

## The Juridical Review of Notaries Who Actually As State Officers in the Concept of Legal Assurance

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**Abstract.** *In legal research, legal theory becomes a scalpel to analyze problems using legal certainty theory and liability theory. This study uses three (3) sources of data, namely legal materials, namely primary, secondary and tertiary legal materials, while data collection techniques use library research. Data analysis using qualitative analysis method using deductive logic and described analytically descriptive. The results of the research found the rules regarding the prohibition of a Notary concurrently serving as a state official in Article 17 paragraph (1) letter d of Act No. 2 of 2014 concerning amendments to Act No. 30 of 2004 concerning Notary Positions. So it can be concluded that a Notary concurrently serving as a state official is a violation of the law, the Notary Supervisory Board has the right to conduct an examination of alleged violations and impose sanctions on a Notary if proven to have committed a violation.*

*Keywords: Concurrent; Notary; Official; State.*

### 1. Introduction

The development of society at this time is very rapid, it certainly makes the needs of the community increase. The growing economic condition certainly causes the wider community to be interested in doing a business to meet their daily needs. Not infrequently in economic activities carried out by the community it requires a large capital, this of course requires an agreement made by the community to be able to run its business, and in making an agreement it is not just an underhand agreement, but to make an authentic agreement made by and before a notary. The reason for making an agreement before a Notary is not because of the lack of trust between each other.<sup>1</sup>

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<sup>1</sup>Agus Toni Purnayasa, Vol.3 No.3 3 Desember 2018, "Akibat Hukum Akta Notaris Yang Tidak Memenuhi Syarat Pembuatan Akta", url:<http://ojs.unud.ac.id/index.php/ActaComitas>, Accessed on 30 June 2022.

The written evidence in the form of an authentic deed is usually made by the parties to make an agreement. Regarding this agreement, it has been regulated in civil law. Indonesia still uses *Burgerlijk Wetboek* the Dutch Civil Code (KUHPerdata). In the Civil Code regarding the agreement adheres to the principle of consensualism, it means that the contract law of the Civil Code adheres to a principle that to give birth to an agreement it is enough to just agree and that the agreement and thus the "engagement" it causes have been born at the time or seconds as referred to above.<sup>2</sup>

Notary is an old profession. They facilitated the needs of the people who at that time could not read and write much. Notaries help write down important points. Then signed by the parties. The notary authenticates the document with a certain mark. There are two views of this profession. First as a document certifier. He verified the archive. If correct, it will be stamped as a sign that the document is verified. This kind of phenomenon occurs in countries that apply the common law system such as England, the United States, Malaysia, the Philippines and Singapore.<sup>3</sup>

In Act No. 2 of 2014 concerning amendments to Act No. 30 of 2004 concerning the Position of a Notary in Article 17 paragraph (1) concerning the prohibition of notaries.

*(1) Notaries are prohibited from: a. Carrying out positions outside their area of office, b. Leaving the area of office for more than 7 (seven) consecutive working days without a valid reason, c. Concurrently as a civil servant, d. Concurrently as a state official, e. Concurrent positions as an advocate, f. Concurrently serving as a leader or employee of a state-owned enterprise, regionally-owned enterprise or private enterprise, g. Concurrently serving as a land deed maker and/or class II auction officer outside the place of domicile of a notary, h. Becoming a substitute notary, i. Performing other work that is contrary to religious norms, decency, or propriety that may affect the honor and dignity of the notary position.*

The provisions regarding the prohibition of a Notary from concurrently serving as a state official are based on the nature of the work of a Notary who has an independent nature, individual work, without superiors, trust work and requires

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<sup>2</sup>Umar Ma'ruf & Dony Wijaya, "Tinjauan Hukum Kedudukan & Fungsi Notaris Sebagai Pejabat Umum Dalam Membuat Akta" (Studi Kasus di Kecamatan Bergas Kanupaten Semarang), Jurnal Pembaharuan Hukum Vol II No.3 September-Desember, url: <http://jurnal.unissula.ac.id/index.php/PH/article/view/1507/1174>., Accessed on 01 July 2022.

<sup>3</sup>Widhi Handoko, (2019), *Dominasi Negara Terhadap Profesi Notaris Antara Ide & Realitas*, Cetakan Pertama, PT Roda Publika Kreasi, Bekasi, p.1-2.

high morale. A notary who doubles as a state official certainly violates the laws and regulations.

