

THE ROLE OF NOTARIES IN THE ACTIVITY AS WITNESS IN THE COURT ARTICLE

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ABSTRACT

As one of its role in the tribunal trial, notaries have denial right as the professional public officials by an obligation of keeping their oath of office to make the content of deed the secret. The legal issue in this study relates, among others, to the governance of notaries' denial right in the term of trial against the notaries in relation to UUJN and Notaries Ethical Code, and its legal consequence when the notaries use their denial right during the trial. This study was a normative law research. The approach used in this study was case approach. Data analysis was carried out using qualitative analysis. The result of research showed that (1) the governance of denial right against notarial function is included into the Notaries' function oat instructing to make the content of deed the secret, as governed in Articles 4 and 16 letter F of Law Number 2 of 2014 about the Amendment to Law Number 30 of 2004 and it was also governed in Article 322 clause (1) of KUHP (Penal Code); (2) legal consequences of a notary who uses its denial right before the court were firstly that the notary should be released from an obligation of being a witness or giving testimony before the court, when it uses denial right, and secondly the notary should be released from any interested parties' lawsuit, when the denial right is in fact declined by the judge or according to the law provision it is obliged to give testimony before the court.

Keywords: Notarial Denial Right, Examination

INTRODUCTION

Authentic deed is expected to minimize the dispute in legal traffic and legal relation between parties. The position of notaries is very important as one of public officials authorized to prepare an authentic deed.

The characteristics of notarial function as a public official undertaking some of state's public function, particularly in legal area.

The presence of notary as the witness, if related to its function existence in legal area entitled to support the smoothness of a legal process, including trialing process, presumably is not a problem. In other words, it is reasonable that the notaries serve as witness in a trialing process. On the other hand, notaries in undertaking their function as a public official, in addition to being related to a regulation of function, is also related to the oath of office said during the appointment of notaries in which notaries is obliged to make the content of deed and the information they got confidential as governed in Article 4 clause (2) of UUJN stating that "I would make the content of deed and the information obtained in my function implementation confidential." (entner, 1982)

Then, Article 16 clause (1) letter f of UUJN explains that in undertaking their function, the notaries are obliged to make anything relating to the Deed they prepare and any information acquired to prepare the Deed corresponding to the oath of office, unless the law determines otherwise. Furthermore, Article 54 clause (1) of UUJN-P explains that Notaries can give, reveal, or inform the content of Deed, Deed Grosse, Deed Copy or Deed Citation, to those interested in the Deed, beneficiaries, or the authorized one, unless the law determines otherwise. (Riva et al., 2001)

Since the enactment of UUJN *jo.* UUJN-P, Distric Court is no longer authorized to supervise notaries, while the supervision is conducted by Minister of Law and Human Rights, as mentioned in the provision of Article 67 clause (2) of UUJN, stating that in conducting supervision as intended in clause (1) the Minister establishes Chamber of Supervisors. Supervision over notaries is conducted by the Minister by means of establishing Chamber of Supervisors consisting of Central Chamber of Supervisors (MPP), Regional Chamber of Supervisors, and Local Chamber of supervisors (thereafter called MPD).(Ruotsalainen & Manning, 2007)

Article 67 clause (3) of UUJN-P states that: Chamber of Supervisors as mentioned in clause (2) comprises 9 (nine) persons consisting of 3 (three) persons from government element; 3 (three) from Notary Organization; and 3 (three) experts or academicians.

In the presence of supervising institution as mentioned in UUJN, ideally the implementation of notary position can be done professionally, honestly, trustworthily and independently. Thus, it finally can cater on and help the people wholeheartedly and support a just law certainty.

Habib Adjie said that notaries expect to get proportional protection in undertaking their functional duties as a notary; there is at least just, transparent and scientific examination when Local Chamber of supervisors (MPD) examines the notaries on the request of police, attorney office, and court.

Denial right is a right to decline to speak or to give any information, as the Notary's legal immunity, related to the deed (or information related to the deed) made before and/or by Notary as the witness in prosecution and court.

