

## THE ROLE AND THE FORMAL REQUIREMENTS OF POWERS OF ATTORNEY AT TRIAL BEFORE THE ADMINISTRATIVE COURT

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### Abstract

*This study aims to determine the role of the special power of attorney in trials before the Administrative Court and to determine the formal requirements of making a special power of attorney in the administrative court. The benefits of this research are legal philosophy and scientific development, especially in the field of procedural law, as well as to become an additional reference for those who are interested in researching this problem further. In addition, this research is expected to provide input for the community, students, and legal practitioners. This study uses normative legal approach or commonly called doctrinal research approach, including statutes and cases. The results of this study provide two conclusions: First, the role of special power of attorney in the trial at the Administrative Court is also applicable the principle of not having to use a power or legal aid. The use of mentoring or representation, authorization, legal aid is a right and not an obligation of a person. Such use is an obligation of the state when a citizen requires it but is unable to obtain it for themselves. Second, matters related to the formal requirements to become a special power of attorney in the Administrative Court have been spelled out in the Administrative Technical Guidelines and the Technical of Civil Service Arbitration Tribunal, Book II, edition 2009, the Supreme Court of the Republic of Indonesia.*

**Keywords:** *constitution, power of attorney, administrative court.*

### A. Introduction

One of the principles in proceeding at trial is that there is no obligation to be represented by counsel. Examination at bench trials is conducted directly to the disputing parties. However, the parties can choose to be accompanied or represented by one or several

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attorneys. Essentially, there is neither a requirement to use an attorney nor any restriction on representation.<sup>2</sup> However, in criminal cases carrying a maximum prison sentence of 15 years or more or death sentence or where the suspect or the accused is indigent facing a five-year sentence, cannot appear *pro se*.<sup>3</sup>

Law No. 18 Year 2003 on Advocates and Law No. 16 Year 2011 on Legal Aid also do not mention, in terms, about the necessity to use a legal representation. The purpose of that principle is to allow the judge determining issues of the disputing parties clearly by examining them directly. Only concerned parties know more in detail facts in a particular case.

In the past, appearance through counsel was seen as an inhibition to court proceedings because the attorneys often did not fully understand the nature of the disputes. The in-depth questions by the judge to attorneys stymied the fact-finding function for lack of understanding and re-consulting them with the client or principal. In addition, the use of an attorney of added an extra burden to the putative parties because they had to provide pay attorney's fees and costs.

Currently, the service of legal representative is viewed as professional and prestigious and the use of advocate is also very helpful to examination process in court. Attorneys deeply understand the legal events experienced by their clients or principals, and even contributes analysis in solving the relevant legal issues. The most important benefit is to provide legal representation for parties who lack legal knowledge, the poor, or those who understand the law but have many other occupations or limitations on time. Such representation can be either free of charge (*pro bono*) for a fee. Today's advocates are different from the old "shysters." They have equipped themselves with legal skills that meet the best standards based on strict recruitments and legal specifications of law graduates, competency exams, and adequate practice experience. However, there are still some misconceptions related to the function and format of legal representation that should be used in the court especially in the Administrative Court.

## **B. Problem Formulation**

Based on the aforementioned discussions on the background of this study, this following problem were formulated:

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<sup>2</sup> Article 123 of HIR and Article 147 of Rbg.

<sup>3</sup> Article 56 Law No. 18 Year 1981 on Criminal Procedural Law.

1. What is the role of attorneys at trials before the Administrative Court?
2. What are the formal requirements to appear as an attorney before the State Administrative Court?

### C. Methodology

To find out the answers of the questions in this research problems, this research used a normative legal approach. This research is commonly called dogmatic study or known as doctrinal research,<sup>4</sup> consisting of research on legal principles, research on various roles of attorneys, legal history research, and comparative research of law.<sup>5</sup>

To obtain information from various aspects of the issues, the researcher conducted the statutory approach and the case approach.<sup>6</sup> The object of this research are various roles of attorneys, legal documents and library materials as well as decisions of Administrative Court's Judges. Material Laws or Research Data is information or correct explanation about the object of research. Research Data or Legal Material in normative research can be primary, secondary, and tertiary legal material.<sup>7</sup>

### D. Discussions and Results

#### 1. The Role of Attorneys at Trial before the Administrative Court

Legal representation by advocates, legal consultants, legal aid agencies, and so forth, is an agreement (either oral or written) in which a person acts as a principal and the others act under the authority and on behalf of the principal perform an action. Authorization also means a delegation of authority.<sup>8</sup>

A written authorization may be made in notarial deed or underhand. Granting power of attorney may limited or "durable." Limited powers of attorney concerns only one

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<sup>4</sup> Bambang Sunggono, *Metodologi Penelitian Hukum* (Raja Grafindo Persada 2003) p. 42.

