



Advocate Good Faith Arrangements in the Future

Charisma Adilaga Sugiyanto¹; Herman Suryokumoro²; Bambang Sugiri²; Iwan Permadi²

¹ Doctoral Candidate at the Faculty of Law, University of Brawijaya, Malang, Indonesia

² Lecturer at Faculty of Law, University of Brawijaya, Malang, Indonesia

E-mail: charismaadilaga@gmail.com

<http://dx.doi.org/10.47814/ijssrr.v6i4.1043>

Abstract

Article 16 of Law Number 18 of 2003 concerning advocates, an advocate has special rights in the form of the right of immunity, so that advocates cannot be prosecuted either civilly or criminally for carrying out their duties both inside and outside the court in good faith. However, the absence of clear parameters to what extent the right of immunity is inherent in advocates has caused not a few advocates carrying out their profession to be entangled in legal problems. Starting from this background, this paper discusses future good-faith arrangements for advocates. The research method used in this article is a normative legal research method. The results of the research in this article are the regulation regarding the good faith of advocates so that in practice it does not cause multiple interpretations and there is legal certainty for advocates in carrying out their duties and obligations without worrying about criminalization, namely by changing Article 16 of Law Number 18 of 2013 becomes "advocates cannot be prosecuted civilly or criminally in carrying out their professional duties by adhering to the code of ethics and laws and regulations for the benefit of defending clients both inside and outside the courtroom".

Keywords: *Advocate; Good Faith; Arrangements; Future*

Introduction

Law Number 18 of 2003 concerning advocates, is a form of recognition that legitimizes advocates in carrying out their profession while at the same time making the advocate profession equal to other law enforcers. In accordance with Article 16 of Law Number 18 of 2003 concerning advocates, an advocate has special rights in the form of immunity, so that advocates cannot be prosecuted either civilly or criminally for carrying out their duties both inside and outside the court in good faith. The absence of clear parameters to what extent the right of immunity is inherent in advocates has caused not a few advocates in carrying out their profession to be entangled in legal problems.

The issue of immunity from the inception of Law Number 18 of 2013 to the decision of the Constitutional Court is within the scope of immunity that applies only in court sessions or also applies outside of court sessions. Constitutional Court Decision Number 26/PUU-XI/2013 provides for an expansion of the scope of advocate immunity so that becoming an advocate cannot be prosecuted both civilly and criminally for carrying out his professional duties in good faith for client defense both in court and outside court proceedings. This means that since the Constitutional Court Decision number 26/PUU-XI/2013, advocates have immunity both inside and outside the court. However, what is happening now? In practice, advocates' right to immunity has not yet been assessed as having clear protection mechanisms/procedures. This is because the advocate profession when carrying out their professional duties has the potential to be criminalized and sued in court or known as obstruction of justice, even though when defending their clients both inside and outside the courtroom they have been carried out in good faith. That is why it is necessary to regulate Advocate Good Faith in the Future.

Methods Of Research

This research's research is normative legal research, which is a process to finding legal rules, legal principles, and legal doctrines to answer legal issues at hand (Marzuki, 2001).

Results And Discussion

Characteristics of Good Faith

Good faith has a dual role in law. Good faith serves as a principle and norm (Mertokusumo, 2004). The principle of good faith was originally a special legal principle in the context of civil law, which narrowly only covers contract law. In its development, the principle of good faith does not only apply as a special legal principle but has become a general legal principle. As stated by Siti Ismijati Jenie that "the principle of good faith which is only a principle applicable in the field of contract law has developed and is accepted as a principle in other fields or branches of law, both within the private law family and those that are the field of public law" (Jenie, 2007). The principle of good faith is also known in the fields of company law, consumer protection, capital markets, tax law, and international law (Jenie, 2007).

Good faith is a very important concern at this time. When defining good faith, the opposite meaning is bad faith. J Edward Bayley said, "good faith is a vague concept. It is not clear whether good faith requires honest conduct, cooperative conduct, reasonable conduct or a combination there of " (Bayley, 2009). The concept of good faith, whose elements are still vague, causes judges to make contextual interpretations. This contextual interpretation results in the emergence of various concepts regarding good faith. J Edward Bayley emphasized that "the phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context.

In a contract, the concept of good faith can be explicitly implied in the substance of the contract or must be reviewed from the facts that occurred both in the stages of contract preparation to contract execution. The development of good faith can also occur in court proceedings where there is an interpretation by the judge as a result of the abstract concept of good faith.

