

Reconstruction of legal policies on notary as witnesses based on justice value

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Abstract

The legal policy towards notaries as witnesses and authentic deed evidence in Indonesia is not fair currently because there is a shift in evidence from authentic evidence (letters) which is deliberately shifted by law enforcers to become witness evidence only even though the legal policy for authentic evidence as Absolute evidence against law enforcers is clearly regulated in Articles 164 HIR, 284 RGB and 1866-1875 of Indonesian Civil Codes, based on this, the subject matter discussed by the author is why the legal policy towards notaries as witnesses and authentic deed evidence that they have made has not yet based on the value of justice and how is the ideal construction of legal policies against notaries as witnesses and evidence of authentic deeds they created based on the value of justice. The approach method used in this research is socio-legal with a qualitative research tradition, using the constructivism paradigm. The discussion was carried out comprehensively by using a progressive legal approach to achieving social justice. The results show that in practice it is found that a legal action or violation committed by a notary related to an authentic deed qualifies as a criminal act. In practice, it is found that a legal action or violation committed by a notary can actually be subjected to administrative or civil sanctions or code of ethics for the position of a notary public, but later withdrawn or qualifying as a criminal act committed by the notary. Criminal law schemes with civil law and state administration will not cross or overlap as there is resistance by legal experts if they are not professionally included in the criminal offense scheme. Unprofessionalism is more precisely fall in the realm of violating the professional code of ethics. Factors that hinder law enforcement are legal and law enforcement factors, the bias between criminal and civil factors, facilities and facilities for law enforcement as well as community and cultural factors, and other obstacles, namely organizational, personal, operational, and managerial barriers, reconstruction of the ideal construction of legal policies against notary as a witness and authentic deed evidence that they created based on the value of justice.

Keywords: reconstruction, legal policy, notary, justice value

Introduction

An authentic deed is a perfect tool of proof for both parties and their heirs as well as all people who get rights which was authorized by the notary concerning what is contained in the deed (Article 165 HIR, Article 285 RBg, and Article 1870 of the Civil Code). An authentic deed is a binding evidence which means that the truth of the things written in the deed must be acknowledged by a judge or other law enforcer (Police, prosecutors, or other officials related to bureaucratic interests). It is said to be authentic because the deed is considered true or perfect as long as there is no other party that can prove otherwise. Meanwhile, an underhand deed can be a perfect tool of proof for the person who signed it and their heirs and people who get the rights from it only if the signature in the underhand deed is recognized by the person against whom the writing is to be used. (Article 1857 of the Civil Code).

Evidence by authentic deeds is intended for the achievement of legal objectives, namely the value of justice. In the theory of basic legal values, there are three basic legal values that will be addressed, namely the value of justice as a philosophical form (philosophical), the value of the benefit as a form of society (social), and the value of legal certainty as a form of dogmatic (state or normative legal rules). Of the three basic values of law, the most important goal of the law is the achievement of the value of justice itself. This achievement of the value of justice is what is called the basis for the value of justice.

The fact in the practice of carrying out the duties and authority of a notary is that the basis for the value of justice is still far from the fire. This means that the objective of the ideal legal policy towards notaries as public officials who are assigned and authorized to make authentic deeds, actions that are not in accordance with the intention, namely not as expected for achieving the value of justice for the protection of the notary profession itself.

The fact of this deviation from the objective of the value of justice is what the author believe will experience and reveal (to explore) and criticize (to criticize) to get fair answers and solutions (to understand).

In carrying out their duties of authority, Notaries are often faced with complex and complicated legal issues. The occurrence of complaints and reports or lawsuits between the parties in the deed that they make sometimes often drags the Notary into the vortex of the case. An example of a fact is the case experienced by Theresia Pontoh's ^[1] case.