<sup>5</sup> Soetandyo Wignjosebroto's opinion in his writing *Hukum dan Metode-metode Kajiannya*" and "Penemuan Hukum: Sebuah Tipologi, states that Doctrinal Research consists of:

- a. Research in the form of business inventory of positive law;
- b. Research in the form of discovery of principles and basic philosophy (dogma or doctrine) of positive law; and
- c. Research in the form of a legal discovery effort that is feasible to be applied in solving a particular legal case.

<sup>6</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Prenadamedia Group 2005) p. 133.

<sup>7</sup> Postgraduate Program Faculty of Law Islamic University of Indonesia, *Buku Pedoman Penulisan Tugas Akhir (Disertasi) Program Doktor Ilmu Hukum* (FH UII Press 2010) p. 17.

<sup>8</sup> Article 1792 of Code of Civil Law states that "The authorization is a covenant in which someone grants authority to another, who receives it, to on his or her behalf organize a matter".

interest while durable power of attorney covers all interests or all actions of the principal.<sup>9</sup>

To represent the parties' interests (Plaintiff or Defendant) in Court, it must be with a durable power of attorney.<sup>10</sup> An attorney-in-fact may not be allowed to do anything beyond its authority.

There are 3 ways of granting durable powers of attorney according to HIR or RBg, namely:

- a. A directly designated Special Authority is mentioned in the lawsuit (Article 118 HIR and Article 142 RBg);
- b. A special authority designated when filing a verbal complaint (*mondeling vordering*) under article 120 HIR. According to the jurisprudence, the authority of the Plaintiff has no right to file a lawsuit.
- c. A special authority made with "Durable Power of Attorney" between the principal and the attorney to represent in the litigation.

By its characteristic, an authorization is as follows:

- a. An authorization happens for free, unless otherwise agreed;<sup>11</sup>
- b. An attorney may not be allowed to beyond the authority granted in the documents;<sup>12</sup>
- c. A principal may directly sue a person with whom the Power of Attorney has acted in his position and demand the fulfillment of his consent.<sup>13</sup>

Obligations of attorney are stipulated in Article 1800-1806 BW, as follows:

- a. To carry out the mandate of its authority including to bear all costs, losses, and any interest that may arise because of the non-exercise of such power;
- b. To complete the affairs which have been commenced at the time the principal dies;
- c. To be responsible for deliberate acts;
- d. To be responsible for the negligence in carrying out the duties;
- e. Giving a report of what has been done;

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<sup>9</sup> Article 1796 of Code of Civil Law.

<sup>10</sup> Article 123 section 2 of HIR and Article 147 section 2 of RBg.

<sup>11</sup> Article 1794 of Code of Civil Law.

<sup>12</sup> Article 1797 of Code of Civil Law.

<sup>13</sup> Article 1799 of Code of Civil Law.

- f. Giving calculation to the principal of all that has been received based on authority (including what has been received shall not be paid to the principal);

To be responsible for the substitution authority:

- a. If he is not granted the authority to appoint his substitution;
- b. If the authority has been granted to him without mentioning a certain person, while the chosen is an incompetent or incapable. The principal may directly request the person appointed by the attorney as his substitute;
- c. In case that the attorney is more than one person, then they do not bear one another;
- d. To pay the interest or principal money used for personal use;
- e. Not be responsible for what happens outside the authority limits, unless he has personally committed to it.

