

Implementation of Independence Principles in Running Notary Profession

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Abstract

Notaries in carrying out their positions as General Officials, apart from being bound by a Position Regulation, Code of Ethics, and also bound by the oath of office pronounced when appointed as a Notary, where the Notary is to carry out his position in a trustworthy, honest, thorough, independent, and impartial manner. as stipulated in Article 4 paragraph (2) Notary Office Act. The formulations in this study are: (1) How is the application of the principle of independence in carrying out the position of a notary public? (2) How is the legal consequence of a principle of independence by a notary public? The research conducted is normative legal research with an invited approach and a conceptual approach. Legal material engineering is carried out through the literature study. The legal materials used are primary legal materials, secondary legal materials and tertiary legal materials. Meanwhile, the source of legal material is literature study (library research). The data technique used in this research is the literature study data method. Based on the results of the research, the form of the Notary is written in carrying out his duties and positions, the work of the Notary is working properly and professionally in accordance with the orders of the Law and the results of the second research. a result of the legal environment, the Notary is not independent in carrying out his obligations, it has an impact on the deed he makes.

Keywords: Principle of Independence, Sanctions, Notary

Abstrak

Notaris dalam menjalankan jabatannya selaku Pejabat Umum selain terikat pada suatu Peraturan Jabatan, Kode Etik, dan juga terikat pada sumpah jabatan yang diucapkan pada saat diangkat sebagai Notaris, di mana Notaris wajib untuk menjalankan jabatannya dengan amanah, jujur, seksama, mandiri, dan tidak berpihak seperti ketentuan yang diatur dalam Pasal 4 ayat (2) UUJN. Rumasalahan dalam penelitian ini adalah : (1) Bagaimana penerapan prinsip kemandirian dalam menjalankan jabatan Notaris? (2) Bagaimana akibat hukum apabila terjadi pelanggaran prinsip kemandirian oleh Notaris?. Penelitian yang dilakukan adalah penelitian hukum normatif dengan pendekatan perundang-undangan dan pendekatan konsep. Teknik pengumpulan bahan hukum dilakukan melalui studi kepustakaan. Bahan hukum yang dipergunakan adalah bahan hukum primer, bahan hukum sekunder dan bahan hukum tertier. Sedangkan sumber bahan hukum adalah studi kepustakaan (library research). Teknik pengumpulan data yang digunakan dalam penulisan tesis ini adalah metode pengumpulan data studi kepustakaan. Berdasarkan hasil peneltian wujud dari kemandirian Notaris itu tercermin dalam menjalankan tugas dan jabatannya, pekerjaan Notaris tersebut bekerja secara benar dan profesional sesuai dengan perintah Undang-Undang dan hasil penelitian kedua Akibat hukum apabila Notaris tidak mandiri dalam melaksanakan kewajibannya maka akan berdampak terhadap akta yang dibuatnya.

Kata kunci: Prinsip Kemandirian, Sanksi, Notaris

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Introduction

Notary is a public official appointed by the Government based on a Decree of the Ministry of Law and Human Rights of the Republic of Indonesia to assist the public in making agreements. Written agreements made before a notary are called deeds. The goal is that the deed can be used as strong evidence if at any time there is a dispute between the parties or there is a lawsuit from another party, therefore to avoid mistakes in making a deed, in carrying out its activities a notary must be

guided by the Act. Number 30 of 2004 concerning the Position of a Notary, hereinafter referred to as Notary Office Act.

Notaries get authority from law or attributively. Attribution is the granting of government authority by legislators to government organs, in other words attributive authority is outlined or derived from the division of state power by the Constitution. Attributive authority is an authority that comes from law (Abdullah, 2017). In private/civil law areas, the state places a notary as a public official who is authorized in terms of making authentic deeds, for the sake of proof/evidence. (Sulihandari, 2013) Positive Law in Indonesia has regulated the position of a notary in a special law, namely Law Number 30 of 2004 concerning the Position of a Notary.

