



Legal Protection for Notaries in Indonesia from Criminalization When Carrying Out Their Duties

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Abstract

The position of a notary is very strategic in civil law because this profession is related to the most basic and very basic matters in legal actions carried out by the community. In carrying out their authority as general/public officials, notaries often need to get legal protection for legal products that have been made when these products cause legal problems. A notary, in carrying out his position, has a high professional ability, however, if in carrying out his position, he is always criminalized and there is no protection for notaries in carrying out their duties, then it is feared that it will undermine the professionalism of notaries in Indonesia. This study analyzes the concept of legal protection for notaries in carrying out their duties. This research is normative legal research using a statutory, conceptual, historical, and philosophical approaches. The concept of legal protection against the criminalization of a notary in carrying out their official duties, namely that a notary legally must be given rights by law clearly and explicitly in the form of an obligation to refuse to provide information regarding the confidentiality of his position, this right is realized by having the right to deny or resign as a witness, insofar as it concerns information of a confidential nature.

Keywords: *Notary; Criminalization; Legal Protection*

Introduction

A notary is a profession that provides legal services to the wider community. Notaries have responsibilities related to authentic evidence in the form of letters, deeds, and written documents against various legal actions. Notaries have a very important position not only in creating legal certainty but also in terms of providing legal protection to the public.

The position of a notary is very strategic in civil law, because this profession is related to the most basic and very basic matters in legal actions carried out by the community. The community, both the subject and the legal object of every legal action taken, will be very burdened by the various administrative complications it goes through. Documents related to legal actions to be carried out will not be arranged correctly and in accordance with legal procedures if done by someone who is not an expert and who understands the field. Therefore, notaries are here to offer services to help the community.

Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (UUJN) has jointly used a notary institution as a Position (Notary Position) and a notary as a Profession (Notary Profession). In Article 1 Number 1, UUJN explains, "Notary is a public official authorized to make authentic deeds and has other authorities as referred to in this Law or based on other laws." The position of a notary as a public official means that the authority that exists with a notary is never given to other officials. As long as this authority does not become the authority of other officials in making authentic deeds, this authority becomes the authority given to a notary.

So important is the notary's role in creating legal certainty over legal relations carried out by those who carry out legal actions. Because the notary is a profession based on the full trust of the parties, the statutory rules governing the position of the notary are enforced. As for Indonesia, the philosophical basis for the birth of the UUJN is the realization of guarantees of legal certainty, order, and legal protection, which have the core of truth and justice. Through an authentic deed made by a notary, the notary must be able to provide legal certainty to people who use the services of a notary (Salim 2015).

A notary, as a public/public official authorized to make authentic deeds, must be able to account for the deeds he has made if problems arise from the authentic deed in the future. Problems arising from the deed drawn up by a notary need to be investigated first. The problem arises due to the notary's error or the mistakes of the parties who need to provide the required information and documents honestly and completely to the notary (Isnaini and Utomo 2019).

Legal problems arise when a notary draws up a deed based on the statements of the plaintiffs, which are untrue or false, causing legal problems in the future. For example, the making of a deed is based on the appearers' statements stating that they will make a deed because of a sale and purchase. In reality, it is a debt of credit. Still, the deed has already been made, so when a legal problem arises, a notary is often sued because the product that has been issued is legally flawed, even though the notary is not authorized or obliged to check the authenticity of all documents submitted by the parties to the notary.

Suppose the error in making an authentic deed comes from the parties carrying out legal actions by providing dishonest information and incomplete documents (hidden). In that case, the legal consequences of an authentic deed made by a notary become legally disabled or can be degraded (Subagiono and others 2019). Suppose the parties' statement is dishonest or hides an important document that must be shown. In that case, the parties who committed the act may be subject to criminal prosecution by the party who feels aggrieved by the issuance of the authentic deed.

In carrying out their authority as general/public officials, notaries often need to get legal protection for legal products that have been made when these products cause legal problems. Notaries must face the law because the legal products they make cause problems. Even though a notary is also a citizen whose rights must be protected by the state, as explained in Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), "All citizens together with their position in law and government and is obliged to uphold the law and government with no exceptions. Article 1, paragraph (3) of the 1945 Constitution states that "Indonesia is a state based on law," thus, the state must be able to guarantee the legal rights of its citizens by providing legal protection, and legal protection is a right for every citizen.

