

Quo Vadis: Notarial Institution's Politics of Law

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Abstract

The Republic of Indonesia as a state of law based on Pancasila and the 1945 Constitution of the Republic of Indonesia guarantees legal certainty, order and protection for every citizen. To guarantee legal certainty, order and protection, it needs authentic written evidence regarding legal actions, agreements, determinations and legal events, which are made before or by an authorized official. Notaries, as public officials who carry out the profession in providing legal services to the public, need to get certainty, order and protection. To guarantee the foregoing, in carrying out his or her position, a notary is obliged to act trustworthy, honest, thorough, independent, impartial, and safeguard the interests of the parties involved in legal actions. In addition, a notary may not make a deed for himself or herself, his or her wife/husband, or a person who has a family relationship with the notary, either by marriage or blood relations in downward and/or upward bloodline without restrictions, also to the sideward line up to the third generation. This means that a notary is required to act independently. On the other hand, a notary is under the supervision of Ministry of Law and Human Rights of Republic of Indonesia, which is part of the executive in the government. Furthermore, notaries are required to register themselves as reporting officials, liaison and administrators in Gathering Reports and Processing Information System (GRIPS) as stated in Government Regulation of the Republic of Indonesia Number 43 on Reporting Parties in Prevention and Eradication of Criminal Act of Money Laundering and Presidential Regulation Number 13 of 2018 on Implementation of the Principle to Recognize the Benefit Owners of Corporations for the Purpose of Prevention and Eradication of Criminal Act of Money Laundering and Criminal Act of Terrorist Funding, whereas in the Law of the Republic of Indonesia Number 8 of 2010 on Prevention and Eradication of Criminal Act of Money Laundering, it does not list notaries as reporting officials, let alone liaison officers and administrators. Therefore, there has been a shift in notaries' authority from being a general official who arranges deeds related to some legal actions to a public official.

Keywords: politics of law, authority, independence, notaries

1. Introduction

Basing on Article 1 point (1) of Law of Republic of Indonesia Number 2 of 2014 on Amendments to Law No. 30 of 2004 on Notary Position, notary is a general official which has the authority to make authentic deeds and other deeds related to this law or other laws.

Law on Notary Position specifies that a notary arranges authentic deeds related to legal actions, agreements and regulations by the law or by request of interested parties, ensures the certain dates of the making of the deeds, and keep the deeds, give the grosse, copies, and citations from deeds, as long as there are not other responsible officials. Furthermore, other authorities of notary are as follows.

- a. To validate signature and dates of a private deed by registering it;
- b. To document private deeds;
- c. To make copies of private deeds;
- d. To ensure the validity of a copy to the original deed;
- e. To hold a seminar concerning deed making;
- f. To arrange deeds related to lands; and
- g. To make official reports of an auction.

Apart from the above authorities, there are other authorities of notary in the laws. To support the authorities, Article 17 point (d) of Law of Republic of Indonesia Number 2 of 2014 on Amendments to Law No. 30 of 2004 on Notary Position (*UUNJP*) determines that notaries are prohibited from holding concurrent positions as state officials. Up to this point, politics of Indonesian notarial law is clear.

Noting the above regulations, it appears that there is a shift in the function of the notary, making notaries as reporting officers, liaison officers and administration officials as announced by the Joint Announcement of the Ministry of Law and Human Rights of the Republic of Indonesia c.q. General Directorate of General Law Administration, Center of Reporting and Analysis of Financial Transactions and the Indonesian Notary Association (INI). Establishing notary to become reporting officers, liaison officers and administration officials is actually contrary to notary's authorities based on the Law on Notary Position. Moreover, this is perceived as degrading notary's dignity and contradicting with the principle of propriety.

Furthermore, in the Law of the Republic of Indonesia No. 8 of 2010 on Prevention and Eradication of Criminal Act of Money Laundering in Chapter IV on Reporting and Supervision of Compliance part one regarding the Reporting Parties, notary is not included in the intended reporting parties. notary is included as a reporting party by the government based on Government Regulation No. 43 of 2015 on Reporting Parties in the Prevention and Eradication of Criminal Act of Money Laundering in conjunction with the Regulation of Head of Center of Reporting and Analysis of Financial Transactions No. 11 of 2016 on Procedures for Submitting Suspicious Financial Transaction Reports for Professionals; in both of these provisions, the notary is included as a reporting party. However, Law of Center of Reporting and Analysis of Financial Transactions does not list notary as a reporting official. A Government Regulation is not supposed to add items other than those specified in a law. In Article 17 section (1) letter (d) of the Law of Notary Position, notaries are prohibited from holding concurrent positions as state officials.

