



Notary Legal Protection Related to Notary Summons in the Notary Audit Process Post the Decision of the Constitutional Court Number 16/Pu-Xviii/2020

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Abstract. This study aims to ensure every citizen's certainty, order, and legal protection. In providing legal certainty, order, and legal protection, authentic written evidence is needed regarding acts, agreements, stipulations, and legal events made before or by an authorized official. One of the authorized officials referred to is a Notary. The problem in this research is the legal protection of a notary related to the summons of a notary in examining a notary after the Constitutional Court Decision Number 16/PU-XVIII/2020. The research method uses empirical juridical research, with a law approach, case approach, and historical approach, and this concept approach refers to legal principles. The results of this study indicate that (1) the position of the Notary Honorary Council regarding the summons of a notary in the examination process of the Police investigation as a coaching agency aims to protect the good name of the Notary from investigators, public prosecutors, and judges against taking minutes of deed and summoning a notary means that investigators, public prosecutors, and judges cannot directly summon a Notary for the investigation and judicial process. (2) Legal protection of a notary related to the summons of a notary in the process of notarizing a notary after the Constitutional Court Decision Number 16/PU-XVIII/2020 against a criminal act suspected of a person, if it was committed or occurred before a notary. In Article 66 of Law Number 2 of 2014 concerning the Position of a Notary, to take a photocopy of the minutes and summons of a Notary with the approval of the Notary Honorary Council is only limited to examinations related to the Notary Deed or Protocol that is in the Notary's custody, while for other criminal cases not related to the duties and authorities of a Notary, then the criminal procedure law as regulated in the Criminal Procedure Code is still applied.

Keywords: Notary Legal Protection · Notary Summon · Notary Examination Process · Post Constitutional Court Decision

1 Introduction

As a legal state based on Pancasila and the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), Indonesia guarantees certainty, order, and legal protection for every

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citizen. In ensuring legal certainty, order, and legal protection, it is necessary to have authentic written evidence regarding acts, agreements, stipulations, and legal events made before or by an authorized official. One of the authorized officials referred to is a Notary.

A notary is a public official who is only authorized to make an authentic deed regarding all actions, agreements, and stipulations required by general regulation or by an interested party who is required to be stated in an authentic deed, guarantees the certainty of the date, keeps the deed and provides a copy and the quotations, all of which are as long as the making of the deed by a general regulation is not assigned or excluded to other people's officials, this is contained in Article 1 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of a Notary from now on in this study is called the Notary Position Act (UUJN).

The implementation of the duties of a Notary, namely making evidence desired by the parties for a specific legal action, and the evidence is at the level of Civil Law. The Notary makes a deed because of a request from the parties who appear. Without a request from the parties, the Notary will not make any deed. The Notary also makes the deed in question based on evidence, information, or statements of the parties stated, explained, or shown to or before the Notary. Then the Notary framed it outwardly, formally, and materially in the form of a Notary deed while still based on the rule of law or procedures or procedures for making a deed and legal rules relating to the legal action in question as outlined in the deed [1].

Article 1868 of the Civil Code (*KUHPerdata*) reads, "Authentic deed is a deed in the form determined by law, made by or before public officials who have power for that at the place where the deed was made." Some elements that make a legal deed in the eyes of the law are; First, the deed was created and inaugurated (*verleden*) in a form according to law. Second, the deed was made by or before a public official. Third, the deed was made by or before an official authorized to make it at the place where the deed was made. The deed must be made under the authority of the official who made it [2].

Prior to issuing Article 66 of the UUJN, the government issued Law Number 30 of 2004 concerning the Position of a Notary. In that provision, Article 66 paragraph 1 became a problem, so a judicial review lawsuit emerged to the Constitutional Court. On 28 May 2013, the Constitutional Court's decision Number 49/PUUX/2012 was issued, which no longer applies Article 66 paragraph (1) of Law Number 30 of 2004 concerning the position of a Notary. And resulting in the summons of a Notary does not require an answer or approval from the Regional Supervisory Council. The Constitutional Court's decision Number 49/PUU-X/2012 brings juridical consequences: investigators can immediately summon a Notary to come to the investigation process.