The more professional abilities of notaries in carrying out their duties as public officials who have the function of regulating legal relations between parties in a written and authentic manner, the better the legal services that the public will receive. A person's professional ability shows his expertise which is supported by mastery of knowledge, experience, and high skills. Even though a notary has high professional ability in carrying out his position, if he is always criminalized and there is no protection for notaries in carrying out their duties, then it is feared that it will undermine the professionalism of notaries in Indonesia. Based on the description above, conducting a deeper study or research on the concept of legal protection for notaries in carrying out their duties is necessary.

Methods

The present study uses a normative legal research method that is conducted in finding solutions for legal matters (Isnaini and Utomo 2019). The research approach used is the statute approach, conceptual approaches, historical approach and philosophical approach.

Discussion

The term criminalization in society is rooted in the idea that crime is a social construction, meaning that an act is seen as a crime based on society's views. Often society is represented by the authorities so that an act is a crime or not depending on the authorities' perspective (Kebudayaan 1995). As a result, an act that, in formal legal terms, does not fulfill the elements of a crime, but investigators are forced to examine a person to be named a suspect. This is a social phenomenon of criminalization against someone, including a notary. Examples of criminalization against notaries include ordering to include fake statements in authentic deeds (article 264 of the Criminal Code), making fake or forged letters, and using fake or forged letters (article 263 paragraph (1), (2) of the Criminal Code).

For this reason, notaries, as public officials carrying out their positions, need to be given legal protection, among others, first to maintain the nobility and dignity of their position, including when giving testimony and proceeding in examinations and trials. Second, keep the minute or letters attached to the minute deed or notary protocol in the notary's repository. Third, keep the contents of the deed and the information obtained in making the deed confidential. In addition, legal protection for a notary is needed so that the notary continues to carry out his duties to maintain order and legal certainty (Adjie 2008).

Legal certainty normatively is when a regulation is made and promulgated with certainty because it regulates clearly and logically. Clear in the sense of not causing doubts (*multiple interpretations*) and logical. It becomes a system of norms with other norms so that they do not clash or cause a conflict of norms. Legal certainty refers to the enactment of clear, permanent, consistent, and consistent laws, the implementation of which cannot be influenced by subjective circumstances. Certainty and justice are not just moral demands but factually characterize law. A law that is uncertain and does not want to be fair is not just a bad law. With the guarantee of legal protection for notaries, notaries can carry out their duties in providing legal certainty and maintaining order (Kie 2000).

Conversely, with the criminalization of a notary, the law has no integrity or loses meaning because there is no certainty. Thus the products issued by a notary can no longer be used as guidelines or evidence (Yuliwarso SH. MH and others 2020). The role of a notary can also be seen from its capacity to provide legal advice and verify an agreement by seeing whether an agreement has been made in accordance with the correct agreement-making rules and does not harm either party or whether the agreement was made without fulfilling the requirements (Suhartono 2018). On the other hand, if the duties and powers given by the state to a notary are not carried out properly and accurately, then mistakes and abuses committed by a notary can lead to disruption of legal certainty and the community's sense of justice. Based on this explanation, it is emphasized that the importance of a notarial deed is to prevent the making of a deed invalid. Making certain authentic deeds, some are required by laws and regulations to create certainty, order, and legal protection (Isnaini and Wanda 2017).

According to Nico (Nico 2003), there have been several notarial mistakes that have occurred in notary practice in Indonesia, including:

1. Allegation of document forgery committed by a notary. The public prosecutor charged the Notary in court with Article 263 of the Criminal Code regarding the forgery of letters in general.
2. In practice, notaries in court proceedings are made defendants. This is not only due to a notary's intentional mistake but also to a notary's negligence in carrying out their duties.