The duties and authority of a notary when viewed from his position, a notary is tasked with carrying out some of the authority of the government, because a notary according to the Regulation of the Position of a Notary as a General Official appointed by law to make an authentic deed which is actually in the opinion of the researcher, the job of making an authentic deed is the work of the government. Meanwhile, the authority of a notary is to make an authentic deed as ordered by Article 1868 of the Civil Code, namely a deed made and inaugurated in a form according to law (law), made by or before a public official, and at the place where the deed was made. Apart from that, it also refers to and relates to article 1870 of the Civil Code and Law Number 30 of 2004 concerning Notary Positions (Hendra, 2012).

According to Deviana Yunitasari in her journal, she stated that a notary has the capacity to make regulations regarding every action or contract stipulated by law to be documented as an authentic deed, only if it is demanded by the interested party and not by a notary request. Notaries are also given the authority to ensure behavior that is not in accordance with the law (Deviana, 2017). Authority (or often also written with the term Authority) is a legal action that is regulated and given to a position based on the applicable laws and regulations governing the position held (Sjaifurrachman, 2011). The authority of a Notary has limitations as regulated in the legislation governing the position of the official concerned. Thus, every authority has a limit as stated in the laws and regulations that govern it (Adjie, 2007). The difference between the notion of authority and authority. We must distinguish between authority (authority, *gezag*) with authority (competence, *bevoegheid*). Authority is what is called formal power, power that comes from the power granted by law, while authority only concerns a certain "*onderdeel*" (part) of authority (Syafrudin, 2000).

The main authority of the Notary is to make an authentic deed regarding all acts, agreements and stipulations required by laws and regulations or desired by the interested parties to be stated in the deed, providing grosse, copies and quotations of the deed. All of this as long as the making of the deeds is not also stated or excluded from other officials or other people stipulated by law (Budiono, 2014).

Notaries in carrying out their positions as Public Officials, apart from being bound by a Position Regulation, Code of Ethics, and also bound by the oath of office pronounced when appointed as a Notary, where the Notary is obliged to carry out his position in a trustworthy, honest, thorough, independent, and impartial manner. such as the provisions stipulated in Article 4 paragraph (2) Notary Office Act which reads:

I swear/promise:

That I will obey and be loyal to the State of the Republic of Indonesia, Pancasila and the 1945 Constitution of the Republic of Indonesia, the Law on Notary Positions and other laws and regulations.

That I will carry out my position in a trustworthy, honest, thorough, independent and impartial manner.

That I will maintain my attitude, behavior, and will carry out my obligations in accordance with the Professional Code of Ethics, honor, dignity, and my responsibilities as a Notary.

That I will keep the contents of the deed and information obtained in the execution of my position confidential.

That in order to be appointed to this position, either directly under any name or under any pretext, I have never and will not give or promise anything to anyone.

Regarding the independence of a Notary, both Notary Office Act Number 2 of 2014 and Notary Office Act Number 30 of 2004 do not clearly describe the meaning of independence as referred to in Article 20 paragraph (1) as follows:

1. A notary may carry out his position in the form of a civil partnership while still taking into account his independence and impartiality in carrying out his office.
2. The form of civil partnership as referred to in paragraph (1) shall be regulated by Notaries based on the provisions of laws and regulations.
3. Deleted

Notaries cooperate in the form of a civil partnership, if the intention is to form a joint office, which is only limited to notaries being together in one office, not in contact with management, accountability, or distribution of profits and losses, it is not a problem, it's just that in making a notarial deed there is no problem. may be done jointly because the Notary is obliged to keep everything about the deed he made.

Article 20 allows Notaries to join in the form of a civil union while still paying attention to independence and impartiality in carrying out their answers in practice, a Notary civil partnership is conceptualized as a form of cooperation in which two or more Notaries rent one building as a joint office, with the division of rooms in the building. as the office of each Notary in the civil partnership. (Marikha, 2016). In the concept of management, the term independent/independence means that the institution concerned is managerially able to stand on its own without depending on its superiors. Institutionally, institutions still depend on their superiors. It is also often confused with the meaning of independent which is both managerial and institutional not dependent on their superiors or on other parties. Independence also means being free from the intervention of any party (Adjie, 2009).

