



## **The Existence of Advocates in the Perspective of the Criminal Justice System According to Law Number 18 of 2003 Concerning Advocates**

**Dr. YB. IRPAN, S.H., M.H./NIDN : 0615036502**

ENDANG YULIANA SUSILAWATI, S.H., M.H./NIDN : 0006076701

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### ABSTRAK

Makalah ini berjudul “ Eksistensi Advokat Dalam Perspektif Sistem Peradilan Pidana Menurut Undang – Undang Nomor 18 Tahun 2003” Tentang Advokat “ Permasalahan yang akan dibahas dan diangkat dalam makalah ini yaitu mengenai kedudukan Advokat sebagai penegak hukum dalam sistem peradilan pidana di Indonesia, serta hambatan - hambatan yang terjadi mengenai kedudukan Advokat sebagai Penegak hukum dalam sistem peradilan pidana di Indonesia. Metode penelitian yang digunakan dalam makalah ini adalah metode penelitian yuridis normatif. Hasil penelitian menunjukkan bahwa Peran Advokat sebagai penegak hukum dalam sistem peradilan pidana di Indonesia selain memiliki peran melakukan pendampingan hukum terhadap tersangka atau terdakwa sebagaimana diatur didalam Hukum Acara Pidana, advokat mempunyai peran melakukan pendampingan hukum terhadap saksi/korban sebagaimana diatur dalam undang - undang tentang Perlindungan Anak, undang - undang tentang Penghapusan Kekerasan Dalam Rumah Tangga, dan undang - undang tentang Perlindungan Saksi dan Korban, sedangkan Hambatan - hambatan yang terjadi mengenai kedudukan advokat sebagai penegak hukum dalam sistem peradilan pidana di Indonesia yakni selain belum adanya sinkronisasi antara peraturan perundang - undangan yang ada di dalam sistem maupun sub sistem peradilan pidana lainnya terhadap kedudukan advokat, disebabkan karena terjadinya konflik internal dalam organisasi profesi advokat yang belum kunjung berakhir, sehingga semakin mempersulit profesi advokat sebagai penegak hukum untuk menjadi bagian sub sistem dari sistem peradilan pidana.

Kata kunci : Sistem Peradilan Pidana Terpadu, Advokat sebagai Penegak Hukum.

### Abstract

This paper is entitled "The Existence of Advocates in The Perspective of The Criminal Justice System According to Law Number 18 of 2003" Regarding advocates "The issues that will be discussed and raised in this paper are: regarding the position of advocates as law enforcers in the criminal justice system in Indonesia, as well as the obstacles that occur regarding the position of advocates as law enforcers in the criminal justice system in Indonesia. The research method used in this paper is a normative juridical research method. The results show that the role of advocates as law enforcers in the criminal justice system in Indonesia in addition to having a role of providing legal assistance to suspects or defendants as regulated in the Criminal Procedure Code, advocates have the role of providing legal assistance to witnesses/victims as stipulated in the law on protection. Children, the law on the Elimination of Domestic Violence, and the law on the Protection of Witnesses and Victims, while the obstacles that occur regarding the position of advocates as law enforcers in the criminal justice system in Indonesia are in addition to the absence of synchronization between laws and regulations. that exist in the system and other criminal justice subsystems on the position of advocates, due to the occurrence of internal conflicts in the advocate professional organizations that have not ended, making it increasingly difficult for the advocate profession as law enforcement to become part of the sub-system of the criminal justice system.

Keywords : Integrated Criminal Justice System, Advocate as law enforcement in the criminal justice.

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## I. INTRODUCTION

### *Background of the Reserach*

The 1945 Constitution of the Republic of Indonesia expressly stipulates that the state of Indonesia is a state of law. The principle of the rule of law demands, among other things, the guarantee of equality for everyone before the law (equality before the law). Therefore, the 1945 Constitution of the Republic of Indonesia also stipulates that everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law. In an effort to realize the principles of the rule of law in the life of society and the state, the role and function of advocates as free, independent and responsible professions is important, in addition to judicial institutions and law enforcement agencies such as the police, prosecutors, and courts.

Through the legal services provided, advocates carry out their professional duties for the sake of upholding justice based on the law for the benefit of the justice-seeking community, including efforts to empower the community to realize their fundamental rights before the law. Advocates as an element of the criminal justice system are one of the pillars in upholding the rule of law and human rights.

