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Legal Reconstruction in Indonesia Based on Human Rights

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“Legal Reconstruction in Indonesia Based on Human Right”

IMAM AS SYAFEI BUILDING

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PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnau, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

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Political Laws Notary Honor Assembly

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Abstract

The MKN is an independent decision-making body that has the duty and obligation to provide guidance or guidance in order to strengthen the notary institution in enforcing UUJN for everyone who carries out the position as a Notary. In carrying out its duties, MKN may conduct investigations on Notaries who are suspected of committing violations related to alleged crimes in the process of making authentic deeds. If it is found that there is evidence of a violation committed by a notary that causes harm to the parties, in this case MKN can give approval to investigators to be examined in the judicial process. If not, then MKN cannot give approval. Notary Honorary Council was formed, authentic. With the formation of the Notary Honorary Council, the MPD's authority is as contained in Article 66 paragraph (1) UUJN No. 30 of 2004 is no longer valid because it has been revoked by the Constitutional Court through decision No. 49 / PUU-X / 2012, but organizationally the MPD still exists as a notary supervisory agency in regencies / cities

A. INTRODUCTION

The philosophical basis for the formation of Law Number 30 of 2004 concerning the Position of Notary Public is the realization of a guarantee of legal certainty, order and legal protection which is based on truth and justice through deeds that he makes, Notaries must be able to provide legal certainty to the public who uses Notary services.¹ Notary is a Public Official who is the sole authority to make authentic deeds regarding all agreements and decisions required by the General Regulations or by those with an interest to be stated in an authentic deed, guarantees the certainty of the date, keeps the deed and provides Grosse, a copy and an excerpt. all as long as the deed by a general rule is not assigned or excluded to an official or other person.²

The deed that has been made by a Notary or before a Notary is one of the most perfect authentic proofs, in this deed of course

it contains everything related to each party making the deed with all the consequences that must be accounted for and the Notary as the deed making official can certainly intersect With the criminal law, it does not rule out the possibility that in the practice of notarization there are still many abuses or exploits by irresponsible people. Then the Notary will be involved or act as a witness before the court so that there will be an examination of the deed, this will be a dilemma for the Notary in carrying out his / her job duties to always keep the secret of the position as an obligation, and on the other hand the Notary is faced with the obligation to give testimony. The position of a notary in its implementation is protected by law. Legal protection received by Notaries is contained in the Law on Notary Position (UUJN) or can be found in other regulatory provisions. Article 66 paragraph (1) UUJN explains that one of the legal protections possessed by a Notary is known as "other privileges" then the privilege that plays a role in protecting this Notary on May 28, 2013 by the Constitutional Court (MK) is declared invalid or deleted. The loss of "other privileges" held by the Notary on the Constitutional Court decision causes the Notary to get legal protection in carrying out his / her duties as a public

¹ Habieb Adjie, *Meneropong Khasanah Notaris dan PPAT Indonesia*, (Bandung: PT. Citra Aditya Bakti, 2009), p. 14.

² Regulation of Notary Position, Article 1 Stb 1860-31 compiled by GHS Lumban Tobing, in Muchlis Fatahna et al, 2003, *Notaris Bicara Soal Kenegaraan*, Watampone Pers, Jakarta, page 253.

official so that UUJN certainly no longer plays a role in protecting Notaries because they do not have any power.³ Then Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary was passed into the Amendment Law of Notary Public (UUJN-P), as well as a new arrangement in the form of a new institution, the Notary Honorary Council (MKN) with its function is also stated in the UUJN-Amendment, namely in particular in providing protection for Notaries who in the previous UUJN had lost protection.

