the Law reflects the immunity and protection of advocates in performing their profession duties for the clients' interest either outside the courts as well as assisting in the public hearing with the parliament.

Therefore, the freedom of action conducted by Advocates in accordance with ethical code of profession and regulation in performing their professional duties at the time of defending the cases being in their responsibilities either in or outside courts “shall not be considered as “hindrance or a conduct of criminal action or violates the laws, and not even a contempt of court. Should such thing occur, then the action made by officers/authorities shall be considered as has been violating the principles of law, especially concerning the immunity of advocates. The lack of understanding concerning the immunity of advocates evidencing the lower quality of our human resources. The bureaucrat circle is also tend not to acknowledge other people's existence, lack of showing willingness to sacrifice due to their ego or the feeling of having powers, although actually they do not have any powers since having such position is a mandate and it is their obligation to serve and to cooperate with community, including with the advocates.

In such case, the advocates and their organization shall be able to illuminate the public, especially to the bureaucrat circle to make them fully understand about “the Advocates' immunity in performing their professional duties in courts”.

Many hindrances experienced by advocates who were performing their profession such as the arrogance of the bureaucrat circle who do not understand the necessity to furnish freedom for the profession of advocate which closely related to the effort for searching justice for the sake of legal upholding, and for such purposes the advocates are having their legal umbrella.

The legal umbrella for the immunity of the advocates which is embodied in the Law on Advocates, was based on the law reform's spirit which strengthening the direction of social changes to create civilized community order which would be able to response to a challenging global development. The acknowledgement of supremacy of law becomes a prerequisite for the unimpaired community order and harmonization, although we have to face various movements or changes disturbance. Provision of Law concerning the immunity of advocates does not in contradiction with the people culture and in line with the second amendment of our 1945 Constitution, Article 28G which guarantee individual protection, family, honor, dignity as well as having the right for safety and protection from fear to do something or not to do anything which is a fundamental right. Therefore, to be viewed from

the law structure and its function, law changes and social changes must be effectively exploited and actuated.

In light of the above stated, it is expected that everyone would be willing to understand about the role and function of the advocates, a free, independent and accountable profession, which is extremely important as an instrument to create principles of constitutional state within the national life and statehood. Through its function and potential embedded in their profession, any legal services of an advocate must be able to exploit people in seeking their fundamental rights before the law as referred to in the 1945 Constitution of the Republic of Indonesia, Article 1 paragraph (3) states: "*Indonesia is law-abiding country*" and provision of Article 27 paragraph (1) which states: "*Any citizen are equal before the law and government and are obligated to uphold the law and the government without exception*". This is a guarantee for equality to everyone before the law (equality before the law).

As I explained earlier, the immunity of advocates in performing their profession duties for the interest of client must be fully respected by every person without exception, if otherwise, then it would be difficult to achieve the atmosphere of living in harmony which becomes the final destination of the law. As a valid law, immunity functioned as social control instrument, facilitating the well planned control for maintaining law order.

Concerning the two articles on

immunity explained above shows that lawmakers are in the opinion to strengthen the immunity of advocates by formulating a "special article", contained in:

- (3) Article 16 which provided that "*Advocates shall have immunity rights, free from any charges either civil or criminal in carrying out their profession in good faith for the interest of defending clients in court*", and further explained in its elucidation that what is meant by "goodwill" is conducting profession for upholding justice upon the law for the interest of client. What is meant by "hearing in court" is the hearing in every level of Courts within all courts circle.

Based on the formulation of the above three articles, it is obvious that guidelines to be used as the basis for assessment and the providence of obligation for the advocates to be responsible for any actions made in performing their professional duties is, the "Profession Ethical Code and regulations". In brief, it can be said that so long as the performance of their professional duties are in accordance with (not prohibited by) Profession Ethical Code and regulations, they will get the intended immunity.

In order to understand whether in performing their profession duties an advocate to cling firmly on Profession Ethical Code and regulations or otherwise, therefore assessment on this matter lies with the powers of the Board of Honor of the Advocate

Organization. The powers were stipulated in the procedure of law provided in the n Ethical Code Profession of Advocate. The Board of Honor will be hard to function without any input from the community, organization and or Supervisory Commission. Supervisory Commission consists of senior advocates, experts/ HEIs and community and is established the Advocate Organization). The Board of Honor of the Advocate Organization monitors the manners of advocates in performing their professional duties, and it is expected that the supervisory instrument will produce empathy for the advocates, so that they will always uphold the Profession Ethical Code and regulations as referred in Articles 13 jo Article 12 jo Article 6 letter c and Article 7 and 8 paragraph (1) of Law No.13 of 2003 on Advocate. Therefore, in this opportunity I call for and foster the advocate organization to establish Supervision Commission of which it is very common and a compulsory. The establishment will really depend on our goodwill. Therefore, it shall be promptly established to help increase the professionalism of advocates and the solidity of advocate organization.

