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Notary, public official or public official: implications for the position of notary

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Abstract

The issue to be discussed is whether there is a shift in the position status of a Notary to a Public Official. A notary is a General public Official according to Notary Office Law. Since Indonesia has acceded to the Apostille Convention, it is necessary to clarify the classification of the Notary position and its implications because the Convention applies to the legal product of Publik Officials. This study discusses whether there is a shift in the position of a Notary to a Public Official and its implications for the Notary Deed, considering the provisions regarding General Public Officials and Publik Officials, including the KIP Law. In conclusion, the classification of Notary occupation, for the sake of legal certainty, as stated in Notary Office Law, is General Public Official. From another perspective, if Notary is classified as a Public Official, this would not immediately force or make the Notary obligated to disclose the Notary Deed they made or the confidential information of the Parties who appear before the Notary.

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1. Introduction

The Notary Institution is one of the social institutions in Indonesia that arises from human needs that require evidence regarding civil law relations between them. The role of a notary in providing services is as an official authorized by the state to serve the public in the civil field, especially doing authentic deeds (Pertiwi, 2017). In Indonesia, private law is handled by public officials who are different from State Officials and Government officials. General officials are a translation of the term "Openbare Amtenaren." The term "Openbare Amtenaren" is contained in Article 1 of the Reghlement op het Notary Ambt in Indonesia (ord. Van Jan. 1860) Staatsblad 1860 Number 3 and Article 1868 BW (translated by R. Soebekti and R. Tjitrosudibio), (Sesung, 2017).

Notaries are legal practitioners who need to understand the concepts of the Notary's position and its impact on various legal systems, particularly Common Law and Civil Law. Herlien Budiono explained the direct comparison of notary positions in the two legal systems. One of them is in authority. Latin notaries are public officials who have the right to do all authentic deeds as long as they are not excluded by law and have a monopoly in doing notarial deeds, which are authentic in private law. However, they are not the only officials who do authentic deeds. The main job of a public notary (Notary in the standard law legal system) is to certify the correctness of a signature or, in the case of a money order protest. In general, the practice of a public notary is to provide advice and prepare documents, especially documents for treaty relations with foreign countries (Elnizar, 2017).

A notary is a public official who has the right to issue authentic deeds and other authorities regulated in the Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to the Law of the Republic of Indonesia Number 30 of 2004 concerning the Position of a Notary (Rachmatullah, 2021). As quoting Habib Adjie stated, the term Openbaar Ambtenaar in the context of the position of a notary does not have a general meaning but a public meaning (Adjie, 2013). A notary is a position in charge of carrying out several State functions in the realm of civil law with authority to do authentic deeds, which are based on the statements of the parties concerned to appear before a notary (Juniresta, 2021).

Not only that, since Indonesia acceded to a convention regarding the legalization of foreign documents for use in Indonesia and vice versa, namely The Hague Convention Abolishing the Requirements for Legalization for Foreign Public Documents 1961 ("the Apostille Convention") through Presidential Regulation Number 2 of 2021 concerning Ratification of the Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Perpres No. 2 of 2021). Indonesia must again review the position held by a Notary because, based on the formulation contained in the convention classifies notarial deeds as deeds issued by public officials.

The State of Indonesia is a constitutional state, as stated in Article 1 Paragraph 3 of the 1945 Constitution, meaning that the life of the nation and state in Indonesia must be based on law. Legal certainty is one of the main goals of the concept of the rule of law, in addition to creating law and order in society (Darusman, 2016). Efforts are made to avoid confusion and overlapping laws so that there is clarity in the legal order. Therefore, it is necessary to research to find out the clarity of the position held by a Notary. Bearing in mind that a Public Official has his definition as stipulated in the Law of the Republic of Indonesia Num-

ber 14 of 2008 concerning Public Information Disclosure.

