

THE PROTECTION ON NOTARY IN CRIMINAL CASES RELATED TO AUTHENTIC FIDUCIARY DEEDS

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ARTICLE INFO

Keywords:

Authority; Criminal;
Fiduciary; Protection.

ABSTRACT

This research aims to find out and analyze the position of notaries in criminal cases related to the fiduciary deed they made and their legal protection. This study uses a sociological juridical approach. Data collection was carried out through interviews and literature study. Data analysis was carried out in a qualitative descriptive manner. This research shows that a notary in a criminal case related to a fiduciary deed he made can serve as a witness or perpetrator of a crime as stipulated in Article 35 of Act No. 42/1999 concerning Fiduciary Guarantees, participating in criminal acts (Article 55 of the Criminal Code), assisting perpetrators in committing crimes (Article 231 of the Criminal Code), making fake letters (Article 263 of the Criminal Code), providing false statements in authentic deeds (Article 266 of the Criminal Code), embezzlement (Article 372 of the Criminal Code), and fraud (Article 378 of the Criminal Code) which causes harm to other parties, the notary can be held criminally responsible. Legal protection for notaries in criminal cases related to the fiduciary deed he made namely after the issuance of the Constitutional Court decision No. 49/PUU-X/2012 namely the summons of a notary through the Notary Honorary Council according to Article 66 UUJN. In addition, notaries still receive protection from the rights and obligations of notary disobeying as referred to in Article 1909 paragraph (3) of the Civil Code and Article 322 of the Criminal Code.

A. INTRODUCTION

In Article 16 paragraph (1) of the UUJN it is stated that in carrying out his position, a Notary is obliged to: act trustworthy¹, honest, thorough, independent, impartial, and safeguard the interests of the parties involved in legal actions. Based on this, the notary in carrying out his duties and authorities must be in accordance with the mandate of these provisions so that the authentic deed produced does not harm his client or other parties.

In reality, in the field, sometimes authentic deed made by a notary public raises legal issues due to doubts about its authenticity, causing harm to the client and/or other parties. These legal issues can occur due to negligence or intentional notary in carrying out his duties and positions in making authentic deeds or caused by the actions of his client who provide incorrect data.

¹ Abdul Jalal, Suwitno, Sri Endah Wahyuningsih, The Involvement of Notary Officials in Unlawful Acts and Participating in Crime in Document Falsification, *Journal of Deeds*, Vol. 5, No. 1, March 2018, page. 228

Notaries as public officials must obey and comply with applicable regulations, and adhere to the Law on Notary Position and also comply with the Notary's code of ethics. If the Deed made by the Notary raises a dispute or lawsuit, then this deed needs to be questioned. Was the deed a Notary's mistake intentionally to benefit one of the appearers or the appearer's mistake who provided documents that were not in accordance with the truth or the correct documents. If the deed made by the notary is legally flawed due to the notary's mistake either due to negligence or on purpose, then the notary must be morally or legally responsible. Of course, with evidence first².

The Notary Office Law stipulates that when in carrying out his duties and position as a Notary, he commits a violation that causes legal deviation, then the Notary may be subject to sanctions. UUJN stipulates that when in carrying out his duties and position as a Notary Public has committed a violation that causes legal deviation, the Notary may be subject to legal sanctions, namely civil sanctions, administrative sanctions or the code of ethics of Notary office, and may even be subject to criminal sanctions.

Various laws and regulations that regulate criminal sanctions do not provide for criminal sanctions regulations directly regarding criminal sanctions for Notaries. In connection with the actions of a notary that can be subject to criminal sanctions, in practice it is often found that there are legal actions or violations committed by a notary, which actually can be subject to criminal sanctions in accordance with the Criminal Code. There are even several notaries who have become suspects. Based on the investigation, the deed made before a notary has fulfilled a criminal element, for example participating in forging a letter or deed.³

The fact is that notaries in carrying out their profession are often summoned by the police legal apparatus as suspects in connection with the authentic deed they made. Practices of making deeds by notaries that cause legal problems are still common in Indonesia. These cases still frequently occur in several regions.