The actual existence of advocates has existed for about a century and a half ago. However, the recognition of advocates is not regulated in a regulation like the law, but only sporadically contained in the articles of dozens of laws and regulations issued since the Dutch colonial government until the present independence period. The opposite situation is experienced by other law enforcers such as Judges, Prosecutors, and Police where their existence is very strong as evidenced by the existence of laws governing their profession which are outlined in the law in detail and systematically.

This is what makes the advocate profession underestimated by other law enforcers. So when dealing with advocates with other law enforcers, the position of advocates can be said to be lower. However, the current situation and situation have been different, especially since the enactment of the Republic of Indonesia Law Number 18 of 2003 concerning Advocates. Where in the law the position of the advocate is also as one of law enforcers, in fact is the only free and independent law enforcer guaranteed by law and statutory regulations so as to make his position equal to other law enforcers. This has also been recognized as the *Catur Wangsa* for law enforcement (Judges, Prosecutors, Police, and Advocates).

So the hope that later emerged with the promulgation of the Law of the Republic of Indonesia Number 18 of 2003 was to make the existence of advocates recognized and no longer underestimated so that in carrying out their obligations related to their profession, an advocate can carry it out well, without pressure, and can fight for justice. according to good legal bases as the basis and in accordance with the procedures for proceedings inside and outside the court proceedings.

Law of the Republic of Indonesia Number 18 of 2003 concerning Advocates Article 1 letter (a) formulates Advocates as people who provide legal services, both inside and outside the court who meet the requirements based on this law. Article 1 letter (b) is defined definitively which are categorized as legal services are legal consultation, legal assistance, exercising power, representing, accompanying, defending, and taking other legal actions for the client's legal interest<sup>1</sup>. While Article 5 paragraph (1) states that, "Advocates have the status as law enforcers, are free and independent guaranteed by laws and statutory regulations". All of this is clear that a positive value that must be maintained in the actual law enforcement process so that there is no discrimination and irregularities in the law enforcement process so that truth and justice can be felt by the community.

Advocate is a very honorable profession (noble officium). However, the role of advocates as law enforcers is actually still there who think there is an ambivalence to the advocate profession, on the one hand advocates are considered a profession that hinders the work of the apparatus, defends the interests of the suspect/defendant, so that in the judicial (criminal) process, when a defendant based on a judge's decision is declared acquitted, then public opinion leads to advocates defending the personal interests of suspects/defendants and not legal interests, not even infrequently, advocates are labeled as bridging the judicial mafia between suspects/defendants and law enforcement officers (police, prosecutors and judges). On the other hand, who else can help people who are litigating in court if not an advocate<sup>2</sup>.

The criminal justice system as a system does not stand alone, in which there are components of law enforcement as the driving force. In the criminal justice system, there are several interrelated components as explained by Mardjono who provides a limitation that what is meant by the criminal justice system is a crime prevention system consisting of institutions of the police, prosecutors, courts, and prisons of convicts<sup>3</sup>.

Judging from Mardjono's explanation, it appears that Mardjono did not include advocates as a subsystem in the criminal justice system. It is different with other criminal justice subsystems such as, for example, the police, prosecutors, judges and correctional institutions. The position of advocates as part of the criminal justice sub-system is still being debated, this can be seen in Rusli Muhammad who explains that the position of advocates as part or sub-system of the Indonesian criminal justice system is still being debated, this is due to the lack of clarity on the container and organizational structure that is unified and controlling the work of the advocate institution<sup>4</sup>. This is also explained by Frans Hendra Winarta<sup>5</sup>, namely that the legal profession known as an advocate is theoretically unknown and cannot be interpreted as law enforcement.

Based on article 5 paragraph (1) of the Advocates Law, it can be seen that advocates have been guaranteed their existence by law and their status as law enforcers. Furthermore, in the explanation of article 5 paragraph (1) of the Advocates Law, it is explained that what is meant by "advocates with the status of law enforcers" are: Advocates as one of the instruments in the judicial process that have an equal position with other law enforcers in enforcing the law and Justice.

With the existence of Article 5 paragraph 1 of the Advocate Law, it can be seen that the true existence of Advocates as law enforcers has an important role in enforcing the law, especially in the criminal justice system.

However, if we look deeply into Article 5 paragraph (1) of the Law on Advocates, it is not concretely explained about advocates with status as law enforcers. This is reinforced by the opinion of Bagir Manan that normatively, the problem of advocates as law enforcers has been completed,

<sup>1</sup> Kunarto (Penyadur), *Ikhtisar Implementasi Hak Asasi Manusia Dalam Penegakan Hukum*, Cipta Manunggal, Jakarta, 1996., Pp. 78.