Based on the elaboration above, it is necessary to conduct a study regarding the relationship between the position status of a Notary as a Public Official, considering that Indonesia is a country of law, which is concerned with legal certainty in order to protect both the Notary and the public in carrying out their obligations and defending their rights. The issue to be discussed is whether there is a shift in the position status of a Notary to a Public Official. Moreover, will this affect the position of a Notary and its relation to legal provisions regarding Public Officials in Indonesia?

As a support for this writing, there are many writings related to the position and profession of a Notary, but each has different characteristics. Based on the writings written by Amanda Puteri Rachmatullah, Tunggul Anshari, and Diah Aju Wisnuwardhani in the Cakrawala Hukum Journal, the substance raised is a juridical analysis of regional grouping at a notary regarding the norms for calculating net income related to public officials. Therefore, this study will examine the analysis of Notaries, Public Officials, or Public Officials: Implications for Notary Positions.

2. Methods

This type of research is normative juridical to find answers to the problems of this research. The approach in this study uses a statutory approach and a conceptual approach. This statutory approach examines the provisions in laws and regulations (Marzuki, 2007), while the conceptual approach is carried out by examining and understanding the concepts. The analysis technique used in this study is to use grammatical interpretation, namely interpretation according to grammar and words, and a systematic interpretation that links one article to another in or to the relevant legislation.

3. Result and Discussion

3.1 Position of Notary: General Officer

The position of the Notary was born because of the community's needs, not a new position that was deliberately created and socialized to the public. The history of the birth of a notary begins with the birth of the scribe profession in ancient Rome; who was a scholar whose job was to record notes and minutes of activity or decision and then make a copy of it, both public and private (Indonesian Notary Association, 2008).

The term Public Official about the Notary profession in Indonesia is a translation of the term Openbaare Ambtenaren which is contained in Article 1 of the Regulation op het Notary Ambt in Indonesia and Article 1868 Burgerlijk Wetboek (BW), which relates explicitly to officials entrusted with the task of doing authentic deeds serving the public interest and such qualifications are given to Notaries (Adjie, 2013).

The position of a notary as stated in Article 1 of Law Number 30 of 2004 concerning the Position of a Notary and its changes in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of a Notary (Notary Position Law) states that a Notary is an official general public who has the authority to do authentic deeds and has other authorities as referred to in the Law. The contents of this article State the definition of a notary's position. According to this Article, a notary is a public official with the authority to draw up authentic deeds and other powers which, of course, have been stipulated in the Notary Office Law or other laws (Triwahyuni, 2020).

The position of a notary as a public official, which is an honorable position, is granted by the State in an attributive manner through Law and is appointed by the Minister. With the appointment of a Notary by the Minister of Law and Human Rights, a Notary can carry out his position freely, without any influence from the executive body or other bodies. Carrying out his position means that the Notary can act neutrally and independently (Waluyo, 2005).

The function of a notary as a public official has the authority to make a deed called an authentic deed relating to all actions, engagements, agreements, and provisions stipulated in positive Law. The authentic deed itself is contained in Article 1868 BW, which is defined as a deed whose method of formation has been determined by laws and regulations, made by or in the presence of public employees who, of course, have the power in this matter at the place where the deed was done. Public officials also carry out legalization/ approval. It is poured into authentic deeds, which are refinements of agreements made by the community, as stipulated in Article 1320 of the Civil Code (Darusman, 2016).

A notary is a public official authorized to do authentic deeds regarding all actions, agreements, and stipulations that are required by a general rule or by interested parties to be stated in an authentic deed, guarantee the certainty of the date, save the deed, and provide Grosse, copies, and excerpts of it, all as long as the making of the deed by a general rule is not also assigned or excluded to officials or other people.

The qualification of a notary as a public official is related to the authority of a notary (Adjie, 2013). The Notary Office Law divides the authority of a Notary into others: Notary General Authority, Notary Special Authority, and Notary Authority which will be determined later. When a notary commits an action beyond the authority specified by law, the notary deed is generally not binding or cannot be implemented. The party who feels aggrieved in this matter may file a civil suit against the Notary concerned civilly to the District Court.

