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The Position of the Letter from the Chief of the Supreme Court and the Decision of the Constitutional Court in the Polemic on the Advocate's Oath

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Abstract: To carry out the profession of an advocate, a person must go through various stages regulated in the Law on advocates, including the process of education and appointment through oaths. However, the publication of the Letter of the Chief Justice of the Supreme Court of the Republic of Indonesia regarding the oath of advocates has created a polemic among law enforcement. This study aims to examine two main issues: first, the substance and position of the Letter of the Chief Justice of the Supreme Court of the Republic of Indonesia regarding advocate oaths; and second, the substance and position of the Advocate Organization's Constitutional Court Decision. As doctrinal legal research, this study uses statutory and contextual approaches to secondary data in the form of primary and secondary legal materials. The results of the analysis conclude that the Letter of Chief Justice of the Supreme Court is recognized as a product of laws and regulations in Indonesia, so it must comply with the principles regarding statutory regulations. However, it is considered that this policy cannot become a binding legal product because it is considered contradictory to the law on advocacy organizations. This was justified by the Constitutional Court's decision, which considered that there was an error in the substance of the letter. The Court, in its legal considerations, then determined the Indonesian Advocates Association (PERADI) as the only advocate organization that was given eight authorities, including carrying out Advocate Profession Special Education (PKPA), Advocate Professional Examination, and carrying out the oath of attorney candidates

Keyword: Polemic on the Advocate's Oath, Law, PKPA

INTRODUCTION

The profession of advocate is regulated in Law Number 18 of 2003 concerning Advocates (Advocate Law). In this *regulation*, Advocates refer to those who work as parties who provide legal services, both in or outside the court that have fulfilled the requirements under the law (Farahwati, 2021). It is further stated that an advocate is a law enforcer *who has* an equal position with other law enforcers (judges, prosecutors and police). (Amatahir,

2021). In the context of criminal law, advocates together with other legal officers form one unit in the criminal justice system (Imron, 2016).

Advocates as law enforcers carry out their roles and functions independently to represent the interests of society and are not influenced by state power. Therefore, an advocate can be interpreted as having his point of view, with an objective way of thinking. An advocate from his point of view represents the interests of society (clients) to defend their legal rights (Risdalina, 2019). However, in defending these legal rights, an advocate's way of thinking must be objective in assessing them based on their expertise, professional code of ethics and a forum for gathering within an organization. (Habibi, 2015). The advocate profession does not devote itself to personal interests but to the interests of society and also must be involved in upholding human rights (Bachmid, 2023a).

To carry out the profession of advocate, a person must pass various qualifications in the stages regulated in Law Number 18 of 2003 concerning advocates. These qualifications include that a person must have completed the legal education process at the tertiary level (strata 1) and taken the Special Education for the Advocate Profession (PKPA). After the education process has been completed, prospective advocates must then pass the Advocate Professional Examination (UPA) stages and take the advocate's oath by the High Court which is held by the parent organization of the advocate profession.

The organization that accommodates the advocate profession is the Indonesian Advocates Association (PERADI). The PERADI organization is one of the largest professional forums for advocates in Indonesia and began to be introduced to the public, especially among law enforcement, on April 7 2005 at Balai Sudirman, South Jakarta (Octaviani, 2021). However, other organizations accommodate advocates besides PERADI, where this often causes polemics among the community, even within the PERADI organization itself it reaps conflict, giving rise to dualism in management (Hutabalian, 2020).

In its activities as one of the largest professional advocate organizations, PERADI has experienced many disruptions in maintaining its existence. One thing that is quite controversial is the publication of the Letter from the Chairman of the Supreme Court of the Republic of Indonesia No. 73/KMA/HK-01/IX/2015 regarding the mechanism for swearing in prospective advocates. In the letter, the Supreme Court interpreted the phrase "Advocate Organizations" as plural organizations that bring together people who work as advocates. Apart from that, the Supreme Court issued the letter as a reaction to the dualism that occurred within the PERADI organization to make it easier to swear in prospective advocates. Thus, the letter in principle has delegated authority to the Chairman of the High Court to administer the oath of office to prospective advocates.

Due to the publication of this letter, Constitutional Court Decision No. 34/PU-XVI/2018 seems to increase the length of the existing conflict. However, there are different interpretations from the Constitutional Court regarding this lawyer issue. Through its decision, the Court appears to be trying to straighten out the "mistakes" in the Chief Justice's Letter. Even though the Constitutional Court in its decision refused to mention PERADI as an element in the term "advocate organization", in its legal considerations it clearly emphasized the Constitutional Court Decision Number 014//PUU-IV/2006 (Pradnyawan, 2017), stating that PERADI is the only organizational forum that in the Advocates Law has the authority to appoint advocates.