For example, legal issues regarding authentic fiduciary deeds which are violations of criminal law, causing notaries as creators of authentic fiduciary deeds to be able to deal with criminal law. Regarding criminal acts related to authentic fiduciary guarantee deed can be found in the provisions of Article 35 Act No. 42 of 1999 concerning Fiduciary Guarantees which states that Every person who deliberately falsifies, modifies, removes or in any way provides misleading information, which if it is known by one of the parties does not result in a Fiduciary Guarantee agreement, shall be punished with imprisonment for a minimum of 1 (one) year and a maximum of 5 (five) years and a minimum fine of IDR 10,000,000.- (ten million rupiahs) and a maximum of IDR 100,000,000.- (one hundred million rupiahs).

2 Andi Ahmad Suhar Mansyur, Normative Juridical Analysis of Forgery of Authentic Deeds Made by Notaries, *Student Journal of the Faculty of Law, University of Brawijaya Malang*, 2013, page.2-30

3 Maimunah Nurlete, Responsibility of Notaries for Fake Deeds Based on Violation of Types of Norms and Sanctions. (Case Study of Tanjung Karang District Court Decision Number 244/PID.B/PN.TJK), *Indonesia Notary*, Vol. 2, 2020, page. 378–401

Legal issues related to authentic fiduciary deed which involve a notary can cause the notary to be prosecuted before the law both criminally and civilly. In criminal cases where the notary is positioned as a witness or suspect, the defendant even shows that the notary is not above the law. A notary who is proven guilty of committing a criminal act in making a deed, for example by committing forgery, can be subject to criminal sanctions. However, sometimes legal problems related to the deed occur due to the actions of the notary client who manipulates the data in making the deed. For this reason, a notary needs to get legal protection in criminal cases related to the deed he made.

Based on the description above, this research will discuss further about criminal cases with the involvement of a notary, especially from the aspect of legal protection. This is important considering that the position of a Notary is very vulnerable to the occurrence of problems related to the deed he made because the deed is evidence that can lead to legal aspects, often causing problems in the field. The main problem with the deed that has an impact on the law is the issue of the authenticity of the deed which can become a legal dispute, especially civil law and criminal law.

In the aspect of criminal law issues related to deeds made by a notary, it can drag a notary into dealing with criminal law so that a notary as a profession also gets legal protection based on statutory regulations.

B. RESEARCH METHODS

The approach method used is the sociological juridical approach, namely research that describes the real situation or the real situation regarding the implementation of law or legislation, especially those related to the position of Notary. This study uses research specifications in the form of descriptive analytical research, namely the depiction of statutory regulations is linked to legal theories and the practice of implementing positive law related to the problem of the object of research. Data collection was carried out by means of interviews and literature study. The research data were analyzed in a qualitative descriptive manner, namely method of analysis that produces descriptive analysis data, namely what is stated by the respondent in writing or verbally as well as real behavior, which is researched and studied as a whole.

C. RESULTS AND DISCUSSION

A deed made in the presence of a notary is called a notarial or authentic deed or an authentic deed.⁴ To be called an authentic deed, namely a deed made in front of a notary based on the form and procedure required and specified in UUJN.⁵

4 Nawaaf Abdullah and Munsyarif Abdul Chalim, Position and Authority of a Notary in Making Authentic Deeds, *Journal of Deeds*, Vol. 4, No. 4, December 2017, page. 657

5 Anny Mawartiningsih, Maryanto, Juridical Review of the Practice of Making Notary Deeds in the Case of Appearing Appearers in Different Timeframes and Places, *Journal of Deeds*, Vol. 4, No. 2 June 2017, page. 121

According to Article 5 Paragraph (1) of the Fiduciary Guarantee Law it states that: "The encumbrance of objects with fiduciary guarantees is made with a notarial deed in Indonesian and is a fiduciary guarantee deed." The fiduciary guarantee deed, in addition to including the day and date, also includes the time (hour) of making the deed. Thus it can be said that the imposition of a fiduciary guarantee which is a fiduciary agreement is made in written form with a notarial deed. There are 2 (two) things that can be observed in this statement, namely Notaries and Authentic Deeds. Notary is a public official authorized to make authentic deeds and other authorities specified in this Law. Article 1868 of the Civil Code provides the meaning of an authentic deed, that is, an authentic deed is 'a deed drawn up in a form determined by law by or before an authorized public official at the place where the deed was made'. From this understanding, it can be said that an authentic deed must meet 3 (three) conditions, namely: 1. Made by or before a public official; 2. Made in the form determined by law; 3. Public employees are authorized to make deeds;

