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Legal Reconstruction in Indonesia Based on Human Rights

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“Legal Reconstruction in Indonesia Based on Human Right”

IMAM AS SYAFEI BUILDING

Faculty of Law, Sultan Agung Islamic University
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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnau, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academicians and practitioners in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

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Juridical Review of The Existence of Notary Prohibitions on The Office of The Curator

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Abstract

The purpose of this study is to determine and analyze: (1) the position of a notary as stipulated in the Law of the Republic of Indonesia on concurrent positions as curator, (2) the concurrent position of notary as regulated in Law of the Republic of Indonesia Number 2 of 2014 concerning Notary Position. The data source used is secondary data consisting of primary and secondary legal materials. The data collection method is done by documentation, interview and literature study.

From the results of this research, it can be seen that a notary is a public official who has the authority to make authentic deeds and other authorities as intended by law. Notaries are public officials who carry out the profession in legal services to the community, in order to provide legal protection and guarantees in order to achieve legal certainty in society. A legal official is a person who carries out part of the state's public functions, particularly in the field of civil law. Notary because the law is given the authority to create an absolute means of proof, namely an authentic deed. A notary deed is an authentic deed made by or before a notary according to the form and procedure stipulated in law, the meaning of which is a deed whose contents are considered to be true. The essence of the notary's duty as a public official is to regulate in writing and authentically the legal relationship between parties who benefit from requesting the services of a notary which is basically the same as the duty of a judge who provides justice between the disputing parties. Formation for notary positions is determined based on: 1) Business activities; 2) Total population; and / or 3) The average number of deeds drawn up by and / or before a notary every month. Notaries can hold concurrent positions as PPAT within the scope of their jurisdiction, but cannot hold concurrent positions as advocates (Article 17 letter g jo. Article 17 letter e UUJN). 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 paragraph (1) and (2) UUJN),

Keywords: Notary, Curator Position

A. INTRODUCTION

Indonesia is a rule of law, meaning that all aspects of life, both as a nation and as a state, are always based on regulations. In state life, the rule of law doctrine instructs that every administration of government must refer to and be based on the prevailing laws and regulations (positive law) and refer to the values of Pancasila as a source of values and a source of norms including as a source of orderly law in the Republic of Indonesia.Indonesia.¹

Article 1 of Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary states the definition of a notary, namely a public official who is authorized to make authentic deeds and has other powers as referred to in this law or based on other statutes. The main task of the notary is to make authentic deeds, where the authentic deed according to Article 1870 BW (Burgelijk Wetboek) provides the parties who make an absolute agreement. Notaries are given the authority to create absolute means of proof by law. that what is stated in the authentic deed is basically considered to

¹ Kaelan, 2013, *Negara Kebangsaan Pancasila, Kultural, Historis, Filosofis, Yuridis, dan Aktualisasinya*, Yogyakarta, Paradigma p. 656.

be true. This is very important for parties who need a means of proof for a purpose,²

Limited Liability Company (PT) is a form of economic activity that is often found, because in addition to its limited liability, Limited Liability Companies also make it easy for owners (shareholders) to transfer their companies (to everyone) by selling all of the shares they own in the company. as well as other benefits.³

Businesses run by companies do not always run smoothly. Various problems can occur until the company is unable to fulfill its various obligations, for example difficulties in fulfilling debt obligations which have an impact on difficulties in carrying out company operations, including employee payments and so on.

Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment defines bankruptcy in Article 1 paragraph 1, namely general confiscation of all assets of the bankrupt debtor whose management and settlement is carried out by a curator under the supervision of the supervisory judge as regulated in this law. If a court has passed a bankruptcy decision on a limited liability company, it will not only affect the company's legal entity.

In the bankruptcy process, after the fall of the bankruptcy decision, there are two organs that play an active role in its implementation, namely the supervisory judge who is in charge of overseeing the management and settlement, then the curator who is in charge of managing and settling the bankruptcy estate. In carrying out its duties, the curator must understand that his duty is not only to save the bankruptcy assets that he managed to collect and then distribute them to creditors but as far as possible can increase the value of the debtor's bankruptcy assets. Curators are also required to have integrity that is guided by truth and justice and must adhere to professional and ethical standards.