Based on the issues above, it is interesting to examine what the actual position of the Supreme Court Letter is from a normative-juridical perspective and the polemic of the lawyer's oath. Apart from that, it is necessary to review the position and substance of Constitutional Court Decision No. 35/PU-XVI/2018 about PERADI's position as an advocate organization.

METHOD

Based on the specified issues, this research uses normative methods or doctrinal legal research. The approaches used to conduct this research are The statutory regulation approach (*the statute approach*) and the legal concept analysis approach (*analytical & conceptual approach*) (Ohoiwutun et al., 2023). In normative research, analysis is usually presented qualitatively using descriptive-analytic techniques (Ramadani et al., 2021).

RESULTS AND DISCUSSION

The Position and Substance of the Letter from the Chief Justice of the Supreme Court in the Polemic on the Advocate's Oath

The existence of a legal product always contains the spirit of legal philosophy, namely in its various considerations or decisions (Bachmid, 2023). As is known, in the letter from the Chairman of the Supreme Court Number 089/KMA/VI/2010 dated June 25 2010 regarding the oath of advocates, it is stipulated that the Chief Justices of the High Court can take the oath of prospective Advocates who have fulfilled the conditions, provided that the oath proposal must be submitted by the PERADI Management by the contents of the agreement dated June 24 2010 (Fatah, 2017). The substance of the letter from the Chairman of the Supreme Court No: 73/KMA/HK.01/IX/2015 cancels the letter from the Chairman of the Supreme Court number 089/KMA/VI/2010 and the Letter from the Chairman of the Supreme Court Number 52/KMA/HK.01/III/2011 March 23 2011 regarding Explanation of the Letter of the Chief Justice of the Supreme Court Number 089/KMA/VI/2010 (Firmansyah, 2018) .

The letter from the chairman of the Supreme Court Number 73/KMA/HK.01/IX/2015 which contains 7 (seven) points, illustrates the juridical and sociological arguments which are the basis for granting the authority of the Chairman of the High Court to swear in all advocates. The Supreme Court circular interprets advocate organizations as any organization that houses those who work as advocates and gives authority to these organizations in nominating the names of those who will take the oath.

On one side, *regulations* This is considered progressive because the Supreme Court's move seeks to provide equal opportunities for all existing advocate organizations to nominate prospective advocates. But Behind these progressive policies, there are negative things. The letter from the Chief Justice of the Supreme Court which allows several advocate organizations on behalf of PERADI and other Advocate Organization Management to submit oath applications is contrary to the substance of the Law on Advocates P origin 28 paragraph 1 jo. P origin 2 paragraph (1) which in principle states that the Advocate organization is the only free and independent forum for the Advocate profession which was formed by the provisions of this Law with the aim and objective of improving the quality of the Advocate profession.

Based on the Law on Advocates, the interpretation of an advocate organization formed by the mandate of this law can be intended as a PERADI organization. This is as stated in the Constitutional Court decision no. 014/PUU-IV/2006 dated 30 November 2006, where the Constitutional Court stated: "The PERADI organization as the only professional forum for Advocates is a state organ in the broadest sense that is independent (*independent state organ*) which also carries out state functions."

The phrase "the only forum for the advocate profession" indicates that the Constitutional Court appointed PERADI as the sole advocate organization in Indonesia. This has implications for PERADI as the only organization authorized to provide education and the appointment of an advocate as the only official forum for the Advocate profession. The phrase "an independent state organ means that PERADI is an institution that is free from interference from any other power. In this case, *an independent state organ* also means a state institution that is not within the structure of the executive, judicial and legislative branches of power (Ramadani, 2020). Thus, advocate organizations should have special authority and be

regulatory (regulated independently) like generally independent state institutions (Ramadani & Mamonto, 2018).

Stufenbau theory proposed by Hans Kelsen and refined by Hans Nawiasky through the theory of the Hierarchy of Legal Norms, in a publication in the Indonesian Law Reform Journal, explains that the legal order is a tiered system of norms (Bachmid & Rachmitasari, 2022). Regarding the position of the Chief Justice's Letter in the legal system in Indonesia, Yuliandri stated that by the hierarchy of laws and regulations, the principle applies that lower laws and regulations must not conflict with higher laws and regulations. Yuliandri believes that other types of regulations (in this context regulations issued by the Supreme Court) should also be subject to the principle of hierarchy (Yuliandri, 2009). Furthermore, Jimly Asshiddiqie included the Supreme Court regulations as special regulations so that they are subject to the principle of *lex specialis derogat legi generalis* (Asshiddiqie, 2005).