When viewed in positive law, the principle of good faith is normalized in Article 1338 paragraph (3) of the Civil Code. Article 1338 paragraph (3) of the Civil Code states that "Agreements must be implemented in good faith". When viewed in terms of terminology, good faith is a term that is a translation from Dutch, namely "*te goede trouw*", and from English, namely "in good faith" (Syaifuddin, 2012). When interpreted historically, good faith is adopted from Roman law, namely *bona fides*. J

Edward Bayley explained that "the concept of bona fides can be translated to mean in accordance with good faith" (Bayley, 2009). In addition, J Edward Bayley explained that "The origins of good faith can be traced to Roman law. Much like equity in English law, the restrictions of formal procedure in Roman law were surmounted by measures taken by those charged with administering justice. Roman law offers the first example of a legal system adapting under the influence of equitable concepts.

Good faith terminology, which is adopted from Roman law, such as decency or propriety in English law. As explained by J Edward Bayley, this limited understanding ultimately requires action from judges to provide contextual interpretation. Roman law is what ultimately provides an example of a legal system that accepts the influence of decency as a legal concept.

In Roman law, the term good faith is bona fides. According to J Edward Bayley what is meant by bona fides are as follows (Bayley, 2009): Fides were originally understood to mean that a man should remain faithful to his word and should honor his undertakings. Bona fides on the other hand was utilized to ascertain the content of a concluded contract. It required the parties to act honestly and therefore influenced how a contract was performed. The qualification of fides as bona fides, therefore, emphasizes the specificity of the standard of behavior that was required.

From the description above, *bona fides* means honesty that is at the bottom of the hearts of the parties. This honesty is framed as sincerity to act without any intention to commit deception that can harm other parties.

According to P. Abas, "the real meaning of Fides is "belief" in one's virtue, meaning trustworthy, careful" (Prawirohamidjojo, 2009). Bonus, among other things, wants to state morality is good, meaning "sincere and good" (Prawirohamidjojo, 2009). Good faith is closely related to decency in action. This was confirmed by the arrest of the Hoge Raad on February 9, 1923, N.J. 1923, 676 where the Hoge Raad translates good faith in engagement law with "fitness and propriety". Donna Batten defines bona fide as honest, genuine, actual, authentic, and acting without the intention of defrauding (Batten, 2010).

The same thing was emphasized by John Bouvier in Bouvier's Law Dictionary: Adapted to The Constitution and Laws of The United States of America and of The Several States of The American Union interpret bona fide is as follows (Batten, 2010): In or with good faith. The law requires all persons in their transactions to act with good faith and a contract where the parties have not acted bonafide is void at the pleasure of the innocent party. If a contract be made with good faith, subsequent fraudulent acts will not vitiate it; although such acts may raise a presumption of antecedent fraud, and thus become a means of proving the want of good faith in making the contract. In civil law, these actions are called (actions) *bonae fidei*, in which the judge has a more unrestrained power (*liberior potestas*) of estimating how much one person ought to give to or do, for another; whereas, those actions are said to be *stricti juris*, in which the power of the judge is confined to the agreement of the parties.

According to the Big Indonesian Dictionary, good faith is having good intentions (Pusat Bahasa Departemen Pendidikan Nasional, 2008). Good faith in English refers to the term good faith. The definition of good faith as described in Black's Law Dictionary is: Good faith is a state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable" (Garner, 2004).

Websters New World Law Dictionary defines good faith as follows: "A party's state of mind in acting or carrying out an action or transaction, evincing honesty, fairness, full communication of any hidden issues or information, and an absence of intent to harm other individuals or parties to the

transaction.” (Wild, 2006). John Bouvier defines "good faith is honesty; a sincere intention to deal fairly with others” (Wild, 2006). The same thing was emphasized by Elizabeth A. Martin who stated that “good faith is honesty. An act carried out in good faith is one carried out honestly. Good faith is implied by law into certain contracts, such as those relating to commercial agencies” (Martin, 2002).

From the description of the meaning of good faith by these experts, it can be concluded that good faith means honesty and decency. Honesty means having sincere intentions and acting without deception that results in losses to other parties. According to the Indonesian dictionary, propriety is defined as an action that is appropriate and should be carried out by the parties (Pusat Bahasa Departemen Pendidikan Nasional, 2008). The criterion of decency is an action that the general public should do.

Advocate Good Faith Arrangements in the Future

Legal disputes that are always repeated are between demands for justice and demands legal certainty. This legal issue cannot be separated because of all the limitations of the legislators, so it is common for us to encounter arrangements that are multi-interpreted.

