

The Legal Harmonization in Bankruptcy Arrangements in the Notary Profession

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Abstract. *Notary profession can be dishonorably dismissed if declared bankrupt by a court decision regulated in article 12 letter a of Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 Position of Notary. The provisions of this article contradict the provisions of the Bankruptcy and Suspension of Obligations for Payment of Debt Law No. 37 of 2004 which cover the subject of bankruptcy, the object of bankruptcy and the legal consequences of bankruptcy. This legal research aims to find out and analyze the harmonization of the Law on Notary Office and the Law on Bankruptcy and Suspension of Debt Payment Obligations, especially the Notary Profession declared bankrupt and to know and analyze legal certainty for the Notary profession declared bankrupt. This study uses a normative juridical approach using analytical descriptive research specifications. The type of data in this legal research is normative by using primary legal materials in the form of various laws and regulations related to bankruptcy law for the Notary profession. Secondary legal materials are in the form of journals, both international and national journals, opinions of legal scholars, papers, research reports, articles and magazines as well as literature and electronic libraries related to legal protection. As well as tertiary legal materials in this study in the form of legal dictionaries, Indonesian dictionaries and encyclopedias. The method of collecting data in this study is in the form of literature and the method of data analysis used is in the form of legal logic with the deductive method. Based on the results of the research and discussion, disharmony was found between the Law on Notary Office and the Bankruptcy Law regarding the regulation of the profession of a Notary who was declared bankrupt both in terms of the subject of bankruptcy, the object of bankruptcy and the legal consequences of bankruptcy for the Notary profession. Then it was found that there were multiple interpretations in article 12 letter (a) of the Notary Office Law, causing legal uncertainty and injustice for Notaries who were declared bankrupt.*

Keywords: *Bankruptcy; Harmonization; Profession.*

1. Introduction

Notary is a profession that has existed for a long time. They facilitated the needs of the people who at that time could not read or write much. The notary helps write down the important points. Then signed by each party. The notary authenticates the document with a certain mark.¹

Act No. 30 of 2004 concerning the Position of Notary Public as amended by Act No. 2 of 2014 (hereinafter referred to as the Law on Notary Position) defines a Notary Public as a public official authorized to make authentic deeds and has other authorities as referred to in this or any other law.²

The legal need in society can be seen in the increasing number of agreements set forth in a notarial deed, where a notary is one of the public officials authorized to make authentic deeds and other powers as stipulated in the law. The authority to make authentic deeds is only carried out by a notary insofar as the making of certain authentic deeds is not reserved for other public officials.³

The notary is appointed and dismissed by the Minister of Law and Human Rights, the minister also has the authority to determine the formation of a notary's position in the district or city as the domicile of the notary. Notaries can stop and be dismissed from their positions either honorably dismissed, temporarily dismissed or dishonorably discharged.

Provisions regarding notaries who are temporarily dismissed and also dishonorably discharged from their positions are regulated in article 9 and article 12 of Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Office of a Notary. Article 9 paragraph (1) letter a of Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of Notary Public, hereinafter referred to as UUJN, explains that a Notary may be temporarily dismissed from his position due to bankruptcy proceedings or postponement of debt payment obligations. Article 12 letter a UUJN explains that a Notary is dishonorably dismissed from his position by the Minister on the recommendation of the Central Supervisory Board if he is declared bankrupt based on a court decision that has permanent legal force.