After the decision of the Constitutional Court Decision Number 16/PUU-VIII/2020, it turned out that there were several cases involving a notary in police investigations, such as a criminal case involving a notary in Southeast Sulawesi, which was only based on the allegation that a Notary who served in Muna Regency was reported to the police. The complainant was annoyed with the action that was alleged to have changed the company's deed without involving himself as the President Director as well as the largest shareholder according to the decision of the meeting of PT. Graha Raditya Realtor in

2012 [3]. The reporter's action based on the allegation becomes interesting to study in terms of the role of the notary honorary council.

2 Research Method

According to Peter Mahmud Marzuki, [4] in relation to this research using empirical juridical research methods, with a statute approach, this case approach is carried out by examining cases related to the issues at hand that has become court decisions that have been made and have permanent legal force (*inckrah van gevisde*). The historical approach is done by examining the background of what is studied and the development of arrangements regarding the issues at hand. This historical approach is needed for philosophical disclosure and the mindset when something learned is born that has relevance to the present. This conceptual approach refers to legal principles. These principles can be found in the views of scholars or legal doctrines.

3 Findings and Discussion

A. The Position of the Notary Honorary Council Regarding the Summon of a Notary in the Police Investigation Examination Process

Based on Article 1 point 1 of the Regulation of the Minister of Law and Human Rights Number 25 of 2020 concerning the Notary Honorary Council, it describes the notion of the Notary Honorary Council (MKN), which is a body that has the authority to carry out notary development and the obligation to give approval or rejection for the investigation and judicial process for taking a photocopy of the minutes of the deed and summoning a notary to attend the examination related to the notary deed or protocol that is in the Notary's storage. Meanwhile, according to Article 1, number 8 of the Code of Ethics for Notaries at this Extraordinary Congress, Banten, 29–30 May 2015. The Honorary Council is an association formed and functions to uphold the Code of Ethics, the dignity and worth of notaries who are independent and free from partiality in carrying out their duties and powers.

The Regional Notary's Honorary Council is assisted by the Examining Council and the Secretariat of the Regional Notary's Honorary Council in carrying out its duties to examine the Notary. After the enactment of Law Number 2 of 2014 on 15 January 2014, the petition for judicial review of Article 66 of Law Number 2 of 2014, which contains legal protection for Notaries, was submitted again. The petition for a judicial review of Article 66 of Law Number 2 of 2014 was filed by the Indonesian Prosecutors Association (PJI) to the Constitutional Court on 27 January 2020, which was then accepted by the Registrar of the Constitutional Court on 10 February 2020 and recorded in the case registration book with Number 16/PUU-XVIII/2020.

Previously there were 2 (two) almost similar petitions against Article 66, especially Article 66 paragraph (1) of Law Number 2 of 2014, namely the Constitutional Court Decision 72/PUU-XII/2014 dated 26 August 2015, which stated that the Petitioner's

petition unacceptable and the Decision of the Constitutional Court Number 22/PUU-XVII/2019 dated 20 May 2019 which stated that it rejected the Petitioner's application for review of Article 66 paragraph (1) of Law Number 2 of 2014.

The Constitutional Court considers in advance whether or not the Petitioner's application can be requested for re-examination based on Article 60 of Law Number 24 of 2003 concerning the Constitutional Court, which as a whole, states, "With respect to the material content of paragraphs, articles, and/or parts of the Law that has been tested, cannot be requested for re-examination," as well as the provisions of Article 42 of the Regulation of the Constitutional Court Number 06/PMK/2005 concerning Procedural Guidelines in Cases of Judicial Review which states that:

- (1) With regard to the content of paragraphs, articles, and/or parts of laws that have been tested, re-testing cannot be requested.
- (2) Apart from the provisions of paragraph (1) above, a petition for judicial review of the contents of the same paragraph, article, and/or part as a case that the Court has decided may be requested for re-examination provided that the constitutionality requirements which are the reasons for the request in question differ.

Based on what has been described above, it can be seen that what is being questioned by PJI is the limit of authority of the MKN. Basically, the one who has the right or authority to supervise and/or examine a Notary is the Minister of Law and Human Rights. The Minister, as head of the Department of Law and Human Rights, has the task of assisting the President in carrying out some government affairs in the field of law and human rights so that in his efforts to carry out the task of supervising and/or examining Notaries, an Honorary Council of Notaries is formed based on the mandate of Article 66 and Article 66A Law Number 2 of 2014.