In case the person concerned was convicted when facilitating the process of buying and selling land under his authority. This case stems from a plan to buy and sell two land titles in Jayapura, Papua. Landowner Hengki Dawir wants to sell his land to a prospective buyer named Rudi Doomputra. According to Aloysius, the land sale and

¹ Hukumonline. (2014), Tolak Kriminalisasi, Ratusan Notaris Protes ke MA, <https://www.hukumonline.com/berita/baca/lt5451ed3b07f82/tolak-riminalisasi--ratusan-notaris-protas-ke-ma/> Kamis, Accessed on 20 August 2015.

purchase agreement have not yet occurred, such as the notary fee and payment of the land price. The formal requirements for buying and selling have not been fulfilled. The landowner canceled the sale plan because it turned out that the two certificates had already changed hands to a person with the initial name of "S", who previously had customary rights. "S" also financed the issuance of the two certificates at the national land office (BPN) and gave a letter not to continue the issuance of the deed of sale & purchase (AJB) and to transfer the owner's name with authorization given by a notary named Theresia. Then the owner came to Theresia, asking for the two land certificates to be returned. However, Theresia refused to give it because if both parties were to submit it, both parties had to attend. Theresia then ordered the landowner to file a civil suit in court. After the trial, a peace deed appeared, which ordered Theresia to return the legal certificate to the owner. After being returned (to "S"), Theresia Ponto was then criminally charged by the prospective buyer. Prospective buyers accused Theresia of embezzling land certificates.

The legal process did not go according to the procedure because the Notary Honorary Council/MKN (at that time still in the area of the Regional / District Honor Council) Theresia was detained by the Papua Regional Police for approximately 96 days. Currently, the Theresia case is being tried at the Jayapura District Court on charges of Article 372 of the Criminal Code (embezzlement). According to Aloysius (MKN Management), the criminalization of notaries is not only experienced by Theresia but also many notaries / PPATs. Many have experienced a similar fate while carrying out their duties.

Universitas Indonesia's Professor of Constitutional Law, Jimly Asshiddiqie^[2] said that the number of certain professional criminalizations was due to the ineffective enforcement of the code of ethics in that profession. Referring to article 50 of Indonesian Penal Code (KUHP) according to him shows that Theresia cannot be subjected to penal law because she is just doing her job permitted by the law which in this case is the Notary Law. According to the author, all laws regulating a specified profession in Indonesia have the same tendency, namely the threat of criminal sanctions. As to why there are many professional job criminalization is because the consumers are unprotected therefore If ethics enforcement is running well, then there is no need for criminalization. In Addition, Wahyu Widodo³ said that not only doctors are afraid of being criminalized, notaries is also the same, when the notary is called as a witness and finds that his deed is deemed to have caused losses to the parties in the deed, then they can be brought under criminal law as seen in many similar cases that are still happened to Notaries in carrying out their duties.

The occurrence of gaps (deviations or gaps) in the practice of carrying out the duties of the authority of the notary office, has a social impact, namely public distrust of the Notary's deed as authentic evidence and legal impact, namely weakening the legal power of authentic deed proof as perfect evidence, as well as personal impact on Notaries. Namely, causing fear in carrying out their duties, not feeling

confident and feeling depressed and causing disharmony and uneasiness for the Notary as a public official.

Based on this problem, the authors are then interested in conducting research with the following issues:

1. Why is the legal policy against notaries as witnesses and evidence of authentic deeds in Indonesia is currently not based on the value of justice?
2. What is the ideal construction of legal policies for notaries as witnesses and evidence of authentic deeds that they make based on the value of justice?

Method of Research

The paradigm that is used in the research this is the paradigm of constructivism which is the antithesis of the understanding that lay observation and objectivity in finding a reality or science knowledge^[4] Paradigm also looked at the science of social as an analysis of systematic against *Socially Meaningful Action* through observation directly and in detail to the problem analyzed.

The research type used in writing this paper is a qualitative research. Writing aims to provide a description of a society or a certain group of people or a description of a symptom or between two or more symptoms.