¹Widhi Handoko, 2019, *State Domination of the Notary Profession (Between Ideas and Reality)*, Wheel of Publica, Bogor, pp. 1-2

²Article 1 point (1) Law number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary

³Habib Adjie, 2009, *Indonesian Notary Law (Thematic Interpretation of Law Number 30 of 2004 concerning the Position of Notary)*, Refika Aditama, Bandung, Hal. 40

This dishonorable dismissal of a notary is a treatment that is not in accordance with the consequences of bankruptcy law because the bankruptcy law itself provides a limitation that the debtor who is declared bankrupt, namely the debtor loses the right to control and manage his assets which are included in the bankruptcy assets from the date the bankruptcy statement decision is pronounced which is regulated in Article 24 paragraph 1 of Act No. 37 of 2004 concerning Bankruptcy and Suspension of Obligations for Payment of Debt, hereinafter referred to as UUK and PKPU and there are exceptions to bankruptcy assets regulated in Article 22 UUK and PKPU which are essentially money obtained from the salary of a position not as an object of bankruptcy estate. If declared bankrupt, he only loses the right to control his assets and does not lose his rights as a notary in his position.

A notary is considered incompetent in exercising his authority as a notary, when viewed from the provisions of article 12 letter a of the Notary Office Law, because the notary has been declared bankrupt by the court due to his inability to pay debts to creditors, where the notary owes creditors outside of his position as a notary, either as an individual or as an entrepreneur. The rules in the Law on Notary Position here are felt to provide insufficient justice where the notary is bankrupt in his capacity as a notary or outside his position as a notary, namely as a businessman.

The contradiction in the two laws here is in explaining the legal consequences of bankruptcy and also the existence of injustice for the Notary regarding the rules contained in the Notary Office Law.

Of course the bankruptcy decision for the Notary is very detrimental to the Notary and this is felt to cause injustice to the Notary. This is contrary to the goals of modern bankruptcy law theory put forward by Donald R. Korobkin, who stated that a modern bankruptcy law theory called "value-based theory" idealizes bankruptcy law not solely for the purpose of responding to collective debt repayment problems or for resolving financial difficulties, but The main objective of bankruptcy law is to restore the debtor's financial condition.⁴ If seen from this theory and related to Article 12 letter a of the Notary Office Law, how can a Notary recover his financial condition in a state of bankruptcy, if the Notary himself receives the sanction of being dismissed from his position as a notary.

Based on the description of this background, the authors formulate the problem, namely how to harmonize the law between the Notary Office Act and the Bankruptcy Law and Suspension of Debt Payment Obligations for the Notary profession who is declared bankrupt and How is legal certainty for the

⁴Elyta Ras Ginting, 2018, Bankruptcy Law (Bankruptcy Theory), Sinar Graphic, Jakarta, p.275.

notary profession who carries out his profession when declared bankrupt.

2. Research Methods

The approach method in this study uses a statutory approach and a conceptual approach. The research specifications used in this study are descriptive analysis using research methods of normative law. The legal material collection method used in this research is library research. After the legal materials have been collected, the next step is to conduct an analysis of the primary and secondary legal materials. The analysis in this study uses legal logic with a deductive method.

3. Results and Discussion

3.1. Harmonization of Laws Between the Notary Office Law and the Bankruptcy Law and Suspension of Debt Payment Obligations for Notary Professions Declared Bankrupt

Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of Notary (hereinafter referred to as UUJN) is a legal product that regulates all matters relating to the duties and powers of a Notary in carrying out his profession and position. Article 9 and article 12 letter a UUJN regulates one of the reasons why a Notary can be temporarily dismissed and can also be dishonorably discharged from his position, namely where a Notary is in a state of bankruptcy.

The contents of Article 9 UUJN are:

1. The notary is temporarily dismissed from his position because:
 - a. In the process of bankruptcy or postponement of debt payment obligations;
 - b. Being under guardianship;
 - c. Doing a disgraceful act; or
 - d. Conducting violations of obligations and prohibitions of office.
2. Before the temporary dismissal as referred to in paragraph (1) is carried out, the Notary is given the opportunity to defend himself before the Supervisory Board in stages.
3. The temporary dismissal of the Notary as referred to in paragraph (2) is carried out by the Minister on the recommendation of the Central Supervisory Council.
4. Temporary dismissal based on the reasons referred to in paragraph (1) letter c and letter d is valid for a maximum of 6 (six) months

The contents of article 12 UUJN, namely:

The Notary is dishonorably dismissed from his position by the Minister on the recommendation of the Central Supervisory Council if:

- a. Declared bankrupt based on a court decision that has obtained permanent legal force;
- b. Being under continuous supervision for 3 (three) years;
- c. Commit acts that humiliate the honor and dignity of the position of Notary; or

d. Committing serious violations of the obligations and prohibitions of office.