The authority in supervising and fostering Notaries is the authority of the Regional Supervisory Council (MPD), as referred to in Article 67, paragraph (1), and paragraph (2) of Law Number 2 of 2014, which explains that the Minister carries out the supervision of Notaries by forming a Supervisory Council. However, in terms of the authority to approve or not to investigators, prosecutors, and judges for taking photocopies of minutes and summons to a Notary as a form of legal protection for a Notary, it is given to the Notary Honorary Council as stated in Article 66 paragraph (1) of Law Number 2 of 2014.

The transfer of some authority from the MPD to the MKN institution does not mean that the MPD institution is no longer functioning. There are still many other powers that are still under the authority of the MPD. The Central Notary Honorary Council has the task of providing guidance and supervision to the Regional Notary Honorary Council. However, the Central Notary Honorary Council does not have the authority as the Regional Notary Honorary Council, which is directly related to the Notary Public.

The Regional Notary Honorary Council has the most important duties and functions related to the implementation of the Notary's position, both coaching and protection of the Notary position, if the Notary is faced with problems that are contrary to the obligations and powers of the Notary himself. The Investigating Council here is formed by the Regional Notary Honorary Council, which is in charge of examining the Notary after obtaining approval for the investigation by the Regional Notary Honorary Council.

The Regional Notary Honorary Council can reject or approve applications submitted by investigators, public prosecutors, and judges based on the Examining Council's results. The parameter of granting approval or rejection by the Regional Notary Honorary Council must consider that if a criminal event is transparent and clear without the need for examination of the Notary as a witness, in this case, the Regional Notary Honorary Council must reject it. On the other hand, if a report on a criminal incident or a criminal event cannot be processed further so that the testimony of a Notary is needed so that the criminal incident becomes transparent and clear, then, in this case, the Regional Notary Honorary Council must give its approval [5].

In carrying out its duties, MKN is more specifically related to legal issues in guiding Notaries. At the same time, MPN (Notary Supervisory Board) directs in stages at any time related to the duties, obligations, prohibitions, and exceptions of Notaries in carrying out their duties.

B. Notary Legal Protection Regarding Notary Summons in the Notary Examination Process After the Constitutional Court Decision Number 16/PU-XVIII/2020

Law is the most crucial system in implementing a series of institutional powers from abuse of power in the political, economic, and community fields in various ways and acts, as the leading intermediary in social relations between communities, against criminalization in criminal law. Criminal law is an attempt by the state to prosecute perpetrators in a legal constitution, which provides a framework for the creation of laws, the protection of human rights and the expansion of political power, and how their representatives will be elected. Aristotle said, "A rule of law would be far better than the rule of rampant tyranny."

According to Bongser, the meaning of crime from a formal point of view (according to the law) is an act for which the community (in this case, the state) is punished. Furthermore, he also said that a crime is part of actions contrary to morality when viewed more deeply [6]. Bongser concludes that crime is a very anti-social act that gets a conscious challenge from the state by giving suffering (punishment or action). Bongser emphasized that crime is identical to the provision of criminal sanctions. Legal experts still proposed a crime eradication strategy with a penal approach (emphasizing criminal sanctions for criminals). The existing fact is that eradicating crime cannot be done partially but must be carried out integrative. Barda Nawawi Arif [7] said the need for handling crime with a "policy approach," meaning that there is a need for harmonization of policies between criminal politics and social politics, as well as integration between penal (repressive) prevention efforts with non-penal (preventive) approaches.

The reality of the existence of criminal law enforcement is more influenced, even restrained, by power. The dialectical relationship between law and power is still massive and becomes a paradox of abuse of power. Positively, the power of the government or state in making policies includes clear and firm forms of action to influence a particular problem. Negatively the power of the government or state in policy consists of a decision by government or state officials, but not to take action or not to carry out a problem solving, which should be resolved by the government or the state so that the debate of law and power occurs in a formal stalemate without a solution [8].

The resolution of problems that should be resolved by the government or the state in law enforcement should require government or state intervention. In fact, in the practice of the PPAT Notary position, there is a massive deviation in the shift of authentic evidence towards witness evidence with the power of the hand (abuse of power). This is because law enforcement in the construction of thinking is still thick with a positivist way of thinking based only on the interpretation of prescriptive law (legal normative) and also on power. The law that should be for humans is actually understood by law for legal texts controlled by power.

The authority of a Notary's job duties is explicitly explained in Article 1 and Article 15 of the UUJN, that the Notary in his position is authorized to make authentic deeds regarding all actions, agreements, and stipulations required by legislation and/or desired by the interested parties to be stated in the authentic deed, guaranteeing the certainty of the date of making the deed, keeping the deed, providing grosse, copies, and excerpts of the deed, all of this as long as the making of the deed is not assigned or excluded to other officials or other people stipulated by law.

