

Legal Protection for Notaries for Mistakes in Deeds They Make in Decision Number 1860k/Pid/2010

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Abstract. *This study aims to analyze the legal protection of notaries for errors in the deeds they made in decision Number 1860K/PID/2010. The research method used is the normative juridical method with a statute approach and a case approach. The results of this study are that legal protection for notaries in this case is not optimal, because the judge does not consider the principle that notarial deeds are products of office that should be protected by law, unless there is evidence of intent or mens rea from the notary. Therefore, the recommendation of this study is the need for affirmation of norms in the Notary Law and guidelines for law enforcement officers in processing criminal cases involving notaries, in order to create legal protection, legal certainty, and justice.*

Keywords: *Criminal Liability; Legal Protection; Notary.*

1. Introduction

Notaries hold a crucial position in the legal life of society. As public officials authorized by the state, notaries have a significant responsibility to ensure that the deeds they draft provide legal certainty, protection, and order for the parties.¹In carrying out their duties, notaries are bound by strict legal regulations and a professional code of ethics that govern how they must act professionally, objectively, and independently. The existence of notaries is regulated in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (hereinafter referred to as UUJN), which regulates in detail the obligations, prohibitions, and sanctions that can be imposed on notaries.² Notaries not only act as deed makers but also serve as guardians of legal certainty. Notaries play a vital role in maintaining the integrity of legal transactions, both in terms of agreements between parties and in the validation of documents that can be used as legal evidence in court. This reflects the critical role of notaries in ensuring that transactions are not only legally valid but also legally valid.³

The provisions in Article 1 number 1 of the UUJN, state that a notary is "a public official authorized to make authentic deeds and has other authorities as referred to in this Law or based on other laws." This means that a notary is not merely an administrative executor, but is an integral part of the legal system that functions to create legality for legal acts carried out by the parties. Notaries also have a large social responsibility because the deeds they make are used as strong evidence in various legal transactions.⁴The absence of a notary, in reality, will result in many civil legal acts losing certainty and becoming prone to legal deviations in society when carrying out legal acts. In carrying out their duties, most notaries still abuse their authority or are negligent in carrying out their duties, which then gives rise to legal consequences, both civil, administrative and criminal.⁵According to Article 13 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, it is stated that: A Notary is dishonorably dismissed by the Minister because he is sentenced to imprisonment based on a court decision that has permanent legal force for committing a crime that is punishable by imprisonment of 5 (five) years or more.

¹Sudikno Mertokusumo, (2009), *Hukum Acara Perdata Indonesia*, Yogyakarta : Liberty, p. 42.

²Habib Adjie, (2009), *Sanksi Perdata dan Administratif Terhadap Notaris Sebagai Pejabat Publik*, Bandung, : Refika Aditama, p. 75

³Maria Farida Indrati, (2007), *Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan*, Yogyakarta: Kanisius, p. 25.

⁴Ahmad M. Ramli, (2004), *Perlindungan Hukum Terhadap Konsumen dalam Transaksi Elektronik*, Bandung: Mandar Maju, p. 64.

⁵Simons, W. A., (2004), *The Criminal Liability of Public Officials*, Amsterdam: University Press, p. 87.

The application of sanctions against public officials in the context of criminal law, such as notaries, must be carried out carefully. Administrative negligence by a notary is an act that, from the outset, does not contain mens rea or malicious intent. Meanwhile, Article 66 of the UUJN indicates that administrative negligence by a notary constitutes an administrative violation that should be resolved through the administrative channels of the notary code of ethics through a mechanism implemented by the Notary Honorary Council (MKN). In relation to the position of the Notary as the party guilty of administrative negligence committed only because of the carelessness he did, it is clearly contrary to the principle of "no punishment without fault" (geen straf zonder schuld), which is a principle in criminal law which states that a person cannot be punished if there is no fault attached to him for the act he committed. In other words, to be punished, a person must not only commit an unlawful act (actus reus), but there must also be fault in him (mens rea).

The Notary Law (UUJN) also explicitly regulates the accountability mechanisms for notaries. For example, Article 66 of the Notary Law (UUJN) stipulates that before a notary can be held accountable for criminal or civil matters, they must seek approval from the Notary Honorary Council (MKN). This is intended to protect the notary profession from direct prosecution and to ensure due process in all legal proceedings involving notaries. However, in practice, this provision is often ignored or ineffectively implemented by law enforcement officials, creating the potential for violations of notaries' professional rights.⁶

2. Research Methods

This study employs a normative legal research method. The data used are secondary data, including primary, secondary, and tertiary legal materials. Data collection was conducted through document study and library research. The data analysis technique used in this study is qualitative analysis.