Bankruptcy is a condition where the debtor is unable to pay his debts to creditors. Meanwhile, a Notary general official has the authority to make authentic deeds who have other authorities as referred to in the Law on Notary Positions. If the Notary here is declared bankrupt by the court because the Notary is unable to pay debts to creditors, namely the Notary as a debtor and because of the Notary's inability to pay debts to creditors, the Notary is declared bankrupt by the court and the consequence of this bankruptcy is that the Notary is dismissed dishonorably by the Minister at the request of the Central Supervisory Board.

Act No. 37 of 2004 (hereinafter referred to as UUK and PKPU) explains that those who can be declared bankrupt are:

1. Individuals (natuurlijke person), both men and women who are married or unmarried.
2. Legal entity consisting of:
 - a. Profit-seeking legal entities such as PT
 - b. Legal entities engaged in the field of public interest such as PT. Persero, PERUM, BUMN/D, Education Legal Entities.
 - c. Profit-seeking social legal entities such as foundations, associations, associations and other similar social legal entities that use other names or designations.
3. Persero Firma including CV.
4. The assets of the deceased

Notary in carrying out legal actions on the one hand becomes a public official as well as on the other hand as an individual legal subject (natuurlijk person), so that the scope of legal action is broad, which includes debts and loans, borrowing money from banking institutions, establishing a company which can then go bankrupt and become a bankrupt debtor.

The notary here in carrying out legal relations can be seen from 2 sides. First, the Notary acts from the side as an individual (natuurlijke person) who is free to enter into an agreement with anyone, either based on an agreement or based on legislation. From the agreement arises rights and obligations which, if not fulfilled, one of them will result in a lawsuit.

Second, in an agreement a Notary acts in his capacity as a public official in which all rights, obligations and authorities are regulated by law, namely in the Law on the position of a Notary. General officials here are born because of the will of the law. A notary is definitely a public official but a public official is not necessarily a notary. This provision for a Notary as a public official is regulated in Article 1 point 1 UUJN which reads that a Notary is a public official authorized to make authentic deeds and other authorities as referred to in this Law.

If a Notary who is declared bankrupt is viewed from the PKPU Law, then a Notary who is declared bankrupt is seen as an individual not as a legal entity. This is because public officials are not part of individuals or legal entities, so they cannot

be bankrupt. If the question arises whether a notary can be bankrupt, of course he can, but the notary acts as an individual, not as a public official.

Therein lies one of the causes of the disharmony of the 2 legal products governing bankruptcy and bankrupt notaries. The contradiction regarding the legal subject of notary bankruptcy here is clearly visible, where UUJN does not clearly describe the capacity of a notary who is declared bankrupt as an individual subject or as a public official. However, judging from the legal consequences of Article 12 letter a UUJN, it is as if the bankrupt person is a public official. On the other hand, the UUK PKPU clearly illustrates that public officials are not one of the subjects of bankruptcy.

The provisions of article 12 UUJN also do not mention what is the object of a notary's bankruptcy as well as what is included in the confiscated assets when a notary is declared bankrupt. In the elucidation of the article, it is simply written "sufficiently clear". As is the case with the subject of notary bankruptcy, the object of bankruptcy in UUJN also causes multiple interpretations. There is no limit to what assets are classified as bankrupt assets.