<sup>2</sup> Kadafi, Bin Zain (Ed.), *Advokat Indonesia Mencari Legitimasi : Studi tentang Tanggung Jawab Profesi Hukum di Indonesia*, Pusat Studi Hukum & Kebijakan Indonesia : Jakarta, 2001. Pp. Vii.

<sup>3</sup> Romli Atmasasmita, *Sistem peradilan pidana Kontemporer, cetakan ke 2, Kencana, Jakarta, 2011, Pp. Viii.*

<sup>4</sup> Rusli Muhamad, *Sistem Peradilan Pidana Indonesia : Dilengkapi Dengan 4 Undan-undang di Bidang Sistem Peradilan Pidana*, UII Press : Yogyakarta, 2012, Pp. 31.

<sup>5</sup> Komusi Yudisial, *Dialektika Pembaharuan Sistem Hukum Indonesia*, Komisi Yudisial : Jakarta, 2012, Pp. 82.

with the Law on Advocates which has confirmed that advocates are law enforcers, but the next issue is how the real form and place of advocates as enforcers is. law <sup>6</sup>.

The existence of Article 5 paragraph (1) of the Advocates Law which has not concretely explained about Advocates as law enforcers is interesting to study especially for the opinions that still doubt the existence of Advocates as law enforcers, especially in their role in the criminal justice system.

### **Question and Objective of the Research.**

Based on the above background, in this study the problems studied and studied will be identified as follows :

1. What is the position of advocates as law enforcers in the criminal justice system in Indonesia ?
2. What are the obstacles that occur regarding the position of advocates as law enforcers in the criminal justice system in Indonesia?

The purpose of this research is to find answers to the questions mentioned in the formulation of the problem. Based on the description of the background and the formulation of the problem in this study, it can be stated that the objectives of this study include :

1. To examine and analyze the position of advocates as law enforcers in the criminal justice system in Indonesia.
2. To examine and analyze the obstacles that occur regarding the position of advocates as law enforcers in the criminal justice system in Indonesia.

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## **II. RESEARCH METHODS**

The type of research used in this research is normative juridical, namely examining various laws and regulations and other library materials that can assist in explaining the position of advocates as law enforcers in the criminal justice system and the obstacles that occur regarding the position of advocates as law enforcers in the justice system. crime in Indonesia.

The approach method used in this research is the statutory approach, namely by examining the laws and regulations <sup>7</sup>, Furthermore, in Peter Mahmud what is meant by the statutory approach is the type of approach taken reviewing all laws and regulations related to the legal issues being handled <sup>8</sup>. The statutory approach as referred to in Peter Mahmud in Dyah Octorina is an approach that is carried out by examining all laws and regulations and regulations related to the legal issues raised <sup>9</sup>. In this case, what will be studied by the author is all laws and regulations related to the position of advocates as law enforcers in the criminal justice system in Indonesia.

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## **III. RESULT AND DISCUSSION**

### **1. The position of advocates as law enforcers in the criminal justice system in Indonesia.**

Advocates as law enforcers as regulated in Law Number 8 of 1981 concerning Criminal Procedure Code can act to assist suspects/defendants in criminal cases. In a criminal case, the suspect or defendant is entitled to legal assistance from one or more legal advisers during the time and at each stage of the examination of the case. To obtain legal counsel, the suspect or defendant has the right to choose his own legal advisor (article 54-55 of the Criminal Procedure Code).

For a suspect/defendant who is suspected or accused of committing a criminal act punishable by 5 years or more or the death penalty, who is unable and does not have his own legal advisor, the official concerned is obliged to appoint legal counsel for those who provide free legal aid. (Article 56 of the Criminal Procedure Code). Based on the provisions of Article 56 paragraph (1) of the Criminal Procedure Code, the presence and presence of legal advisors is imperative, so ignoring them results in the results of the examination being invalid and null and void.

Article 56 paragraph (1) of the Criminal Procedure Code as a provision assessing human rights has been appointed as one of the benchmarks for the Miranda Rule or the Miranda Principle. If the investigation, prosecution, or trial of a suspect or defendant is not accompanied by legal counsel, then according to Miranda's rules, the examination is invalid (illegal) or null and void (null and void). 1991 (September 16, 1993) which states: "If the conditions of the request are not fulfilled, as in the case where the investigator does not appoint legal counsel for the suspect from the start of the investigation, the prosecution's demands are declared unacceptable."

