
LEGAL CERTAINTY OF ADVOCATE ORGANIZATIONS AUTHORIZED TO CARRY OUT THE APPOINTMENT AND SWEARING-IN OF ADVOCATES

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ABSTRACT

Highlighting significant issues within the Indonesian legal system, particularly concerning the profession of advocates. After the enactment of Law Number 18 of 2003 concerning Advocates (the Advocate Law), the Indonesian Advocates Association (PERADI) was initially mandated as the sole organization authorized to appoint and swear in advocates. This was intended to create legal certainty and establish uniform standards for the legal profession.

This situation has been complicated by varying court rulings, with some decisions recognizing the authority of organizations other than PERADI to appoint and swear in advocates, while others adhere to the Advocate Law, which exclusively grants this authority to PERADI. The diversity of court rulings reveals sharp differences in legal interpretation, leading to doubts about legal validity. This research aims to examine and analyze the legal certainty regarding which advocate organizations are authorized to carry out the appointment and swearing-in of advocates.

The research employs a normative juridical approach. The findings suggest that any actions taken by advocate organizations other than PERADI, which appear to utilize one of the eight powers granted to PERADI by the Advocate Law, including proposing the Advocate Oath to the High Court, constitute unlawful acts that harm PERADI as the sole entity entitled to such authority. These actions can be subject to legal accountability in both criminal and civil domains. This research is expected to provide comprehensive recommendations for improving the advocate legal system in Indonesia.

Keywords: Legal Certainty; Authority; Advocate Organization

Introduction

In the life of the nation and state, based on the 1945 Constitution it is stated that Indonesia is a state based on law (*rechtstaat*) not based on mere power (*machtstaat*), the affirmation of the rule of law for Indonesia is carried out through Article 1 paragraph 3 of the

1945 Constitution. In the Unitary State of the Republic of Indonesia, all actions must be subject to and based on the law because Indonesia is a State of Law (*rechtstaat*). The concept of the rule of law is related to the term *nomocracy* (*nomocratie*) or legal sovereignty, which means that the determinant in the exercise of state power is law. The concept of the state of law that is best known in the world is the concept of the *Rechtsstaat* legal state of Continental European products and the concept of the Rule of Law legal state of Anglo-Saxon products (Asshiddiqie, 2006). As a State of Law (*rechtstaat*) Indonesia is obliged to guarantee that all layers of the life of the nation and state must be based on and implemented in accordance with the provisions of the law, both the apparatus and the entire community (Dewi, 2019).

As a state of law, one of the indicators of the success of organizing a state can be seen from the aspect of law enforcement in the state itself. According to Lawrence M. Friedman, the legal system is a legal entity consisting of three elements, namely legal structure, legal substance, and legal culture (Wardhana, 2019). It appears that law enforcement is one of the important aspects included in the legal structure group because law enforcement is an indicator of achieving legal certainty. Related to the legal structure, law enforcers consisting of the police, prosecutors, judges, and advocates must be able to carry out their duties as well as possible, resulting in increased public confidence (Santoso, 2020).

Advocates are one of the professions that have an important role in guarding the implementation and realization of recognition, guarantees, protection, and certainty of fair law and equal treatment before the law in the life of the nation and state. Advocates together with the Police, Prosecutors, and Judges are the “Governing Body of Law Enforcement” Advocates carry out the profession by upholding the principles of upholding justice based on the law for the sake of justice-seeking communities, by providing understanding and making people aware of their fundamental rights before the law. Therefore, Advocates as one of the elements of the justice system one of the pillars in upholding the rule of law and human rights (Nasution, 2007).

Advocates as a profession certainly have an organization as a shelter in carrying out their roles and functions. The Indonesian Advocates Association abbreviated as PERADI, PERADI is a professional organization established under Article 32 paragraph (4) of the Advocates Law which was declared in December 2004 which is the embodiment of a single bar association and is also a signal of the unity of the Indonesian advocate profession in a single advocate profession organization (Soeharto, 2023).