Noting the above regulations, it appears that there is a shift in the function of the notary from concluding actions in private law to being state officials in public law. Therefore, the problem is: where should we bring or quo vadis the current direction of politics of law of the notarial institution in Indonesia?

2. Theoretical Framework

Politics of law is an activity of choosing ways to be used to achieve certain social and legal objectives in society (Satjipto Rahardjo, 2014). Politics of law is the official direction or line that is used as the basis of the steps and the way to make and implement the law in order to achieve the objectives of the nation and state. It can also be said that politics of law is an attempt to make law as a process of achieving the goals of the state (Moh. Mahfud MD, 2006). It can be said that politics of notarial law in Indonesia shifted from time to time.

Politics of notarial law in Indonesia can be divided into three periods, namely the Dutch East Indies, Law No. 30 of 2004 and Law No. 2 of 2014. According to Abdul Ghofur Anshori, one of the salient characteristics of the notarial politics of the Dutch East Indies was the aim of this professional service which was limited and exclusively serving the interests of the European group and limited to a portion of the foreign eastern groups (especially people of Chinese mixed race). From the time the notarial institution entered the Dutch East Indies until the beginning of the Japanese occupation period, almost no indigenous groups utilized the services of a notary. There are several reasons why this could happen, one of the important reasons put forward here is the connection with the policy of legal pluralism that took place in the Dutch East Indies at the time (Abdul Ghofur Anshori, 2013). The ratification of Law No. 30 of 2004 on Notary Position is the most important legal foundation of notarial law after Indonesia's independence period. As a political product, Law on Notary Position does not only contain technical elements in the making of authentic deeds, but also political elements related to the social, economic and political dimensions that underlie the birth of such law. In its development, Law No. 30 of 2004 on Notary Position was changed to Law No. 2 of 2014 on Notary Position, which indicates a shift in the politics of notarial law which is expanding the authority to the realm of public law.

3. Analysis/Discussion

3.1 The Nature of Notary

The legal profession of notary is essential for every country that adheres to a written legal system (civil law system). In the tradition of written law, the existence of the notary profession is highly needed in providing guarantees of legal certainty, order and protection for legal actions in almost every level of societal life, starting from the area of family law to the most important ones in supporting business transactions.

In connection with this matter, in the consideration section of the amended Law of Notary Position letter b, it is stated that to guarantee legal certainty, order and protection, authentic written evidence is needed when dealing with legal acts, agreements, determinations and events which are made before or by the competent official. Furthermore, in letter c, it is

stated that a notary, as a public official who runs the profession in providing legal services to the public, needs to get protection and guarantee in order to achieve legal certainty.

In Indonesia, notary is a position which carries part of the state's authority in civil law, namely providing authentic evidence for the people who need it. In Article 1870 of the Civil Code (*Burgerlijk Wetboek*), Authentic Deed is something authentic that provides a perfect proof of what is contained therein for the parties concerned and their heirs or for those who get the rights from them (Taufik, 2019).

Furthermore, Taufik stated that as an official appointed by the state, the role of a notary is vital in providing legal protection and legal certainty so that disputes would not occur in society that could cause chaos in the social system that has been built in the societal system. This is where the important role of the notary in creating social cohesion and providing human rights protection for everyone takes place.

Legal certainty for the sake of the realization of legal protection of the parties will be difficult to achieve when a notary has additional duties or side jobs. For instance, this can be seen in a situation where in order to obtain a Ministerial Decree regarding a ratification of a company's legal entity as referred to in Article 7 section (4), the founders jointly submit applications through the information technology services of the legal entity administrative system electronically to the Minister and can also be authorized to a notary. In addition, according to the provisions of the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia No. 9 of 2013 on Application of Fiduciary Assignment Electronically, an applicant can be a recipient of fiduciary, holder of power of attorney or representative. Registration of fiduciary assignment electronically is a registration of fiduciary assignment that is done by an applicant by filling out an application electronically. In reality, in submitting an application electronically, only a notary can do such thing because only a notary has a user ID and password to enter the platform of application.