² R. Soegando Notodisoejo, 1982, *Hukum Notariat Di Indonesia Suatu Penjelasan*, Jakarta: Rajawali, p. 8

³ Ahmad Yani dan Gunawan Widjaja, 2003 *Perseroan Terbatas*, Jakarta: Raja Grafindo Persada, p. 1

In the bankruptcy process, after the fall of the bankruptcy decision, there are two organs that play an active role in its implementation, namely the supervisory judge who is in charge of overseeing the management and settlement, then the curator who is in charge of managing and settling the bankruptcy estate. In carrying out its duties, the curator must understand that his duty is not only to save the bankruptcy assets that he managed to collect and then distribute them to creditors but as far as possible can increase the value of the debtor's bankruptcy assets. Curators are also required to have integrity that is guided by truth and justice and must adhere to professional and ethical standards.

Based on the background of the problems above, this research problem can be formulated, namely:

1. What is the position of the notary against the concurrent position of curator ?
2. How are the concurrent positions of a notary in accordance with the Law of the Republic of Indonesia Number 2 of 2014 concerning Notary Position?

B. DISCUSSION

1. Notary Position on Concurrent Positions of Curator

Life in a society that runs in an orderly and orderly manner because it is supported by an order, because of this order, life becomes orderly. The order which is supported by the existence of this order, on further observation, turns out to consist of various orders which have different characteristics. This different nature is caused by the fact that the norms that support each order have different characteristics.⁴

Indonesia is a state based on law, as mandated in the 1945 Constitution of the Republic of Indonesia. As a rule of law, the course of government is guided by statutory regulations as the state constitution. The rule of law requires restrictions by law in the sense that all attitudes, behavior and good deeds

⁴ Satjipto Rahardjo, 2000, *Ilmu Hukum*, Jakarta: Citra Aditya Bhakti, p. 13.

carried out by state authorities and by citizens are based on positive law, so that especially its citizens are free from arbitrary actions by state authorities.⁵

Law has the task of creating legal certainty because it aims at public order. In its function as protection of human interests, law has a purpose. Law has goals to be achieved. The main purpose of law is to create an orderly social order, create order and balance. By achieving order in society, it is hoped that human interests will be protected. In achieving this goal, the law has the duty to divide rights and obligations between individuals in society, share authority and regulate how to solve legal problems and maintain legal certainty.⁶

The position of notary was born because the community needed it, not a position that was deliberately created and then socialized to the public. The history of the birth of the notary begins with the birth of the scribe profession in ancient Rome (2nd and 3rd century AD).⁷ Notary comes from the Roman language, namely *notarius*, which means writing scribe. The name *notarius* comes from the word *Nota Literaria* which means a letter mark or a character that states a word used to write or describe something.⁸ This term gradually has a different meaning from the original, it is estimated that in the second century AD the so-called by that name were those who kept records in shorthand.⁹

The notion of a notary and other general provisions is regulated in Law Number 30 of 2004 concerning the Position of Notary in Article 1, namely:

1. Notary is a public official who has the authority to make authentic deeds and

other powers as referred to in this Law.

2. Temporary Officer of Notary is a person who temporarily serves as a notary to carry out the position of a notary who dies, is terminated or temporarily suspended.
3. Substitute Notary is a person who is temporarily appointed as a notary to replace a notary who is on leave, is sick, or temporarily unable to carry out his position as a notary.
4. Special Substitute Notary is a person who is appointed as a special notary to make certain deeds as stated in his letter of determination as a notary because in a regency or city there is only a notary public, while the relevant notary according to the provisions of this law may not make the deed concerned.

2. Concurrent Positions of Notary According to the Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary

According to Philipus M. Hadjon, et al, that for the government, the basis for committing public legal acts is the existence of authority associated with a position (*ambt*). A position obtains authority through three sources, namely attribution, delegation and mandate to give birth to authority (*bevoegdheid*, legal power, competence).¹⁰ Authority must be based on existing legal provisions (constitution), so that this authority is a legitimate authority. Thus, officials (organs) in issuing decisions are supported by the source of authority. Sources of authority can be obtained for government officials or organs (institutions) by way of attribution, delegation and mandate. The authority of government organs (institutions) is an authority that is strengthened by positive law

⁵ Soehino, 1985, *Ilmu Negara*, Yogyakarta. Liberty, p. 9.