A Notary Deed in the provisions of Article 1 point 7 UUJN, is interpreted as an authentic deed made by or before a Notary, according to the form and procedure stipulated in the UUJN and other related rules (according to Articles 38–54 UUJN). Grammatically, in the Big Indonesian Dictionary, a deed is interpreted as a letter of evidence containing a statement (description, acknowledgment, decision, etc.) about a legal event made according to applicable regulations, witnessed, and ratified by an official (authorized official) [9]. Based on the results of an interview with a Notary in the Semarang area, he stated that as a public official, it was confirmed in Article 1868 of the Civil Code, which states that an authentic deed is a deed made in the form specified in the law made by or before a public official who is authorized to do so [10].

Other officials who are given the authority to make an authentic deed other than a Notary include Consul (based on *Conculair Wet*), Regent of Regional Head or Regional Secretary as determined by the Minister of Justice, Substitute Notary, Bailiff of the District Court, and Civil Registry Office Employees. Although these officials only carry out their functions as general officials, they are not public officials. Concerning the authenticity of a Notary deed, Soegondo Notodisoerjo [11] stated that to be able to make an authentic deed. A person must have the position of a "public official," in Indonesia, an advocate, even though he is an expert in the field of law, is not authorized to make an authentic deed because he does not have the position of a "public official." On the other hand, a "Civil Registry Officer" (*Ambtenaar van de Burgerlijke Stand*), even though he is not a legal expert, has the right to make authentic deeds for certain things, for example, to make birth certificates, marriage certificates, death certificates. That is because he is designated by law as a "public official" and is given the authority to make the deeds.

Law enforcers try (to make a Notary) change the written testimony (Authentic Notary Deed) by summoning the Notary and giving testimony (shifting from Authentic Evidence to Witness Statement). This will set a bad and dangerous precedent when abuse of power becomes a covid (deadly virus) in law enforcement. Notary deed as written evidence, authentic and guaranteed by law. According to the law, a notary may not be examined as a witness regarding the use of a deed. A notary can only be a witness to a criminal

act that is suspected of someone if it is committed or occurs in the presence of a notary [12].

National Police Investigators (Polri), PPNS (Civil Servant Investigator) Investigators, Public Prosecutors, and Judges are designated as law enforcers, who are given the task and authority to carry out law enforcement tasks involving several law enforcement agencies into an inseparable unit in one system, known as Criminal Justice System. The role and Duties of Polri Investigators as law enforcers in the criminal justice system are regulated in detail in the Criminal Procedure Code, where the investigation process is upstream of a law enforcement process; (a) Summons, (b) Examination of witnesses or suspects, (c) confiscation, (d) searches, (e) arrests, (f) detention, (g) and or other legally responsible actions.

The powers of the Investigator mentioned above are regulated in detail. Clearly, in the Criminal Procedure Code, at what time, to anyone, anywhere, and when it can be carried out, for how long/limited time, with the aim that the implementation of investigation tasks can run smoothly if in its implementation it is not following or violates the provisions stipulated in the Criminal Procedure Code, it will result in all the implementation of the authority is illegal. Criminal Procedure Code also defines restrictions in carrying out these duties and authorities to prevent investigators from exceeding their authority, which can cause material or immaterial losses or human rights violations, on the authority given to investigators in carrying out their duties as law enforcers.

Law, in fact, at this time, encounters obstacles to solving the problems of the Indonesian nation. So that the fulfillment of a sense of justice and social justice is still far from expectations, not least the law in the notary field, which is related to the duties of a notary authority and the strength of notarial deed evidence (authentic deed evidence as perfect evidence) in the perspective of the legal system, especially in the realm of authoritative law enforcement, “if in the investigation process an investigator imposes his will with power or abuses power, so that there is a deviation from the Criminal Procedure Code” [13].

In law enforcement in Indonesia, there are several stories of legal experts considered unusual in terms of the hegemony of the way of law in their era. One of them is the story of Judge Bismar Siregar [14]. Bismar’s attitude, actions, and thoughts in breaking through the deadlock of the legal system and realizing justice show a portrait of progressive law enforcement. Advanced legal theory studies emerge and depart from a maxim, “law is an institution that aims to deliver humans to a just, prosperous and happy life” [15].