However, placing the position of the Supreme Court Chairman's Letter is not as simple as the Supreme Court Regulations. This is because the nomenclature of "regulations" is identical to *regulations* or legal products that are general and abstract (Ni'matul Huda & Nazriyah, 2019). Meanwhile, the nomenclature "letter" as in "decision letter" in state administrative law is known as *beschikking*, namely a legal product that is individual, concrete and final (Herman & Noor, 2017). On that basis, it can be said that generally applicable legal products such as Supreme Court Regulations are classified as institutional regulations as stated in Law 12 of 2011, so they are included as Legislative Regulations (Hambali et al., 2021).

different from the Supreme Court Chief's Letter which does not use regulatory nomenclature, so it is closer to the concept of policy regulations or *beleidsregel*. *Beleidsregel* or policy regulations are a one-sided type of State Administrative Action in the field of public law (*eenzijdige publiek rechtelijke handelingen*) (Nasarudin, 2016). It is a shadow law (*spiegelrecht*) that shadows the law or law related to the implementation of the policy. *Beleidsregel* originates from discretionary authority which is generally used to determine policies for implementing statutory provisions (Leonardy, 2023).

Constitutional review of Constitutional Court Decision No. 35/PU-XVI/2018 regarding advocate organizations regarding the position of PERADI

Chronologically, a judicial review of the phrase "advocate organization" in the Advocate Law was requested by Bahrul Ilmi Yakup, Shalih Mangara Sitompul, Gunadi Handoko, Rynaldo P. Batubara, Ismail Nganggon who are advocates who are members of the Indonesian Advocates Association (PERADI) Fauzie Yusuf Hasibuan's camp so that the phrase is interpreted as PERADI which is the sole forum for the profession of advocates. The phrase "Advocate Organization" is considered ambiguous and has multiple interpretations, resulting in misinterpretation among the government. regarding the phrase "Advocate Organization". The petitioners requested that the Constitutional Court decide on the polemic of the phrase "Advocate Organization" as a PERADI organization in Law no. 18 of 2003.

This material test gave rise to Constitutional Court Decision No. 35/PUU-XVI/2018 dated 28 November 2019. Even though the request for judicial review regarding this phrase was completely rejected in the ruling, in the legal considerations of Constitutional Court Decision No. 35/PUU-XVI/2018, the Court reaffirmed the constitutionality of PERADI as an advocate organization, the only professional forum for advocates with 8 (eight) authorities by the Advocate Law. This decision strengthens the existence of Constitutional Court Decision No. 014/PUU-IV/2006 dated 30 November 2006 concerning Advocates' Organizations which confirmed PERADI as a state organ in the broadest sense that is independent (*independent state organ*) and also carries out state functions.

First, it is necessary to understand which parts of the Constitutional Court Decision are considered binding. Is it only in the ruling section or is it included in the legal considerations? There are several opinions which explain this view. The first opinion states that in the Constitutional Court's decision only the ruling part is binding, so there is no need to waste time reading the decision in its entirety, just the ruling is enough. (Maulidi, 2017) .

Another opinion emerged by stating that the part of legal considerations that is binding is *the ratio decidendi part*. This section is the part that is the basis or reason for making a decision which is formulated in the ruling section. Regarding this issue, Maruaar Siahaan stated that it is no longer debatable that the ruling is an operative provision which is first and foremost binding as a law that must be implemented. However, the decision must certainly be confirmed or justified through legal considerations which describe the judge's reasoning regarding the process of interpreting facts and law, based on evidence submitted and debated by each party. (Laksono, 2018) .

Some state that the legal considerations of the constitutional court's decision are binding. According to V. Guttler, the decision of the constitutional court is binding on everyone. Not only injunctive statements but also part of the legal considerations of the Constitutional Court which are included in the judgment opinion (Guttler, 2000) . However, the author agrees with what Fajar Laksono stated that in the Constitutional Court's decision, what can be understood to have binding force as law and must be implemented are all parts of the decision. including legal considerations and rulings. Because without binding legal considerations, the decision cannot be understood what the ratio legis is, what the ratio decidendi is. When the ruling is separated from the legal considerations, it will not be understood what *the legal ratio* is.

This was also explained by Maruar ar Siahaan that the decision must receive justification or justification through legal considerations which describe the judge's reasoning regarding the process of interpreting facts and law, based on evidence submitted and debated by each party. In the judge's decision at *the International Court of Justice*, the judges' debate was raised in their legal considerations. Including *dissenting opinions* or *concurring opinions*, which are placed in legal considerations. Therefore, if it is separated, the basis for making the decision cannot be understood.