Obligations of principal are provided in articles 1807-1812 BW, as follows:

- a. To meet the commitments made by the attorney according to authority granted to him;
- b. To be bound by what is made by the attorney beyond the things that have been authorized to him, as long as they have been expressly or secretly approved;
- c. To reimburse or pay compensation for the things issued by the attorney during carrying out the principal's interest;
- d. To pay the wages of the contracted authority;
- e. In case of a collective authorization, the respective principals are responsible to the attorney for all the effects of such authorization;
- f. The attorney entitles to retain all the principals' belongings which are in the attorney's hands until they are paid off for their rights (retention rights).

In practice, not infrequently the appearance of an attorney in the Court is rejected because filling in the power of attorney is defective. This rejection is emphasized more on the lack issue of formal legality requirements of the attorney/grantee. Rejection provides suggestions for improvements only. Whereas the material legality need not be doubted because the power of attorney is an agreement that has been agreed upon by the authorizer and attorney or authorized. For this reason, it is necessary to pay attention to the formal requirements for making and filling of the power of attorney. *First*, which must be considered is the identity of the principal and the proxy or attorney, namely: name, age or

place and date of birth, occupation, address, and so on. If the principal is a Legal Entity, then in the power of attorney it must be mentioned first the name of the legal entity then the identity of person authorized to authorize according to the articles of association or applicable regulation. *Second*, concerning the contents or materials of the power of attorney, it must be clearly stated in detail for the authorization granted. *Third*, it shall be expressly delineated about the limits of attorney's authority to carry out his or her authority. *Fourth*, it is signed by both the principal and the attorney and must be affixed with duty stamp.

Sometimes a special power of attorney that has been made and submitted to the Court, there is a mistake or error or deficiency regarding the filling. To fix it, only the principal can do it. The attorney is not in control.

## **2. The Formal Requirements to Become a Special Power of Attorney in the State Administrative Court**

There are 8 (eight) types of authorizations or powers:

- a. Special Power (Article 123 HIR, 147 RBg and SEMA No. 6 of 1994 dated 14 October 1994)

In practice at trial, there is a development in authorization of special power of attorney, which is not merely represented to an advocate but may also be granted to *legal officer* of a legal entity acting for and on behalf of the legal entity in which he or she works, the civil servant's staff of the legal department, based on Minister of Defense Regulation No. 22 Year 2012 on Legal Aid in the Ministry of Defense jo. Decision of TNI (Tentara Nasional Indonesia) or Indonesian National Army Commander No. Kep/713/IX/2013 dated September 19, 2013 on Legal Assistance Instruction Guidance in the TNI Environment, people from Babinkum (Badan Pembinaan Hukum) TNI can become legal representative for members of TNI's family who are involved in legal matters.

An authorization intended for in-court representation must:

- i. be in writing;
- ii. made for signature, can be made by Court Clerk legalized by the President of the District Court or Judge and may also be an authentic deed made before the Notary;
- iii. Must identify the parties;

- iv. Affirming object and case in question;
  - v. In a criminal case, it must mention identity of Defendant and Legal Adviser and mention the alleged or indicted articles.
- b. Limited Power(article 1796 BW, article 157 HIR and 841 RBg)
- This power of attorney shall meet certain conditions:
- i. Authentic deeds;
  - ii. Limitative;
  - iii. Firm words, for example to say confessions, make peace, to swear an oath, to transfer, to mortgage, and so on.
- c. Durable Power
- Outside of Court, there is what is known as a durable power of attorney. For example, in case of land sales, the power contains: the power cannot be revoked, even upon death the principal.
- d. Oral Power (Article 120 HIR section 1 and article 147 section 1 RBg)
- The oral authority occurs because of or raised by one of the litigants in the Court. It means that the oral power of attorney is granted in front of the bench. If the party is illetterate, and cannot prepare documents, when the plaintiff requests an oral claim to the Chief Justice, then he appoints his or her attorney.
- It can also be delivered orally at trial.
- e. Designated Power of Lawsuit (Article 124 section 1 HIR and 147 section 1 RBg).
- In the lawsuit letter, the plaintiff at once designates the name of attorney, clearly and candidly, so that he or she may act as an attorney in the process of examining case.
- f. Substituted Power
- Such a power is granted by the attorney, in order to represent the attorney to take action. This substitute power may be granted if the power of the principal contains also the authority to transfer power either partially or in whole.
- g. Intermediary Power (Article 1792 Code of Civil law jo Article 62 WvK)
- Such power is commonly used in commerce. It usually called Representative or Agent to do something or Commercial Agency or Realtor.
- h. Counsel Power
- This institution grew out of a principal's concerns, out of the need for a lawyer to accompany him in the trial process. Thus, during the trial process the principal

remains present and is accompanied by an expert to be asked for the necessary opinion. The counsel power is granted both orally and in writing and the principal notifying it to the Judge.