According to Nico Indra Sakti, additional or side tasks have an impact and raise concern for a notary's main function in ensuring legal certainty in relation to authenticity attachment to legal events and relations that occur in the society; a notary would tend to be less focused, or even less in accuracy. Today's performance indicator of notary can be identified in advance: how much authenticity degradation a notary produces, whereas in the past, according to Nico, the indicator was how many deeds were canceled by the court.

Viewed from the perspective of politics of law, notarial institution in Indonesia shows inconsistency. This is based on the fact that laws and regulations have turned notary into a "Profession" in Article 64 section (1) letter d of Capital Market Law in conjunction with Article 1 number 5 in conjunction with Article 4 in conjunction with Article 82 of Law of Notary Position.

In connection with this inconsistency, a senior notary who is also the Chairperson of Regional Supervisory Board of Notaries in Bogor City, Agus Surachman, stated that this is a "disharmony phenomenon" of regulations within the scope of the notarial authority. It is said that Article 1 of Law of Notary Position is an elaboration of Article 1868 of BW, stating that a notary is an official who makes authentic deeds. However, in Article 1 section 1 of Government Regulation Number 37 of 1998 on Land Deeds Officer Regulations is contrary to Law of Notary Position in Article 15 section 2 letter f, namely notary has the authority to make a deed relating to land or to make a deed of auction report (Agus Surachman, 2019).

He then also added that Article 18 section 3 letter b of Presidential Regulation Number 13 of 2018 does not explicitly mention "Notary"; it is merely an interpretation. If a notary knows that there is an indication of benefit owner of corporation related to an alleged money-laundering crime or a connection with terrorism, the notary must surely report it to the authorities, however, the notary has no authority to investigate the client or prospective client himself or herself.

Meanwhile, in the event that notary is given the power to register CV, firm and civil partnership by making deeds, this "additional task" is certainly in conflict with Article 1 of Law of Notary Position which states that the authority of the notary is only to make an authentic deed; this matter does not have actually to be mentioned in Regulation of Minister of Law and Human Rights because the task can be conducted automatically to simplify and facilitate the registration process.

As for the notary, who is a public officer, he acts as a witness of the life and commitments of the persons, natural or legal. He must make sure that each signatory is able to grasp the true dimensions. This testimony from an impartial third party cannot be disputed, except by a very rigorous questioning. In this, the act he receives is authentic because a third party with special powers testifies to it. This strength also lies in the nature of the advice given by notary. To avoid subsequent disputes, the notary is obliged to implement a balanced solution; he is therefore a committed witness. He ensures the preservation of the proof of the person's commitments because a right that cannot be proved is a right that does not exist. To ensure the natural person's legal security and the protection of his rights, the notary authenticates small and large acts of life. This mission of public service entrusted to the notaries by the State, thus making them "delegates of public office", is far from innocuous (International Congress of Notaries, 29th Edition, Theme II on "Notary and the Natural Person").

3.2 To Conclude Legal Acts

Quo vadis notarial institution? On one hand, notarial institution needs to provide certainty and order in the traffic of private law, but on the other hand notaries without control can lead to unprofessionalism, so they cannot provide legal certainty, order and protection. The existence of notaries guarantees legal certainty. To ensure legal certainty, notaries need not be involved too much in public law; they are supposed to concentrate in the realm of private law, because many tasks await there.

The principle of legal certainty is the principle in the state of law that prioritizes the basis of statutory regulations, propriety and justice that must be obeyed by notaries in carrying out their duties and positions relating to all their actions in making authentic deeds. The principle of legal certainty brings the idea that an authentic deed that has been made must provide legal interpretation/certainty in accordance with the rights and obligations of the parties. The principle of legal certainty gives the right to the parties concerned to know exactly what is desired by them, as stated in the authentic deed. This element plays a role, for example in the proper authorization and it may not evoke various interpretations; what is aimed should be visible, including obligations imposed (M. Luthfan Hadi Darus, 2016).

Based on Article 16 section 1 of the amended Law of Notary Position, it is stated that in carrying out his work, a notary is obliged to act in a trustful, honest, thorough, independent, impartial manner, and safeguard the interests of the parties involved in legal actions, so that the deed made provides legal certainty. If a notary is not honest and thorough in carrying out his work, the notary's deed cannot provide legal certainty to the parties. Notaries who violate the matter will not be able to protect interests of parties involved in legal actions. Instead of legal certainty, parties or one of the parties would lose their rights (Habib Adji, 2011).