Notaries as public officials in carrying out their duties, obligations and authorities receive full legal protection from Article 66 paragraph (1) UUJN No. 30 of 2004, where the retrieval of documents that are in the notary's storage cannot be carried out arbitrarily by investigators, prosecutors. Public and Judges in an examination process for legal purposes.⁴ In addition, the summons of a notary to be examined or presented as a witness also cannot be carried out directly by the Police Investigator, Public Prosecutor or Judge in an examination process both at the level of investigation, investigation by the police, as well as at the level of prosecution and case examination in court. Summons of a notary for the sake of legal examination must first obtain permission / approval from the Regional Supervisory Council (MPD). Article 66 paragraph (2) UUJN No.30 of 2004 further provides legal protection for notaries by stating that, "Taking photocopies of Minuta Deeds or letters as referred to in Article 66 paragraph (1) letter a, an official report of submission is made."⁵ Three months after the issuance of the Constitutional Court Decision No.49-PUU / X / 2012 which revoked Article 66 of UUJN No. 30 of 2004, the Government

of the Republic of Indonesia issued Law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning Notary Position. Law No.2 of 2014 was passed and promulgated in Jakarta, On January 15, 2014, and again contained legal protection for notaries in article 66 of the Law by making changes that gave rise to the Notary Honorary Council.⁶

Based on the description above, the author has formulated the following problems:

1. How is the legal politics for the formation of the Notary Honorary Council?
2. What is the role of the Regional Supervisory Council after the Notary Honorary Council was formed?

B. DISCUSSION

1. Legal Politics Establishment of Notary Honorary Council

In a democratic country, the people make laws through their representatives in the legislative body based on the aspirations and will of the people. Then the law is binding and must be obeyed. For this reason, ideally laws are the formalization or crystallization of norms and rules desired or according to the aspirations of society.⁷ According to Prof. Mahfud MD "Political Law" is a legal policy or line (policy) official regarding the law that will be enforced either by making new laws or by replacing old laws, in order to achieve the goals of the state. Thus, legal politics is a choice of laws to be enforced as well as choices about laws to be revoked or not enforced, all of which are intended to achieve

³ Habib Adjie, 2017, *Memahami Majelis Pengawas Notaris (MPD) dan Majelis Kehormatan Notaris (MKN)*, Refika Aditama, Bandung, p. 38.

⁴ Ellise T Sulastini dan Wahyu Aditya, *Pertanggungjawaban Notaris Terhadap Akta yang Berindikasi Pidana*, (Bandung : Refika Aditama, 2010), p. 7

⁵ Habib Adjie, *Hukum Notaris Indonesia*, (Bandung : PT. Refika Aditama, 2008), p. 10.

⁶ Mardianto Hasbi, *Mahkamah Konstitusi*, Sebagai Peradilan Perundang-undangan, (Bandung : Media Ilmu, 2012), p. 14.

⁷ Foreword by the Chairman of the Indonesian Constitutional Court by Prof. Dr. Mahfud MD, SH in the book Pataniari Siahaan, *Politik Hukum Pembentukan Undang-Undang Pasca Amandemen UUD 1945*, Constitution Press, Jakarta, October 2012

the goals of the state as stated in the Preamble to the 1945 Constitution.⁸

The politics of law at the instrumental level in the field of notarization can be seen in the preamble to the UUJN as follows:

"Whereas the State of the Republic of Indonesia as a rule of law based on Pancasila and the 1945 Constitution of the Republic of Indonesia guarantees legal certainty, order and protection, which has the essence of truth and justice, that in order to guarantee certainty, order and protection of the law, authentic written evidence is needed regarding circumstances, events or legal actions carried out through certain positions, that notaries are certain positions that carry out the profession in legal services to the public, it is necessary to obtain protection and guarantees in order to achieve legal certainty, that notary services in the development process are increasing as one of the legal needs of the community. "