The independence of the Notary in carrying out his position, being in a neutral and impartial position must have his own office, meaning that he is outside the parties who carry out the legal relationship and not as one of the parties in the legal relationship. In such a function, it can be said that a Notary is a legal apparatus, but he is not a law enforcer. Notaries must be independent and independent, the word independent in this case contains many meanings, including: structural independence (institutional structural or institutional independence), functional independence (functional independence), financial independence (financial independence), administrative independence (administrative independence), Notaries are said to be structurally independent, if the organ of office is institutionally independent outside the organizational structure of a particular State or government. For example, the extent to which the office of a Notary is within or outside the structure of the Ministry of Law and Human Rights of the Republic of Indonesia. Notaries can also be said to be functionally independent if, for example, even though they are institutionally under or within a government organization, in carrying out their functions they are free and independent and cannot be intervened even by the relevant government officials (Adjie, 2012). Although institutionally under or within a government organization, in carrying out its functions it is free and independent and cannot be intervened even by the relevant government officials (Adjie, 2012).

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In carrying out the duties of his position, that a Notary must adhere to the Code of Ethics for the Notary Position. In the Indonesian Notary Code of Ethics, several rules have been set that must be adhered to by a Notary in addition to adhering to the regulations of the Notary position, including: (Kansil, 2017)

- a. Realizing their obligations, working independently, being honest and impartial, and with a full sense of responsibility;
- b. Using one office in accordance with what is stipulated by law, and not opening branch and representative offices and not using intermediaries;
- c. Do not use promotional mass media.

Starting from the description above, the author will analyze the Luwuk District Court Decision No. 10/ Pdt.G/ 2013/ PN. Lwk, Decision No.10/PDT/2014/PT.PALU, and Decision No.2484 K/Pdt/2014 with the position of the case in outline as follows: The case relating to the cooperation of a Notary in the form of a notarial profit sharing agreement originated from the Plaintiff's lawsuit Notary/PPAT Sang Abuda, SH (SA), as the first party in the agreement against Defendant Notary/PPAT Demmy Mahendra, SH (DM), as the second party in the agreement in which DM was reported by SA who is a partner of DM in running the joint Notary's office on charges of default.

In managerial and institutional terms, the Notary is not dependent on his superiors or on other parties and in carrying out his position, the Notary is also free from the intervention of other parties. However, does this mean that the Notary is fully independent, including in relation to carrying out his profession as a Notary.

Based on Luwuk District Court Decision No. 10/ Pdt.G/ 2013/ PN. Lwk on October 2, 2013 there was an appeal from DM who was originally the defendant against SA who was originally the plaintiff, in decision Number 10/PDT/2014/PT.PALU stated: the plaintiff's claim was unacceptable (*Niet Onvankenlijk Verklaard*) so it could no longer be defended and must be cancelled.

Furthermore, the Decision of the High Court 10/PDT/2014/PT.PALU by the Plaintiff in the main case has submitted a Cassation to the Supreme Court of the Republic of Indonesia. the decision is to reject the Cassation Application from the cassation applicants on the grounds that the High Court has been right and correct in its considerations and has not been wrong in applying the law, because it is proven that the Plaintiff is still providing work to the Defendant as stated in the profit sharing agreement in the notarial field so that it cannot be said that the

Defendant broke his promise and the lawsuit was filed too early because the agreement is still running between the two parties. about a fact which cannot be considered in the examination at the cassation level.

The examination at the cassation level only relates to not being carried out or there is an error in the application of the law, there is a violation of applicable law, there is negligence in fulfilling the conditions required by the legislation, which threatens the negligence with the cancellation of the decision in question or if the court is not authorized or exceeds the limits of its authority, as referred to in Article 30 of the Law on the Supreme Court (Law Number 14 of 1985 which has been amended by Law Number 5 of 2004 and the second amendment by Law Number 3 of 2009).

Research Problems

The problems taken in this research are, First, How is the application of the principle of independence in carrying out the position of a Notary? and the second problem, what are the legal consequences if there is a violation of the principle of independence by a notary?

Research Method

This research was conducted using a normative juridical method with a statutory approach and a conceptual approach. The research specification used is an analytical perspective, which is to describe and describe and at the same time analyze the facts through a statutory approach.