Unlike the case with the provisions in the UUK PKPU. The law clearly regulates the objects included in bankruptcy assets. This is regulated in Article 21 and Article 22 of the UUK PKPU. Article 21 UUK PKPU reads bankruptcy includes all of the Debtor's assets at the time the bankruptcy statement decision is pronounced as well as everything that was obtained during the bankruptcy. However, "all the assets of the debtor" in Article 21 UUK and PKPU are limited by Article 22 UUK and PKPU, namely the provisions referred to in Article 21 do not apply to:

- a. Objects, including animals that are really needed by the debtor in connection with his work, equipment, medical devices used for health, beds and equipment used by the debtor and his family, and even food for 30 (thirty) days for the debtor and his family, which was in that place;
- b. Everything that is obtained by the Debtor from his own work as salary from a position or service, as wages, pensions, waiting money or allowances, to the extent determined by the Supervisory Judge; or
- c. Money given to the Debtor to fulfill an obligation to provide a living according to the law.

Based on article 22 letter b UUK PKPU above, if it is related to the notary's bankruptcy provisions, then everything that a Notary receives as a bankrupt debtor comes from the salary from the position he holds or the wages he gets from the position he serves cannot be included in the object of bankruptcy. So the dishonorable dismissal of a Notary as in article 12 letter a UUJN according to the author is not appropriate when it is related to the PKPU UUK because if you look back at it one of the objectives of this law is for the sake of guaranteed legal protection. The implementation of fair debt repayment and restoring the debtor's financial condition.

One other cause that causes UUJN and UUK PKPU to experience disharmony is the legal consequences for bankrupt debtors who are contradictory. The legal

consequences of bankruptcy for debtors are explained in Article 21 of the PKPU UUK where bankruptcy covers all of the debtor's assets. However, the provisions of this article are limited by Article 22 of the PKPU UUK where there is an exception for debtor assets that are included in bankruptcy assets.

However, the debtor does not simply lose his assets which are classified as bankrupt, the debtor only loses his rights to manage his assets as stated in Article 24 paragraph (1) of the PKPU UUK, namely the debtor by law loses his right to control and manage his assets which are included in the assets bankruptcy, from the date the bankruptcy declaration decision was pronounced.

The legal consequences of bankruptcy for debtors in the PKPU UUK are only limited to the debtor losing his right to manage his assets since the bankruptcy decision was handed down. Unlike the case with the consequences of bankruptcy law for Notaries in UUJN.

The provisions in Article 12 letter a UUJN where the legal consequences for a Notary who is declared bankrupt is dishonorably dismissed. The elucidation of this Article is not accompanied by further explanation regarding this provision. Which means that after a bankruptcy decision from the Court which has obtained permanent legal force, a Notary no longer has his position and is considered incompetent in carrying out his profession and position.

Here there is a clash of norms between the UUJN and the PKPU UUK, even though the PKPU UUK does not explicitly stipulate the position of a Notary, it would be better if UUJN refers to the PKPU UUK. The PKPU UUK is the parent of bankruptcy issues, but the bankruptcy arrangements in the UUJN are contrary to the provisions in the PKPU UUK. This creates a condition of disharmony in the two laws and causes the notary to suffer losses.

Legal harmonization of UUJN and UUK and PKPU should have been carried out. Harmonization of law is an effort to harmonize, adjust, strengthen and unify the conception of a draft law and regulation with other laws and regulations, whether higher, equal or lower and other matters other than statutory regulations, so that they are arranged in an orderly manner systematic, not conflicting or overlapping.⁵

If we think about UUJN and PKPU again, there is no point of contact between the two regarding bankruptcy for the position of a notary. The existence of multiple interpretations of the UUJN causes legal uncertainty in accordance with the elements of the theory of legal certainty put forward by Michael Jefferson above. If legal certainty cannot be achieved, how can legal justice be given to a Notary who is experiencing bankruptcy?

3.2. How is legal certainty for the profession of a notary who carries out his profession when he is declared bankrupt?

⁵Wicipto Setiadi, 2007, The Harmonization Process as an Effort to Improve the Quality of Legislation, Journal of Indonesian Legislation Vol.4 No.2., Page 46

The definition of bankruptcy according to Article 1 UUK PKPU is a general confiscation of all the assets of a bankrupt debtor whose management and settlement are carried out by a curator under the supervision of a supervisory judge regulated in this law. According to the PKPU UUK, bankruptcy in principle regulates that a bankrupt debtor by law only loses his right to administer and carry out acts of ownership of his assets which are included in the object of bankruptcy. The loss of his free rights is only limited to his assets and not to his personal status.