Notaries also have other authorities regulated in laws and regulations besides the powers in Article 15, both in paragraph (1) and paragraph (2) of the Notary Office Law. Doing authentic deeds is required by laws and regulations in order to create certainty, order, and legal protection. Not only because laws and regulations require it, but interested parties can also wish that their legal actions be poured in the form of an authentic deed to ensure rights and obligations for certainty, order, and legal protection of interested parties as well as for society as a whole (Hendra, 2012). The services provided by a notary are related to issues of trust between the parties. Giving trust to a notary also means that a notary can also bear responsibility in the form of legal and moral responsibility (Anand, 2018). A public official is a position held or given to those authorized by law to do authentic deeds, with a notary as a public official given the authority to do authentic deeds. Therefore, a notary is a general official, but a general officer is not necessarily a notary because there are also positions for making land deeds (PPAT) and auction officials (Adjie, 2013).

3.2 Obligation of a Notary to Maintain Confidentiality

Article 16 paragraph (1) letter f of the Notary Office Law stipulates that the obligation of a notary in carrying out his duties, especially in doing notarial deeds, is to keep secret everything regarding the deed he makes and all information obtained for doing a deed by an oath or promise

of office, except for the law -The law determines otherwise. Instruct the notary to keep secret based on an oath or promise of office everything in the form of letters or documents, or statements in the framework of doing a notarial deed to protect the interests of all parties related to the deed (Kusumaningrum, 2017).

Maintaining confidentiality is a must for a notary. Judging from the existing provisions in the law, the most crucial element that becomes confidential and must be guarded by a Notary is the contents of the deed and all information obtained in making and regarding the deed. The contents of the deed are the wishes and wishes of interested parties in the body of the deed, where the body of the deed contains information given by the parties to the deed or statements from a notary regarding matters submitted at the request of the person concerned. However, the things that a notary must keep secret in carrying out his position are not only limited to the contents of the deed; the obligation to keep the notary confidential is also the information and information provided by the parties when conveying the intent and purpose of doing the deed. The information submitted to the notary, although not included in the deed, must be kept confidential by the notary. The provisions of Article 54 of the Notary Office Law also explain that the Grosse of the deed, a copy of the deed, or an excerpt of the deed and also does not show the contents of the deed, is a notary's obligation to maintain confidentiality unless otherwise provided by law (Kusumaningrum, 2017).

3.3 Notarial Deed

The Law on Notary Positions defines that "Notarial Deeds are authentic deeds drawn up by or before a Notary in the form and procedure stipulated in this law." An authentic deed, as referred to in the Notary Office Law, is an authentic deed that fulfills and is by the matters stated in the Civil Code (KUHPerdata), namely Article 1868: "An authentic deed is a deed in the form determined by law, made by or in the presence of a public official who has the power to do so at the place where the deed was done."

Regarding the form of a notarial deed as an authentic deed, it is stipulated in the Notary Office Law Article 38 Paragraph (1) that each deed consists of the beginning, deed body, and end of deed. The beginning of the deed contains the title of the deed; Deed number; Hours, days, dates, months, and years; and Full name and domicile of the Notary. The body of the deed contains the following matters, including Full name, place, date of birth, nationality, occupation, position, position residence of the appearers or the person they represent; Information regarding the position of acting as appearers; The contents of the deed which are the wishes and desires of the parties concerned; and Full name, place, and date of birth, as well as occupation, position, position and place of residence of each identifying witness.

At the same time, the end of the deed contains a description of the reading of the deed, a Description of the signatory and the place of signing or translation of the deed, if any; Full name, place, and date of birth, occupation, position, position and place of residence of each deed witness; and a description of the absence of changes that occurred in the making of the Deed (Dewi, 2016). In the procedure for doing an Authentic Deed, as mandated by Article 16 paragraph (1) letter m of the Notary Office Law, the Notary is obliged to be present in person to read the deed in front of the appeared in the presence of 2 (two) witnesses and specifically for the deed of inheritance must

be attended by 4 (four) witnesses (Dewi, 2016). As a general provision governing the importance of an authentic deed, Article 1868 of the Civil Code states that:[3] An authentic deed is a deed that, in the form determined by law, is made by or before public officials who have the power to do so in the place where the deed was done.

