

Analysis Of The Principle Of Notary Independence In Notarial Deed Making In Review Of The Notary Position Law And The Notary Professional Code Of Ethics

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Abstract.

The position of notary is an office of trust and is a noble profession (officium nobile), in carrying out the duties of his office the notary is regulated by Law No. 30 of 2004 concerning the office of notary which has been amended by Law No. 2 of 2014 concerning the Office of Notary and also regulated in the Code of Ethics for the Notary Profession. in carrying out the duties of a notary has obligations and authorities, one of which is the obligation to be independent. In this study aims to analyze how the ideal regulation so that the principle of notary independence in making deeds can be carried out properly. this research is a normative legal research where the author approaches the problem by studying the provisions of the applicable law and studying the views and doctrines in legal science relating to the obligation of notaries to act independently in carrying out their job duties. The Notary Position Law has actually provided a legal framework to support the independence of notaries in carrying out their duties. However, the application of this principle of independence in daily practice may depend on how the notary complies with the law and professional ethics and there is still a legal gap where there is no specific regulation relating to the independence or impartiality of notaries. The definition of notary independence in the Notary Law and the notary code of ethics is very limited, with no classification regarding the form of the law, as with the independence of judges who have a clearer classification, it would be better if the code of ethics of the notary profession explains in more detail regarding the independence of notaries in terms of structural, functional, financial, and independence in carrying out the duties of the office of notary.

Keywords: Notary, Principles, Principles of Independence, and Professional Ethics.

I. INTRODUCTION

Notaries are public officials who have a central role in upholding the law in Indonesia, because in addition to the large quantity of Notaries, Notaries are known to be included in the elite group in Indonesia. The main basis of a notary profession is trust and as an elite community, professionals who are members of the community bear a heavy mandate for the trust placed in them (Sutan Rachmat 2009). The position of notary is an office of trust and is a noble profession (*officium nobile*) called a noble profession because the notary profession is closely related to humanity, and as a public official the notary must also maintain dignity both in carrying out the duties of office as a notary and in everyday social life. In carrying out their duties, notaries are regulated by Law No. 30 of 2004 concerning the Office of Notary which has been amended by Law No. 2 of 2014 concerning the Office of Notary, and there are also regulations that must be a guideline for every notary who is a member of the Indonesian Notary Association (INI), namely the Notary Professional Code of Ethics. Article 1 ayat 1 of the Law on the Office of Notary explains that "Notaries are public officials authorized to make authentic deeds and other authorities as referred to in this law." In carrying out their duties, notaries have obligations and authorities that have been regulated in the law and the code of ethics of the notary profession, one of which relates to the independence of notaries. The independence of notaries in carrying out their duties means that in carrying out their duties a notary is in a neutral position and does not take sides with one of the parties, or is in one of the parties that will conduct legal relations, independence and independent notaries have many meanings, namely related to structural independence, functional independence, financial independence and administrative independence.

Regulations regarding notary independence are contained in Law No. 2 of 2014 concerning the Office of Notary Article 16 paragraph 1 letter (a) which reads as follows: In carrying out his/her position, the Notary is obliged to: a. act honestly, carefully, independently, impartially, and safeguard the interests of the parties involved in legal acts." Apart from the law, the Indonesian Notary Association also discusses notary independence which is stated in the Notary Code of Ethics in Chapter 3 concerning obligations, prohibitions and exceptions article 3 number (4) which reads "notaries and other persons (as long as they are concerned with carrying out notary positions) must : Behave honestly, independently, impartially, trustworthy, thorough, full of a sense of responsibility, based on laws and regulations and the contents of the oath of office of a notary." Although there are clear arrangements regarding the independence of notaries in the performance of official duties, the laws and regulations, namely Law Number 2 of 2014 concerning the Position of Notary and the Notary Code of Ethics, do not explain the specific arrangements regarding what is meant by independence itself, Therefore, notaries have an important role in determining an action whether what the client wants can be poured into a deed or not in order to maintain the principle of independence that must be upheld by notaries, these considerations must pay attention to all legal aspects including legal problems that may arise in the future, considering that legal responsibility for authentic deeds made by notaries has lifetime liability.