According to Habib Adjie, what is meant by a bankrupt notary is if the notary is sued to provide compensation due to his mistakes which causes a deed to lose the power of proof as an authentic deed, or a deed made by or before him becomes null and void, causing losses to the parties. and it turned out that the value of the losses demanded was so large that all of the Notary's assets were not sufficient to replace him, he was declared bankrupt based on a court decision that has permanent legal force.⁶

Referring to Habib Adjie's opinion above and the provisions of article 12 letter a UUJN, it can be said that a Notary who is declared bankrupt according to UUJN if the Notary is demanded compensation by the parties or appearers, because the deed made by/or before a Notary, it turns out that a claim for compensation arises As a result of an error caused by a Notary, whose value exceeds the assets owned by the Notary, the Notary may be declared bankrupt based on a Court decision with permanent legal force.

Notaries who were declared bankrupt based on the UUJN felt that it was very unfair. There is no legal certainty for a notary who is in bankruptcy. This is because the Notary who is declared bankrupt should not be the position that is bankrupt but the individual, this is because the position is not a legal subject in bankruptcy law. If the provisions for a bankrupt notary refer to article 12 letter a UUJN, it is as if after a court decision has been issued declaring a notary declared bankrupt, the notary loses everything, both his assets and his position and there are no other legal remedies that the notary can take. Therefore, in fact, the problem of bankruptcy at a Notary is a problem that rarely occurs. The notary is very careful not to go bankrupt.

Arrangements regarding bankruptcy at a Notary, if it is based on the PKPU Law, a Notary who has a bankruptcy condition after completing his bankruptcy can apply for rehabilitation based on the creditor's approval. However, after the bankrupt Notary submits for rehabilitation, there are no further arrangements regarding the re-appointment of the Notary concerned. Supposedly if there is such a regulation, the rules are regulated further in the UUJN.

UUJN only regulates the appointment and dismissal of Notaries in Part One and Part Two. Article 2 UUJN states that the Notary is appointed and dismissed by

⁶Habib Adjie, 2008, *Civil and Administrative Sanctions Against Notaries as Public Officials*, Refika Sditama, Bandung, Hal. 64

the Minister, in this case the Ministry of Justice and Human Rights. Article 3 UUJN only regulates the requirements to be appointed as a Notary.

Here there is a legal vacuum in UUJN. After a notary is dishonorably dismissed due to bankruptcy according to article 12 letter a UUJN, there is no further regulation what if the notary, after completing his bankruptcy condition, can be reappointed or not. This does not provide legal certainty to a Notary who is declared bankrupt.

According to the author, if a person who serves as a Notary is declared bankrupt, it means that the individual who is experiencing bankruptcy is the individual. So after the person has completed his bankruptcy, applied for rehabilitation and the rehabilitation decision has been issued, legally the person's name is clean. In order to achieve legal certainty for a Notary, that person should be reappointed as a Notary by submitting an application to the Ministry of Justice and Human Rights.

A notary who has completed the bankruptcy process and is undergoing rehabilitation to improve his good name cannot apply again to become a notary. Here the notary will lose his right to work to carry out his position only because the notary has been or has been sentenced to bankruptcy by the court. This bankruptcy is simply the notary's inability to pay debts owed to creditors, not a criminal act. If it is associated with the provisions contained in the 1945 Constitution of the Republic of Indonesia, namely article 28 letter d, regarding Human Rights which explains that everyone has the right to work and receive rewards and fair and proper treatment in work relations.