Apart from being required by laws and regulations, the authority of a notary in doing authentic deeds must be based on requests from the appearers. The Notary is obliged to listen to the statements or statements of the parties without taking sides with one of the parties, which is then stated in a notarial deed as a form of embodiment of the parties' wishes. Which deed is signed before a notary after the deed is read out in front of and approved by the parties, by Article 38 of the Notary Office Law (Tjukup, 2016).

The importance of a deed or letter cannot be separated from the public interest in proof. Proof in the form of written evidence is divided into two forms: authentic deed and private deed. Furthermore, it is known that there are two forms of the deed: a deed made by a notary (relaas deed) and a deed made before a notary (partij deed). He has been seen or witnessed by a Notary in carrying out his position authentically (Tjukup, 2016).

A deed made without complying with Article 1868 of the Civil Code is not an authentic deed but an underhanded deed. Some of the differences between an authentic deed and a deed made privately are that an authentic deed is perfect evidence as stipulated in Article 1870 of the Civil Code because it is considered that the strength of proof is attached to the deed itself so that it does not need to be proven again and is "obligatory evidence" (Verplicht Bewijs) for the judge. The authentic deed has the power of proof physically, formally, and materially. The underhanded deed is "Free Evidence" (VRU Bewijs) for judges because the strength of material evidence of an underhanded deed only exists when the formal strength of the deed can be proven by the parties concerned (Tjukup, 2016).

3.4 Public official

Regarding matters of a general nature, there are several terms in Dutch, including General, Algemeen, Operbaar, and Publiek. Quoting Habib Adjie, Generaal, Algemeen, and Publiek mean general. At the same time, Openbaar is defined as an affair that is open to the Public or means Public, the Public. Openbaar is interpreted to or for (legal) institutions that have general duties or serve the Public, as a Notary as a Public Official who serves the Public in doing authentic deeds (Adjie, 2013).

In contrast to Dutch, which has "General," "Algemeen," "Operbaar," and "Publiek," which can accommodate general understandings in different contexts, Indonesian only knows the words "General" and "Public." In the interest of avoiding confusion in its use, the term Public (in Indonesian) must be interpreted the same as the term public (in Dutch), which has a legal meaning, so that the use of the word "Publik" is only for government agencies or officials equipped with power or authority. Moreover, certain functions according to the rule of law to serve the interests of the community, such as those who work in executive agencies from the center to the regions, are referred to as public officials (Adjie, 2013).

According to Habib Adjie, the title of a public official can be given to those who, in their duties, function to serve the public interest by their authority. Not only to those who are domiciled as Executive Officers but also to Notaries (Adjie, 2013). The term Openbaare Ambtenaren as stated in Article 1 of the Regulation op het Notaris Ambt

in Indonesia and Article 1868 BW, can be interpreted as a Public Official, bearing in mind that Ambtenaren is defined as an Official. One of the meanings of Openbaare is de publieke zaak, which means public interest or affairs (Adjie, 2013).

Law No. 14 of 2008 concerning Public Information Disclosure (UU KIP) defines a Public Official as a person appointed and assigned to occupy a particular position or position in a public body. Notary as a public official in the sense of having authority with exceptions. A Notary as a Public Official does not mean the same as a Public Official in the government sector who is categorized as a State Administrative Agency or Officer, which can be seen and distinguished from their respective products, namely a Notary with an Authentic Deed as the end product. In contrast, a Public Official in the government sector has a product in the form of a decree or decision. Thus, Habib Adjie concluded that a Notary is the category of a public official who is not a State Administrative Officer, with authority stated in the legal provisions of the Notary Office Law (Adjie, 2013).

