




Loss of Advocate Immunity Due To Obstruction Of Justice Based On Criminal Provisions

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Abstract

Introduction: The enforceability of Article 16 and the Constitutional Court decision number 26/PUU-XI/2013 does not necessarily exempt advocates from alleged intervention in the enforcement process in carrying out their profession to defend clients, but that right can be lost said the lawyer committed a criminal act of Obstruction of Justice.

Purposes of the Research: The purpose of this study is to explain the right of attorney immunity can be lost when committing a criminal act of Obstruction of Justice.

Methods of the Research: The research method used is normative legal research with a statute legal approach and a conceptual approach.

Results of the Research: Advocates in terms of exercising their profession require immunity rights, but the use of immunity rights has definitive conditions that must be considered as stipulated in Article 16 of law no. 18 of 2003. The act of an advocate should be suspected of committing a criminal act of obstruction of justice if the act is not related to his professional duties and is not based on good faith. The action taken by The Advocate in relation to his professional duties has the meaning that the action is carried out for the benefit of the client's defense. Good faith referred to in Article 16 is to carry out professional duties for the sake of establishing justice based on the law to defend the interests of its clients.

1. INTRODUCTION

Criminal acts are acts that in the legislation are threatened with criminal sanctions and/or actions. There are three elements that make the formulation of an act into a criminal offense, namely; actions; formulated in legislation; and there are criminal sanctions and/or actions. A criminal act is an act that is formulated in criminal legislation as a prohibited act. The act if committed by mistake then a person who commits the act in question may be subject to criminal sanctions.¹

In the event of a criminal offense, in order to be sentenced to criminal sanctions, there is a legal process that must be passed as stipulated in law No. 8 of 1981 on the Code of criminal procedure henceforth referred to as the Criminal Procedure Code. The legal process includes investigation, investigation, prosecution, examination of court hearings, and court decisions. An investigation is a set of actions of an investigator to search for and

¹ Sianturi, *Asas-Asas Hukum Pidana Di Indonesia dan Penerapan*, (Jakarta : Stora Grafika,2002),p.76.

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find an event that is suspected of a criminal offense. Investigation is a series of actions carried out by investigators in terms of and according to the manner regulated by law to find and collect evidence. Prosecution is an action taken by the public prosecutor to delegate criminal cases to the competent district court, in accordance with the methods contained in the law followed by a request to be examined and decided by a judge in a court hearing. The examination of the court session is a series of actions taken by the judge such as receiving, conducting examinations, and giving decisions on criminal cases based on the principle of free, honest, and impartial at the court session in accordance with the procedure set forth in the Criminal Procedure Code.²

The process of Criminal Procedural Law involves several parties in it, which have their own roles. These parties include a suspect, a person who because of his actions based on preliminary evidence should be suspected of being a criminal offender (Article 1 Number 14 Criminal Procedure Code); investigator is a police official who is given authority by law to conduct investigations (Article 1 Number 4 Criminal Procedure Code); investigator is a police officer or civil servant official who is given special; The public prosecutor is a prosecutor who has the authority to prosecute and carry out the determination of judges (Article 1 point 6 letter B of the Criminal Procedure Code); the judge is a state judicial official who is authorized to prosecute (Article 1 point 8 of the Criminal Procedure Code); and the legal adviser is a qualified person determined by or based on the law to provide legal assistance (Article 1 point 13 of the Criminal Procedure Code).³

A person who is entangled in a legal case has the right to obtain legal assistance, as a manifestation of the mandate of Article 28 d paragraph (1) of the 1945 NRI Constitution where everyone has the right to recognition, guarantee, protection, and fair legal certainty.⁴ Not infrequently parties who are going through legal proceedings use the services of legal counsel to assist them in undergoing ongoing legal proceedings. Legal counsel or advocate is someone who works to provide legal services, both inside and outside the court that has met the requirements under the provisions of the law. Advocates are tasked with providing legal advice and representing their clients to uphold the presumption of innocence and have a responsibility to fight for truth and the principles of Justice. Legal services provided by advocates can be in the form of legal assistance, legal consultation, exercising power of attorney, accompanying, defending, representing, and other legal actions for the legal interests of their clients. In carrying out its duties to provide legal services an advocate is not infrequently considered to obstruct or hinder the ongoing legal process or what is referred to as obstruction of justice.⁵