Hearing of the Board of Honor becomes the party having right to assess on whether or not an advocate shall be considered as having fulfill the requirements for violating the Ethical Code, or in other word does not follow the Profession Ethical Code and regulations, so that he/she will not bear immunity guarantee. The assessment must be made through a mechanism and

the result of hearing of the Board of Honor. As long as there has no decision made by the Board that declare that an advocate has violates the Profession Ethical Code and regulation, an advocate shall be considered as and or assumed not to having (loss) his/her immunity.

It is necessary to be underlined that the Law on Advocate has its peculiarity and specifically regulated the profession on advocate. Profession Ethical Code in this contact shall mean the Ethical Code of the Indonesian Advocate and regulation means regulation that govern the advocates, and NOT regulation in general (it is appropriate to draw attention on the elucidation of Article 12 paragraph (2) of the Law on Advocate).

Profession in all field will always have particularity, *lex specialis*, which is an uncontestable basis. Therefore, in many other professions such as medical doctor, accountant, auditor, the police, prosecutor as well as judges are always have their own internal profession hearing mechanism (ethic/profession/ honor), to decide whether or not there has been violation to the Profession Ethical Code and regulation. Should violation be proven, then the matter shall be proceed in accordance to the law (means that the relevant advocate can be investigated for accusation on committing a criminal act and or can be civilly claimed for violation of the law).

By whatever reason, the authorized officers may not enforce their wish tyrannically so that an advocate may become the accused/the defendant. The tyrannical action taken by the authorized officer may be considered as violating authorization, and shall result in contra production, and reflects the inability to

accept the reality of advocate profession. Such has become hindrance to the implementation of law upholder's function embedded in advocate profession.

In whatever profession, ethical aspect becomes an urgent matter. Implementation of advocate profession shall be considered honorable if to be base on idealism for the upholding of justice for the community interest and not for the interest of the profession holder itself. The profession holder (advocate) is a mandate repository from the people in accordance with his/her expertise and so does other professions holder.

Why is there advocates circle that find difficulties in implementing their profession in accordance with their professional ethic and regulation? Even now, it frequently happened that advocate was turn out as the accused? This shall become our deep thought and introspection. There could be a big possibility that this is because of our minimum understanding on rights and obligation of the advocates. Moreover, we are unable to provide understanding illumination and awareness specifically to the authorized officers and to the community, concerning immunity embedded in the advocate profession. Advocate shall be able to open legal viewpoint and cultural perspective so that people are able to accept positive changes (to include the immunity of advocates), and that advocate circles shall be able to proven their professionalism.

In view of the complicated profession of the advocates, it is therefore legal provision on the immunity of advocates (as contained in the Law on Advocate) is absolutely required, and

functioned as the legal umbrella for the freedom of implementation of their duties. Moreover, as explained earlier in the introduction, the profession of advocate is also functioned as a tool of social engineering as pointed out by Roscoe Pound (*Trusbis Rahardiansah P. and Endar Pulungan, 2004: 227-228*).

b) Rights of Advocate

By observing the content of Law No 18 of 2003 concerning Advocate, it can be listed that rights of Advocates are as provided in Articles 14, 15, 16 as described above and in Article 17, whereas in carrying out their profession, Advocates have the rights to obtained information, data, other documents either from governmental institution as well as other relevant parties that are required for defending their Clients in accordance with regulations.

Article 18 para (2) states: Advocates shall not be viewed identical with the Client in defending the Client's case by the authority or public.

Article 19 para (2) states: Advocates shall have the confidentiality rights in connection with their Clients, including protection over the briefs and documents from confiscation or inspection and protection from tapping the Advocates' electrical communications.

Article 5 stipulates: Advocates shall be law enforcers, free and independent guaranteed by laws and regulations with working area throughout the area of the Republic of Indonesia.

Article 7 para (3) described: Advocates shall perform self defense in the Hearing of the Board of Honor of the Advocate Organization.

Article 9 para (1) states Advocates have the right to stop from becoming an Advocate.