⁶ Sudikno Mertokusumo, 2005, *Mengenal Hukum: Suatu Pengantar*, Liberty, Yogyakarta, p. 77.

⁷ Anke Dwi Saputro, 2008, *Jati Diri Notaris Indonesia Dulu, Sekarang, dan di Masa Datang*, Jakarta, Gramedia Pustaka, p.40.

⁸ R. Soegondo Notodisoerjo, 1993, *Hukum Notariat Di Indonesia, Suatu Penjelasan*, Raja Grafindo Perasada, Jakarta, p. 12

⁹ *Ibid*, h. 13

¹⁰ Philipus M. Hadjon dkk, 1988, *Hukum Administrasi Indonesia*, Gadjah Mada University Press, Yogyakarta, p. 139-140.

to regulate and defend it. Without authority, a correct juridical decision cannot be issued.¹¹

Authority is a definition derived from the law of governmental organizations, which can be explained as a whole of the rules relating to the acquisition and use of governmental powers by public legal subjects in public legal relations.¹² The government's authority in a state of law originates from the prevailing laws and regulations, meaning that the source of authority for the government is statutory regulations. Ridwan, HR quoted HD Van Wijk / Willem Konijnenbelt's opinion, explaining theoretically that authority derived from statutory regulations can be obtained in three ways, namely:¹³

- a. *Attributie: toekenning van een bestuursbevoegheid door een wetgever aan een bestuursorgaan* (attribution is the granting of governmental authority by legislators to government organs).
- b. *Delegatie: overdracht van een bevoegheid van het een bestuursorgaan aan een ander* (Delegation is the delegation of governmental authority from one governmental organ to another).
- c. *Mandaat: een bestuursorgaan laat zijn bevoegheid namens hem uitoefenen door een ander* (a mandate occurs when a government organ allows its authority to be exercised by another organ on its behalf).

Article 1 UUJN does not provide a complete description of the notary's duties. According to Lumban Tobing, in addition to making authentic deeds, notaries are also tasked with registering and ratifying letters or deeds made under hand. Notaries also provide legal advice and explanations regarding laws to the parties concerned.¹⁴ The essence of the notary's duty as a public official is to regulate

in writing and authentically the legal relationship between parties who benefit from requesting the services of a notary which is basically the same as the duty of a judge who provides justice between the disputing parties.¹⁵

C. Conclusion

Based on the results of research and discussion, the following conclusions can be drawn:

1. Notaries are public officials who have the authority to make authentic deeds and other powers as intended by law. Notaries are public officials who carry out the profession in legal services to the public, in order to provide legal protection and guarantees in order to achieve legal certainty in society. A general official is a person who carries out some of the state's public functions, particularly in the field of civil law. Notary because the law is given the authority to create an absolute means of proof, namely an authentic deed. Notary deed is an authentic deed made by or before a notary according to the form and procedure stipulated in law, the meaning of which is a deed whose contents are considered to be true.
2. Formation for notary positions is determined based on: 1) Business activities; 2) Total population; and / or 3) The average number of deeds drawn up by and / or before a notary every month. Notaries can hold concurrent positions as PPAT within the scope of their respective positions (Article 17 letter g UUJN), but notaries cannot concurrently serve as advocates (Article 3 letter g jo. Article 17 letter e UUJN). 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 paragraph (1) and (2) UUJN), and must appoint a substitute

¹¹ F.A.M. Stroink dalam Abdul Rasyid Thalib, 2006, *Wewenang Mahkamah Konstitusi dan Aplikasinya dalam Sistem Ketatanegaraan Republik Indonesia*, Bandung: Citra Aditya Bakti, p. 219

¹² Ridwan, HR, 2002, *Hukum Administrasi Negara*, UII Press, Yogyakarta, p. 65.

¹³ *Ibid*, p. 75.

¹⁴ Lumban Tobing, 1992, *Peraturan Jabatan Notaris*, Jakarta, Erlangga, p. 37

¹⁵ Setiawan Wawan, 1995, *Hak Ingkar dari Notaris dan Hubungannya dengan KUHAP (Suatu Kajian Uraian Yang Disajikan Dalam Konggress INI di Jakarta*, p. 2

notary who will accept the protocol, and after no longer holding his position as an official State, the Notary can resume his

duties as a Notary (Article 11 paragraph (3) - (6) UUJN).

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