The term obstruction of justice is a legal terminology derived from anglo saxon literature, in the doctrine of criminal law in Indonesia is often interpreted as a criminal act of obstructing legal proceedings. The act of obstructing the judicial process or obstruction of justice is an act that includes a criminal offense because such an act is prohibited and threatened with a crime for the subject of law who violates it. The Penal Code (Book of Criminal Law) has regulated the provisions relating to the act of obstructing legal

² Sri Harijatip, *Hukum Acara Pidana*, (Badan Jakarta : Pendidikan dan Pelatihan Kejaksaan, 2016),p.25

³ Imron, "Peran dan Kedudukan Empat Pilar dalam Penegakan Hukum Hakim Jaksa Polisi serta Advokat Dihubungkan dengan Penegakan Hukum pada Kasus Korupsi," *Jurnal Surya Kencana Dua: Dinamika Masalah Hukum dan Keadilan*, 6, no.1, (2016),p.92

⁴ <https://sulsel.kemenkumham.go.id/pusat-informasi/artikel/4449-golongan-yang-berhak-menerima-bantuan-hukum>

⁵ Solehuddin, "Manakar Hak Imunitas Profesi Advokat," *Rechtldee Jurnal Hukum* 10, NO.no.1 (2015):92. <https://doi.org/10.21107/ri.v10i1.1141>

proceedings. Besides being regulated in the general provisions of criminal law, obstruction of justice is also regulated in more specific legislation.⁶

Advocates in providing legal services are not infrequently suspected of committing acts that are considered to hinder either directly or indirectly the court hearing process. Advocates as an independent, free, and responsible profession in law enforcement need to be guaranteed and protected by law in order to ensure the enforcement of the rule of law. The government has ratified the legal rules governing the advocate profession in Law No. 18 of 2003 on lawyers. One of the privileges granted by Law No. 18 of 2003 to advocates in carrying out their profession is the right of immunity regulated in Article 16 where advocates cannot be prosecuted either civilly or criminally in carrying out their duties in good faith (Khambali, 2017) while still paying attention to the code of ethics of the Advocate profession and applicable laws and regulations. The validity of Article 16 of the Advocates Law was strengthened by the decision of the Constitutional Court Number 26/PUU-XI/2013.⁷

The validity of Article 16 and Constitutional Court decision number 26/PUU-XI/2013 does not necessarily exempt advocates from alleged intervention in the enforcement process in carrying out their profession to defend clients. Based on the background that the author describes above, the discussion that will be discussed in this article is the criminal act of obstructing the judicial process on advocates in carrying out their profession as a legal service provider with the formulation of the study as follows; (1) How is the legal arrangement regarding obstruction of justice in Indonesia?; (2) What are the characteristics of an advocate's actions that can be classified as a criminal act of obstructing legal proceedings or obstruction of justice.

2. METHOD

The research method used in this study is legal research with doctrinal approach. Doctrinal legal research describes legal problems based on doctrines and previous legal opinions that have relevance to the legal problems discussed. The method used is normative juridical, which is included in doctrinal legal research, namely analyzing problems based on applicable legislation and previous literature that discusses similar problems. Normative juridical Law Research is a method of research on legislation both in terms of the hierarchy of legislation or the harmonious relationship of legislation in question. Research with normative juridical method is a legal research conducted by examining library materials or secondary data. Secondary data used in this study include primary legal materials and secondary legal materials.⁸

3. RESULTS AND DISCUSSION

3.1 Obstruction of Justice in Indonesia

Obstruction of Justice is not a new term in the world of law, although it is not yet widely known by the public. Some of the things that cause obstruction of justice is not widely known is that there are many differences in perception among law enforcement

⁶ Agustina, Shinta., Isra, Saldri., & Daulay, Zaenul., "Obstruction of Justice," (Jakarta: Themis Book, 2016): 12

⁷ Khambali, "Hak Imunitas Advokat Tidak Terbatas," Jurnal Universitas Proklamasi 45 Yogyakarta 13, no. 1, (2017): 22. <https://ejournal.up45.ac.id/index.php/cakrawala-hukum/article/view/328>

⁸ Marzuki, Peter Mahmud, "Pengantar Ilmu Hukum," (Jakarta: Kencana, 2008): xx

regarding the form of obstruction of justice.⁹ Obstruction of Justice is an act classified as a criminal offense for obstructing or obstructing the legal process in a case. Obstructing the legal process is of course an act against the law because it hinders the enforcement process in a case where each party should help the law enforcement process itself. Obstruction of justice is a legal terminology derived from Anglo-Saxon literature, in the doctrine of criminal law in Indonesia is often translated as a criminal act that obstructs legal proceedings.¹⁰