A Power of Attorney may expire because of (Article 1813-1819 BW):

- a. Revocation by the principal;
- b. Resignation of the the attorney-in-fact;
- c. Death, guardianship, bankruptcy of the principal or the attorney;
- d. Marriage of authorizing or authorized woman. After the enactment of the Marriage Principal Law, this provision was declared null and void.
- e. Replacement, causing the withdrawal of the first power.

In the State Administrative Court, during the preparatory examination procedure process, the Panel of Judges start by clarifying the parties' claims, and explanation by the relevant State Administrative Officer or Agency. Previously, the Panel of Judges examined the legality of the parties present in the preparatory examination room because the trial was *in camera*, only attended by the parties. Both the Plaintiff and the Defendant are required to show their identities, when using legal representative, they must show special power of attorney for it. In case of represented by a legal representative, the Panel of Judges then provides suggestions for improvements aimed at the completion of formal requirements of such special power. The purpose of this recommendation is solely for the sake of processing of the parties themselves in order to be more efficient and effective. Be concise, not long-winded, and in accordance with purposes and objectives of making such special power of attorney. Regarding the substantial matters therein shall not be altered in view of the fact that the power is binding on the authorizing parties as a treaty. This is in contrast to the proposed remedies applicable to the lawsuit which are compulsory to be fulfilled by the Plaintiff within thirty days and may result in the lawsuit not being accepted.<sup>14</sup>

If a person wishes to file a lawsuit before the Court because he or she feels his or her rights have been violated by other parties, it may be represented by the Attorney. The Law does not require the use of Authority, but it also does not prohibit it. (Article 57 of Law No. 5 of 1986 on the Administrative Court).

One of the principles of universal human rights is right to counsel, which means the right of a person to be able to use legal assistance, and if not able, the government is

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<sup>14</sup> Article 63 section (1), (2), (3) Law No. 5 of 1986 on Administrative Court.

obliged to provide it at state expense. This principle is derived from the principle of right to a fair trial.<sup>15</sup>

This means that there is no necessity for someone to use legal power or aid. Using accompaniment or representation or authorization or legal aid is a right and not an obligation to someone. Such use is an obligation to the state if a citizen requires it but is unable to obtain it him or herself.

As a comparison, in Dutch administrative law, the principle of the right to legal representation and legal aid, that someone can be accompanied or represented by a legal representative in relation to an administrative authority. Moreover, if the legal representative is an Advocate (an attorney-at-law), then the state administrative body or official is not justified to deny his or her presence.<sup>16</sup>

While it may be possible for a state administrative body or agency to refuse a person's representative or proxy if there is an objection from another party, the objection must be made in writing, but the objection does not apply to advocates and legal counsel.<sup>17</sup>

Dutch administrative law provides an opportunity to the disputing parties, either the Plaintiff (claimant), the Defendant (administrative authority), or the Third Party (third interested party), to be able to represent or empower his or her interests. The right to use this power applies at all levels of the judiciary except in the Supreme Court of the Netherlands, compulsory with the assistance of an advocate. Any party to the dispute may choose their respective advocate. The authorization shall be poured in the form of a written power of attorney as evidence of its capacity in the ongoing dispute resolution. The defendant is usually represented by a civil servant who is a member of the law firm at the defendant's agency. However, due to the increasing complexity of law material development and applicable procedural law, it is recommended the use of legal professionals. Subsidized legal aid is also provided for those who cannot afford.<sup>18</sup>

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<sup>15</sup>Zachary Elkins, Tom Ginsburg, and James Melton., 'Constitute: The World's Constitutions to Read, Search, and Compare' (Constitute Project 2013) <<https://www.constituteproject.org/>> accessed on 17 December 2017.