The main values of Latin Notaries (civil law) are impartiality and independence. Impartiality has a general definition where notaries explain to the parties what their rights, obligations and risks of legal actions are, without identifying themselves as part of either party. Independence means that notaries do not obey orders from anyone but are independent to determine their attitudes, except those determined by law. Notaries from countries which adopt the common law system check the veracity of the signatures of the people signing to ascertain whether the writing really originates from the signatory, while a lawyer or solicitor in the common law system will always defend his client and side with the client (Herlien Budiono, 2019).

Notaries, according to Nico, actually have conducted some of the tasks of Government's in private law, meaning that they have performed the government-assistance function (*medebewind*), "based on Law No. 25 of 2009 on Public Services in the sector of Administration, not in the sector of Public Services. The state acts to carry out the purpose of living in a state, to protect the civil rights of its citizens, namely individual rights and material rights, to administer Public Services in the sector of Administration as well as Public Services and Public Goods," (Nico Indra Sakti, 2019).

Related to this, M. A. Loth as quoted by Herlien Budiono stated that private law arises and functions in the form of regulating and facilitating subjects to conduct actions through the making of laws. Rules or regulations have either administering or compelling nature. Compelling regulations have the nature in which parties are not allowed or impossible to deviate from the laws and regulations, while the administering regulations have the nature in which parties have a chance to deviate from them. Compelling regulations possess imperative or obligatory sense. Administering regulations are left to the autonomy of parties; there is a permissive sense to it. In general, provisions of law for public interest or decency will be coercive, so that legal actions or agreements that do not follow the law's orders do not have legal force (Herlien Budiono, 2019).

The most important thing said by Herlien Budiono is notarial deeds have the power of authentication that is physical, formal and material, so that it is the strongest tool of evidence. The strength of authentication of notarial deeds' that guarantee legal certainty will face the challenges of digitalization related to the use of supercomputers in the era of industrial revolution 4.0.

The challenge of digitizing deeds that must be faced is that the strength of authentication inherent in notarial deeds are not diminished, but on the contrary, should be getting stronger. Relevant to the main task of notaries, which is concluding legal acts in private law, Yualita Widyadhari, Chairperson of the Indonesian Notary Association, stated that the strengthening of duties and functions of notaries can be started from Indonesia. She said this in the Panel Discussion Part I, in the 29th UINL International Congress, at Jakarta Convention Center (JCC), on 30 November 2019.

In connection with this matter, Cahyo Rahadian Muzhar, General Director of General Law Administration, stated that the obligation to report suspected criminal act of money laundering as contained in Government Regulation No. 43 of 2015 for a number of professions including notaries in the field of finance and law is a vulnerable point that can be misused by money launderers. Notaries, as public officials, are vulnerable to being used for money laundering schemes because of the provisions of confidentiality given under the law such as the confidentiality of the relationship between the notary and the

client. Results of researches on typology and money laundering cases in the world show that certain professions including notaries can be used as gatekeepers by money launderers to obscure the origins of funds that actually stem from criminal offenses (Cahyo Rahadian Muzhar, 2019).

Maferdy Yulius, a notary in Jakarta, stated that in the government regulation is determined that some parties must report to the Center of Reporting and Analysis of Suspicious Transactions. The first reporting parties include the category of financial service providers, and the second reporting parties include providers of goods and/or other services. In addition, a number of other parties included in the reporting parties are advocates, notaries, land deed officials, accountants, public accountants and financial planners. "Reporting parties as mentioned must apply the principle of recognizing service users" as affirmed in Article 4 of Government Regulation No. 43 of 2015 (Maferdy Yulius, 2019). All of this matter is inseparable from the politics of law that is currently developing, where the government desires to obtain or maximize tax revenues and so on, by among others involving all elements to be active. However, there is a rather strange problem when notaries have to report their own client. It is even feared that one day it is also necessary to report on one's own neighbors.

4. Conclusion

Politics of notarial law in Indonesia has caused a shift of notary's function from a general official to public official. Also, it can be concluded that there has been a tendency that politics of law towards notarial institution is experiencing an inconsistency and a disharmony of laws and regulations related to notaries. Another tendency is a shift of notaries' duties and functions, where they are supposed to essentially conclude legal actions of parties – especially those who appear in front of the notaries – in the private law, but notaries are also required to become public servants in the realm of administrative law. This shift proves that politics of notarial law is in conflict with the meaning of politics of law itself. Such meaning is supposed to show clear directions and purposes of notaries.

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