Here are some cases related to violations of notary independence in making deeds, in decision Number 83/Pid.B/2011/PN.Ska jo 345/Pid/ 2012/PY.Smg, Jo MA 1014 K/Pid/2013 with Notary Nioek Poernomo, S.H. convicted of falsifying deeds, then in the decision of the Notary Supervisory Panel Number 12 /PTS /Mj.PWN.Prov. DKI Jakarta/IX/2021 where the notary named Fenty Abisin, S.H. Notary in the city of North Jakarta was reported by L. Efendi and Rustam efendi who were labeled unprofessional due to favoritism to one of the parties in making the deed, as well as in the case of decision number 261/PDT.G/2016/PN DPS Where the complainant named YS felt disadvantaged by a PH Notary Where in making a notarial deed the notary did not read the deed and provide legal counseling, and it turned out that the deed caused losses to YS by changing ownership of the land. With so many cases regarding the implementation of the principle of independence of notaries in carrying out their duties, namely making authentic deeds, therefore the authors are interested in conducting research with the title "**Analysis of the Principle of Notary Independence in Making Notarial Deeds in Review of the Notary Office Law and the Code of Ethics for the Notary Profession**".

II. METHODS

In this research the author uses the type of normative legal research, namely legal research conducted by examining library materials or secondary data consisting of primary legal materials and secondary legal materials. Peter Mahmud Marzuki explains the definition of normative legal research, namely: "A process to find a rule of law, legal principles, or legal doctrines to answer the legal problems at hand. Normative legal research is conducted to produce new arguments, theories or concepts as prescriptions in solving the problems at hand (Peter Mahmud Marzuki, 2005). The research approach used in this research is a *statutory* approach and conceptual approach, carried out by examining all laws and regulations related to the legal issues being addressed and by studying views and doctrines in legal science where the approach to the problem is carried out by studying the applicable statutory provisions regarding the obligation of notaries to act independently in carrying out their duties based on Law No. 2 of 2014 concerning the office of notary and the code of ethics of the notary profession, so that the product made by the notary, namely the authentic deed, reflects the rights and obligations of the confronters which are balanced and fair to the confronters. Sources of legal materials in normative legal research are obtained from library legal materials or literature that have to do with the object of research.

In this research, the author uses primary legal materials and secondary legal materials, and in this legal research, the technique of collecting legal materials is carried out by literature study (library research) Literature study and the author also uses the interview method which aims to obtain data as support in this research. The technique of analyzing legal materials used is the analysis of legal materials that are deduction

with the syllogism method. This means that the analysis of this legal material prioritizes logical thinking so that it will find the causes and effects that occur. Where as the opinion of Philipus M. Hadjon quoted by Peter Mahmud Marzuki, that in syllogistic logic for legal reasoning which is a major premise is the rule of law while the minor premise is legal facts.

III. RESULT AND DISCUSSION

Notary is a position of trust and is a noble profession (*officium nobile*) and as a notary public official must also maintain dignity, According to Habib Adjie, the definition of a public official is interpreted as a public official, which is the meaning of the term *openbare ambtenaren* in the provisions of article 1 of the Notary Law, the word *openbare* is defined as an institution (law) that has the task of serving the public (public), while the word *ambtenaren* means an official. So *openbare ambtenaren* are officials who have duties related to the public interest, so it is appropriate if *openbare ambtenaren* are defined as public officials. Thus, *openbare ambtenaren* translated as public officials can be interpreted, officials who are given the task of making authentic deeds that serve the public interest (Habib Adjie, 2009) in carrying out their duties and positions notaries are regulated by laws regarding the office of notary and the code of ethics of the notary profession, The existence of regulations regarding the office of notary does not necessarily appear just like that, but goes through a very long process, the following is a history of the politics of notary law which is the forerunner of notaries and notary laws in Indonesia.

Notary institutions originated in Northern Italy in the 11th or 12th century BC, which at that time Northern Italy was called "Latijnse Notariaat", then developed and expanded to the plains of Europe through Spain then to Central and South America, except England and Scandinavian countries and reached Indonesia in the 17th century through France which at that time colonized the Netherlands. Through the Emperor's Decree of March 1, 1811, the French legislation of the Netherlands became effective. This French-made regulation (25 Ventose an XI (March 16, 1803)) also became the first general regulation governing notaries in the Netherlands. After the Netherlands separated from French rule in 1813, this French-made regulation continued to be used until 1842, when the Netherlands issued the Act of July 19, 1842 (Ned. Stb no 20) concerning the Notary Position. When analyzed, the notary laws that apply in Indonesia today were once derived from the French notary regulations that applied in the Netherlands which were later refined. The Jabatan Notaris regulation is a copy of the articles in the *Notariswet* applicable in the Netherlands. Since the entry of Notaries in Indonesia until 1822, Notaries were only regulated by two rather detailed regulations, namely from 1625 and 1765. In order to realize the unification of law in the field of notarization, Law No. 30/2004 on the Office of Notary was established. The Law on the Office of Notary (UUJN) consists of 13 chapters and 92 articles, which was promulgated on October 6, 2004.