3.5 Public Officials and Information/Public Documents

UU KIP provides enlightenment in the implementation of state administration. Disclosure of public information in the administration of the state is a manifestation of good governance and a guarantee of legal certainty for the public's right to obtain the information needed and to participate in controlling the administration of the state or government.

One of the essential elements in the administration of an open state is the public's right to obtain information by statutory regulations. The elucidation of the KIP Law explains that every Public Agency must open access to Public Information relating to that Public Agency for the wider community. The scope of Public Bodies in this law includes executive, judicial, legislative, and other state administrators that receive funds from the State Revenue and Expenditure Budget (APBN)/ Regional Revenue and Expenditure Budget (APBD). Also, it includes non-governmental organizations, both incorporated or not, such as non-governmental organizations, associations, and other organizations that manage or use funds partially or wholly sourced from the APBN/APBD, community contributions, or abroad (Retnowati, 2012).

Based on UU KIP, information is information, statements, ideas, and signs containing values, meanings, messages, data, facts, and explanations that can be seen, heard, and read, presented in various packages and formats according to developments. Electronic and non-electronic information and communication technology. What is meant by public information is information that is generated, stored, managed, sent, or received by a public agency relating to the administration and administration of the state or the administration and administration of other public bodies by this law, as well as information other matters relating to the public interest.

Public information is open and can be accessed by every information user, except for confidential information as stipulated by law, decency, and the public interest, which is based on an examination of the consequences that arise when information is given to the public and after consideration for protecting the more significant interest. Public information must be able to be obtained by every applicant for public information quickly, on time, at a low cost, and simply (Retnowati, 2012). Even so, a Public Agency has the right to refuse to provide information exempt from the provisions of laws and regulations. There is also

Public Information that a Public Agency 1). cannot provide). information that can harm the state; 2). information relating to the interests of business protection from the unfair business competition; 3). information relating to personal rights; 4). information relating to job secrets; or 5). The requested Public Information has yet to be mastered or documented.

In addition, the KIP Law contains several exceptions to public information disclosure, including 1). which may interfere with the interests of protecting intellectual property rights and protection from the unfair business competition; 2). which can endanger the defense and security of the state; 3). which can reveal Indonesia's natural wealth; 4). which can be detrimental to the resilience of the national economy; 5). which can be detrimental to the interests of foreign relations; 6). which can reveal the contents of an authentic personal deed and someone's last will or testament; 7). which can reveal personal secrets; 8). memorandums or letters between public bodies or between public bodies, which according to their nature, are confidential, except for the decision of the Information Commission or the court; and 5). information that may not be disclosed under the law.

Disclosure of public information is an obligation of every public agency, which includes the executive, judiciary, legislative, and other state administrators who receive funds from the State Revenue and Expenditure Budget (APBN) or Regional Revenue and Expenditure Budget (APBD), and also includes non-governmental organizations, both legal entities and non-legal entities, such as non-governmental organizations, associations, and other organizations that manage or use funds which are partly or wholly sourced from APBN or APBD, community donations, or foreign countries.

3.6 Linkages of Notary Associations, Notary Positions, Notary Deeds with Public Agencies, Public Officials and Information/ Public Documents

Based on the UU KIP, one form of agency included in the scope of public agencies is a non-governmental organization, which includes non-governmental organizations, both legal and non-legal entities, and other organizations that manage or use funds partially or wholly donated by the public. In the previous case, as stated in the Decision of the Central Information Commission of the Republic of Indonesia Number: 011/III/KIP-PS-A/2016, the Board of Commissioners thinks that the Respondent, namely a business entity in the form of a Limited Liability Company which is open, must be declared a public body, i.e., a non-governmental business entity in the form of a limited liability company whose funds are partly or wholly sourced from donations from the public, with a scope of work covering the entire territory of Indonesia. This decision allows other non-governmental legal entities to be categorized as public bodies.