Approach method used in this research is *Empirical-Juridical*^[5], which is based on the norms of law and the theory of the existing legal enforceability of a law viewpoint as interpretation.

As for the source of research used in this study are:

1. Primary Data, is data obtained from information and information from respondents directly obtained through interviews and literature studies.
2. Secondary Data, is an indirect source that is able to provide additional and reinforcement of research data. Sources of secondary data in the form of: Primary Legal Material and Secondary Legal Materials and Tertiary Legal Material.

In this study, the author use data collection techniques, namely literature study, interviews and documentation where the researcher is a key instrument that is the researcher himself who plans, collects, and interprets the data^[6] Qualitative data analysis is the process of searching for, and systematically compiling data obtained from interviews, field notes and documentation by organizing data into categories, describing it into units, synthesizing, compiling into patterns, selecting important names and what will be studied and make conclusions.

Research Result and Discussion

1. Reason Why The Legal Policy Against Notaries As Witnesses And Evidence Of Authentic Deeds In Indonesia Is Currently Not Based On The Value Of Justice

Theoretically, the Notary Law does not regulate criminal sanctions against Notaries. However in practice, it is found that a legal action or violation committed by a notary regarding the authentic deed that the notary commit can be classified as a criminal act.

² Asshiddiqie, Jimly. (2018). Constitutional Adjudication and Democracy. Journal of Constitutional Justice. 5. 45-71. 10.35215/jcj.2018.5.2.002.

³ Widodo, Wahyu & Galang Winda Pratama, Toebagus. (2019). Poverty, Evictions and Development: Efforts to Build Social Welfare Through the Concept of Welfare State in Indonesia. 10.2991/icglow-19.2019.65.

⁴ Faisal, (2010), Menerobos Positivisme Hukum, Rangkap Education, Yogyakarta.

⁵ Johnny Ibrahim, (2005), Teori dan Metodologi Penelitian Hukum Normatif, Bayumedia, Surabaya.

⁶ L. Moleong, (2002), Metode Penelitian Kualitatif, PT Remaja Rosdakarya, Bandung.

All duties, powers, and responsibilities of a notary are actually the duties, authorities, and responsibilities of the state in the realm of civil law and state administration however In practice, it is found that a legal action or violation committed by a Notary that can actually be subjected to administrative or civil sanctions or a notary's code of ethics, but classified as a criminal act committed by the Notary Public instead.

Criminal law schemes with civil law and state administration will not cross or overlap. The meaning of being professional or unprofessional in carrying out the authority of a Notary has nothing to do with deviations or violations of criminal law as there is resistance by legal experts if they are not professionally included in the criminal offense scheme as this unprofessional action is more fitting in the criteria of violation of the professional code of ethics.

Even though Notary is not a government employees, but a profession of public officer that is at the same level as a government employees, such as police, prosecutors and judges, who are assigned to a person in public office and state office means that they cannot be convicted as long as they carry out their duties in accordance with the requirement required by law.

If MKN receives a request for approval for the examination of a Notary on suspicion of a criminal act other than the implementation of the notary's duties, then MKN must firmly reject it on the grounds that MKN is not authorized to give approval or rejection of the examination on this matter. Meanwhile, if it is limited to a violation of the code of ethics, the matter is sufficient to be brought to the Notary Honorary Council (DKN).

Law enforcement by officials in the police, prosecutors, and judiciary institutions, on the duties of a notary office, on a deviant scheme. Abuse of power (abuse of power) by power holders is usually on behalf of the interests of law enforcement.

The shift in the legal scheme is indicated by the number of criminalizations against Notaries as witnesses and authentic deeds as evidence, which so far, the duties of this authority are in accordance with the position of Notary Public (Law No.2 of 2014 jo Law No.30 of 2004 and other related regulations. and its derivatives).