As a legal apparatus, on the one hand the notary has denial right as a professional public official to keep his/her oath of office not to inform the content of deed, on the other hand notary should stand on the state's interest referring to the public interest in order to complete the legal process in the court, thereby resulting a just, beneficial and certain verdict as governed in the last sentence of Article 16 clause (1) letter f of UUJN-P unless the law determines otherwise and the last sentence of Article 54 clause (1) of UUJN-P unless the law determines otherwise. The article implies that a notary seems to be able to inform the content of deed to those interested in it such as police officers as long as the legislations support it.

An example of case in which Police calls notaries without MPD's approval is experienced by a Notary in South Jakarta. The notary refused to fulfill the call and sent a letter to the Police to ask the MPD of South Jakarta's approval first. Then, because the call was declined, Police sent a letter to ask the MPD of South Jakarta for approval, but MPD of South Jakarta did not grant it. Then the police sent once again the second call, with a threat stating that if the Notary does not come to the Police Office, the police will conduct an arrest based on the provision of Law Number 8 of 1981 about Criminal Procedural Law/KUHAP, Article 7 clause (1) of letter g, Article 11, Article 112 clause (1) and clause (2), Article 113 of KUHAP and Article 1909 KUHPerdata and Article 16 clause (1) letter f of Law Number 2 of 2002 about Police, reading:

In the attempt of undertaking the duty as mentioned in Articles 13 and 14 in the criminal process, Republic of Indonesia's State Police is authorized to call a person to be heard and examined as the accused or the witness. In the term of the police's call over Notary as the witness, Notary should be present. The use of notary's denial right is conducted when the notary is asked for information related to the content of deed prepared.

THEORETICAL STUDY

Article 1 number 1 of Law Number 30 of 2004 about notaries' function mentioning that "Notary is a public official authorized to prepare authentic deed and with other authorities as mentioned in this law". Furthermore, the explanation of UUJN states that notary is a public official authorized to prepare authentic deed as long as the preparation of authentic deed is not specific to other officials. (Vastrick, 2015)

An important element of the definition of notary is "notary as a public official". It means that the notary is provided and equipped with public authority or power to reach the public (*openbaar gezag*). As a public official, although notary is not a civil servant receiving salary from State/Government, notary is hired by State/Government and works to cater on public interest and pensioned by State/Government without getting pension fund from the government.

Notary as the public official is hired legally by the authorized one for every citizen's interest, authorized to give authenticity to its writings about actions, approvals, and stipulations of those present before them.

Notary in undertaking its duty and function is governed in Article 17 of Notary Law Number 30 of 2004 Jo Law Number 2 of 2014 about Notarial Function, i.e. concerning the prohibition from being a notary. If a notary breaks the prohibition, it will be imposed with sanction as governed in Article 85 of Law Number 30 of 2004 Jo Law Number 2 of 2014 about Notarial Function. Article 17 of Law Number 30 of 2004 jo Law Number 2 of 2014 about Notarial Function, prohibiting the Notaries from: (1) undertaking some function beyond their functional jurisdiction; 2) leaving their functional jurisdiction for more than 7 (seven) successive workdays without legitimate reason; 3) serving as civil servant concurrently; 4) serving as state official concurrently; 5) serving as advocate concurrently; 6) serving as a director or an employee of state-, local, or private-owned enterprise concurrently; 7) serving as Land Titles Registrar and/or 2nd class-Auction Official concurrently beyond Notarial position; 8) serving as substitute Notary; or 9) doing other job in contradiction to religion, moral, or compliance norm that can affect the Notarial Function's respect and dignity. (Arrudada, 2004)

Article 17 of Law Number 30 2004 Jo Law Number 2 of 2014 about notarial function mentions that notary is not allowed to leave its position seat for more than 7 successive workdays; it can be associated with Article 19 clause (2) of UUJN stating that notary is not authorized to leave its functional duty regularly beyond its position area/jurisdiction. If it occurs, the notary will be imposed with sanction based on the provision of Articles 1868 and 1869 of Civil Code, mentioning that when the corresponding notary has no authority related to the place where the deed is prepared, the deed prepared is not treated as an authentic deed but has authenticity power as underhand deed, if it is signed by the parties. (Hoffer & Merwick, 2007)