Public bodies, as described above, raise new questions regarding the status of the Indonesian Notary Association (INI) when viewed from the perspective of the UU KIP. INI is an association or organization for Notaries which was established on July 1, 1908, and has been recognized as a Legal Entity based on Government Decree dated September 5, 1908, Number 9 (Stephanie, 2018).

INI is the only unifying forum for notary positions in Indonesia, as in the Articles of Association of the Notary Association which has received the Decree of the Minister of Justice dated December 4, 1958, Number J.A.5/117/6 and announced in the State Gazette of the Republic of Indonesia dated March 6, 1959 Number 19, Supple-

ment State Gazette of the Republic of Indonesia Number 6, and the latest amendment to the articles of Association has received approval from the Minister of Law and Human Rights of the Republic of Indonesia based on Decree January 12, 2009, Number AHU03.AH.01.07.Tahun 2009, therefore, is a Notary Organization as referred to in Law Number 30 of 2004 concerning the Position of Notary Public promulgated based on the State Gazette of the Republic of Indonesia of 2004 Number 117, Supplement to the State Gazette of the Republic of Indonesia Number 4432 and came into force on October 6, 2004, as amended by Law Number 2 of 2014 regarding Changes to the Law and Number 30 of 2004 concerning the Position of Notary Public which has been promulgated in the State Gazette of 2014 Number 3, Supplement to the State Gazette Number 5491.

INI is an association that is a professional organization for the position of a Notary Public is a legal entity. Regarding INI wealth, it is regulated in the INI Bylaws as stated in the Amendments to the Bylaws of the Indonesian Notary Association Results of the Expanded Central Management Plenary Meeting in Balikpapan, January 12, 2017, stating that the Association's wealth comes from: a). membership dues; b). non-binding contributions from Association members, government and private bodies, and other parties; and c). Other efforts are carried out by the Association as long as they do not conflict with the provisions of applicable laws or regulations.

Based on the Indonesian Notary Association Association Regulation Number: 04/Perkum/Ini/2017 Concerning Member Fees, it is stated that one of the administrative requirements to become an ordinary member of an active Notary is to have paid the mandatory membership fees. It is also regulated that the obligation of an ordinary member (from an active Notary) to pay monthly dues, and one of the administrative requirements to become an extraordinary member is to have paid the initial fee.

Based on the above descriptions, a conclusion can be drawn that if a *public agency* is defined as an organization that includes non-governmental organizations with legal entities that manage or use funds partially or wholly derived from donations from the public, then INI can be categorized as a public body.

The above explanation raises the question of whether a notary is a public official. So, regarding the notarial deed, it also relates to the provisions of the UU KIP? For the sake of legal certainty, it is advisable that, regarding the classification of a Notary's position, they remain as a Public Official, as stated in the Law on Notary Positions, by taking into account and considering the authority of a Notary. Even though there has been a shift in the position of a Notary from a Public Official to a Public Official concerning the Notary Deed and the information relating to the deed, as well as the information and information received by the Notary in carrying out his position, the Notary Deed and the information must still be kept confidential by the Notary. This is not only because it is a Notary's obligation in his oath to carry out his duties and positions, but it is also stated in the UU KIP regarding exceptions to public information disclosure, information related to personal rights and related official secrets, in this case, the secret of a Notary's office, cannot be provided as other public information.

4. Conclusion

Based on the description in the discussion above, a Notary's Office is classified as a Public Official for the sake of legal certainty, as stated in the Notary's Position Law. About the Notarial

Deed and the secret of the Notary's position, even if later the Notary is classified as a Public Official, this will not necessarily force or make the Notary obligated to disclose the Notarial Deed he made or reveal the secrets regarding the information of the Parties facing the Notary, this is based on provisions regarding exceptions to information that can be provided to the public as regulated in UU KIP. The classification of the Notary's position as a Public Official will also affect the classification of the Notary association, INI, as a public body. However, INI cannot be immediately categorized as a public body because it is not necessarily INI is the body referred to in Article 1 number 3 of the KIP Law.

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