3. Results and Discussion

Legal protection for notaries for errors in deeds they make in Decision Number 1860K/PID/2010 has not been implemented fairly, this is due to obstacles in the form of:

a. Substantial constraints on the law

Based on the explanation above, it is clear that under Article 16 of the UUJN, a Notary is only obligated to make a deed when requested by a party. In this case, the Notary is not responsible for the accuracy of the information provided by the parties in the deed made by the Notary. Therefore, the Notary cannot be subject

⁶Andi Hamzah, (2004), *Asas-Asas Hukum Pidana*, Jakarta: Rineka Cipta, p. 117.

to sanctions related to the duties and responsibilities of his position as a Notary. The absence of limitations on the actions of a Notary as a criminal offense in making a deed that is not emphasized in the UUJN, creates a loophole for the entry of unethical lawsuits against Notaries in making deeds.

This situation is further complicated by the fact that the UUJN does not regulate the legal protection mechanism for Notaries when carrying out their duties and obligations as Notaries who make authentic deeds. From this perspective, it can be concluded that there is a legal vacuum in the form of the absence of limits on the actions of Notaries who can be held accountable when the Notary's deed is problematic due to defects resulting from administrative errors and incorrect statements from the parties who appear before him, and there is a legal vacuum regarding legal protection for Notaries when the deed he made contains false statements caused by the parties who appear before him. This clearly results in uncertainty in the legal system of protection for Notaries.

b. Structural legal constraints

The position of a notary as a public official is an honorable position granted by the state through law to a person it trusts. This is because the position of notary cannot be placed in the executive, legislative, or judicial branches. The existence of notary institutions is required by law with the aim of serving and assisting the public who need authentic written evidence. Article 1868 of the Civil Code states that an authentic deed is a deed made in a form determined by law and made by or before an authorized public official at the location where the deed is made.⁷

Notaries have duties as public officials and have the authority to make authentic deeds and other authorities regulated by the Notary Position Law, the Authority of Notaries as stated in Article 15 of the Notary Position Law is to make authentic deeds regarding all actions, agreements, and provisions required by laws and/or desired by interested parties, to be stated in authentic deeds, guarantee the certainty of the date of making the deed, store the deed, provide legal protection for Notaries in carrying out their position as Public Officials. Law Number 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the position of Notaries actually regulates legal protection for Notaries carried out by the Notary Honorary Council (MKN), however, regulations regarding the position and form of legal protection are not expressly regulated in a statutory regulation, so that in this case there is a gap in Norms in enforcing the Law for Notaries which must be carried out by the Notary Honorary Council (MKN). The legal protection provided to (the Position of) Notaries, both as regulated in the Notary Position Law (UUJN) and in other regulatory provisions, is sufficient to provide legal protection for

⁷Fainnadya Shanvieta Britney Kaligis, Daniel F. Aling, dan Roy Ronny Lembong, "Aspek Perlindungan Hukum Bagi Notaris Terhadap Malpraktek Dalam Pembuatan Akta", *Lex Administratum*, Vol. 10 No. 5 2022.

Notaries in carrying out their position in order to maintain the confidentiality of their position. At this time, the "other privileges" held by Notaries in accordance with the provisions of Article 66 paragraph (1) of the Notary Position Law: For the purposes of the judicial process, investigators, public prosecutors or judges with the approval of the notary's honorary council are authorized,⁸

- a. take a photocopy of the minutes of the deed or notary protocol in the notary's storage and
- b. summoning a notary to attend an examination related to a notarial deed or protocol that is in the notary's custody, on May 28 2013, was declared invalid by the Constitutional Court of the Republic of Indonesia as stated in the Decision of the Constitutional Court of the Republic of Indonesia Number 49/PUUX/2012, which stated that:
 - 1) the phrase "with the approval of the Regional Supervisory Council" in Article 66 paragraph (1) of Law Number 30 of 2004 concerning the Position of Notary is contrary to the 1945 Constitution of the Republic of Indonesia;
 - 2) The phrase "with the approval of the Regional Supervisory Council" in Article 66 paragraph (1) of Law Number 30 of 2004 concerning the Position of Notary does not have binding legal force.

Based on the Constitutional Court's decision, the "other privileges" held by Notaries are lost. With the Decision of the Constitutional Court of the Republic of Indonesia Number 49/PUU-X/2012, investigators, public prosecutors, or judges can immediately take photocopies of the Minutes of Deeds and/or letters attached to the Minutes of Deeds or Notarial Protocols in the Notary's storage and summon the Notary to attend the examination related to the deed he made without the need for "the approval of the Regional Supervisory Council (MPD)". Based on subsequent developments, the existence of the Notary Position Law (UUJN) is deemed to no longer have the power to provide legal protection to Notaries in carrying out their duties as public officials.⁹