## 2. Research Methods

This type of research is normative juridical research or normative legal research. The nature of this research is analytical descriptive. The data source of this research is obtained from secondary data derived from library research (Library Research) which consists of the following materials: Primary legal materials, namely the main material study Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning Notary Positions, Secondary Legal Materials, data used to provide explanations regarding primary legal materials, such as books, journals, articles and other scientific works relating to the discussion on the prohibition of a Notary concurrently serving as a state official and Tertiary Legal Materials, namely supporting materials that provide explanations for primary and secondary legal materials, such as legal dictionaries and encyclopedias. According to the data that has been obtained during the research by means of a literature study, then data analysis is carried out. The analysis used in this thesis is Qualitative Analysis, which is a study of written documentary material which is then analyzed, interpreted, explored in the process of data reduction.

## 3. Results and Discussion

### 3.1. Prohibition of Notaries from holding positions as State Officials

With such a construction, the Notary exercises part of the state's power in the field of civil law to serve the interests of the people who require evidence or legal documents in the form of an authentic deed recognized by the state as perfect evidence. The authenticity of the notary deed is not on the paper, but the deed in question is made before the notary as a public official with all his authority or in other words the deed made by the notary has an authentic nature, not because the law stipulates that, but because the deed was made by or before public officials, as referred to in Article 1868 of the Civil Code.<sup>4</sup>

Meanwhile, the term ethics of the legal profession is closely related to human morality, which teaches about actions that are right or wrong, about actions that are bad as well as actions that are good in nature, which are included in appropriateness or which are not appropriate by insiders. His position as a person who exercises his authority includes a person who works as a notary who is a public official. A legal expert from Indonesia named Notohamidjojo stated that in carrying out his obligations and sense of responsibility, a notary needs to

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<sup>4</sup>Habib Adjie, (2018). *Hukum Notaris Indonesia*, Cetakan Kelima, PT. Refika Aditama, Bandung, p.42.

have a humane attitude which means to act like he sees the law not only in terms of formality but of course also from the true truth that is in accordance with conscience. Besides that, Notaries need to have a fair attitude that becomes the standard in the lives of many people. While proper attitude itself is a consideration based on conscience in order to achieve justice in a material case and being honest, which means stating something as it is, not made up, made up or often called inconsequential.<sup>5</sup>

Public officials in this case notaries have their own authority which has been determined in the legislation, the scope of their duties is very different from state officials whose work environment is in state institutions.

The Notary Supervisory Council is an institution that has the authority to carry out guidance and supervision of Notaries. Supervision of Notaries aims to ensure that Notaries carry out their functions and duties in accordance with and follow the laws and regulations governing the Notary's position. So that the Notary in carrying out the functions and duties of his position must comply with and follow the laws and regulations governing the position of a Notary, meaning that all the existing rules in the laws and regulations governing the position of a Notary are an obligation to be followed.

In carrying out the position, there are principles and principles that must be considered and applied by an official making an authentic deed, namely the principle of prudence which and also a notary are faced with institutional rules called the Notary Code of Ethics where it is explained that a Notary official must have high integrity and always trustworthy in carrying out their responsibilities and so that all of this can be realized, the position of a Notary is deemed necessary to obtain control. Based on the above, the Notary Supervisory Council was formed by the Menkumham as an extension of the ministry's arm to supervise and strengthen notaries where its implementation is carried out regularly.<sup>6</sup>

Supervision and examination of Notaries are carried out by the Supervisory Council, in which there is a Notary element, thus at least Notaries are supervised and examined by members of the Supervisory Council who understand the world of Notaries. The existence of a member of the Supervisory Board from a Notary Public is an internal control, meaning that it is carried out by fellow Notaries who

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<sup>5</sup>Abdullah Dian Triwahyuni, "Kewajiban & Tanggung Jawab Notaris Sebagai Pejabat Umum", Vol 05 No 01 April 2020, url: <http://ojs.unud.ac.id/index.php/ActaComitas>, accessed on 30 June 2022.