There is debate within the community as well as among advocates themselves regarding the right of immunity possessed by an advocate or lawyer, specifically regarding the right of advocate immunity which is a benchmark for an Advocate in carrying out his duties according to the power given by the client in legal defense in the case he is handling. As we know in practice, not a few Advocates have been complained about by parties who objected to an advocate's statement in carrying out his profession to the Police, some were investigated and arrested by the Police, and even became convicts based on court decisions when defending the interests of their clients. In carrying out their profession, advocates are always related to the right of immunity that is attached to them when carrying out their profession in defending or assisting justice seekers.

The basis of the right of immunity that an advocate bears while carrying out his profession is Article 16 of Law Number 18 of 2013, which states that: "Advocates cannot be prosecuted civilly or criminally for carrying out their professional duties in good faith for the benefit of client defense in court proceedings."

Related to the above, the Constitutional Court has expanded the right to immunity owned by advocates, through the decision of the Constitutional Court Number 006/PUU-II/2004 dated December 13, 2004, which considers, Law Number 18 of 2013 is a law that regulates the conditions, the rights and obligations of being a member of an advocate professional organization, which also includes supervision of the implementation of the advocate profession in providing legal services, both inside and outside the court. Therefore, the objective of the Law Number 18 of 2013, apart from protecting advocates as a professional organization, is primarily to protect the public from advocate services that do not meet legal requirements or from the possibility of misuse of the services of the advocate profession.

With this opinion, the Constitutional Court stated, Article 16 of Law Number 18 of 2013 is contrary to the 1945 Constitution of the Republic of Indonesia, and does not have binding legal force as long as it is not interpreted, "An advocate cannot be prosecuted both civilly and criminally in carrying out his professional duties by the good faith for the benefit of the client's defense inside and outside the courtroom".

According to Munir Fuady, advocates have the right to immunity which applies in two scopes, namely the right to immunity in court and outside the court session (Fuady, 2005). The right of immunity in court sessions is easier to implement because trials are open to the public so efforts to weaken the right of immunity, especially from the court, will be more difficult to realize. However, this right of immunity

is not necessarily understood by advocates, in court, they may not give maximum effort in defending their client (Fuady, 2005).

Concerning the right to immunity outside the court, the duties of an advocate related to criminal and civil matters, which include assisting clients both when making reports and complaints of suspected criminal acts, assisting in the investigation process at the police level, which includes the right to contact clients at the time of arrest or detention and contacting the suspect at each examination, can also assist the suspect in additional investigations at the Attorney General's Office. Apart from that, you can also make warnings/commons to individuals, companies, or even countries based on the client's power of attorney. Also, advocates can take on the role of a capital market supporting professional (legal consultant) to provide legal opinions in the context of offering company shares to the public (going public) as stipulated in the capital market law (Fuady, 2005).

Regarding immunity in hearings at the House of Representatives (DPR), in connection with his position as an independent law enforcer, advocates can provide input or raise objections to the making of laws or discuss something related to other issues in the field of law (Fuady, 2005). In connection with the description of the regulation on the immunity of advocates, it can be seen that there are equal rights for advocates to carry out work outside of court hearings and to give opinions in the House of Representatives (DPR).

According to Munir Fuady, advocates have the right to immunity outside the court even though it is acknowledged that by setting Article 16 of Law Number 18 of 2013 it is as if the right of immunity only applies in court (Fuady, 2005). It is clear that granting equal immunity to advocates on duties both outside the courtroom and in the House of Representatives (DPR), the more clearly it can be concluded that advocates have immunity both inside and outside the courtroom (Fuady, 2005).

The hope of alleviating the advocate's right to immunity must exist within the advocate himself. Each advocate must be aware that they must unite. United for what, namely for a better future of the advocate profession. Based on this, the reconstruction of the article proposed is as follows:

Table 1. Reconstruction of Law Number 18 of 2013

Law Number 18 of 2013	Reconstruction
Article 16 of Law Number 18 of 2013 stipulates: advocates cannot be prosecuted both civilly and criminally for carrying out their professional duties in good faith for the benefit of client defense in court proceedings	Advocates cannot be prosecuted civilly or criminally in carrying out their professional duties by adhering to the code of ethics and laws and regulations for the benefit of client defense both inside and outside the courtroom

The guarantee of freedom and immunity given to advocates is a guarantee against any parties who exert pressure, threats, manipulation, obstruction, intimidation, and other actions or treatment that are demeaning to the dignity of the advocate profession when carrying out their professional duties. All steps in the form of resistance, namely for the sake of upholding justice based on the law to defend the interests of their clients, are protected by the right of immunity.