This then became one of the references for revising or changing Law Number 30 of 2004 concerning the Position of Notary. On January 15, 2014, Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary was passed, which was promulgated in the State Gazette of the Republic of Indonesia 2014 Number 3 (hereinafter referred to as the Notary Position Law). In this Notary Position Law, it is regulated regarding the formation of the Notary Honorary Council (hereinafter referred to as MKN) whose members are representatives of Notaries, government and academics, which functions as a legal

⁸*Loc. cit.*

⁹*Loc. cit.*

protection institution for the Notary Position in relation to deeds made by or before them, as stated in Article 66 paragraph (1) of the Notary Position Law. Based on the provisions of this article, provisions similar to Article 66 paragraph (1) of the Notary Public Law (UUJN) can be seen again, which reads "...with the approval of the Regional Supervisory Council (MPD)" which was declared no longer valid by the Constitutional Court some time ago. In Law Number 2 of 2014, the authority of the Regional Supervisory Council (MPD) has now changed to the authority of the Notary Honorary Council (MKN) as a legal protection institution for Notaries. If later there is a Notary who is suspected of making an error or violation in the matter of making a deed, then law enforcement, police, prosecutors, judges, must again obtain approval from the Notary Honorary Council (MKN) to examine or summon the Notary for questioning. In providing legal protection to Notaries, the Notary Honorary Council must carefully examine whether the reported Notary is proven to have intentionally or not committed a violation in the process of making an authentic deed. If the Notary is proven to have committed a form of criminal act, such as falsifying documents or ordering and/or participating in committing a crime in the process of making an authentic deed, then in this case the Notary Honorary Council (MKN) as a legal protection institution does not need to provide any form of legal protection to such Notaries, because apart from tarnishing the good name of the Notary institution, it will also have a sociological impact on society, that the Notary as a trusted institution will lose public trust. In this case, as an implementation of Article 66 paragraph (1) of the Notary Position Law, the Notary Honorary Council has the right to give approval to investigators who wish to summon a Notary to be questioned in court.

This is done to maintain the nobility and dignity of the Notary's position itself, so that legal protection for the Notary's position is not misused by irresponsible parties involving Notaries. If a Notary is suspected of making a mistake (alleged malpractice) in the process of making an authentic deed, even though the Notary has carried out his duties and authorities in accordance with the legal regulations (in accordance with the Notary Public Law and the Notary Code of Ethics), the Notary Honorary Council must provide legal protection to the Notary concerned by summoning and examining the Notary to ask for information before giving approval or rejecting the request submitted by the investigator who wants to examine the Notary. In this case, it is possible that there are parties or clients who come to the Notary with bad intentions, such as, when he meets the Notary to request an authentic deed, he uses a fake identity or fake letters or documents, so that the Notary who tries to help formulate the wishes of the party into an authentic deed actually becomes involved in legal problems and can even be accused of participating or helping to commit a crime in the process of making the authentic deed, even though the Notary is not authorized or obliged to check the authenticity of all documents submitted by the parties to the Notary. This is a strong warning for Notaries to be careful in carrying out their duties as public officials in making authentic deeds. If the Notary Honorary Council does not find

any evidence related to the alleged malpractice committed by the Notary, then the Notary Honorary Council (MKN) is obliged to provide a form of legal protection to the Notary concerned by not giving approval to investigators, prosecutors or judges to summon and examine the Notary in court. This serves as a stern warning to notaries to exercise caution in carrying out their duties as public officials in the preparation of authentic deeds. If the Notary Honorary Council finds no evidence of alleged malpractice by the notary, the Notary Honorary Council (MKN) is obligated to provide legal protection to the notary in question by refusing to allow investigators, prosecutors, or judges to summon and examine the notary in court. This serves as a stern warning to notaries to exercise caution in carrying out their duties as public officials in the preparation of authentic deeds. If the Notary Honorary Council finds no evidence of alleged malpractice by the notary, the Notary Honorary Council (MKN) is obligated to provide legal protection to the notary in question by refusing to allow investigators, prosecutors, or judges to summon and examine the notary in court.¹⁰

Regarding the position and form of legal protection provided by the Notary Honorary Council (MKN) as a legal protection institution for Notaries, it is not expressly regulated in the Notary Law or in other laws and regulations, so that this causes the implementation of the provisions of Article 66 paragraph (1) of the Notary Law to appear to be not functioning. This can have a bad impact if at some point in the future there is a case of alleged malpractice carried out by a Notary, which will certainly be very detrimental to the Notary concerned.¹¹

Based on the various explanations above, it is clear that the Notary Honorary Council (MKN) is the front line in legal protection for notaries, including regarding issues of defective notarial deeds. The Regional Supervisory Council is an agency that has the authority and obligation to supervise and provide guidance to notaries domiciled in districts/cities. Article 66 of Law Number 30 of 2004 regulates the authority of the MPD related to:

1. For the purposes of the judicial process, investigators, public prosecutors or judges with the approval of the Regional Supervisory Board are authorized to:
 - a. Take photocopies of the minutes of the deed and/or letters attached to the minutes of the deed or notary protocol in the notary's storage;
 - b. Summoning a notary to attend an examination related to a deed he/she has made or a notary protocol that is in the notary's custody.
2. Taking photocopies of the minutes of the deed or letters as referred to in paragraph (1) letter a, a handover report is made. Before the Constitutional

¹⁰*Loc, cit.*

¹¹*Loc, cit.*

Court Decision No. 49/PUU-X/2012, to involve a Notary in a legal case, there was an obligation to submit an application to the Regional Supervisory Board first. The examination of the case by the Regional Supervisory Board is the main thing in summoning a Notary by investigators, public prosecutors and judges.

Constitutional Court Decision number: 49/PUU-X/2012 decided to eliminate or end the authority of the Regional Supervisory Council (MPD) as stated in Article 66 paragraph (1) of Law Number 30 of 2004 concerning the Position of Notary. So in other words, the approval of the MPD is no longer required in summoning a Notary or taking a photocopy of the minutes of the deed and/or the Notary's protocol. In relation to the above, this creates confusion among notaries. On the one hand, notaries are required to keep the contents of the deed confidential, but on the other hand, investigators can easily summon notaries for investigative purposes in investigator examinations related to minutes of the deed.

According to Muh. Rikaz Prabowo, regarding the Constitutional Court's decision, this will cause many problems for notaries because supervision is crucial to avoid criminal threats for notaries in carrying out their duties and functions. Many notaries are very concerned about the risks to their work, duties, and position.¹²

The absence of regulations regarding the role of the MKN, as well as the absence of efforts by stakeholders regarding the issue of the legal vacuum regarding protection for Notaries, has resulted in the legal view that sees protection for Notaries as an important thing in realizing the mandate of the Fifth Principle of Pancasila and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia being unable to be realized.

Based on the various existing realities, it is necessary to formulate several related solutions. Obstacles to the implementation of the role and responsibilities of notaries in making deeds. The solutions in question are:

1. Establishing a mechanism for the obligation to provide evidence by the Notary Supervisory Board at the regional level first, so that the determination of the MPN becomes the basis for the parties to file a civil or criminal lawsuit. This is intended to allow for an in-depth investigation of the involvement and violation of the law by the Notary receiving the protocol regarding the creation of the protocol or regarding the storage and alteration of the protocol unlawfully, where the party with the most authority to conduct an examination and in-depth investigation of the Notary's unlawful acts related to the defects of the deeds he made is the MPN. The examination of the

¹²Muh. Rikaz Prabowo, "Perlindungan Hukum Pemanggilan Dan Pengambilan Minuta Akta Notaris Paska Berlakunya UU No. 2 Tahun 2014 Tentang Perubahan Atas UU No. 30 Tahun 2004 Tentang Jabatan Notaris (UUJN-P)", *Jurnal Hukum NOVELITY*, Vol 7 No. 1, February 2016, p. 114.

involvement of the Notary receiving the protocol as an Unlawful Act related to the damage or deviation from the contents of this protocol, can become the legal basis for the filing of civil and criminal lawsuits, because it has been clearly proven that there was an Unlawful Act by the Notary receiving the protocol in the case of a defective Notary protocol problem.

2. Establishing provisions regarding legal protection mechanisms for Notaries. Considering that Notaries frequently face criminal consequences due to administrative errors related to the preparation of deeds and errors in the statements of parties who appear before them, it is clear that the Notary's position is very weak and vulnerable to legal consequences from lawsuits from parties due to defects in the deeds they have prepared.
3. Make provisions regarding the regulation of acts that can be subject to sanctions, and the types of sanctions that can be imposed in relation to the issue of unlawful acts in the matter of making deeds, so that the imposition of sanctions for the issue of defects in deeds made by Notaries will be in accordance with the violation committed by the Notary concerned.

4. Conclusion

Based on the discussion, it is concluded that legal protection for notaries who are prosecuted for notarial deed errors in a juridical manner is the absence of regulations on protection mechanisms for notaries in carrying out their duties as authentic deed making officials in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary and Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 25 of 2020 concerning Duties and Functions, Requirements and Procedures for Appointment and Dismissal, Organizational Structure, Work Procedures, and Budget of the Notary Honorary Council. In terms of legal structure, the role of the MKN in protecting notaries when notaries are subject to criminal charges due to defects in the deeds they make is not yet optimal. Legal culture constraints in the form of the absence of regulations regarding the role of the MKN, as well as the absence of efforts by stakeholders regarding issues related to the legal vacuum regarding protection for notaries, have resulted in the legal view that sees protection for notaries as an important thing in realizing the mandate of the Fifth Principle of Pancasila and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia being unable to be realized.

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