<sup>6</sup>Kadek Setiadewi & Dewa Gde Rudy, "Kewenangan & Tanggung Jawab Tim Investigasi Dalam Pengawasan & Pembinaan Notaris", Vol.6 No.3 Desember 2021, url: <http://ojs.unud.ac.id/index.php/ActaComitas>, accessed on 30 June 2022.

understand the world of Notaries inside and out, while the other elements are external elements that represent the academic world, government and society.<sup>7</sup>

The Notary Supervisory Council as the only agency authorized to supervise, examine and impose sanctions on Notaries, each level of the MPN consists of the Supervisory Council (MPD, MPW and MPP) having their respective authorities.<sup>8</sup>

The Notary Honorary Council is the body authorized to carry out the guidance of a Notary. This agency is also obliged to carry out the guidance of a Notary. This agency is also obliged to give approval or rejection for the purposes of the investigation and judicial process. This is done by taking a photocopy of the minutes of the deed and summoning a Notary to attend the examination related to the Notary deed or protocol that is in the Notary's custody (Article 1 of the Minister of Law and Human Rights Number 7 of 2016 concerning the Notary Honorary Council).<sup>9</sup>

MKN membership consists of government representatives, notaries, and experts or academics. One person serves as chairman. One other became vice chairman. Then the remaining five people served as MKN members. Article 66 of the Law on Notary Positions explains one of the powers of the MKN, as explained below:<sup>10</sup>

For the purposes of the judicial process, investigations, public prosecutors or judges with the approval of the Honorary Council of Notaries are authorized to:

- a. Take a photocopy of the Minutes of Deed and/or documents placed on the Minutes of Deed or Notary Protocol in the Notary's depository,
- b. Summon the Notary to attend the examination. relating to the Deed or Notary Protocol that is in storage, and
- c. Taking a photocopy of the Minutes of Deed or documents as referred to in paragraph (1) letter a, an official report is made.

The Notary Honorary Council (DKN) has the authority to examine violations of the code of ethics and impose sanctions on notaries who intentionally and are proven to have violated the code of conduct.

However, DKN is also tasked with:<sup>11</sup>

- Carry out coaching, guidance, supervision, improvement of members in upholding the code of ethics

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<sup>7</sup>Habib Adjie, (2017). *Memahami: Majelis Pengawas Notaris (MPN) & Majelis Kehormatan Notaris (MKN)*, PT. Refika Aditama, Bandung, p.11.

<sup>8</sup>Ibid.

<sup>9</sup>Widhi Handoko, Op.Cit, p. 185-186.

<sup>10</sup>Ibid.

<sup>11</sup>Ibid. p. 201-202.

- Examine and make decisions on allegations of violations of the provisions of the code of ethics that are internal or that do not have a direct community involvement
- Provide advice and opinions to the supervisory board on alleged violations of the code of ethics and the position of a notary.

During carrying out his/her duties, the Notary is entitled to leave which can be taken after carrying out his/her duties for 2 (two) years. The total number of leave taken by a Notary is not more than 12 (twelve) years. In accordance with the character of the Notary's position, which must be continuous as long as the Notary is still in his term of office, the Notary concerned must show a substitute Notary.<sup>12</sup>

Regarding this leave, it is necessary to give a separate interpretation, namely leave submitted by a Notary because the person concerned is appointed as a state official. In this regard, it is necessary to first mention the state officials. In Act No. 43 of 1999 concerning amendments to Act No. 8 of 1974 concerning the main points of employment, in Chapter I concerning general provisions, Article 1 point 4, mentions the existence of state officials, and Article 11 paragraph (1), that State officials consist of:<sup>13</sup>

- President and vice president.
- Chairperson, Deputy Chairperson, and Members of the People's Consultative Assembly.
- Chairperson, Deputy Chairperson and Members of the House of Representatives.
- Chairperson, Deputy Chairperson, Deputy Chairperson, and Supreme Court Justices at the Supreme Court as well as Chairpersons, Deputy Chairpersons, and Judges in all Judicial Bodies
- Chairperson, Deputy Chairperson, and Members of the Supreme Advisory Council.
- Chairperson, Deputy Chairperson, and Members of the Financial Audit Board.
- Ministers and positions at the level of the Minister.
- The Head of Representative of the Republic of Indonesia abroad who serves as Ambassador Extraordinary and Plenipotentiary.
- Governor and Deputy Governor.
- Regent/Mayor, and Deputy Regent/Deputy Mayor; and
- Other State Officials determined by law

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<sup>12</sup> Habib Adjie, Op.Cit, p. 102.