In fact, in making a fiduciary guarantee deed, it is possible for irregularities to occur, whether committed by a notary intentionally or unintentionally. Irregularities in making a fiduciary guarantee deed can cause losses to the parties interested in the said fiduciary deed. Viewed from the aspect of criminal law, the actions of a person in which there are elements of a criminal act in accordance with laws and regulations governing acts that can be punished and punishable by punishment such as the Criminal Code and statutory regulations outside the Criminal Code, the said person can be processed in criminal justice. The criminal justice process is intended to determine the guilt of a person suspected of being the perpetrator of a crime and determine the punishment.

A notary in a criminal case related to a fiduciary deed he made can serve as a witness or perpetrator of a crime as stipulated in Article 35 of Act No. 42 of 1999 concerning Fiduciary Guarantees concerning criminal acts by intentionally falsifying, changing, removing or in any way providing information illegally which if it is known by one of the parties does not give birth to a Fiduciary Guarantee agreement. In addition, based on the provisions of Article 15 Act No. 30 of 2004 concerning the Position of Notary as amended by Act No. 2 of 2014 (UUJN) a notary who makes an authentic deed with the elements of a criminal act such as participating in criminal acts (Article 55 of the Criminal Code), assisting perpetrators in committing crimes (Article 231 of the Criminal Code), making fake letters (Article 263 of the Criminal Code), providing false statements in authentic deeds (Article 266 of the Criminal Code), embezzlement (Article 372 of the Criminal Code), and fraud (Article 378 of the Criminal Code) which causes harm to other parties, the notary can be held criminally responsible.

Notary is one of the legal subjects who get legal protection. Legal protection for a notary is related to his duties and responsibilities as a general official making deeds including in making fiduciary guarantee deeds. Making a fiduciary deed carried out by a notary is basically the same as making an authentic deed which is the duty and authority of a notary in

general. Based on this, the legal protection given to a notary in making a fiduciary guarantee deed by laws and regulations is basically legal protection for the duties and positions of a notary as determined by law.

Prior to the issuance of the Constitutional Court Decision Number 49/PUU-X/2012 dated March 23 2013, notary protection was provided by the provisions of Article 66 UUJN which states that in the interest of the judicial process, investigators, public prosecutors, or judges with the approval of the Regional Supervisory Board are authorized to: a. Take a photocopy of the Minutes of the Deed and/or the letters attached to the Minutes of the Deed or the Notary Protocol in the Notary's safekeeping; and b. Summons the Notary to attend the examination relating to the deed he made or the Notary Protocol which is in the Notary's custody.

Based on these provisions, at least law enforcers, especially the police, cannot simply for the sake of the criminal justice process take documents in the notary's safekeeping without the permission of the Regional Supervisory Council (MPD). Likewise, law enforcers cannot summon a notary to attend an examination that is in contact with the documents he made, without the approval of the Regional Supervisory Board (MPD). After the issuance of the Constitutional Court Decision Number 49/PUU-X/2012 dated March 23 2013 the approval of the Regional Supervisory Council (MPD) the approval of the Regional Supervisory Council (MPD) as referred to in Article 66 UUJN is no longer needed.

Even though the legal protection provided by Article 66 UUJN has been revoked with the issuance of the Constitutional Court Decision Number 49/PUU-X/2012 dated March 23 2013, the protection of the notary position has not just disappeared. Legal protection for the position of a notary who carries out his duties and positions as a public official is then provided by UUJN, in particular Article 66 paragraph (1) which states that in the interest of the judicial process, investigators, public prosecutors or judges with the approval of the Notary Honor Council are authorized to: Take a photocopy of Minuta Deed and/or letters attached to Minutes of Deed or Notary Protocol in the Notary's safekeeping; and summon the Notary to attend the examination relating to the Deed or Notary Protocol which is in the Notary's custody.