Notarial duty and authority in Article 1 of Law Number 30 of 2004 Jo Law Number 2 of 2014 about Notarial Function states firmly that notary is the only public official authorized to prepare authentic deed, unless the law determine otherwise. Notarial duty and authority, viewed from the Notarial Function Law, includes only preparing deed, legalizing underhand deed, and preparing deed grosse, and being entitled to issue deed copy or derivation to the one authorized to prepare it. Meanwhile in practice, notarial duty and function are broader than what existing and governed in Notarial Function Law. In practice, notary can be legal finding expert and legal advisor.

Notarial function is to control legal relation between parties in written form and certain format, thereby constituting an authentic deed; the notary can prepare a strong document in a legal process. Considering the provision of Article 15 clause (1) of Law Number 30 of 2004 about notarial function, the notarial authority includes preparing authentic deed about all actions (deeds), agreement, and stipulation required by legislation and/or those interested to be stated in the authentic deed, ensuring the certainty of deed preparation date, storing the deed, providing deed grosse, copy, and citation, all of which as long as the deed preparation is not assigned and excluded from other officials or persons as specified by the law (Agustin, 2016) (Nicholson, 1987)

In addition to its authority of preparing authentic deed in the sense of “*verlijden*” (organizing, reading, and signing), but also based on Article 16 letter d of Law Number 30 of 2004 Jo Law Number 2 of 2014 about Notarial Function, the notary obligatorily prepares it, unless there is an underlying reason to decline its preparation.

Notarial responsibility itself, viewed from Article 16 letter d of Law Number 30 of 2004 Jo Law Number 2 of 2014 about Notarial Function is closely related to notarial duty and job. Thus, in addition to preparing authentic deed, notary is also assigned and responsible for legalizing and registering (legalization and *waarmerken*) letters / deeds prepared underhand by parties.

In relation to the authority the notary should have, the notary is allowed only to undertake its function in the area (jurisdiction) specified by UUJN and in the jurisdiction the notary has authority. When the provision is ignored, the deed prepared by notary becomes illegal. Notary has four authorities: 1) Notary should be authorized as long as it pertains to the deed prepared; 2) Notary should be authorized as long as it pertains to persons, for whose interest the deed is prepared; 3) notary should be authorized as long as it pertains to place where the deed is prepared; 4) notary should be authorized as long as it pertains to the deed preparation time.

In addition to some notarial authorities as included in Article 15 clause (1) of Law Number 30 of 2004 about Notarial Function, Article 15 clause (2) of Law Number 30 of 2004 about Notarial Function explains that notary is authorized: a) to ratify signature and to establish the certainty of date for underhand letter by enlisting in a specific log; this explanation or provision is the legalization of underhand deed prepared by individual or parties on a paper with adequate stamp by means of registering it in specific log provided by the notary; b) recording underhand letters by registering it in a specific log; c) making copy of the original underhand letters in the form of copy containing the elaboration as written and represented in the corresponding letter; d) legalizing the compatibility of copy to the original letter; e) giving legal education concerning deed preparation; f) preparing deed related to land affairs and preparing auction treatise deed.

Considering the notarial authority aforementioned, it can be seen that one of notarial authorities is to legalize or in legal language to ratify the underhand deed. The underhand deed itself has been very prevalent in community life, and many of them ask notarial service for legalizing or ratifying this underhand deed aiming to increase the authenticity power over the undersign deed.

Legalization and *waarmeking* are governed specifically in Article 15 clause (2) letters a and b of Law Number 30 of 2004 jo Law Number 2 of 2004 about Notarial Function, while the Civil Code also governs this legalization as included in Article 1874 of Civil Code stating that: “the ones considered as underhand writings are deeds signed underhand, letters, registers, domestic affair letters, and others prepared without a public official’s regulation. The signing of an underhand letter is equated with thumbprint, to which a dated statement of a notary or another officer designated by the law is appended in which in fact it knows the one appending thumbprint or that the one has been introduced to it, that the content of deed has been explained to the person and that thereafter the thumbprint is appended before a public officer. The officer should register the writing in a log with the law and further rules can be developed about the intended statement and registration.