<sup>13</sup>Ibid, p. 103.

UUJN also regulates for Notaries who are appointed as State Officials. If the Notary concurrently holds a state position, this is a reason to temporarily dismiss the Notary from his position (Article 8 paragraph [1] letter e UJN). If a Notary is to be appointed as a State Official, he is obliged to take leave while serving as a state official (Article 11 paragraphs [1] and [2] of the UJN), and is obliged to appoint a Substitute Notary who will receive the protocol, and after no longer serving as an Official the State, the Notary can resume his duties as a Notary (Article 11 paragraph [3]-[6] UJN). This kind of provision is to maintain the continuity of the Notary's position.<sup>14</sup>

Especially for a Notary who takes leave for 12 (twelve) years whose application for leave is rejected by the Central supervisory board, the Notary is obliged to apply for leave for the period concerned to hold office as a State Official and will be temporarily dismissed from his position, and the protocol will be submitted to Another Notary, the Notary who receives the protocol is obliged to hand it back to the Notary who has completed his duties as State Officials.<sup>15</sup>

In Article 1 point 2 UJN describes the temporary Official Notary.

Article 1 number 2:

Temporary Notary Officer is a person who temporarily serves as a Notary to carry out the position of a Notary who dies.

Substitute Notary Public is explained in Article 1 point 3 UJN.

According to Article 1 point 3 UJN, what is meant by a substitute Notary is a person who is temporarily appointed as a Notary to replace a Notary who is on leave, sick, or temporarily unable to carry out his position as a Notary. The provisions of this Article are to maintain the continuity of the Notary's position as long as the Notary's authority is still attached.<sup>16</sup>

According to Article 1 point 4 UJN, a Special Substitute Notary is a person who is appointed as a Notary to make a certain deed as stated in his stipulation letter as a Notary because in one district or city there is only a Notary, while the Notary concerned according to this law does not may make the said deed. This Special Substitute Notary arrangement needs to be linked to the Notary's domicile and the Notary's area of office.<sup>17</sup>

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<sup>14</sup>Op.cit. p. 104-105.

<sup>15</sup>Ibid

<sup>16</sup>Ibid, p. 43.

<sup>17</sup>Ibid.

The implementation of the Indonesian State has been contained in terms of the division of power into 3 (three) powers, namely executive, legislative and judicial in accordance with Montesquieu's trias politica theory which aims to create checks and balances against state institutions so that mutual control and supervision occurs between state institutions with the aim of achieving balance. between institutions so that power is not in one hand to avoid arbitrary power.

The term state officials can be found in Article 122 of Act No. 5 of 2014, State officials are: 1. President and Vice President, 2. Chairman, deputy chairman, and members of the MPR, 3. Chairman, deputy chairman, and members of the DPR, 4. Chairman, deputy chairman, and members of the DPD, 5. Chairman, deputy chairman, junior chairman and supreme judge at the Supreme Court as well as chairman, deputy chairman, and judges in all judicial bodies except judges and hoc, 6. Chairman, deputy chairman and members of the Constitutional Court, 7. Chairman, deputy chairman and members of the BPK, 8. Chairman, deputy chairman and members of the Judicial Commission, 9. Chairman and deputy chairman of the KPK, 10. Ministers and ministerial-level officials, 11. Heads of representatives of the Republic of Indonesia abroad having the position of Ambassador Extraordinary and Plenipotentiary, 12. Governor and Deputy Governor, 13. Regent/Mayor and Deputy Regent/Wali, and 14. Other State Officials determined by law.

Notary position is a symbol of the state; but not in terms of state symbols such as the President or the State Flag. This state symbol can at least be proven by the authority of a Notary to use the Garuda Pancasila symbol in the practice of a Notary position. Of course, this authority will not be given by the state to any or just anyone. Only people who are considered to represent the state or who are considered to carry out the direct mandate of the state in achieving state goals, are authorized by the state to use the Garuda Pancasila symbol.<sup>18</sup>

With the reading of the oath, the Notary is obliged to carry out the functions and duties of his position as best as possible, and to avoid all prohibitions that have been regulated in the laws and regulations. Act No. 2 of 2014 concerning amendments to Act No. 30 of 2004 concerning the Position of Notary in Article 17 paragraph (1) mentions the prohibition of Notaries.