Juridically, Advocates are subject to Law Number 18 of 2003 concerning Advocates (Advocates Law). The Advocates Law, in addition to recognizing the existence of Advocates as law enforcers, also recognizes the existence of an Advocates Organization as the sole forum for Advocates in Indonesia which has the authority to carry out Advocate Professional Special Education, testing of Advocate candidates, Appointment of Advocates, creating a Code of Ethics, forming an Honor Council, forming a Supervisory Commission, conducting Supervision, and dismissing Advocates (Hidayat, 2021).

The Advocates Act is essentially a positive law in the world of advocacy, but this law has multiple interpretations of the phrase “Advocate Organization” The phrase “Advocate Organization” in the Advocates Act is a loophole for the emergence of claims of professional organizations outside the Indonesian Advocates Association (PERADI) that feel authorized to

organize advocate education, appoint advocates, submit applications for advocate swearing to the High Court, and supervise and impose sanctions on advocates (Putri, 2022). This is then emphasized through Article 28 paragraph (1) of the Advocates Law has been completed and has been explicitly considered by the Constitutional Court (MK) in Decision Number 014/PUU-IV/2006 dated November 30, 2006. In the decision, the Constitutional Court affirmed PERADI, which stands for the Indonesian Advocates Association (Perhimpunan Advokat Indonesia), as an advocate organization that is the only forum for the advocate profession with eight authorities (Nugroho, 2021).

However, in the field, there are many Advocate Organizations other than PERADI whose establishment is based on Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia which explains the freedom of assembly and association. In addition to this article, Supreme Court Decree No. 73/KMA/HK.01/IX/2015 concerning the swearing-in of Advocates is also the legal basis for the establishment of other Advocate Organizations and even claims to have eight authorities like PERADI. The emergence of Advocate organizations other than PERADI results in uncertainty of regulations and rules related to organizational authority and legal certainty of Advocate membership.

This raises legal issues, namely the conflict of norms, especially in the authority of the Advocate Organization in Law Number 18 of 2003 concerning Advocates which is emphasized in the Constitutional Court Decree Number 35 / PUU-XVI / 2018 with the Supreme Court Decree Number 73 / KMA / HK.01 / IX / 2015 concerning Advocate Oaths. Based on the background described above, the authors are interested in discussing the legal certainty of the Advocate Organization in the authority to organize the appointment of Advocates and the submission of the Advocate's Oath.

After the enactment of Law Number 18 of 2003 concerning Advocates (the Advocate Law), the Indonesian Advocates Association (PERADI) was initially mandated as the sole organization authorized to appoint and swear in advocates. This was intended to create legal certainty and establish uniform standards for the legal profession.

However, over time, various other advocate organizations emerged, claiming the same authority, such as the Indonesian Advocates Congress (KAI), the Indonesian Advocates Association (IKADIN), and other advocate organizations. This situation was further complicated by differing court rulings, with some recognizing the authority of organizations other than PERADI to appoint and swear in advocates, while others adhered to the Advocate Law, which exclusively grants this authority to PERADI (Yusuf, 2020).

The diversity of these court decisions reflects sharp differences in legal interpretation regarding who is legitimately authorized to carry out the appointment and swearing-in of advocates. This inconsistency has led to chaos in enforcing professional standards for advocates, where those appointed by organizations other than PERADI face doubts about the legality of their status as advocates. Questions surrounding the legitimacy of these advocates directly impact public trust in the legal profession, as uncertain legal status can affect their ability to perform professional duties, both inside and outside the courtroom.

This uncertainty also negatively impacts the overall quality of law enforcement. Without clarity regarding the authority to appoint and swear in advocates, the legal system risks

producing advocates who do not meet adequate standards of competence and integrity, ultimately harming the public that relies on quality legal services. Public trust in the legal profession and the legal system can erode, as this uncertainty reveals that existing regulations and law enforcement have not yet provided sufficient clarity and legal protection.