Article 21 para (1) described Advocates are entitled to honorarium for legal services rendered to Clients.

Matters concerning rights of Advocates explained above are relevant to be correlated with Advocate's status as law enforcer who is free and independent guaranteed by laws and regulations, meanings that Advocate as one of other instruments in the proceeding process who have similar position with other law upholders in upholding laws and justice. What is meant by other law upholders shall refer to the elucidation of Article 9 para (2) i.e. High Court of all type of courts, Prosecution Office and the Police of the Rrepublic of Indonesia, where its jurisdiction to cover the Advocate's domicile.

The status of law enforcer granted by the law makers for the profession of Advocates, to form profession of Advocate as one of judicial system element and form the pillar in upholding the supremacy of law and human rights. Based on this status, therefore Advocates shall have the same treatment as to the other law upholders, in line with the enforcement of principles of concordance. Therefore, there shall be no discrimination that may end with the violation of Article 28 D para (1), Article 28G, Article 28I para (2) and para (5) and Article 28 J of the 1945 Constitution (Marsono, 2002: 51-54).

Lev's statement is relevant to be pointed out; he stated that law order and consideration concerning equivalency shall not be avoided. More precisely such kind of situation illustrates parameter which is more or less defines widely the margins of justice. They become the minimum requirements for maintaining community order integrity. The elimination of conflicts which may resulted in social disturbance tends to be prominent than the application of regulation provided (Daniel S. Lev as pointed out by Peters A.A.G and Koesriani Siswosoebroto, 1988:225).

The unavailability of protection guarantee for the profession of advocate impacted the stagnation for the upholding of supremacy of law in our beloved country, and ended with injustice atmosphere that creates reincarnation that "law is tools of power which does not in favor of the people, does not protect individual interest or social interest, and on top of that human rights".

3. Implementation

The immunity rights of advocate shall not be awkwardly implemented but it shall be implemented conditionally, except there have been regulations that expressly exempted it. Does the Law on Advocate permit the Advocates to act as free as possible? No, it does not, because of the guidelines of the Ethical Code of Advocate, and the influence of governmental system which is based on a law abiding country (*rechtstaat*) and does not based merely on power (*machtstaat*).

The milieu of nation life and statehood of the law abiding country must be well versed as the inner feelings of the law makers so that the aspiration of law (*rechtsidee*) that covers the intended immunity regulation will be well understood.

In this era, our nation life and statehood much more influenced by globalization symptoms, either within law area as well as within the culture. It is therefore we shall always be dynamic, shall not show impression of rigidity, and continue to show the status (*gestaltung*) for the immunity of advocate.

Although we have to follow the rule that the nature of written regulation contained in the laws represent the prevailing and binding regulations, however the spirit in the continually implementation of the law provisions in order to create the supremacy of law shall be taken priority. It must be viewed casuistically since any conducts of discrimination in the implementation of law does not come originally from the natural character of the law. From the beginning, law (as norm) is always stated as generally binding to every person, everywhere, without any intention to discriminate. In fact, it is not the law that does discriminate, but the law upholders do. (Trubus Rahardiansah P and Endar Pulungan, Op.Cit.hal.198).

It would not be too exaggerated should I say that the implementation of advocate profession (based on the Law on Advocate) may not be separated from powers and responsibility upon the advocate organization. Therefore, it is now the time that advocate organization shall be responsible for bringing about the imperative validity on the immunity of

advocates as one form of moral responsibility for the advocate profession, so that advocate will depend only on the advocate organization.

The Advocate organization shall put forward legal aspect as a social control tool, i.e. "everything done for conducting the planned or unplanned process to educate, to invite or even to force people in the community in order to adjust themselves to the habitual life and value of life of the advocate profession community. At least, they shall perform a process of influencing people to act as expected by advocate's community". (Soerjono Soekanto, 1973:58 as pointed out by Satjipto Rahardjo, 1979:127).

The essential matters shall be continually maintained so that power preferences that has strong drive to be misused by the holders shall not occur.

The achievement of organization's goal to reach productivity or satisfaction, will strongly depend on their own potential and vitality of activities, and to achieve such intended goal, the members of organization (human resources, technique, information, structure and goal) must be operated so that it can be seen the movement shape of the organization (*Shrode & Voiich* as pointed out by *Satjipto Rahardjo, 1983: 136*). We do expect that the existence of advocate organization will in fact be acceptable to the community as a noble profession (*officium nobile*), so that the sense of advocate shall not merely imply in the slogan or in verbal or even in writing.

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