<sup>16</sup>Oswald Jansen, 'Country Analysis—the Netherlands', a translation from Oswald Jansen (*ed.*), *Administrative Sanctions in the European Union* (Intersentia Publishing 2013) p. 418., states that: In Dutch administrative law, a guarantee is given that anyone may be assisted or represented by a legal representative in any dealings they may have with an administrative authority. If the legal representative is an attorney-at-law, administrative authorities do not have the possibility to refuse someone the right to be a legal representative in a certain dealing.

<sup>17</sup>See Article 2:2(3) of *Administratief Wet Bestuursrecht (AWB) / General Administrative Law Act (GALA)* of 1994.

<sup>18</sup>Marieke van Hooijdonk and Peter Eijvoogel, *Litigation in the Netherlands* (Civil Procedure, Arbitration and Administrative Litigation) (Kluwer Law International 2012) p. 174.

In France, it is known the general principle of the law, both in civil courts and administrative courts, that the plaintiff is obliged to have a personal interest in the process called *pas d'interet, pas d'action*. This means that the plaintiff should be able to show that the decision sued causes a serious loss (*faisant grief*) to his or her interest. There is no interest, then there is no right to sue. In principle, a plaintiff must be legally represented in filing a lawsuit (presenting a recourse). The goal, in the process of lawyers, is the advocate's help (lawyer) will make court duties easier. It should be noted that the state does not require plaintiffs to be legally represented (legal representation is not obligatory). In contrast, legal representation is required for government use.<sup>19</sup>

As for matters related to power of attorney, those are:<sup>20</sup>

- a. The Special Power of Attorney shall contain clearly and in detail the authorized matters by mentioning the litigants, the State Administration Decision of the Dispute Object and the stages of the examination levels. Specifically, for the Defendant must state the number of his case (Article 57 UU RI No. 5 of 1986 on Peradilan Tata Usaha Negara (State Administration Judicial Act), Article 1792 Code of Civil law, SEMA (Supreme Court Guideline Letter) No. 2 of 1991, SEMA No. 6 of 1994);
- b. A Special Power of Attorney may be made at the same time for the first level of examination, appeal, cassation, judicial review as long as the authorized matters are clearly described in detail;

The Defendant (Agency or Official of State Administration) may grant:

- a. Power of Attorney to advocate;
- b. Power of Attorney with no stamp to the official at the relevant government Agency or Official of State Administration.
- c. The Insidental Authority may be granted permission by the Chief of Administrative Court to a person who will convene in Administrative Court if

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<sup>19</sup> *Ibid.*, p. 93., states that: It should be noted that the state is not required to be legally represented. Its officials, it is assumed, can be trusted to present a case in an organized way. On the other hand, legal representation is required for “departments”, “regions” and other local authorities and “establishments publics”; see also Jean-Bernard Auby, ‘Administrative Law In France’ in Rene J.G.H. Seerden dan Frits Stroink (ed.), *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis* (Intersentia Uitgevers Antwerpen 2002) p. 82., states that: Is the assistance of a lawyer required? The answer is negative.

<sup>20</sup> Supreme Court of the Republic of Indonesia, *Administrative Technical Guidelines and the Technical of Civil Service Arbitration Tribunal* (Book II, Supreme Court of the Republic of Indonesia 2009) p. 45.

requested, provided that the person has a family relationship with the Plaintiff reinforced by the letter of the chief of village and known by the sub-district head, and is capable to convene in the court;

- d. The Prosecutor as a State Attorney may act as a legal representative of the TUN Agency or Official only in order to save the State's wealth and enforce the authority of the government (Article 27 section 2 of Law No. 5 of 1986 on Administrative Court and Article 24 of Presidential Decree No. 55 of 1991);
- e. Legal Aid Bureau (BBH) or Legal Aid Institute (LBH) and Law Faculty complying with legislations may act as a representative of the Plaintiff in prodeco case;
- f. The Power of Attorney must be signed by the Principal as a formal agreement proof of both parties with stamp duty and date;

The expire of the power of attorney may occur because of:

- a. Removed by Authorizer;
- b. The death of one party;
- c. The attorney releases power of his own free will (Art. 1813 Civil Code);
- d. The Principal authorizes the other party in the same case, then by itself the authorization of the first power of attorney terminated, unless there is a clause in the new power of attorney that the old power remains valid.