In decision no. 35/PUU-XVI/2018, Constitutional Court in his consideration, assessed the Letter of the Chief Justice of the Supreme Court no. 73/KMA/HK.01/IX/2015 dated 25 September 2015 has been mistaken or misunderstood the constitutional juridical meaning of the phrase "Advocate Organization" as intended by the Advocate Law, so it seems as if all advocate organizations have the authority to provide Special Education for the Advocate Profession (PKPA), appoint advocates, hold the Advocate Professional Examination (UPA), and administer the oath of office for prospective Advocates to the Chairman of the High Court.

In addition, there is a description of several important considerations. In the decision of the Constitutional Court. This decision constitutionally confirms PERADI as the only forum for the advocate profession which has eight authorities: including carrying out special education for the profession of advocates (PKPA); carrying out testing of prospective advocates; appointing an advocate; creating a code of ethics; forming an Honorary Council; establishing a Supervisory Commission; carry out supervision; and dismissing advocates.

In an *open legal policy*, the legislators only limit one professional organization for each profession as an umbrella institution that accepts and implements state authority and state functions to control and create integration, standardization and professionalism in the profession concerned, to provide legal guarantees and protection for the interests of the community as users of these services .

Whereas about other advocate organizations which *de facto* currently exist, this cannot be prohibited considering that the constitution guarantees freedom of association and

assembly as intended in Article 28 and Article 28E paragraph (3) of the 1945 Constitution. However, other advocate organizations do not have the authority to exercise the 8 (eight) types of authority and this has been expressly considered as the Court's stance in its decision relating to advocate organizations which can exercise the 8 (eight) types of authority in question.

Furthermore, in the legal considerations of the Constitutional Court, regarding the swearing in of advocates carried out by the High Court without linking it to the membership of the advocate organization which currently exists de facto, it does not necessarily justify that organizations outside PERADI can exercise the 8 (eight) powers as stated in determined in the Law on Advocates, but solely with the consideration that it is not permissible to obstruct the constitutional rights of every person, including other advocate organizations which de facto exist as intended in Article 28D paragraph (2) of the 1945 Constitution, namely the right to work and receive fair compensation and treatment and appropriate in an employment relationship.

In this regard, prospective advocates must also be guaranteed the protection of their constitutional rights to be sworn in by the high court because, without an oath, the prospective advocate in question will not be able to carry out his profession. As a juridical consequence, in the future other advocate organizations apart from PERADI must immediately adapt to the PERADI organization because as has been confirmed in the Constitutional Court Decisions above, PERADI is the only forum for the profession of advocates in which 8 (eight) exclusive authority, one of which is closely related to the appointment of Advocates. In its decision, the Constitutional Court's confirmation is inseparable from its strong desire to build the dignity of advocacy as a noble profession (official nobile) to strengthen integrity, competence and professionalism.

CONCLUSION

Letter from the Chairman of the Supreme Court of the Republic of Indonesia No. 73/KMA/HK.01/01/2015 dated 25 September 2015 regarding the oath of advocates is considered wrong because it gives authority to all Chief Justices of High Courts throughout Indonesia to swear in Advocates without involving PERADI as an advocate organization. This is considered not by the appointment and quality standards set by PERADI concerning statutory orders. The letter from the Chief Justice of the Supreme Court is a legal product that is legal and is not included in the hierarchy of laws and regulations stated in Law No. 12 of 2011 concerning the Formation of Legislation. On that basis, This letter cannot overrule the Constitutional Court's decision, which is binding. The part of the Constitutional Court's decision that is binding apart from the ruling is the legal consideration. This is because legal considerations are a unified result of analysis and the results of the judge's reasoning in making decisions. The validity of PERADI as a single organization is explained in Constitutional Court Decision No. 014 of 2006 which stated that PERADI was established with 8 (eight) authorities within two years. Its constitutionality is stated in the mandate of article 32 of Law no. 18 of 2003 concerning Advocates to form an advocate organization, namely PERADI as the sole forum for advocate organizations.

Furthermore, MK Decision No. 35/PUU-XVI/2018 concerning advocate organizations must be used as a reference in implementing the appointment of the advocate profession. Even though the material review of the phrase "advocate organization" was rejected, the Constitutional Court has strengthened PERADI's position in its legal considerations as the only advocate organization that has 8 (eight) authorities in appointing and regulating the advocate profession. This decision orders other advocate organizations to adapt to the mechanisms implemented by PERADI. Apart from that, it is necessary to initiate a discussion of the Advocates Bill to overhaul regulations and provide specific clarity regarding *single-bar organizations* in the advocate profession. In this bill, it is also necessary The status of

advocate organizations be emphasized in one institution to avoid misinterpretation of advocate organizations and to make the implementation of education and the appointment of advocates more qualified, professional and controlled.

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