Through the provisions of Article 91 of Law Number 30 Year 2004 on the Position of Notary, the following provisions have been revoked and declared invalid:

1. Ordonantie of September 16, 1931 concerning the Honorarium of Notaries;
2. Law No. 53 Year 1954 on Deputy Notaries and Temporary Deputy Notaries;
3. Government Regulation No. 11 of 1949 concerning the Oath and Promise of the Office of Notary;
4. Law No. 8 of 1954 on the Amendment to Law No. 2 of 1986;
5. Reglement of Het Notaris Ambt in Indinesie Stb. 1860: 3

(M. Alkatiri, Nadhif, 2021) Then over time Law No. 30 of 2004 concerning the Notary Position has been updated with Law No. 30 of 2014 concerning the Notary Position which was enacted on January 15, 2014, State Gazette of the Republic of Indonesia of 2014 Number 3, Supplement to the State Gazette of the Republic of Indonesia of 2014 Number 5491 (hereinafter referred to as UUJN Amendment). In this UUJN Amendment, there are several substance changes that can be concluded that the origin of the emergence of the notary profession is during the Dutch colonial period and the regulations that existed at that time were the legacy of colonialism from the Dutch who had colonized Indonesia, as well as the Criminal Code and Civil Code in Indonesia, it cannot be denied that this is a legacy from the Dutch state. There are similarities regarding the regulation and supervision of the authority and obligations of notaries, which actually have the same goal so that notaries can carry out their duties professionally and independently. although notaries are

appointed and terminated by the Minister administratively, it cannot be interpreted that notaries are subordinate to the Minister, or an office that performs its duties under the full orders of the Minister. However, in carrying out the duties of the office the notary is required to :

- Autonomous;
- Impartial
- Not dependent on anyone (independent);
- Does not receive salary or pension from the appointing authority

According to Habib Adjie, Independence has three forms, which include: (Habib Adjie,2009)

1. Structural Independent

Institutionally independent which in the structure (organization) chart is firmly separated from other institutions. In this case, although Notaries are appointed and dismissed by the Minister of Justice (Minister of Law and Human Rights), institutionally it does not mean that they are subordinate to the Minister of Justice (Minister of Law and Human Rights) or are in the structure of the Ministry of Law and Human Rights of the Republic of Indonesia (now the Ministry of Law and Human Rights).

2. Independent Functional

Independent of its functions which are adjusted to the laws and regulations governing the duties, powers and positions of notaries. Based on the existing authority of the Notary as stated in Article 15 of Law Number 2 Year 2014 and the evidentiary power of the notarial deed, there are 2 (two) conclusions, namely:

- The duty of a Notary is to formulate the wishes or actions of the parties into an authentic deed by taking into account the applicable legal rules.
- Notarial deeds as authentic deeds have perfect evidentiary power, so there is no need to prove their validity, if there are people/parties who assess or state that it is not true, they are obliged to prove their assessment or statement in accordance with applicable legal rules.

3. Financial Independent

Independent in the field of finance who has never received a budget from any party. Article 2 of Law Number 2 Year 2014 stipulates that Notaries are appointed and dismissed by the Government. The government referred to in this case is the minister in charge of law (Article 1 paragraph (14)) of Law Number 2 of 2014. Although notaries are administratively appointed and dismissed by the government, it does not mean that they are subordinate to the government. Based on the above description, according to the author, the notary office law has actually provided a legal framework that supports the independence of notaries in carrying out their duties. However, the application of this principle of independence in daily practice may depend on how the notary complies with the law and professional ethics. And also the definition of notary independence in the Notary Public Office Law and the notary code of ethics is very limited, with no classification of the form of the law, as with the independence of judges who have a clearer classification, it would be better if the code of ethics of the notary profession explains in more detail regarding the independence of notaries in terms of structural, functional, financial, and independence in carrying out the duties of the notary office.

IV. CONCLUSION

Law No. 2 of 2014 concerning the Office of Notary and also the Code of Ethics of the Notary Profession have actually provided a legal framework to support the implementation of the principle of independence of notaries in carrying out their duties, however, the application of this principle of independence in daily practice may depend on how consciously a notary complies with the law and professional ethics, this can be prevented by conducting joint supervision of notaries in carrying out their duties, both from the ministry of law and human rights, the notary supervisory board, and the community.

In addition, it would be better if there is a regular agenda related to improving the ability of notaries that can be done in the Indonesian Notary Association (INI) binding the rapid development of the times. And also the definition of notary independence in the Notary Position Law and the notary code of ethics is very limited, with no classification of the form of the law, as with the independence of judges who have a clearer classification, it would be better if the code of ethics of the notary profession explains in more detail

regarding the independence of notaries in terms of structural, functional, financial, and independence in carrying out the duties of the notary position.

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