METHOD

This study was a qualitative research in the form of normative law, a process of finding rule of law, legal principles and doctrines to address the legal issues encountered. The foundation of normative research is the norm obscurity, in which the regulation about the notarial denial right has been unclear or obscure thereby can result in different interpretation.

The approach used in this study was statute approach conducted by studying all statutes or law and regulation pertaining to legal issue studied. In statute approach, the author should understand the hierarchy and principle of legislation.

The law material used in this study was primary law material, the authoritative one consisting of Republic of Indonesia’s 1945 Constitution (UUD 1945), Civil Code (*KUH Perdata*), and Criminal Procedural Law (KUHP), Law Number 30 of 2004 about Notarial Function and Law Number 2 of 2014 about the Amendment to Law Number 30 of 2004 about Notarial Function. In addition, secondary law material was also used, the one giving explanation and clue about primary law material, consisting of various literatures/books, result of seminar, workshop, symposium and research, journal, article related to the problem of study.

Technique of collecting law material used in this study was documentation, by means of learning, studying, and investigating the law materials related to this study. The law materials collected and systematized was then analyzed qualitatively.

RESULT AND DISCUSSION

1. The Implementation of Notarial Denial Right in the case of Examination conducted over the Notary as Witness corresponding to Notarial Function Law and Notarial Ethical Code

Notary as Public Official is protected by Law in the attempt giving testimony in the court. Law protection given includes Denial Right, the right to decline to give testimony in the court. The declination is not limited to anything included the deed prepared, but includes all facts related to the deed. It is not only limited to the right, but is an obligation to keep silent. In practice, only few Notaries can use this Denial Right, determining the legitimacy of Notary’s reason to be released from the obligation to give testimony. The release from obligation to keep the content of deed confidential is not an excuse for them to use Denial Right. It is because this Denial Right is given for public interest as well, thereby it cannot be overridden.

A notary perceiving that there is a higher interest that can remove its denial right, the denial right is submitted to the notary itself to prefer giving or not giving testimony. Eventually, the judge will later decide whether or not a notary necessarily gives testimony

in case settlement process. There is an exclusion in which the notary obligatorily gives testimony because Denial Right cannot be used when it is in contradiction to other laws.

This Law Protection for notary aims to implement the notary's right, authority, and obligation consistently with those included in UUJN and ethical code based on the enacted stipulation, law, moral, and professional ethics, for the sake of ensuring law protection and law certainty to Notarial profession and public interest.

Law protection for Notary has been given normatively by the enacted legislation including the establishment of Chamber of supervisors as mandated in Article 67 of UUJN by Minister, consisting of 3 (three) elements: government, notary organization, and academican. The supervision involves the implementation of notarial function. Regarding the procedure of taking deed minutes and calling notary, Article 66 of UUJN states that for trialing process interest, investigator, public prosecutor or judge with MPD or MPW's approval are authorized to call notary in the examination related to the deed prepared and to take the copy of deed minutes and letters attached to the Deed Minutes. Notarial Denial Right as governed in: Article 170 of KUHAP; Article 19019 letter 3 of KUHPdata; Article 146 clause (1) number 3 of HIR; Article 277 of HIR; Article 4 of UUHN and Article 16 clause (1) letter e of UUJN. Memorandum of Understanding between Republic of Indonesia's Police and Indonesian Notary Association, Number 01/MOU/PP-INI/V/2006 about Professionalism Building and Improvement in Law Enforcement Field; Central Chamber of Supervisors' Decree Number C-MPPN.03.10-15 about the Approval or Declination against the Notary Calling by investigator, public prosecutor or judge.

Notarial professional organization or INI is considered as knowing and understanding the condition and practice of notarial profession, so that the infringement of profession committed by notary should be examined first by Chamber of Supervisors before a decision is taken whether the corresponding infringement belongs to personal or professional infringement. Investigator and Chamber of Supervisors should be in synergy in giving law protection to notarial profession.