As previously described, UUJN has provided law enforcement for the arbitrary actions of law enforcers against notaries. This can be seen in Article 66 paragraph (1) UUJN with the existence of the Notary Honorary Council (MKN), as a legal protection institution for notaries, whose function is to carry out initial inspections in notary organization meetings to give approval or rejection to investigators from the Police, prosecutors, or The judge summons the Notary to be examined in the judicial process. In addition, MKN is also authorized to guide notaries in carrying out their duties as public officials. However, if MKN finds evidence that a notary is suspected of being guilty, then MKN must hand it over to the Police (Hatta Isnaini Wahyu Utomo 2019).

This UUJN regulates the establishment of a Notary Honorary Council (hereinafter referred to as MKN) consisting of representatives of notaries, government, and academics, which functions as a legal protection institution for the Position of Notary in relation to deeds made by or before him, as contained in the Law on Notary Position, that is:

For the judicial process, investigators, public prosecutors, or judges, with the approval of the Regional Supervisory Board, have the authority to:

1. take a photocopy of the Minutes of the Deed and/or the letters attached to the Minutes of the Deed or Notary Protocol in the Notary's safekeeping; and
2. summon the Notary to attend the Deed or Notary Protocol examination, which is in the Notary's custody (Budiono 2012).

Legal protection is the main goal as a consequence of a rule of the law state that the state is obliged to guarantee the legal rights of its citizens, Notary is no exception. Legal protection for notaries can be realized in a juridical arrangement (*Bescherming juridische voorzieningen*). The legal protection here is this preventive legal protection, this legal protection aims to prevent notaries from being brought to trial in relation to the products they have made so that the legal certainty of the products they make still has binding legal certainty because the duties and authorities notary is to provide certainty and maintain order. Legal certainty is a sign of action because without legal protection, it is potential for a notary to lose public trust, and he is no longer considered a trusted person (*vertrouwens person*).

The most important obligation of a notary is as a public official whose profession as a public official is to maintain the secrecy of a deed based on the wishes of his client. This is in accordance with the intent of Article 16 paragraph (1) letter f UUJN, namely that a notary is required to keep everything related to the deed made in accordance with the oath of office unless the law determines otherwise (Utomo 2020). The phrase "unless the law stipulates otherwise" makes regulations regarding the secrecy of deeds a separate dilemma for a notary. This is because one article states clearly and unequivocally that a notary must maintain the secrecy of the deed he makes. Still, in the same article, there is also a phrase that indicates there is hesitation in determining the position of the strength of the contents of the article (Utomo 2022).

From the legal hierarchy's perspective, that law at a higher level takes precedence over lower law (*lex superior derogate legi inferior*), and/or more specific legal rules override more general legal rules (*lex specialis derogate legi generalis*). The sentence "unless the law stipulates otherwise" in that article will be a phrase that will dilute the Notary's obligation to maintain the secrecy of a deed. It is known that the obligation to maintain confidentiality is very urgent to provide a sense of security, both to the parties facing the making of an authentic deed and the Notary himself (Sjaifurrachman; Adjie 2011).

The obligation to maintain secrecy must be carried out not only to maintain the secrecy of the contents of the deed but also to keep all information obtained confidential. Maintaining the dignity and honor of a notary in carrying out his professional position and providing protection to a notary related to the obligation to keep the contents of the deed confidential. So here, what is protected is the position, not the officials. Notary officials or individuals do not get legal protection attached to them. The absence of

legal protection attached to notary officials will give the notary strong legal force in refusing or arguing to defend the deed that was opened in a trial.

Notary, a profession that intersects with the law, should naturally also have the right of immunity. The existence of legal protection and certainty that provides legal immunity to the notary, namely in terms of legal protection for a notary who opens the contents of the deed before the court, can provide a sense of security to the notary from the demands of the notary's obligation to keep the deed secret, and also from criminal entanglements contained in the Criminal Code. The existence of legal protection and legal certainty attached to the immunity granted to a notary can provide a sense of security for a notary. On the other hand, this legal immunity will make it easier for the court to open the contents of the deed without fighting against the notary's right of denial so that the evidentiary activities in court will be fast and precise in their implementation.

Punishment against a notary can be carried out with limitations if there is legal action from a notary against the birth, formal and material aspects of the deed that is intentional, full of awareness and conviction, and it is planned that the deed made before the notary or by the notary together (agreed) the appearers to used as a basis for committing a crime. There are legal actions from a notary in making a deed before or by a notary which, if measured based on UUJN, is not in accordance with UUJN, and the notary's actions are also not appropriate according to the competent authority to evaluate the actions of a notary, in this case, the Notary Supervisory Board.