## **E. Conclusion**

From the above discussion the author will draw two conclusions' outlines. *First*, the role of special power of attorney in the trial at the administrative court is also applicable the principle of not having to use a power or legal aid. The use of mentoring or representation or authorization or legal aid is a right and not an obligate to a person. Such use is an obligation to the state if a citizen requires it but is unable to obtain it him or herself.

In the Administrative Court, in the preparatory examination process, the Panel of Judges will start by completing the Plaintiff's unclear lawsuit and may request an explanation to the relevant Administrative Officer or Agency. Previously the Panel of Judges shall examine the legality of the parties present in the preparatory examination room because the trial is close to the public. It should only be attended only by concerned parties. Both the Plaintiff and the Defendant are required to show their identities, when

using legal representative, they must show special power of attorney for it. In case of represented by a legal representative, the Panel of Judges then provides suggestions for improvements aimed at the completion of formal requirements of such special power. The purpose of this recommendation is solely for the sake of processing of the parties themselves in order to be more efficient and effective. Be concise, not long-winded, and in accordance with purposes and objectives of making such special power of attorney. Regarding the substantial matters therein shall not be altered in view of the fact that the power is binding on the authorizing parties as a treaty. This is in contrast to the proposed remedies applicable to the lawsuit which are compulsory to be fulfilled by the Plaintiff within thirty days and may result in the lawsuit not being accepted. *Second*, matters related to the formal requirements of making a special power of attorney in the administrative court have been spelled out in the Administrative Technical Guidelines and the Technical of Civil Service Arbitration Tribunal, Book II, edition 2009, the Supreme Court of the Republic of Indonesia, those are:

- a. The Special Power of Attorney shall contain clearly and in detail the authorized matters by mentioning the litigants, the Administration Court Decision of the dispute object and the stages of the examination levels. Specifically, for the Defendant must state the number of his case (Article 57 of Law No. 5 of 1986 on State Administrative Court, Article 1792 Code of Civil Law, Supreme Court Guideline Letter No. 2 of 1991, Supreme Court Guideline Letter No. 6 of 1994);
- b. A Special Power of Attorney may be made at the same time for the first level of examination, appeal, cassation, judicial review as long as the authorized matters are clearly described in detail;
- c. The Defendant (Agency or Official of State Administration) may grant:
  - i. Power of Attorney to advocate;
  - ii. Power of Attorney with no stamp to the official at the relevant government Agency or Official of State Administration.
- d. The Insidental Authority may be granted permission by the Chief of
- e. Administrative Court to a person who will convene in Administrative Court if requested, provided that the person has a family relationship with the Plaintiff reinforced by the letter of the lurah or village head and known by the chief of village, and is capable to convene in the court;

- f. The Prosecutor as a State Attorney may act as a legal representative of the TUN Agency or Official only in order to save the State's wealth and enforce the authority of the government (Article 27 section 2 of Law No. 5 of 1986 on Administrative Court, Article 24 of Presidential Decree No. 55 of 1991);
- g. Legal Aid Bureau (BBH) or Legal Aid Institute (LBH) and Law Faculty complying with legislations may act as a representative of the Plaintiff in prodeco case;
- h. The Power of Attorney must be signed by the Principal as a formal agreement proof of both parties with stamp duty and date;
- i. The expire of the power of attorney may occur because of :
  - i. Removed by Authorizer;
  - ii. The death of one party;
  - iii. The attorney releases power of his own free will (Article 1813 Civil Code);
  - iv. The Principal authorizes the other party in the same case, then by itself the authorization of the first power of attorney terminated, unless there is a clause in the new power of attorney that the old power remains valid.

The author provides advices that, if a person wants to file a lawsuit in front of the Court because of violated rights by other parties, he or she may use a legal representative to represent him. The law does not require the use of Authorization, but it also does not prohibit it. One of the principles of universal human rights is right to counsel, which means the right of a person to be able to use legal assistance, and if not able, the government is obliged to provide it at state expense. This principle is derived from the principle of right to a fair trial. This means that there is no necessity for someone to use legal power or aid. Using accompaniment or representation or authorization or legal aid is a right and not an obligate to someone. Such use is an obligation to the state if a citizen requires it but is unable to obtain it him or herself.

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