If in fact the notary as witness or accused or prosecuted or in the Notarial Chamber of Supervisors, reveals the secret and gives an information the ones that should be kept confidential, while the law does not instruct it, the complaint can be filed by the party feeling to experience the loss to the authorized one in order to take action on it. Such notary's action can be treated with Article 322 clause (1) and (2) of KUHAP, revealing the secret while the notary is obliged to keep it. In the position as a witness in civil case, the notary can ask to be released from its obligation to give testimony because a position (function) according to the law is obliged to keep it (Article 1909 clause (3) BW).

Viewed from theoretical aspect and judicature process, the implementation of notary's function essentially can be viewed from fundamental dimension, in which notary should undertake its function corresponding to the law, ethical code, caution, precision, integrity, and trustworthiness; when these aspects are ignored in deed preparation, the notary will assume the consequence of it. In undertaking its function, a notary is likely called to be witness in relation to the deed it has prepared. In this case, the notary faces a condition not to give information based on the oath of office and/or to give testimony about what it has seen and heard only, at both investigation and trial levels.

Denial right is governed in Article 4 clause (2) of UUJN about the Notarial Oath of Office stating that I will keep the confidentiality of content deed and information acquired in the implementation of my position. It means that the notary obligatorily keeps confidential anything pertaining to the deed prepared, value, and preparation of deed and deed contention. In addition, Article 16 clause (1) letter e is explained that in undertaking its position, Notary obligatorily keeps confidential anything related to the deed it has prepared and any information acquired in order to prepare the deed corresponding to the oath of office, unless the law determines otherwise. Then article 54 of UUJN explains that the notary can provide, reveal, or inform deed content, deed process, deed copy or citation, to those interested directly in the deed, beneficiaries, or the authorized ones, unless the law determines otherwise.

Considering this, it can be explained that denial right can be used to be a right to withdraw from being the witness in the trial and/or from speaking before the court related to the problem of deed prepared by the notary. Denial right to give testimony, if related to the functional secret, is based on Article 170 clause (1) KUHAP and Article 1909 clause (2) of KUHPdata. Therefore, if this functional secret is broken, the notary will be imposed with sanction as included in Article 322 clause (1) of KUHP.

Article 4 clause (2) *jo* Article 6 clause (1) letter e *jo* Article 54 of UUJN governs the functional secret, a notary's obligation to keep the confidentiality of a deed's content and information acquired in the implementation of function. In undertaking such obligation, the last sentence of Article 16 clause (1) letter e, unless the law determines otherwise, and the last sentence of Article 54 of UUJN, unless the law determines otherwise, has nullified the notary's denial right.

A notary with Pancasila spirit should keep holding tightly on the essential feeling of justice, not be affected by money quantity and not merely create formal evidence to pursue the law certainty but ignore the feeling of justice. The implementation of notarial duty by taking caution principles and legislation into account does not automatically release it from dispute or conflict occurring later. Therefore, when a dispute or conflict occurs, notary can take some attempt to protect itself.

2. Legal consequence in the case of Notary uses its Denial Right during the examination to be witness

In judicature process, notary serves as witness and expert witness. If the notary serves as expert witness, it must not break the functional secret because the information is limited to knowledge and its comprehensive and in-depth expertise in law and notarial sciences. However, when notary serves as a witness, it will give information pertaining to the substance of deed, when there is an

exceptional stipulation requiring a notary to give testimony. Witness' information is given in its capacity as the one experiencing or finding out the actual incidence or fact of an event being examined.

In civil court process, what is searched for is formal truth, the truth based on only any thing revealed by parties in the court as the evidence, the witness' information is not primary evidence. The thing prioritized in civil court is written evidence, particularly in the form of authentic deed. Actually calling notary as a witness in civil case is not too necessary, as the deed is enough to be evidence. Witness' information is needed when some parties do not recognize the written evidence, so that the clarification about the existence of written evidence is needed. In civil court process, the authentication with testimony can be conducted when there is an early authentication with written evidence.