Discussion

1. Application of the principle of independence in carrying out the position of a notary

Notary comes from the word "Notarius", which is the name in Roman times given to people who carry out the work of writing. Some other opinions state that the name Notarius comes from the words "*nota literaria*", which means that something is said (Notodisoerjo, 1993). Notaries according to Article 1 point 1 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions (hereinafter referred to as Notary Office Act) are:

“A public official who is authorized to make an authentic deed and has other authorities as referred to in this law or based on other laws.”

Notaries are officials appointed by the state to represent the general power of the state in providing legal services to the public in the field of civil law in order to create certainty, order, and legal protection (Kurniawan, 2019). The role

of a notary is to meet the needs of the community who require written legal documents in the form of authentic deeds in the field of civil law. The notary is responsible for serving the public who sued civilly, demanding fees, compensation, and interest if it turns out that the deed he made can be proven to be made not in accordance with the applicable legal rules. this is a form of notary accountability to the public (Adjie, 2009). The notary profession is a noble profession, so notaries need to carry out their duties as deed officials by paying attention to obligations and prohibitions in accordance with applicable laws and regulations and the applicable notary code of ethics so that the public is not harmed in legal services. In carrying out his profession, it is not because of encouragement, threats or seduction outside the demands of his profession, but he does it out of an awareness of the obligations inherent in him and is based on the fighting spirit (idealism) that is embedded in his soul. The morality of a noble profession is the ethics that apply to the profession. Professional ethics is an ethical product which is the application of a set of ethical thoughts or a set of formulations of moral norms for a particular profession (Tuwaidan, 2018).

In Article 1 point 1 of the Law on Notary Positions it is stated that a Notary is a public official authorized to make authentic deeds and other authorities as referred to in this law. Based on these provisions, it can be understood that in general a Notary can be interpreted as a public official whose scope of duties is to make an authentic deed. The existence of the notary profession is as a public official authorized to make authentic deeds as stated in Article 1868 of the Civil Code (Nico, 2003).

Notary profession is a semi-public profession. Notary positions are public positions but their scope of work is in the construction of private law. Notaries are legal service providers who work for the benefit of clients. In this context, the bureaucratic hierarchy does not support their work. This profession is indeed regulated in statutory regulations, but the rule of positive law is also an open profession, in the sense that everyone can survive, or leave the profession at any time. a profession are as follows: (Kansil, 2003)

- a. The profession is a servant, because of that they have to work selflessly, especially for clients or patients who can't afford it.
- b. The implementation of professional services refers to noble values.
- c. The executor of the profession is oriented to the community as a whole.
- d. The pattern of competition in 1 (one) profession must be healthy.

According to Habib Adjie, a Notary is a public office that has the following characteristics: (Adjie, 2008)

- a. As a position

The Notary Position Act is a unification in the field of notary position regulation, so the Notary Position Act is the only legal rule in the form of a law that regulates Notary positions in Indonesia.

b. Notaries have certain powers

Every given authority must be based on the rule of law as a limitation so that the position can run well and not collide with the authority of other positions.

c. Appointed and dismissed by the government

d. Notaries in carrying out their duties are appointed and dismissed by the Minister of Law and Human Rights, although a Notary is administratively appointed and dismissed by the government, it does not mean that a Notary is subordinate to the government. However, notaries in carrying out their duties must be independent (autonomous), not partial to anyone (impartial), not dependent on anyone (independent).

e. Does not receive a salary or pension from the person who raised it.

f. Accountability for their work to the community.

As a public official, a notary must be independent. In everyday terms the term independent is often equated with Mandiri. In the concept of Management, the application of the term Mandiri means that the institution concerned is managerially able to stand alone without depending on its superiors, but institutionally it remains dependent on its superiors. Meanwhile, Independent, both managerially and institutionally, does not depend on his superiors or on other parties (Adjie, 2008).

The independence of the position of a notary is in a neutral and impartial position, administratively a notary is appointed and dismissed by the government, but a notary is not subordinated to the one who appointed him in this case is the government. The notary is also not a party to the legal relationship that will be carried out by the parties. So that in carrying out the duties of his position, a notary must be independent, not taking sides with anyone, not depending on anyone.