There is a tendency for some law enforcers recently to ignore legal norms, which should serve as guidelines for every law enforcer so as not to enforce laws that violate the law.

In the practice of summoning a notary as a witness it is not in accordance with the constitution and the meaning of perfect evidence, in the end, deviates from the value of justice (not based on the value of justice, especially Pancasila justice)Then in relation to the weaknesses of the Legal Policy Against Notaries as Witnesses and Evidence of Authentic Deeds Made by the author which basically originates from the tug-of-war of various interests against witnesses and notary deed evidence (authentic or perfect evidence) in legal policies against witnesses. Notary and authentic deed evidence that he makes, cannot be separated from the study of legal pluralism in Indonesia. Issues or studies surrounding legal pluralism are not new issues or new areas of study in Indonesia. Simply put, legal pluralism exists as a criticism of centralism and positivism in the application of the law to the people. There are several ways in understanding legal pluralism. First, legal pluralism

explains the relationship between various legal systems that work in society. Second, legal pluralism maps various existing laws in a social field. Third, explaining the relationship, adaptation, and competition between legal systems. Legal pluralism shows the choice of citizens to use certain laws when in conflict.

From these three points of view and many other points of view, we can briefly say that legal pluralism is a reality in people's lives. In line with that, to borrow a phrase from Brian Tamanaha ^[7] that legal pluralism is everywhere. This expression emphasizes that in the social area the diversity of normative systems is a necessity.

However, the interesting thing about legal pluralism lies not only in the diversity of these normative systems but in the facts and the potential to clash with each other to create uncertainty. This uncertainty becomes one of the weak points that are "attacked" from legal pluralism, although this is not entirely true because the main problem of the potential conflict is the asymmetrical relation of the normative system.

In line with this, John Griffiths ^[8] put forward the concept of weak pluralism of law (weak pluralism) and strong pluralism.

Legal pluralism is called weak legal pluralism when the state recognizes the existence of elements of other legal systems outside the state law, but the system -The non-state legal system is subject to its enforcement under state law. Meanwhile, strong legal pluralism exists when the state recognizes the existence of non-state laws and the legal system has the same enforceability capacity as state law.

Tamanaha and Griffiths's view above ultimately leads us to a review of the weaknesses and criticisms of legal pluralism that exists in the regulation of the duties of a notary's authority. In UUN especially in Article 15 paragraph (3), it provides an explanation that what applies to the regulation of the duties of a Notary's authority, it is stated that "other laws also apply". Starting from this, legal pluralism in Indonesia also applies to the duties and responsibilities of a notary. So that in reality, state institutions or institutions such as the BPK, OJK, and even the tax authorities enter into the affairs of the Notary. This is where the tug of war of various interests against witnesses and notary deed evidence (authentic evidence or perfect evidence) in legal policies against Notary witnesses and authentic deed evidence made by Notaries. Then it creates a sharp disparity between the rights and obligations that must be borne by the notary. Inequality is dominated by power.

When the imbalance of power domination among exponents of various legal systems persists, legal pluralism can be limited to a myth or delusion, and the creation of legal uncertainty is not impossible if legal pluralism opens space for recognition for every other legal system outside the state law without any limitations clear. These two things at least give a "warning" to the notaries, that legal pluralism in the realm of notary arrangements needs to be considered and needs to get sharp criticism. This has resulted in unequal rights and obligations for the duties of authority in the field of notary law. And it has become part of the stretching feud which is indicated to cause various obstacles. Among these

⁷ Brian Z Tamanaha,(2005), An Analytical Map of Social Scientific Approaches to the Concept of Law, Oxford Journal of Legal Studies Vol 501.

⁸ John Griffiths, in Hanne Petersen & Henrik Zahle, (1995), Legal Polycentricity: Consequences of Pluralism in Law, Cambridge, p.201.

obstacles the researcher can put forward are namely:

First; the legal factor itself, namely regulations that have unclear words in the formulation of the articles, are proven to have influenced law enforcement against legal disputes in Indonesia.