In contrast, what is searched for in the criminal case is material truth; thus notary is obligatorily present to give testimony about what it has seen, known, and heard about an event so that the case examination can be conducted transparently. Considering the provision governed in Article 66 clause (1) of UUJN stating that for a judicature process purpose, investigator, public prosecutor, or judge with MPD's approval are authorized to call the notary to be present in the examination related to the deed it has prepared. Judge serves as the one stipulating the law for trialing process on the one hand; while on the other hand, the scope of judge's notarial knowledge is also limited, so that the notary's information is needed regarding the validity, authenticity, and truth of a deed prepared by corresponding notary.

Considering the elaboration above, it can be explained that when a notary becomes a witness in the court, it remains to have denial right. However, if the notary serves as the accused in the court, the denial right is automatically nullified. A noble profession like notary requires professionalism and precision. A profession's nobility can remain to be intact and well-maintained when the members of profession give contribution and act carefully.

In undertaking its function, a notary is likely called to be witness in relation to the deed it has prepared. In this case, the notary faces a condition not to give information based on the oath of office and/or to give testimony about what it has seen and heard only, at both investigation and trial levels. Closely observed, Article 4 clause (2) Jo. Article 16 clause (1) letter (e) Jo Article 54 of UUJN of 2004, connected to Article 66 of UUJN of 2004 Jo Article 8, Article 9, Article 14, and Article 15 of Republic of Indonesia Minister of Law and Human Rights' Regulation Number: M. 03.HT.03.10 of 2007 about Deed Minutes Taking and Calling.

Indonesian Notary Association is one of professional organizations existing in Indonesia. In undertaking its function, the notary should comply with all moral norms that has been living and developing within society. In addition to the presence of professional responsibility and ethics, integrity and good moral are the important precondition a notary should have. It is because professional responsibility and ethics are closely related to integrity and moral.

To undertake its duty well, as a public servant, a professional should undertake its function by synchronizing its expertise and upholding professional ethical code. The profession undertaken building on professionalism only can make the one entrapped into a condition to be "skilled laborer (*tukang*)" only thereby cannot control its expertise and doing anything it wants volitionally, and while ethics is implemented without professionalism can paralyze the wing.

Notary's oath of office is the foundation of Notarial Ethical Code enactment that should be upheld by notary in the attempt of undertaking its function. Notarial ethics is a part of community ethics, and professional ethics may not be in contradiction with the community ethics prevailing commonly because notary is a subsystem of entire community. Connected to the problem likely arising in the practice, the notary should take stance and decide itself when it will use denial right as the witness and when it will ignore the denial right by means of giving actual testimony. Selecting and considering which action is the best are the reflection and the implementation of community ethics, what is considered as good or bad by the community. For that reason, in implementing professional ethics, there is a requirement to follow science development and technology advance.

In this case, there is an element contributing to the selection process: internal element of notary based on its good will to prefer keeping the confidentiality or giving actual information for the sake of justice, and element inside the client equipped with good will as well, corresponding to the ethical norm living within community. Such notary's duty is not to be heard, but to contribute to find the genuine truth or material truth as required in the criminal law. Therefore, in deciding whether or not it will give testimony, a notary should be based on an accountable for consideration in order to avoid unexpected things.

CONCLUSION

1. The regulation of denial right over notarial function is included in the oath of Notary instructing to keep the content of deed confidential, governed in Article 4 and Article 16 letter f of Law Number 2 of 2014 about the Amendment to Law Number 30 of 2004, and in Article 322 clause (1) of KUHP. Both articles are not enacted when other Laws instruct to reveal the secret and to give such information/statement to the one requesting.
2. The legal consequences of a notary using its silent right before the law are *firstly* the notary should be released from the obligation to be witness or to give testimony before the court, when it uses denial right. It is because constitutionally, the witness given, in its knowledge, is considered as in contradiction to the oath of office and breaking the functional secret; *secondly* the notary should be released from any lawsuit by the interested parties when the denial right is in fact declined by the judge/court or according to the provision of law it is obliged to give testimony before the court.

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