Obstruction of justice normatively has been regulated in the main Indonesian criminal law, namely in Article 221 of the Criminal Code in addition to the general regulation in the Criminal Code there are special laws and regulations that have relevant arrangements with the criminal act of obstruction of justice including Article 21 of Law No. 31 of 1999 Jo Law No. 20 of 2001 on Combating Corruption, Article 22 of Law No. 21 of 2007 concerning the eradication of trafficking in Persons, and Article 22 of Law No. 15 of 2003 on the application of government regulation in lieu of Law No. 1 of 2002 on combating criminal acts of terrorism.¹¹

Article 221 of the Criminal Code provides for a criminal threat to a person who deliberately hides a person who has committed a crime or who is prosecuted for a crime, or provides assistance to escape investigation and examination or detention by the police and Justices. The person who violates this article is obliged to know that the person he is hiding or helping has really committed a crime or is prosecuted for a crime; and someone who destroys and so on the traces of a crime, in order to hide the crime and so on. The person must have this intention, otherwise there can be no punishment.¹²

If a person who helps another person to escape and does not know that the person he is helping has committed a crime, then he cannot be sentenced to obstruct the judicial process and that must be proven in court. There must be an intention to conceal a criminal offense is an element that must be met by a person to be sentenced to obstruct or obstruct legal proceedings, because without such an intention a person cannot be sentenced to criminal sanctions under Article 221 of the Criminal Code.

Article 221 paragraph (1) of the Criminal Code threatens with a crime for everyone who hides or helps someone who commits a crime so that the person is spared from investigation or detention. Whereas paragraph (2) of Article 221 of the Criminal Code threatens with a crime for any person who has the intention of covering up or obstructing or making difficult the investigation or prosecution of a crime (Tulandi, 2015). The Criminal Code as a general provision of criminal law is a guideline for special legislation including the obstruction of justice crime which is also regulated in several special laws and regulations. The articles in the special laws and regulations governing criminal acts related

⁹ Gareda, "Perbuatan Menghalangi Proses Peradilan Tindak Pidana Korupsi berdasarkan Pasal 21 UU No. 31 Tahun 1999 Juncto UU No. 20 Tahun 2001," *Lex Crimen* IV, no. 1, (2015) :136. <https://ejournal.unsrat.ac.id/index.php/lexcrimen/article/viewFile/7009/6514>

¹⁰ Yuherawan, "Obstruction of Justice in Corruption Cases : How Does the Indonesian Anti-Corruption Commission Investigate the Case," *Journal of Indonesia Legal Studies*. 5,no.1, (2020) :245-248. <https://doi.org/10.15294/jils.v5i1.38575>

¹¹ Tarek, "Tindak Pidana Menghalangi Proses Hukum Penyelidikan, Penyidikan, Penuntutan Sampai Peradilan dalam Tindak Pidana Korupsi Menurut Undang-Undang Nomor 31 Tahun 1999 tentang Tindak Pidana Korupsi," *Lex Crimen* 3, no. 3,(2019): 146- 147 <https://ejournal.unsrat.ac.id/index.php/lexcrimen/article/view/25642/25295>

¹² Soesilo, "Kitab Undang-Undang Hukum Pidana (KUHP) serta Komentar-Komentarnya Lengkap Pasal Demi Pasal," (Bogor: Politeia,1994):xx

to obstructing legal proceedings cannot be separated from Article 221 of the Criminal Code.¹³

Summary Of Article 21 Of Law No. 31 Of 1999 Jo Law No. 20 of 2001 on Combating Corruption, Article 22 of Law No. 21 of 2007 concerning the eradication of trafficking in Persons, and Article 22 of Law No. 15 of 2003 on the application of government regulation in lieu of Law No. 1 of 2002 on combating the crime of terrorism categorizes an act that is included as a criminal act of obstruction of justice if the act is formally a prohibited act and contains criminal sanctions therein. By its nature obstruction of justice is intended to stop or inhibit a legal process against the perpetrator of a criminal offense. Of course, the criminal act of obstruction of justice is an act carried out in the judicial process starting from investigation, investigation, prosecution, to trial examination.¹⁴

Subject of offense Article 21 of Law No. 31 Of 1999 Jo Law No. 20 Of 2001, Article 22 Of Law No. 21 of 2007, and Article 22 of Law No. 15 of 2003 not only refers to one particular profession such as advocates but the subject of these articles is everyone. Prohibited acts are to prevent, obstruct, or thwart either directly or indirectly the legal process against the criminal.