Therefore, resolving the issue of legal certainty regarding which advocate organizations are authorized is crucial. Clear legislative measures and consistent court rulings are needed to ensure that the authority to appoint and swear in advocates is correctly aligned. This is also part of the effort to strengthen the integrity and professionalism of the advocate profession in Indonesia, which is a key pillar in the enforcement of law and justice. This issue is interesting to study because it is an effort to increase the role of the Advocate profession in upholding the law in the justice system in Indonesia. It is hoped that this research can contribute to creating better legal certainty for the advocate profession in Indonesia, which will ultimately strengthen law enforcement and justice in this country.

Research Method

The research method used is Normative Legal Research (juridical normative), using a statute approach, comparative approach, and historical approach. By collecting Primary, Secondary, and Tertiary data through literature studies which are then analyzed using the principle of legal preference and systematic and consistent descriptive analysis. Data will be collected through library research. In this process, the researcher will explore and gather legal materials from various sources, such as legislation, scholarly journals, books, and relevant articles. The researcher will also study court rulings related to the issue of advocate organization authority.

The collected data will be analyzed using qualitative methods. The researcher will systematically analyze legislation, legal documents, and court rulings, comparing them with relevant legal literature. This analysis aims to identify issues related to legal certainty, understand the evolving legal interpretations, and formulate recommendations for improving regulations and law enforcement concerning the authority of advocate organizations.

To ensure data validity, the research will employ source triangulation, which involves comparing and verifying data from various primary and secondary legal sources. Additionally, the researcher will seek to confirm the data obtained through discussions with legal experts with expertise in the field of advocacy.

With this research methodology, it is hoped that the study will make a significant contribution to addressing the issues of legal certainty regarding the authority of advocate organizations to carry out the appointment and swearing-in of advocates in Indonesia.

Result and Discussion

The oath of office or professional oath is a requirement of the Advocate profession in carrying out law enforcement duties before the court or Criminal or Civil Law. The advocate oath is a requirement mandated by the Advocate Law and must be owned by an advocate before being declared legal to act in court regardless of which advocate organization the advocate comes from.

In carrying out his profession, an advocate must uphold his advocate oath in order to uphold the law (Rambe, 2001). In the provisions of Article 4 paragraph (1) of the Advocates Law which states: "before carrying out his profession, Advocate must take an oath according to his religion or promise solemnly in the open court of the High Court in the area of his legal domicile". The content of Article 4 paragraph (1) of the Advocates Law is a requirement mandated by the Advocates Law and must be owned by an advocate before being declared legal to act in court regardless of which advocate organization the advocate comes from.

The provisions of Article 4 paragraph (2) of the Advocates Law have provided signs that the advocate profession is carried out in accordance with the aim of upholding law and justice. The easiest thing to see is from the advocate oath stipulated in Article 4 paragraph (2) of Law Number 18 Year 2003 concerning Advocates, where the oath is taken before carrying out the profession. The advocate's oath is essentially the promise of a person who will undergo the profession as an advocate, to God, self, and society (Asshiddiqie, 2006).

The oath or promise of the parties involved in the trial is also regulated in Article 76 paragraphs (1) and (2) of the Criminal Procedure Code:

1. Where, pursuant to the provisions of this Act, it is required to take an oath or promise, the applicable laws and regulations concerning oaths or promises shall apply for this purpose, both as regards the content and the procedure.
2. If the provisions referred to in paragraph (1) are not complied with, the oath or promise shall be void according to law.

Based on the contents of Article 76 paragraphs (1) and (2) of the Criminal Procedure Code, it is very clear that the parties involved in the trial are required to take oaths either based on the Criminal Procedure Code or based on other laws (Advocates Law) which specifically regulate, if not fulfilled then the oath is null and void.