Progressive law is seen as an approach that considers the empirical reality of the workings of the law in the PPAT (Land Deed Official) Notary position in making and ratifying authentic deeds. Progressive law enforcement aims to free people from the shackles of the law. The view of advanced law is the basis and in line with the “*Ultimate Remedium*,” criminal law should be used as a last resort in law enforcement criminal complaints are used to suppress and always put forward.

In article 66 of Law Number 2 of 2014 concerning the Position of a Notary, to take a photocopy of the minutes and summon a Notary with the approval of the Notary Honorary Council is only limited to examinations related to the Deed or Notary Protocol that is in the Notary’s custody. Meanwhile, for other criminal cases that are unrelated to the duties and authorities of a Notary, the criminal procedure law as stipulated in the

Criminal Procedure Code is still applied. According to Anwar Bahoma, investigators who do not heed the provisions specified in Law No. 2 of 2014 concerning the Position of a Notary will invalidate the actions taken by the Investigator; of course, this will result in an illegal investigation as well [16].

The fact that there are still investigators in the field of an investigation who do not understand this, many investigators assume that the rules in article 66 of the law hinder the investigation process so that many investigative techniques are stopped and cannot continue because they cannot present a Notary to be examined as a witness or a suspect, even though his statement was very decisive. On the one hand, many think that what investigators do to Notaries significantly hampers the duties and roles of Notaries as “Public Officials” in providing legal services to the community to the fullest.

In the jurisprudence of the Supreme Court, the decision number No.702K/Sip/1973, the Notary in carrying out his position is only formal. The Notary only functions to record/write down what is desired and stated by the parties who appear before the Notary. Notaries are not obliged to investigate materially the things put forward by the notary public. So it is only natural that MKN must ask for approval because MKN will first check whether there is an element of error from the Notary or not so that MKN can guarantee the position of a notary as a “trust” position.

4 Conclusion

- a The position of the Notary Honorary Council regarding the summons of a notary in the process of examining the Police investigation, in essence, does not hinder law enforcement procedures. After all, in consideration of the panel of judges, it is stated that the approval of the Notary Honorary Council does not aim to complicate the investigation process or the need for examination of a notary because the provisions of Article 66 paragraph have anticipated this (3) and Article 66 paragraph (4) UUJN which states. The position of the Notary Honorary Council as a coaching body aims to protect the good name of the Notary from investigators, public prosecutors, and judges against taking minutes of deed and summoning a notary, meaning that investigators, public prosecutors, and judges cannot directly summon a notary for the purposes of the investigation and judicial process.
- b Legal protection of a notary related to the summons of a notary in the notary examination process after the Constitutional Court Decision Number 16/PU-XVIII/2020 in the perspective of certainty and justice, as well as legal benefits, is carried out without changing the written testimony. Based on the law, a Notary may not be examined as a witness regarding the use of a deed. A notary may only be a witness to a criminal act that is suspected of a person if it was committed or occurred before a notary. The UUJN explicitly regulates the authority of law enforcement in taking actions to take or confiscate evidence as described in Article 66 of Law Number 2 of 2014 concerning the Position of a Notary, to take a photocopy of minutes and summon a Notary with the approval of the Notary Honorary Council, only limited to examination related to the Notary Deed or Protocol that is in the custody of the Notary, while for other criminal cases that are not related to the duties and authorities of the Notary, the criminal procedure law as regulated in the Criminal Procedure Code is still applied.

5 Suggestions

- a For the Government, it should protect the position of a notary in carrying out his duties and obligations following Law Number 2 of 2014 concerning the Position of a Notary, which has implications for the invalidity of investigative actions carried out by investigators to provide legal certainty to notaries, namely with the phrase “against the act of summoning a notary in an examination” cases that do not heed the provisions of article 66 paragraph (1) will result in the invalidity of the act of summoning a notary in the investigation process carried out by law enforcement officers.
- b For the Notary Honorary Council, they should provide an answer to accept or reject the request for approval within a maximum period of 30 (thirty) days to be ambiguous because there is the phrase “The Notary Honorary Council does not provide an answer within the period as referred to in paragraph (3), the Notary Honorary Council deemed to have received a request for approval”, which has implications for the uncertainty of legal protection for a notary.
- c For the public, in using the services of a notary, they should understand that a notary is a public official and not a profession. This can affect the views and treatment of people who require the services of a notary.

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