With the existence of reconstruction, "advocates cannot be prosecuted civilly or criminally in carrying out their professional duties by adhering to the code of ethics and laws and regulations for the benefit of defending clients both inside and outside the courtroom", meaning that the right to immunity is

protected as long as he does not commit acts contrary to obligations of honor or the dignity of the profession, also does not violate laws and regulations or acts that are disgraceful, also the right to immunity is protected as long as advocates express opinions proportionally and not excessively both in open and closed sessions.

Thus, based on Law Number 18 of 2013 as well as the Indonesian Advocate Code of Ethics, advocates are not protected by immunity if they are proven to have carried out their duties in violation of the code of ethics and disgraceful acts, as well as violating statutory regulations. Therefore, in carrying out their professional duties, advocates must be careful and selective in choosing what steps to take when defending clients. Do not act arbitrarily, ignore the dignity of the profession, override laws and regulations, and code of ethics. In this regard, Luhut M.P. Pangaribuan explained that, if there is an allegation of a crime committed by an advocate, then the advocate's right to immunity or legal immunity does not apply (Pangaribuan, 1996).

The achievement of legal certainty is divided into two main elements, first, the law itself. In the sense that the law must be firm and must not have multiple interpretations. If the law states something contrary to the idea of democracy, then it is appropriate that what is regulated by law is not binding because of injury to democratic principles. Second, the power itself enforces the law. The authorities must not arbitrarily apply the law retroactively and remain firm on the principles of legality. Legal certainty from its legal elements, emphasizes firmness and may not be interpreted differently from the purpose of drafting laws.

Conclusion

Arrangements regarding Advocate good faith so that in practice it does not cause multiple interpretations and there is legal certainty for advocates in carrying out their duties and obligations without worrying about criminalization, namely by changing Article 16 of Law Number 18 of 2013 which originally read "advocates cannot be prosecuted both civilly and criminally in carrying out their professional duties in good faith for the benefit of defending clients in court hearings", to "advocates cannot be prosecuted civilly or criminally in carrying out their professional duties by adhering to code of ethics and laws and regulations for the benefit of client defense both inside and outside the courtroom".

References

- Batten, D. (2010). *Gale Encyclopedia of American Law: Dictionary of Legal Terms*. USA: Gale.
- Bayley, J. (2009). *A Doctrine of Good Faith in New Zealand Contractual Relationships*. Christchurch: University of Catenbury.
- Fuady, M. (2005). *Profesi Mulia (Etika Profesi Hukum Bagi Hakim, Jaksa, Advokat, Notaris, Kurator dan Pengurus)*. Bandung: Citra Aditya Bakti.
- Garner, B. (2004). *Black's Law Dictionary*. USA: West Publishing.
- Jenie, S. (2007). *Itikad Baik Perkembangan Dari Asas Hukum Khusus Menjadi Asas Hukum Umum Di Indonesia*. Yogyakarta: Fakultas Hukum Uniersitas Gajah Mada.
- Martin, E. (2002). *Oxford: Dictionary of Law*. England: Oxford University Press.
- Marzuki, P. (2001). *Penelitian Hukum*. Jakarta: Kencana Prenada Media.

- Mertokusumo, S. (2004). *Penemuan Hukum*. Yogyakarta: Liberty.
- Pangaribuan, L. (1996). *Advokat dan Contempt of Court: Suatu Proses di Dewan Kehormatan Profesi*. Jakarta: Djambatan.
- Prawirohamidjojo, R. (2009). *Pelaksanaan Itikad Baik: Pasal 1338 ayat (3) BW, Perkembangan dan Dinamika Hukum Perdata di Indonesia*. Surabaya: Lutfansah Mediatama.
- Pusat Bahasa Departemen Pendidikan Nasional. (2008). *Kamus Bahasa Indonesia*. Jakarta: Departemen Pendidikan Nasional.
- Syaifuddin, M. (2012). *Hukum Kontrak: Memahami Kontrak dalam Perspektif Filsafat, Teori, Dogmatik, dan Praktek Hukum (Seri Pengayaan Hukum Perikatan)*. Bandung: Mandar Maju.
- Wild, S. (2006). *Websters New World: Law Dictionary*. Canada: Wiley Publishing Incorporation.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).