As is known, after the birth of the Indonesian Advocates Association (PERADI) on December 21, 2004, which is the realization of article 32 paragraph (4) of Law Number 18 of 2003 concerning Advocates, as the bearer of practical law in the realm of law enforcement called advocates, the authority to foster and supervise the advocate profession is fully exercised by a single forum (single bar system) as mandated by the Advocates Law. The authorities include (Sitompul, 2024):

- a. Carry out special education for the advocate profession;
- b. Testing prospective advocates;
- c. Appointment of advocates;
- d. Creating a code of ethics;
- e. Establish an honor council;
- f. Establish a Supervisory Commission;
- g. Conduct supervision; and
- h. Dismiss advocates.

The long and dynamic journey towards a single advocate professional organization did not go as mandated by the Advocates Law. The Chief Justice of the Supreme Court

then issued a new decree No. 73/KMA/HK.01/IX/2015 (hereinafter SKMA 73) stating that it allows the swearing in of advocates from any organization, stating:

“...that Advocates who have taken an oath before the President of the High Court either before the Advocates Law or after the Advocates Law comes into force may continue to practice law in the Court regardless of the organization from which they come”.¹

The legal position of advocate organizations after the issuance of Supreme Court Decree No. 73/KMA/HK.01/IX/2015 on Advocate Oaths, shows that de facto advocate organizations are represented in the multi-bar model by PERADI and the Indonesian Advocate Congress (KAI) as well as many new advocate organizations, while de jure represents a single bar model by the Association of Advocate Organizations (in this case by PERADI) (Candra, 2019).

Regarding the appointment of an advocate through a procession of advocate professional oaths, this swearing-in authority can also be the authority of the Chief Justice of the High Court as referred to in Point 6 of SKMA Number 73/KMA/ HK.01/IX/2015 concerning the Swearing-in of Advocates, which reads: “That for Advocates who have not taken an oath or pledge, the President of the High Court has the authority to swear in Advocates who meet the requirements in Article 2 and Article 3 of Law No. 18 of 2003 at the request of several Advocate Organizations on behalf of Peradi and other Advocate Organization administrators until the formation of a new Advocate Law”. Therefore, when the authority to take an advocate's oath, which was originally based on a single bar system, was deflected by SKMA 73 on Advocate Oath-taking, what happened then was the maladministration practice caused by SKMA 73.

The Chief Justice of the Supreme Court affirmed that for Advocates who have not taken an oath or pledge, the Chief Justice of the High Court has the authority to swear in Advocates who meet the requirements in Article 2 and Article 3 of the Advocates Law at the request of several Advocate Organizations on behalf of PERADI and other Advocate Organization Managers until the formation of a new Advocates Law. Therefore, it can be concluded that all Advocate organizations have the right to propose the swearing-in of Advocates, regardless of whether the Advocate organization has met the requirements from the administrative and qualitative aspects as stipulated in the Advocates Law.

The dispute over the status of the single-bar system or multi-bar system has been decided by the Constitutional Court, most recently in Constitutional Court Decision No. 35/PUU-XVI/2018 dated 28 November 2019. The swearing-in of Advocates based on Article 4 Paragraph (1) can be done after going through procedures, namely, the process of Special Education for the Advocate Profession (PKPA), passing the Advocate exam, and being appointed as an Advocate by the Advocate Organization that oversees him. Therefore, the procedure for swearing in an Advocate is a series of further processes and is inseparable from the previous processes. On this basis, if we understand the provisions of the article regarding the authority to conduct education, testing, and appointment of Advocates, the proposal for the Advocate oath is the beginning of the next process, namely swearing-in at the High Court. So through this interpretation, PERADI claims that this systematic interpretation can be seen

¹ Surat Ketua Mahkamah Agung RI Nomor 052/KMA/HK.01/III/2011 tertanggal 23 Maret 2011, poin 3.

that the proposal for the Advocate oath is an inseparable part of the 8 (eight) authorities of the Advocate Organization which has been mandated by the Advocate Law, namely PERADI.