Provisions that are universal and still need to be maintained, related to Notary Default Obligations, which are still relevant today, and are still necessary for the latest dynamics of notary law. When viewed from the perspective of legal politics in Indonesia, the obligation to disobey a notary cannot be separated from the development of the substance of the norms for regulating the position of a notary, as described above.

The obligation to disobey a notary is part of legal politics in Indonesia to provide legal protection for the profession/position of a notary in a position of trust. To be able to assist community activities related to private law. This obligation to refuse makes a notary, in carrying out his position, not subject to the principle of equality before the law, as long as in carrying out his position, he has followed the procedures determined by law. Departing from this thought, the obligation to disobey a notary is still maintained by legislators in the revision of the UUJN, which is a configuration of the power of protection for the profession and position of a notary from a political perspective.

Law aims to integrate and coordinate the various interests that exist in society because of the traffic of interests. Protection of certain interests can only be done by limiting the interests of other parties. In social life, individual human rights are limited by the rights of other human individuals. The law is used as a tool to limit people's rights so that other people's rights also get protection.

Legal interests are useful for dealing with human rights and interests so that the law has the highest authority to determine human interests that need to be regulated and protected. Legal protection must be able to pay attention to the stages, namely legal protection born from a legal provision (Prasetya and Wahyu Utomo 2019). All legal regulations given by the community are community agreements to regulate behavioral relations between community members and between individuals and the government who are considered to represent the interests of society (Hatta 2020).

Legal protection seeks to protect legal subjects in a set of preventive and repressive regulations. Philipus M. Hadjon also said, "Legal protection for the people is an action or effort by the government that is preventive and repressive in nature". Preventive legal protection aims to prevent disputes from occurring. Meanwhile, repressive legal protection aims to resolve disputes currently happening in society, including handling them in the judiciary (Philipus M. Hadjon 1987).

Legal protection illustrates the function of the law itself, that law has a concept and purpose of providing a sense of justice, order, certainty, benefit, and peace. The function of law is to protect all people from dangers and actions that can harm and cause suffering to the lives of the people, society, and those in power. In addition, the law must also function to provide a sense of justice and to realize prosperity for all people (Slamet 2017).

In addition to the theory of legal protection described by Philipus M. Hadjon, experts express several theories of legal protection. According to Satjipto Raharjo, "legal protection is to provide protection for human rights (HAM) that are harmed by other people and that protection is given to the community so that they can enjoy all the rights granted by law" (Rahardjo 2000). The law can function to realize adaptive and flexible protection but also predictive and anticipatory. Those weak and not yet strong socially, economically, and politically need law to obtain social justice.

Legally a notary must be given rights by law in the form of an obligation to refuse to give information regarding the secrets of his position, this right is realized by having the right to deny or resign as a witness insofar as it concerns information that is confidential. As a public official who carries out public services in the legal services field, it is necessary to distinguish between notary errors, personal errors (*faute personnel or personal fault*), and errors in carrying out their duties (*fault de service or service fault*).

Conclusion

The concept of legal protection against the criminalization of a notary in carrying out their official duties, namely that a notary legally must be given rights by law clearly and explicitly in the form of an obligation to refuse to provide information regarding the confidentiality of his position, this right is realized by having the right to deny or resign as a witness, insofar as it concerns information of a confidential nature. Strengthening the right of refusal for notaries, where strictly notaries can refuse to reveal secrets in the deed so that law enforcement does not arbitrarily summon and oblige notaries to disclose client secrets. Preventively legal protection in relation to the right of refusal of a notary to refuse to provide information that is confidential must be further emphasized by legislators in the revision of the UUJN, which is a configuration of the power of protection for the profession and position of a notary from a political perspective. Legal protection is repressive, so the notary, as a public official who carries out public services in the field of legal services, if he makes a mistake, can still be prosecuted, even though the notary's mistake must be distinguished between personal mistakes (*fault personnel or personal fault*) and mistakes in carrying out the task (*faute de service or in service fault*).

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