According to Michael Jefferson, there are four conditions for realizing the consequences that exist in the principles and methods of legality to achieve legal certainty, namely:⁷

1. There is no ambiguity in the law (laws must not be vague);
2. Legislators (legislatures) are prohibited from making laws that apply retrospectively (the legislature must not create offenses to cover wrong doing retrospectively);
3. The judiciary is prohibited from creating new offenses (the judiciary must not create new offenses and perhaps);
4. Laws must be interpreted in a limited or strict manner (criminal statutes should be strictly construed)

Based on the four conditions for achieving legal certainty, in general there are two elements that can lead to achieving legal certainty, namely:

1. There is a law. Laws that are not allowed to have multiple interpretations

⁷E. Fernando M. Manullang, 2017, *Legism, Legality and Legal Certainty*, Kencana, Jakarta, p.154

because it can result in legal uncertainty in its application in court.

2. It is the power itself that authorizes the law to apply. This power is not allowed arbitrarily to apply the principle of legality, followed by a power structure based on the *trias politica* so as to guarantee legal certainty.

Disrespectful dismissal of a notary who is declared bankrupt according to the author is not in accordance with the theory of legal certainty. This is due to the provisions in the case of bankruptcy notaries regulated in Article 12 letter a UUJN are not clear and have multiple interpretations so that they are not appropriate as a basis for dismissal. This is in line with Jefferson's opinion above, the reflection of legal certainty can be achieved if there is no ambiguity in the law (laws must not be vague). There is no ambiguity in the law covering the norms of articles in statutory provisions that must be clear. The ambiguity of legal norms can lead to injustice. This injustice is seen from the legal construction of Article 12 letter a which states "a notary can be dismissed from his position if he is declared bankrupt based on a court decision whose decision has permanent legal force". Just because of the unclear rules, a person who works as a notary and runs his business then goes bankrupt and submits a legal effort for a PKPU application and is declared bankrupt with all the legal consequences then being dishonorably discharged is really not worth the struggle during education which costs quite a lot. And after continuing the notary program, it is still a long and winding process to obtain a professional title as a notary. Just because of the unclear rules, a person who works as a notary and runs his business then goes bankrupt and submits a legal effort for a PKPU application and is declared bankrupt with all the legal consequences then being dishonorably discharged is really not worth the struggle during education which costs quite a lot. And after continuing the notary program, it is still a long and winding process to obtain a professional title as a notary. Just because of the unclear rules, a person who works as a notary and runs his business then goes bankrupt and submits a legal effort for a PKPU application and is declared bankrupt with all the legal consequences then being dishonorably discharged is really not worth the struggle during education which costs quite a lot. And after continuing the notary program, it is still a long and winding process to obtain a professional title as a notary.

4. Conclusion

The bankruptcy arrangements for Notaries in the UUJN give rise to multiple interpretations among legal practitioners. Because in Article 12, letter a creates a lot of blurring of norms. Unlike the case with the provisions in the PKPU UUK, if the bankruptcy provisions are applied to a notary who is bankrupt, everything is clear and certain. It can be seen that these 2 rules are experiencing disharmony, in terms of the subject of bankruptcy, the object of bankruptcy and the consequences of bankruptcy. UUJN does not provide legal certainty for notaries

who experience bankruptcy. Especially if a Notary has been declared bankrupt and dishonorably discharged. An individual notary who has completed his bankruptcy and is applying for rehabilitation in accordance with the PKPU UUK has no further arrangements on how in the future, can that person apply again to become a notary or not, because remembering that person only experienced bankruptcy and did not commit a crime. The bankruptcy arrangements for Notaries in the UUJN are further clarified so as not to cause a blurring of norms. Moreover, if the UUJN can refer to the PKPU UUK because all bankruptcy arrangements are in the PKPU UUK. In order to prevent legal uncertainty for a notary who has been declared bankrupt, it is better to have further arrangements regarding the reappointment of a notary who has completed his bankruptcy and is applying for rehabilitation. This is because bankruptcy is just a person's inability to settle his debts to creditors, not committing a crime.

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