Based on the formulation of Article 21 of Law No. 31 Of 1999 Jo Law No. 20 of 2001 on Combating Corruption, Article 22 of Law No. 21 of 2007 concerning the eradication of trafficking in Persons, and Article 22 of Law No. 15 of 2003 on the application of government regulation in lieu of Law No. 1 year 2002 on eradication of terrorism acts obstructing the legal process or obstruction of justice can be grouped into 3 forms of action, namely:¹⁵

- a) Intentionally preventing, the perpetrator of the preventive crime from committing certain acts so that investigation, prosecution, and examination cannot be carried out as provided in the law;
- b) Deliberately obstructing acts, criminal perpetrators have taken certain actions so that investigations, prosecutions and hearings in courts that have been carried out are hampered to be carried out in accordance with laws and regulations;
- c) Deliberately thwarting actions, the perpetrator has committed certain acts so that the investigation, prosecution, and examination in the trial are blocked from being carried out as regulated by law

The birth of obstruction of justice provisions in legislation outside the Criminal Code cannot be separated from Article 221 of the Criminal Code, however, if examined further, there are differences in the nature of the formulations of articles in special legislation with Article 221 of the Criminal Code (Harnita, 2018). The formulation of Article 221 of the Criminal Code refers to the purpose of doing an act if the act is done but there is no element of purpose or intent to obstruct the legal process, it cannot be sentenced to obstruction of justice. While obstruction of justice in Article 21 of Law No. 31 Of 1999 Jo Law No. 20 of 2001 on Combating Corruption and Article 22 of Law No. 21 of 2007 concerning the eradication of trafficking in Persons is interpreted as an act. In the absence of a purpose, a person who commits acts that should be suspected of obstructing or hindering the legal process may be sentenced under applicable laws and regulations.

¹³ Tulandi, "Menghalangi Penyidikan dan Penuntutan untuk Kepentingan Orang Lain Menurut Pasal 221 ayat (1) KUHPIDANA," *Lex Crime*4,no.6,(2015):130

¹⁴ Ali, Mahrus, "Asas, Teori dan Praktek Hukum Pidana Korupsi," (Yogyakarta: UII Press.2013)

¹⁵ Fadli, Khairul, "Pertanggungjawaban Pidana oleh Anggota Polisi Republik Indonesia yang Merintang proses Penyidikan Tindak Pidana Korupsi. Universitas Riau," p.6. <http://repository.unri.ac.id:80/handle/123456789/4612>

3.2 Obstruction of Justice related to lawyers

Advocates as one of the *catur wangsa* law enforcers have an equal position with police, prosecutors, and judges. Each of the *catur wangsa* law enforcers has its own duties and functions as specified in the laws and regulations. Law No. 18 of 2003 concerning advocates provides a definition of an advocate as someone who provides legal services both inside and outside the court that meets the requirements under the provisions of laws and regulations. Advocate law affirms that an advocate has the status of a law enforcer, free and independent guaranteed by laws and regulations.¹⁶

The Advocate code of ethics defines an advocate as a person who practices providing legal services, both inside and outside the court that meets the requirements under applicable law, either as an advocate, lawyer, legal adviser, practicing lawyer or as a legal consultant. Advocates in carrying out their professional duties both in the field of litigation and non-litigation have an obligation to protect the rights of individual legal subjects (*naturlijke person*) and legal entities (*rechtspersoon*) (Arif, 2018). As one of the law enforcement elements, advocates have rights and obligations that have been regulated in laws and regulations. One of the rights granted by the law to advocates in the exercise of their profession is the right of immunity stipulated in Article 16 of law no. 18 of 2003 on lawyers.¹⁷

The right of immunity possessed by advocates intersects with the criminal act of obstruction of justice, in practice, an advocate is often suspected of committing a criminal act of obstruction of justice in defending his client (Bijayanti, & Darmadi 2020). The provision on the right of immunity in general has been formulated in Article 50 of the Criminal Code, which provides that a person who commits an act cannot be convicted of performing the provisions of the law. In particular, the provision of immunity rights owned by advocates in carrying out their professional duties is regulated in Article 16 of Law No. 18 of 2003 concerning advocates. In principle, Article 16 of the Advocates law determines that *rechtspersoon* as a person who carries out the act even though in doing the act is very close to the possibility of committing a criminal offense but if the act is based on a statutory order, the perpetrator cannot be sentenced for committing the act.¹⁸