Knowing the importance of the duties and position of a notary in the midst of society and the strength of proof of the authentic deed he makes, it can be said that the notary office is a position of trust. The position of trust given by the law and society obligessomeone who works as a notary is responsible for carrying out

trust as well as possible and uphold legal ethics, dignity and the nobility of his position. In practice, notaries are often involved with law cases either as witnesses and as suspects.⁹Notary's involvement in a legal case is due to an error in the deed he made, either because of the Notary's own mistake or the fault of the parties or one of the parties who did not provide actual information or documents (absence of good faith from the parties or one of the parties) or had there is an agreement between the notary and one party which causes losses to the other

party. In connection with the deed that he made, the notary must be held liable for causing harm to the parties or one of the parties. Basically, a notary cannot be held responsible for a crime, because the notary is only responsible for the formal side of the deeds.¹⁰ Regarding the allegation of a legal case committed by a notary public, in article 66 paragraph 1 of Law Number 30 of 2004 concerning the Position of a Notary, it is stated that investigators, public prosecutors, or judges, in taking minuta deeds and summoning a Notary, must be approved by the Regional Supervisory Council (MPD).¹¹ The Constitutional Court Council (MK) on March 23, 2013 granted the petition for a judicial review of Article 66 (paragraph (1) of Law No. 30 of 2004 concerning the Position of Notary that was proposed by Kant Kamal. Amr, the decision of the Constitutional Court essentially canceled the phrase "with the approval of the Regional Supervisory Council" in the article being tested. With the Decision No. MK No. 49 / PUU-X / 2012 dated March 23, 2013, the legal process examination involving a Notary does not require approval

The Regional Supervisory Council (MPD) again and the phrase is considered contrary to the 1945 Indonesian Constitution and has no binding legal force. In Law Number 30 of 2004 concerning the Position of Notary (MPD), the Regional Supervisory Council has special powers not possessed by the Regional Supervisory Council (MPW) and the Central Supervisory Council (MPP), namely as stated in article 66 of the UUJN, that the MPD has the authority to examine the Notary in connection with the request of investigators, public prosecutors or a judge to take a photocopy of the Minuta or other letters that are attached to the Minuta or in the

⁸ Moh. Mahfud MD, *Politik Hukum di Indonesia*, PT. Rajagrafindo Persada, Jakarta, Cetakan ke-6, 2014, p. 1.

⁹Mulyoto, 2010, *Kesalahan Notaris dalam Pembuatan Akta Perubahan Dasar CV*,Cakrawala Media , Yogyakarta, p. 2.

¹⁰ Pieter Latumaten, 2009, *Kebatalan dan Degradasi Kekuatan Bukti Akta Notaris Serta Model Aktanya*, Paper presented at the XX Congress of the Indonesian Notary Association in Surabaya

¹¹ Habib Adjie, 2011, *Kompilasi Peraturan Perundang-Undangan Jabatan Notaris*,Pustaka Zaman, Semarang, p. 22.

Notary's protocol in the Notary's deposit, as well as the Notary's summons related to the deed he has made or in the Notary's protocol that is in the Notary's deposit. The final result of the MPD examination which is set forth in the form of a decree contains the ability to give approval or reject the request of the investigator, public prosecutor or judge.¹²

The existence of this MKN institution is to "replace" the role of the MPD in approving or rejecting the notary's summons and taking photocopies of Notary protocols by investigators, public prosecutors and judges. The MKN is an independent decision-making body that has the duty and obligation to provide guidance or guidance in order to strengthen the notary institution in enforcing UUJN for everyone who carries out the position as a Notary. In carrying out its duties, MKN may conduct investigations on Notaries who are suspected of committing violations related to alleged crimes in the process of making authentic deeds. If there is evidence of a violation committed by a notary that causes harm to the parties, So in this case MKN can give approval to investigators to be examined in the judicial process. If not, then MKN cannot give approval.

The role of MKN is very much needed to provide guidance and legal protection for Notaries in order to avoid legal problems that can overthrow the notary institution as an institution of trust for the public. The presence of MKN is expected to provide an optimal form of legal protection for Notaries, and can provide preventive and curative guidance in enforcing UUJN in carrying out their duties as a public official. According to Permen No.7 / 2016, the Notary Honorary Council consists of the Central Notary Honorary Council and the Regional Notary Honor Council. MKNP is formed by the Minister and domiciled in the capital city of the Republic of Indonesia, while MKNW is formed by the Director General on behalf of the Minister and is domiciled in the

Provincial Capital. MKNP and MKNW elements consist of government elements, Notaries, and experts or academics, whose membership consists of 7 (seven) members, consisting of one chairman, one deputy chairman, five members. Notary Honorary Council was formed, its legal politics is a form of providing legal protection to Notaries as public officials who are authorized to make deeds authentic.