Second: Law enforcement factors, namely the low quality of judges, prosecutors, police, and advocates, disregard for the principle of the right man in the right place, their low commitment to law enforcement, lack of integrated, good, and modern law enforcement mechanisms, strong influence and political intervention and power in the world of law, especially in the police, prosecutors and judiciary, there are strong allegations of corruption and organized crime between members of law enforcement and allegations of the judicial mafia. The practice of law enforcement is getting more difficult, due to the lack of coordination among law enforcers, both at the theoretical and normative level as well as at the operational level.

Third; Criminal Law and Civil Law Factors; The understanding of the very thin boundaries between criminal and civil law is biased and often obscured by law enforcers.

Fourth; facilities and facilities factor, namely insufficient support for facilities or facilities, it is not easy for law enforcement to proceed properly, which includes, among other things, highly educated and skilled human resources, good organization, adequate equipment, adequate finance, and so on.

Fifth, community factors (Society). The gap between poor and rich citizens becomes an obstacle itself in enforcing the law, thus affecting the culture of corruption and bribery.

Sixth, cultural factors (Culture). The culture of extortion, bribery, and corruption is the most difficult factor for law enforcement.

In addition to the aforementioned obstacles, notaries are also still hampered by other problems, namely, problems originating outside the law, namely Organizational Barriers, namely problems that arise are internal to the International Notary Organization (INI), such as unprofessional and unfair competition (violations of the code of ethics that are left without sanctions). Operational Barriers, namely the operational problems in question can come from the character of clients who are indeed trouble makers. And Personal and Managerial Barriers, namely personal and managerial barriers, namely the Notary itself or the Notary's assistant (where for Notary Assistant in Indonesia have no arrangement), in practice in the Notary's office there are actually several Notaries using assistants even though they are non-formal (usually in practice that happens limited to staff trust).

2. The Ideal Construction Of Legal Policies For Notaries As Witnesses And Evidence Of Authentic Deeds That They Make Based On The Value Of Justice

From the previous explanation, it can be understood that the accountability of power in the rule of law is to ensure that the use of power is appropriate and the mechanism is in accordance with the purpose of granting that power. Abuse of power can be made legally responsible. Abuse of power in the field of administrative law can be carried out through the process of state administrative justice, abuse of power that is detrimental to the interests of a person or society can be sued through civil courts. Abuse of power which is categorized as a criminal act can be prosecuted criminally.

Those are the points of tentative thinking regarding the dialectical relationship of law and power, especially in the field of notary (the task of notary authority in the field of law).

The rest of the formulation of the law and the powers given by the jurists, it can be concluded that the law includes several elements, namely:

- a. Regulations regarding human behavior in social interactions.
- b. The regulations are enforced by authorized bodies.
- c. The rules are compelling.
- d. Sanctions for violating these regulations are strict.

The assignment of a notary's authority is a duty of authority in the field of law and is closely related to the meaning of the rule of law itself, so talking about legal protection for notaries cannot be separated from the understanding of the law itself.

The understanding of the law as mentioned above can be underlined that the law, in essence, can be in the form of principles, values, norms, and also legislation. The legal concepts described by these experts have actually been explained by Article 1337 of the Civil Code. Where in an agreement it must not be contrary to the values, norms, and laws and regulations. While in the agreement, the notary has the role of an official who is ordered by law to carry out his / her position to make alt perfect evidence (authentic deed) as a law for the parties or those concerned. All of that aim in the realm of law enforcement in proving civil law. So the role and function of the notary's position are very clear if we understand the essence of the notary's duties in the civil domain, as explained above, namely as lawmakers for those who have an interest (parties and even third parties who are legally related). This means that if we talk about law, the notary deed is the law for the parties or those concerned. And the actual notary deed also contains legal principles, values, norms, and legal rules.