Legal counsel has the right to contact the suspect from the moment he is arrested or detained at all levels of examination. For the sake of defense, legal advisors can contact and talk to suspects at any time (Articles 69 - 70 of the Criminal Procedure Code). Legal Advisors can request a derivative of the Official Report of Examination (BAP) to the official concerned (article 72 of the Criminal Procedure Code). In carrying out their profession, advocates have the right to obtain information, data, and other documents, both from government agencies and other parties related to these interests which are needed to defend the interests of their clients in accordance with the laws and regulations (Article 17 of the Advocates Law).

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<sup>6</sup> Bagir Manan, *Menegakkan Hukum Suatu Pencarian, Asosiasi Advokat Indonesia : Jakarta, 2009, Pp. 40.*

<sup>7</sup> Peter Mahmud Marzuki, *Penelitian Hukum, Kencana : Jakarta, 2007 Pp. 96*

<sup>8</sup> *Ibid.*, Pp. 93.

<sup>9</sup> Dyah Octorina, dan A'an Efendi, *Penelitian Hukum (Legal Research)*, Sinar Grafika : Jakarta, 2013. Pp. 110.

One of the main objectives to be achieved is the strict and imperative enforcement of Article 56 paragraph (1) of the Criminal Procedure Code in order to ensure a fair and humane examination. Because with the presence of legal counsel accompanying the suspect, they play a role in controlling so that the examination is avoided from torture, coercion, and cruelty. Article 114 of the Criminal Procedure Code clearly states that prior to the commencement of the examination by the investigator, the investigator is obliged to inform him of his right to obtain legal assistance or that he must be accompanied by a legal advisor in his case as referred to in article 56 paragraph (1) of the Criminal Procedure Code. This is important because in order to uphold human rights, it has been explained from the investigation stage to the suspect that the suspect has the right to be accompanied by legal counsel during examination in court.

The provision of legal assistance by advocates can avoid the possibility of irregularities committed by investigators and investigators. The forms of irregularities carried out by investigators to obtain instructions and confessions of suspects include, among others, suspects are often the object of torture, receive unfair, inhuman and degrading treatment, even in carrying out forced efforts in the form of detention, search, and confiscation that are not in accordance with the regulations laid down. outlined in the Criminal Procedure Code.

In many cases the legal counsel cannot take any action, even though he knows that the examination process carried out against his client is contrary to the provisions of the procedural law. For example, questions from investigators that are trapping, suggestive, and do not give the person being investigated the freedom to provide answers. If in a case that is suspected of being a state security offense, the assistance of legal counsel in the investigation process is of little use, because the legal advisor can only see without being able to hear the question and answer process in the investigation. Legal advisors need to have the right to be able to provide opinions or advice directly to suspects regarding violations of their clients' rights on investigation procedures carried out by investigators or public prosecutors. If there is an official who is negligent, the official must be subject to sanctions and the minutes resulting from the investigation or examination process must be declared null and void by law.

In the "due process of law" even though the police in carrying out their investigation and investigation functions, by law have given special rights or privileges to POLRI official investigators to summon, examine, arrest, detain, search, confiscate against and from suspects, will However, in exercising their rights, POLRI official investigators must obey and comply with the principle of The Right of Due Process, namely that suspects have the right to be investigated or investigated on the basis of procedural law.

To provide legal certainty in violations of human rights that have been outlined in the Criminal Procedure Code, advocates can take pretrial efforts against the investigation process that is not in accordance with the Criminal Procedure Code. In order to avoid that the rights of the suspect or defendant as mentioned above can be implemented properly, it is very necessary for the profession of an advocate as legal advisor to the suspect or defendant. For this reason, the position of advocates as one of the pillars in terms of the rights of suspects or defendants in the context of the law enforcement process, advocates must actually defend according to the rights of suspects or defendants as regulated in the Criminal Procedure Code.

The role of advocates as law enforcers in the criminal justice system in Indonesia in addition to providing legal assistance to suspects or defendants as stipulated in the Criminal Procedure Code, advocates also have a role to provide legal assistance to witnesses/victims.

The provisions governing the role of advocates to provide legal assistance to witnesses/victims are as follows :

1. Law Number 23 of 2004 concerning the Elimination of Domestic Violence (UU KDRT), it is stated that in terms of providing protection and services, advocates are obliged to :

- Provide legal consultation which includes information on victims' rights and the judicial process ;
- Accompany victims at the level of investigation, prosecution, and examination in court proceedings; and
- Helping victims to fully describe the domestic violence they experience; or, and coordinating with fellow law enforcers, companion volunteers, and social workers so that the judicial process runs as it should.