Protection for notaries based on the provisions of Article 66 paragraph (1) UUJN is actually almost the same as the legal protection provided by UUJN before the issuance of the Constitutional Court Decision. Article 66 paragraph (1) UUJN stipulates that investigators, public prosecutors and judges are only allowed to take photocopies of minuta deed and/or letters attached to the minuta deed or notary protocol in the notary's safekeeping. In addition, investigators, public prosecutors and judges are not allowed or not allowed to take the minutes of the deed and/or the original documents attached to the minutes of the deed or the notary protocol in the notary's safekeeping.

In connection with the summons of a notary by investigators, public prosecutors, or judges to be present at the examination of a case in court that is directly related to the deed made by a notary, it still requires

approval from the Notary Honorary Council (MKN). On the other hand, the summons of the notary is not related to the authentic deed he made, which does not require the approval of the Notary Honor Council. This shows that the summons of a notary as a person whose statement is required outside the deed he made does not require the approval of the Notary Ethics Council.

Referring to the provisions of Article 66 paragraph (1) and Article 15 UUJN it applies to notaries, with limitations insofar as they are related to the duties and powers of the Notary's position. Based on this, the cases referred to in the provisions of Article 66 are only criminal cases. This is because the article designates investigators and public prosecutors who are law enforcement officers within the scope of criminal cases.

The provisions of Article 66 UUJN do not explain the scope of the intended notary, whether it includes a substitute notary, temporary notary official and emeritus notary or werda notary. In the aspect of legal protection for a notary, ideally this legal protection includes a substitute notary, temporary notary officials and notary emeritus or notary werda. This is considering that in practice it does not rule out the possibility of a criminal act allegedly being committed or involving or being related to a former notary as a witness. In this regard, there are still summons (examination) of notaries who are no longer active as a notary to be examined by investigators in relation to the deeds he made while still active as a notary.

The position of the Notary Honorary Council as mandated in UUJN is very strategic in providing legal protection for notaries. Given this, it is necessary to emphasize the position and form of legal protection from the Notary Honorary Council. Unfortunately, there are no further provisions governing this matter, both in UUJN and in the form of other laws and regulations.

According to Article 66 A paragraph (3) UUJN it is stated that further provisions regarding duties and functions, terms and procedures for appointment and dismissal, organizational structure, work procedures, and budget of the Notary Honor Council (MKN) are regulated by ministerial regulations. However, in reality the regulations regarding this matter have not been issued.

Ideally, regulations regarding guidelines for the implementation of duties and authorities from the Notary Honor Council (MKN) should be issued immediately after the promulgation of the UUJN as a result of the slow establishment of laws and regulations which further regulate the guidelines for the implementation of duties and authorities of the Notary Honorary Council (MKN) resulting in the existence of the Notary Honorary Council (MKN) as a legal protection institution for Notaries unable to carry out its functions yet to run optimally. The procedures or procedures for carrying out the duties of the Notary Honorary Council (MKN) have also not been explicitly regulated.

The laws and regulations governing the implementation of the UUJN regarding the position, guidelines and procedures for carrying out the duties and functions of the Notary Honorary Council (MKN) can refer to the laws

and regulations governing the Regional Supervisory Council because basically the two institutions have the same duties and authorities. This is based on the provisions of Article 66 paragraph (1) UUJN which gives authority to give approval or refuse approval submitted by investigators to summon and examine a notary in the judicial process related to the deed he made, before the issuance of the Constitutional Court Decision Number 49/PUU- X/2012 Dated March 23, 2013.

UUJN does not mention the position of the Notary Honorary Council. Article 66 A paragraph (1) only states that in carrying out coaching, the minister forms an Honorary Council of Notaries. Then in Article 66 A paragraph (3) it is stated that further provisions regarding duties and functions, terms and procedures for appointment and dismissal, organizational structure, work procedures, and budget of the honorary assembly of Notaries are regulated by a Ministerial Regulation. There are no statutory regulations regarding this matter. This will have implications for the provisions of Article 66 paragraph (1), namely if the Notary Honorary Council is located at the center it will certainly become an obstacle for law enforcers in the implementation of Article 66 paragraph (1).