### **3.2. Legal Consequences of Notary Concurrently Position as State Official**

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<sup>18</sup>Bachrudin, "Jabatan Notaris di Indonesia Dalam Jeratan Liberalisasi", *Jurnal Pembaharuan Hukum* Vol.II No.2 May-August 2015, url:<http://jurnal.unissula.ac.id/index.php/PH/article/view/1428/1101> , Accessed on 01 July 2022.



Legal consequences for violations of UUJN by a Notary can be in the form of sanctions while sanctions against Notaries are regulated in Article 84 and Article 85 of the UUJN, there are 2 (two) kinds of sanctions, namely:

- Civil Sanctions;
- Administrative Sanctions.

Sanctions are a means of coercion, in addition to punishment, also to comply with the provisions specified in the regulations or agreements. Sanctions are also interpreted as a means of coercion as punishment if they do not obey the agreement. According to Philipus M. Hadjon, Sanctions are tools of power of a public law nature used by the authorities as a reaction to non-compliance with administrative law norms. Thus the elements of sanctions, namely:<sup>19</sup>

- As a tool of power
- Public law.
- Used by rulers.
- As a reaction to disobedience.

Sanctions against Notaries are regulated at the end of the UUJN, namely in Article 84 and Article 85 of the UUJN, there are 2 (two) kinds, namely:

- Civil Sanctions

These sanctions in the form of reimbursement of costs, compensation, and interest are the consequences that will be received by the Notary on the demands of the appearers if the deed in question only has the power of proof as an underhand deed or the deed becomes null and void.

- Administrative sanctions in the form of: a. Verbal warning, b. Written warning, c. Temporary dismissal, d. Dismissal with respect, and e. Dismissal with respect.

While the sanctions against Article 17 paragraph (1) UUJN is an administrative sanction has been regulated in Article 17 paragraph (2) UUJN.

Article 17 paragraph (2) UUJN: Notaries who violate the provisions referred to in paragraph (1) may be subject to sanctions in the form of: a. Written warning, b. Temporary dismissal, c. Dismissal with respect, and d. Dismissal with respect.

The researchers observed that a Notary "MM" was elected as regional head in the regional head election in Kubu Raya district so that he applied for leave

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<sup>19</sup>Habib Adjie, (2017), Op.cit, p. 89.

according to the Decree of the Notary Central Supervisory Council of the Republic of Indonesia Number: 01/KET.CUTI-MPPN/III-1/ 2009, from January 2, 2009 to January 1, 2014.

In the case of leave proposed by a Notary, it is obligatory to appoint a substitute Notary in accordance with Article 1 point 3 of the UUJN, a substitute Notary is a person who is temporarily appointed as a Notary to replace a Notary who is on leave, sick or temporarily unable to carry out his duties as a Notary.

What was done by the Notary "MM" and the Notary Supervisory Council was a legal step that was in accordance with the rules of the UUJN.

#### 4. Conclusion

Notary is a very vital position and is needed by the community. State efforts to maintain the Notary profession so that it functions according to its objectives are by prohibitions while the Prohibition of Notaries is contained in Article 17 paragraph (1) Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of a Notary. Notaries are prohibited from: a. Carrying out positions outside their area of office, b. Leaving the area of office for more than 7 (seven) consecutive working days without a valid reason, c. Concurrently as a civil servant, d. Concurrently as a state official, e. Concurrent positions as an advocate, f. Concurrent positions as leader or employee of state-owned enterprises, regionally-owned enterprises or private enterprises, g. Concurrent positions as land deed maker and/or class II auction officials outside the place of domicile of the notary, h. Becomes substitute notary, i. Performing other work that is contrary to religious norms, decency, or propriety that may affect the honor and dignity of the position of a notary. It is clear in Article 1 letter d regarding the prohibition of a Notary concurrently serving as a state official that legal certainty deals with the prohibition of a Notary concurrently serving as a State official. Notary violations of the prohibition of positions and the code of ethics have legal consequences in the form of sanctions in Permenkumham Number M.02.PR.08.10 of 2004

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