2. Law Number 23 of 2002 which has been updated with Law Number 35 of 2014 concerning Child Protection, it is stated that every child who is a victim or perpetrator of a crime has the right to get legal assistance and other assistance. The provision of legal aid involving advocates is intended for the children of victims or perpetrators.

3. Law Number 13 of 2006 concerning the Protection of Witnesses and Victims' rights is regulated in Article 5 paragraph (1) which, when linked to the role of an advocate, the role of an advocate will be related to the rights of victims, namely the right to:

- obtain information regarding the development of the case;
- obtain information regarding court decisions; and
- know in the event that the convict is released;

## **2. The obstacles that occur regarding the position of advocates as law enforcers in the criminal justice system in Indonesia.**

Placing a legal institution into a sub-system of a system is not an easy thing. Likewise, advocates to be placed as sub-systems in the criminal justice system have several obstacles so that the advocate profession has until now been experiencing debate among academics and practitioners, whether they can enter into a sub-system in the criminal justice system or not. The obstacles regarding the position of advocates as law enforcers in the criminal justice system in Indonesia are as follows.

### **a. Problems with laws and regulations.**

Legislation is not only sufficient with the advocate law alone, but must be supported by other laws and regulations that exist in the system and other subsystems on the position of the advocate itself. Such as the Law on the Criminal Procedure Code, the Law on Judicial Power, the Law on the Police, the Law on the Prosecutor's Office and other derivatives. So that the criminal justice system has a structure or sub-system that should work in a coherent, coordinating and integrative way in order to achieve maximum efficiency and effectiveness.

### b. Internal Conflict in the Organization of Advocates.

An advocate organization is a professional organization established by law. The phenomenon that is quite warm is the internal conflict within the professional organization of advocates, where the conflict is over the legitimacy of a single organization of advocates that accommodates 8 (eight) advocate organizations recognized by law. Conflicts that are motivated by various factors have made this profession quite shaky as a law enforcement agency in the eyes of the community. Although in the Decision of the Constitutional Court of the Republic of Indonesia in case Number 014/PUU-IV/2006 dated November 30, 2006, it has been stated that one of the advocating organizations in conflict is the only legal forum for the advocate profession, but basically the advocate organization is a legal organ. state in a broad sense that is independent (independent state organ) which also carries out state functions. However, the phenomenon is that organizations that feel that their existence is not recognized still do not recognize legitimate advocate organizations as organizations established by law. The phenomenon makes it more difficult for the advocate profession as a law enforcement agency to become part of the sub-system of the criminal justice system. Because even if it is placed as a sub-system, which advocate professional organizations should enter.

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## IV CONCLUSIONS AND SUGGESTIONS

### 1. Conclusion

Based on what has been discussed in the previous chapter regarding the position of advocates as law enforcers in the criminal justice system in Indonesia and the obstacles that occur regarding the position of advocates as law enforcers in the criminal justice system in Indonesia according to Law Number 18 of 2003 concerning Advocates, then in this study the following conclusions can be drawn.

- 1) The role of advocates as law enforcers in the criminal justice system in Indonesia in addition to providing legal assistance to suspects or defendants as regulated in the Criminal Procedure Code, advocates also have a role to provide legal assistance to witnesses/victims as regulated in the law on child protection, law the law on the elimination of domestic violence, and the law on the protection of witnesses and victims;
- 2) The obstacles that occur regarding the position of advocates as law enforcers in the criminal justice system in Indonesia are the absence of synchronization between the existing laws and regulations in the system and other criminal justice subsystems on the position of advocates, as well as the occurrence of internal conflicts within the advocate professional organization that has not yet ended, making it increasingly difficult for the advocate profession as law enforcement to become part of the sub-system of the criminal justice system.

### 2. Suggestion

- 1) The role of advocates as law enforcers in the criminal justice system in Indonesia in providing legal assistance to suspects or defendants as regulated in criminal procedural law, and legal assistance to witnesses/victims as regulated in the relevant legislation, should be carried out properly, without pressure. , and be able to fight for justice according to good legal grounds as a basis and in accordance with the procedural procedures inside and outside the court trial.
- 2) Advocates in their position as legal advisors in the criminal justice system in Indonesia, it is necessary to synchronize the existing laws and regulations in the system and other criminal justice sub-systems with the position of advocates, and a professional organization is needed as an advocate organization called PERADI as a single forum as an organ. state in a broad sense that is independent (independent state organ) which also carries out state functions.

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