Advocates in terms of exercising their profession require immunity rights, but the use of immunity rights has definitive conditions that must be considered as stipulated in Article 16 of law no. 18 of 2003. These conditions are actions performed in relation to their professional duties and each such action is based on good faith. The action taken by The Advocate in relation to his professional duties has the meaning that the action is carried out for the benefit of the client's defense. Good faith referred to in Article 16 is to carry out professional duties for the sake of establishing justice based on the law to defend the interests of its clients.¹⁹

¹⁶ Rompis, "Kewenangan Advokat Didalam Sistem Peradilan Pidana Guna Menunjang Sistem Peradilan Terpadu," *Lex et Societatis* 1,no.2,(2013): p.126. <https://doi.org/10.35796/les.v1i2.1756>

¹⁷ Arif, K., "Perlindungan Hukum Terhadap Hak Imunitas Advokat Dalam Penegakan Hukum Di Indonesia," *Iqtisad* 5, no.1(2018):31. <http://dx.doi.org/10.31942/iq.v5i1.2206>

¹⁸ Atmaja, Ida Wayan Dharma Punia., & Suardana, I Wayan., & Wirasila, AA Ngurah, "Hak Imunitas Advokat dalam Persidangan Tindak Pidana Korupsi," *Kertha Wicara:Journal Ilmu Hukum* 7,no.5,(2018) :13, <https://ojs.unud.ac.id/index.php/kerthawicara/article/view/43617>

¹⁹ Rakinaung, Vicky Y, "Kajian Hukum Terhadap Pengacara yang dengan Sengaja menghalangi, Mempersulit Jalannya Penyidikan, Penuntutan serta Proses Peradilan terhadap Terdakwa dalam Tindak Pidana Korupsi," *Lex Crimen* 7, no.4, (2019): 192. <https://ejournal.unsrat.ac.id/index.php/lexcrimen/article/view/25669/25321>

The size of the actions performed by an advocate is said to have good faith if the act is not contrary to applicable laws and regulations and is not against the law. Good faith is the intention of a person's heart that is manifested in a concrete action for the benefit of the client in carrying out his profession for the sake of upholding justice and not violating the rule of law and applicable laws.²⁰

When an advocate provides legal advice to his client to present several expert witnesses in the trial, it is certainly not included in the criminal act of obstruction of justice. Because it is an obligation of an advocate to take an action in the interests of his client and presenting expert witnesses is not an act that is against the law. Another case if an advocate advises his client to hide one of the evidence, then the action includes a criminal act of obstruction of justice.

The definition of good faith in the dictionary of the Dutch-Indonesian term Fockema Andre which says good faith (*goede trouw*) means intent, the spirit that animates the participants in legal relations. Based on this definition, good faith has two meanings, namely; this definition can complement general matters, so that it can be applied in civil relations and criminal relations; this understanding is not associated with legislation or legal norms, but concerns the background of the purpose and spirit that animates why an act is carried out by advocates in carrying out their duties. The Actus reus of obstruction of justice can be established if the perpetrator shows that the act he has committed has a tendency to obstruct the course of the Justice enforcement process.²¹

4. CONCLUSION

An advocate in carrying out his duties to provide legal services is often considered to obstruct or hinder the ongoing legal process or referred to as obstruction of justice. Advocates in terms of exercising their profession require immunity rights, but the use of immunity rights has definitive conditions that must be considered as stipulated in Article 16 of law no. 18 of 2003. The act of an advocate should be suspected of obstruction of justice if the act committed is not related to his professional duties and is not based on good faith. The actions taken by advocates in relation to their professional duties have the meaning that these actions are carried out for the benefit of the client's defense. The good faith referred to in Article 16 is to carry out professional duties for the sake of establishing justice under the law to defend the interests of its clients.

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²⁰ Loi, "Tinjauan Yuridis Mengenai Hak Imunitas Seorang Advokat yang Melakukan Tindakan Obstruction of Justice dalam Perkara Korupsi (Contoh Putusan Nomor 90/Pid.Sus- TPK/2018/PN.Jkt.Pst)," *Jurnal Hukum Adigama* 3, no.1,(2020): 704. <https://journal.untar.ac.id/index.php/adigama/article/viewFile/8953/5737>

²¹ Nyoman & Purwoto, "Pertanggungjawaban Pidana Advokat Pelaku Tindak Pidana Suap terhadap Hakim (Studi Kasus Putusan Nomor 1319k/pid. sus/2016)," *Diponegoro Law Review* 6, no.2,(2017):15. <http://www.ejournals1.undip.ac.id/index.php/dlr>

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