Notaries in carrying out their duties as public officials have the main characteristics, namely in their impartial and independent (independence) position, even being explicitly said to be "not as one of the parties". Notaries as public officials in carrying out their functions of providing services to the parties concerned, among others, in making authentic deeds are not parties of interest at all. Even though a Notary is a legal apparatus, he is not a "law enforcer", a Notary is truly neutral and does not take sides with any of those concerned. The independence of a Notary is reflected in the expertise possessed and supported

by knowledge, experience and has high skills and has good moral integrity (Sinaga, 2015).

This independence provision is also regulated in the obligations of a notary which is described in Article 16 Paragraph 1 letter a of Law Number 2 of 2014 as follows:

In carrying out his/her position, the Notary is obliged to: a. act honestly, thoroughly, independently, impartially, and protect the interests of the parties involved in legal actions.

Based on the principles of independence, a Notary not only has an independent structural relationship with the Ministry of Law and Human Rights that appoints a Notary, but is also functionally independent among Notary colleagues and is financially independent in financial management. Structurally independent, apart from the Ministry of Law and Human Rights, Notaries are also not allowed to depend on Banks, BPN and others.

Notaries in providing services to the public should act in accordance with applicable laws. This is because a Notary in carrying out his duties is not solely for his personal interest, but also for the benefit of the community, and has an obligation to guarantee the truth of the deeds he has made. Therefore, a Notary is required to act trustworthy, honest, thorough, independent, impartial, as well as fair and transparent in making a deed in order to ensure legal certainty for all parties directly involved in making an authentic deed. In carrying out the duties of his position, a Notary must also adhere to the code of ethics for the position of a Notary, because without it, the dignity of professionalism will be lost and will no longer be trusted by the public.

Notary professionalism must also be shown if joined in a *maatschap* (civil partnership). Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of a Notary, provides an opportunity for Notaries to join and form alliances in carrying out their duties. The notary acts in partnership with Law Number 30 of 2004 concerning the position of a notary, in particular Article 20 paragraph (1) stipulates that a notary can carry out his position in the form of a civil union. Meanwhile, in Law Number 2 of 2014, Article 20 paragraph (1) is changed to a Notary who can carry out his position in the form of a Civil Partnership.

Notaries carry out their positions in the form of a civil partnership as confirmed in Article 20 of the Notary Office Act, that a notary can carry out his position in the form of a civil partnership while still paying attention to independence and impartiality in carrying out his office, but the Notary Office Act does not provide a definition of the notary civil partnership in question. A

notary civil partnership is then called a cooperation agreement between notaries in carrying out their respective positions as notaries by including all the needs to establish and administer and by joining in one office with a notary (Wigusta, 2017).

Regarding this Civil Partnership, the Criminal Code recognizes two terms, namely: partnership and civil union. This association in the broadest sense is formed to run the company. This company is a form of effort to realize the common goal of the association, namely to obtain mutual benefits. The form of this association can be in the form of legal materials or non-legal entities that both run the company. own legislation (Purwosutjipto, 2007).

As for the partnership means a union of people who have the same interest in a particular company and an ally means a participant in a company. In the provisions of Article 1618 of the Criminal Code there are 2 (two) elements that must be carried out, namely:

1. The entry element (*inbrenng*) Each partner has an obligation to include something into the partnership in the form of goods, capital (money) or expertise.
2. The element of purpose to obtain mutual benefits the element of purpose to obtain this mutual benefit in a civil partnership is carried out within a company. Running a company according to the legislature is defined as an act that aims to seek profit and is carried out continuously, openly, in a certain position. By running a company, these forms of partnership are more specifically regulated in the Commercial Code (hereinafter referred to as KUHD) because they are studies in business law such as firm partnerships and limited partnerships.

In the Civil Union, in running the union, the business entities included in the partnership are: (Tuqa, 2019)

- a. The form of company regulated in the Civil Code is a Civil Partnership (*Maatschap*).
- b. The form of the company regulated in the Criminal Code is a Firm Partnership (Fa) and a Limited Liability Company (CV).
- c. Forms of companies regulated in special legislation, namely Limited Liability Companies (PT), Cooperatives and State Companies (BUMN).