The form of legal protection provided by Article 66 paragraph (1) UUJN, through the Notary Honorary Council (MKN) after the issuance of the Constitutional Court Decision Number 49/PUU-X/2012 dated March 23, 2013 is still supported by the Rights and Obligations of Denial attached to a notary. The notary's right of refusal is an inherent right because of the notary's obligation to keep confidential the deeds he made along with the information obtained from the parties to the deed in the making of the deeds. Rights and Obligations Rejecting a notary public is null and void if the law orders the disclosure of secrets and to provide information to the requesting party such as investigators, prosecutors or judges.

The notary's right of refusal gives the right to refuse to provide testimony as a witness in criminal cases and civil cases. The right of refusal is granted by statutory regulations, namely Article 170 of the Criminal Procedure Code for criminal cases and Article 1909 paragraph (3) of the Civil Code and Article 146 paragraph (1) of the HIR. However, the right of refusal is only given to a notary only in relation to the authentic deed he made and all the information obtained in making the authentic deed. So the notary's right of refusal is given because the notary's position is not for the notary's person.

Article 170 of the Criminal Procedure Code states that those who because of their work, dignity or position are required to keep secrets, can be asked to be released from their obligation to provide information as witnesses, namely about things that are trusted to them. The judge determines whether all the reasons for the request are valid or not. Furthermore, in the explanation of Article 170 of the Criminal Procedure Code it is explained that the job or position that determines the obligation to keep secrets is determined by statutory regulations. If there are no statutory provisions governing the position for the job in question, then as determined

by this paragraph, the judge determines whether or not the reasons put forward for obtaining said freedom are valid.

In addition, the notary's right of refusal can be used by a notary to refuse to be a witness in a criminal case as referred to in Article 168 of the Criminal Procedure Code which states that unless otherwise stipulated in this law, his testimony cannot be heard and he can resign as a witness of blood relatives or relatives in line straight up or down to the third degree from the accused or who are together as defendants, brothers and defendants or who are together as defendants, mother's or father's relatives, also those who are related by marriage from the children of the defendant's relatives to third degree, the husband or wife of the accused even though they are divorced or who are together as defendants.

Pursuant to the provisions of Articles 170 of the Criminal Procedure Code and 168 of the Criminal Procedure Code, the right of disclaimer by a notary as a witness in a criminal case can be used to refuse to provide testimony based on his family relationship with the accused, determined by law, or his occupation, position and dignity. This shows that a notary may refuse to be a witness to provide information in a criminal justice process either as an individual or as a public official in terms of fulfilling the provisions of Articles 168 and 170 of the Criminal Procedure Code.

The obligation to disobey a notary has consequences for sanctions for a notary who violates it. Provisions regarding sanctions for notaries who violate the Obligation to Deny are related to the provisions of Article 322 paragraph (1) of the Criminal Code which states that: anyone who deliberately opens a secret that he is obliged to keep because of a position or job, either present or former, is subject to criminal penalties. imprisonment for a maximum of nine months. The word "whosoever" in Article 322 paragraph (1) of the Criminal Code is associated with the Notary's Default Obligation including Substitute Notaries, Temporary Notary Officials as referred to in Article 33 paragraph (2) UUJN which states that the provisions that apply to notaries as referred to in Article 4, Article 15, Article 16, and Article 17 apply to Substitute Notaries, Notary Temporary Officials.

D. CONCLUSION

A notary in a criminal case related to a fiduciary deed he made can serve as a witness or perpetrator of a crime as stipulated in Article 35 of Act No. 42/1999 concerning Fiduciary Guarantees. Apart from that, based on Article 15 UUJN, a notary makes an authentic deed with the elements of a criminal act, such as: participating in criminal acts (Article 55 of the Criminal Code), assisting perpetrators in committing crimes (Article 231 of the Criminal Code), making fake letters (Article 263 of the Criminal Code), providing false statements in authentic deeds (Article 266 of the Criminal Code), embezzlement (Article 372 of the Criminal Code), and fraud (Article 378 of the Criminal Code) which causes harm to other parties, the notary can be held criminally responsible. Legal protection for notaries in criminal cases related to the fiduciary deed he made namely after the issuance of the

Constitutional Court decision No. 49/PUU-X/2012 namely the summons of a notary through the Notary Honorary Council according to Article 66 UUJN. In addition, notaries still receive protection from the rights and obligations of notary disobeying as referred to in Article 1909 paragraph (3) of the Civil Code and Article 322 of the Criminal Code.

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