The strengthening of PERADI's authority to propose the swearing-in of advocates has also been affirmed by the Constitutional Court in Decision Number 35/PUU-XVII/2018 on page 318 point 3. Several legal norms are the subject of study to determine the validity of the appointment and swearing-in of advocates. In its application, there is a conflict of norms between Supreme Court Decree Number 73/KMA/HK.01/IX/2015 concerning the swearing-in of advocates and the Constitutional Court Decision Number 35/PUU-XVII/2018.

In the juridical constitutional order, it is explained that laws and regulations must not conflict with the regulations above them or regulations of a higher position (hierarchy), this has become a basic principle that is contained or expressed in the Stufenbau Theory. The resolution of this norm dispute can be solved by using existing legal principles that are relevant to the problems that occur. In order to resolve conflicts or norm disputes, the principle of legal preference is used, which consists of three principles: *lex superior* principle, *lex specialist* principle, and *posterior* principle (Philipus & Djatmiati, 2005). which principles are described as follows:

1. *Lex Superior Derogate Lex Inferior* principle, this principle means that higher rules trump lower rules.
2. The principle of *lex posteriori derogate lex priori*, which means that the newer rule defeats the older rule which can then be further interpreted that if the conflicting rules are equal then the newer rule is used rather than the old rule, it can be seen from what year the rule was promulgated.
3. The principle of *lex specialis derogate legi generali* means that a more specific rule overrides a general rule, this condition is used when rules with the same degree or hierarchy contradict the norm, the more specific rule is used rather than the general one (Mahmud Marzuki, 2005).

Reviewing the two Legal Norms is a Legal Product of the High State Institution, both of which structurally have an equal position so that in this study uses the legal principle of *lex posteriori derogate lex priori*, which means that the newer rule overrides the older rule, which can then be further interpreted that if the rules that face are equal, the newer rule is used rather than the old rule, it can be seen from what year the rule was enacted. So in this case in *tempus* or time, the newer legal norm is the Constitutional Court Decision in Number 35/PUU-XVII/2018.

Thus, any action taken by an Advocate Organization other than PERADI that ostensibly exercises one of the 8 (eight) powers of PERADI granted by the Advocates Law, including proposing the Advocate Oath to the High Court, is an unlawful act that harms PERADI as the only Party entitled to such authority. The act can be held liable in the realm of criminal and civil law. Meanwhile, from the realm of Administrative law, the actions taken by Advocate Organizations other than PERADI cannot be recognized as Administrative Law Actions, because Organizations other than PERADI do not have public law authority to carry out such actions.

Conclusion

The legality of the appointment and oath of Advocates conducted outside the Advocate Organization is examined based on the principle of Legal Preference, namely the principle of *lex posteriori derogate lex priori*, where the Supreme Court Decree Number 73/KMA/HK.01/IX/2015 concerning the Oath of Advocates as *Lex Priori* is overruled by the Constitutional Court Decision in Number 35/PUU-XVII/2018 as *Lex Posteriori* so that based on the Decree it is confirmed that the proposal of the Advocate oath is included as part of the 8 (eight) powers of the Advocate Organization in this case PERADI. So all actions taken by Advocate Organizations other than PERADI that ostensibly carry out one of the 8 (eight) powers of PERADI granted by the Advocates Law, including proposing the Advocate Oath to the High Court, are illegal acts.

Acknowledgments

In this study, the author provides suggestions, namely to revise Law Number 18 of 2003 concerning Advocates which can guarantee standardization for the advocate appointment system and regulate advocate organizations that currently exist and continue to emerge. efforts to revise the Advocate Law to strengthen the institutional arrangements of advocate organizations, achieve standardization and quality of Indonesian advocates in the future who are accountable, and uphold the ideal values of the advocate profession.

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