2. Position of the Regional Supervisory Council (MPD) After the Notary Honorary Council was formed

In Article 66 paragraph (1) of Law no. 2 Th. 2014 MPD authority was replaced by a new institution, namely the Notary Honorary Council (hereinafter referred to as MKN) as a legal protection institution for Notaries. If the notary is suspected of having committed an error or violation in drawing up a deed, then the law enforcement apparatus must again seek approval from MKN to summon the notary in the event that he is asked for information. Following up on the provisions of Article 66 of Law no. 2 Th. 2014 regarding MKN, the Minister of Law and Human Rights Regulation of the Republic of Indonesia was created Number 7 of 2016 concerning the Notary Honorary Council (hereinafter referred to as Permenkumham No.7 Th. 2016). With the transfer of the role of the MPD to MKN, the role of the MPD now has the authority in accordance with Article 70 of the UUJN²⁹. With the existence of article 66A concerning the Notary Honorary Council, Notary Public . Then it is appropriate Article 1 point 6 is questioned regarding the Notary Supervisory Council functions to carry out guidance and supervision of Notaries. Thus, there are 2 (two) councils that function to carry out guidance and supervision of Notaries, namely the Notary Supervisory Council and the Notary Honorary Council. Whereas according to article 67 (CHAPTER IX) the function of the Notary Supervisory Council is to supervise Notaries (without mention of any

¹²Habib Adjie , *Op.cit*, *Kebatalan dan Pembatalan Akta Notaris* , page 159

guidance function). According to Amrul Partomuan Pohan, whether the function of the Notary Supervisory Council should focus on notary supervision.¹³

Thus it can be said that even though the MPD's authority as contained in Article 66 paragraph (1) UUJN No. 30 of 2004 is no longer valid because it has been revoked by the Constitutional Court through decision No. 49 / PUU-X / 2012, however organizationally the MPD still exists as a notary supervisory agency in regencies / cities. MPD's authority is not only to provide written approval in summons and notary examination by investigators in their capacity as a witness or suspects but more than that the MPD has other powers which are also regulated in UUJN No. 30 of 2004 and Regulation of the Minister of Law and Human Rights of the Republic of Indonesia No. M. 02.PR.08.10 Year 2004 as previously described. Therefore, the existence / existence of the MPD as a notary supervisory agency in the regency / city area still exists and still has the authority, duties and responsibilities in carrying out supervision and guidance for notaries in the regions.

C. CLOSING

The MKN is an independent decision-making body that has the duty and obligation to provide guidance or guidance in order to strengthen the notary institution in enforcing UUJN for everyone who carries out the position as a Notary. In carrying out its duties, MKN may conduct investigations on Notaries who are suspected of committing violations related to alleged crimes in the process of making authentic deeds. If it is found that there is evidence of a violation committed by a notary that causes harm to the parties, in this case MKN can give approval to investigators to be examined in the judicial process. If not,

then MKN cannot give approval. Notary Honorary Council was formed, authentic.

With the formation of the Notary Honorary Council, the MPD's authority is as contained in Article 66 paragraph (1) UUJN No. 30 of 2004 is no longer valid because it has been revoked by the Constitutional Court through decision No. 49 / PUU-X / 2012, however organizationally the MPD still exists as a notary supervisory agency in regencies / cities.

¹³ Syafran Sofyan, 2013, *Catatan Perubahan UU Jabatan Notaris Nomor 30 tahun 2004*(Peraturan Menteri Sangat Mendesak), http://medianotaris.com/catatan_perubahan_uu_jabatan_notaris_nomor_tahun_berita352.html,

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