In practice, an agreement among Notaries is allowed in the form of a civil agreement in which a collaboration is formed where two or more Notaries, in making the agreement, are guided by Article 1320 of the Civil Code which states the legal terms of the agreement as carried out by legal subjects who generally interpreted as supporting rights and obligations, namely humans and legal

entities (Ali, 2005), and the agreement is carried out if the legal subject is capable of carrying out legal actions. Skills in acting or what in Dutch is referred to as *handelingsbekwaamheit* is the authority possessed or possessed by people in general, to carry out a legal act in general. as a possibility to carry out legal actions independently which bind oneself without being inviolable (Hernoko, 2010).

After the civil partnership between notaries is formed, the notary civil partnership can also rent a building and occupy it together, by dividing the rooms in the building as the office of each notary in the civil partnership, clients are expected to freely choose a notary where in the building the services will be used. Notaries who are members of the partnership can have their own computers and can also have one computer facility or office equipment together. Relationships with other parties are personal relationships as well as responsibilities. The agreement between fellow Notaries or referred to in a Notary civil partnership must reflect the existence of an element of partnership between fellow Notaries.

2. Legal Consequences if There is a Violation of The Principle of Independence by a Notary

Notaries must be aware of the limits of their authority. The notary must comply with the applicable legal provisions regarding how far he can act and what is allowed and what cannot be done. It is contrary to professional behavior if a notary turns out to be domiciled and does not reside in the place of his domicile as a notary. Or put up a board and have an office in his domicile, but his residence in another place. A notary is also prohibited from carrying out his position outside his area of office. If these provisions are violated, the deed in question will lose its authenticity.

Responsibilities of a Notary in Civil Law, the juridical construction used in civil liability for the material truth of the deed made by a notary is the construction of an unlawful act. The juridical construction of this unlawful act has a very broad scope so that it is possible to reach any act as long as it is detrimental to another party and the loss has a causal relationship with any such act. Notary's administrative responsibility, Notary's administrative responsibility is that the notary's actions can be punished for his actions that have violated the elements that are expressly regulated in Law Number 30 of 2004 concerning Notary Positions as amended by Law Number 2 Year 2014.

The legal consequences if the Notary is not independent in carrying out his obligations, it will have an impact on the deed made by or before the Notary.

Notary deed as evidence in order to have perfect evidentiary power, if all the provisions of the procedure or procedures for making the deed are fulfilled.

Conclusion

- a. Application of the principle of independence in carrying out the position of a notary

The form of the independence of a Notary is reflected in carrying out his duties and positions, where the results of the work of the Notary itself (in terms of making an authentic deed, or in carrying out his authority as a Notary), the Notary works correctly and professionally in accordance with the orders of the Act, without there is influence and coercion, from other parties. So that the deed made by the Notary does not cause a dispute for the parties who appear in the future, and there are no lawsuits arising from the making of the deed itself and does not provide benefits for only one party.

- b. Legal consequences if there is a violation of independence by a notary

The legal consequences if the Notary is not independent in carrying out his obligations, it will have an impact on the deed made by or before the Notary. Notary deed as evidence in order to have perfect evidentiary power, if all the provisions of the procedure or procedures for making the deed are fulfilled. A notary deed must be made in a form that has been determined by law, this is one of the characteristics of a notary deed.

Suggestions

- a. Notaries as public officials, to uphold the profession, the Notary is expected to always be independent and independent and not be influenced by the wishes of certain parties in order to achieve the legal goals expected by the community from the idealism, dignity and integrity of a public official, namely a Notary that a public official or a professional Notary must be honest and full of responsibility and always uphold the Notary's code of ethics.
- b. More emphasis on sanctions, according to the author, it is necessary to be firm on the sanctions imposed, so that they are truly binding and obeyed by violators, in order to provide protection and certainty to the public interest, so that violations of the code of ethics can be followed up by giving sanctions to notaries who have been proven to have violated the code of ethics, in order to provide a deterrent effect to the notary, so that the notary does not abuse the trust has been given to him to serve people who need legal services in making authentic deeds in order to provide legal certainty.

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