History provides an overview and explanation that the state needs a notary in relation to authentic evidence, both in the trade sector.

Then, based on the value of justice as in the application of basic legal values (triadims law theory)^[9], namely the value of justice, benefit, and legal certainty, with the direction and purpose of the notary's harmony and tranquility in carrying out their duties, and society as legal subjects in making authentic deeds can feel the benefits of justice and achieve what is desired, namely legal certainty of authentic evidence, which in the end the people will also get legal protection from the state and feel the welfare and happiness as a result of the enforcement of just laws.

Then what has been disclosed (to explore), criticized (to criticize) the legal policies against notaries as witnesses and the existence of authentic deeds (Notarial deeds) in the stage of investigation by the police, prosecution by the prosecutor's office, and examination by judges, are used to build and discuss the results of research to understand it further, the aim is to provide solutions and find new principles, concepts or theories, so that this research can then be used to provide suggestions or recommendations and efforts to solve problems raised in the problems of this research where the proposed construction are as follows:

⁹ Thorburn, Malcolm. (2020). Introduction: Criminal Law Theory. University of Toronto Law Journal. 70. 1-3. 10.3138/utlj.2019-0137.

- a. on the Findings of the Concept of Limited Open Investigation and the Principle of Assistance (transparency of the stages of an investigation, prosecution, and examination or evidence)
- b. Absolute Authenticity Principle (stage of an investigation, prosecution, and examination of evidence)
- c. The principle of authority for the elements of private and state administration (the stage of an investigation, prosecution, and examination) emphasizes the prohibition of shifting authentic evidence as perfect and absolute evidence which is shifted towards evidence of testimony and testimony of notary witnesses as public officials in carrying out their duties of authority in professional positions Confirming that the realm of the duties of the authority of the notary office in the realm of private law and state administration, not criminal law. So it needs to be emphasized by the principle of the authority of the private and state administrative elements so that all lawsuits related to notarial deeds can only be made under the authority of PN judges for private lawsuits (Civil Code) and the authority of state administration judges for state administrative lawsuits.

The Principle of Professional Position Protection (affirming and affirming the use of the right of refusal if it is related to carrying out the duties of the authority of a professional position) the rest of the construction concept of Legal Policy against Notaries as Witnesses and Authentic Evidence to be built can be briefly explained as follows:

The expected value bases are the value of Justice and Social Justice, Value of Benefit, and Value of Legal Certainty. The concept of law and legal principles that want to be applied are the concept of limited open investigation, the principle of assistance, the principle of absolute authenticity, the principle of authority, the elements of private and the state administration, the principle of protection of professional positions^[10].

The underlying legal norms are the Formal Legal Norms as an achievement of the Value of Legal Certainty and Progressive Legal Norms as an achievement of Value of Benefit and Value of Social Justice.

The ideal institutional are namely: The Examination of Authentic Evidence of Notarial Deeds at the District Court for Elements of Private Lawsuits in accordance with the normative rules of the Civil Code, Examination of Authentic Evidence of Notarial deeds at the State Administrative Court for Elements of Claims on Legal and Notary Deeds (Cancellation of Deeds Notarized as Authentic Deed), in accordance with the normative rules of State Administrative Law, based on the Procedural Law at the State Administrative Court.

MPD, MPW, and MPP examinations for elements of claims for violations of deviations from the Professional Code of Ethics for the Position of a Notary, in accordance with the rules of the Notary professional code of ethics.

Examination at MKNW; In Case if a Notary, in carrying out his / her duties, his / her position is subjected to accusations and charges for crimes.

To be able to fulfill this, the operational techniques that

must be fulfilled are the legal process at the stage of Investigation, Prosecution, and Examination, obeys, and adheres to the Absolute Authenticity Principle and requires borrowing or taking authentic notary deed evidence, explicitly requiring MKNW permission.

Notary summons can be no longer needed if there is legal certainty over authentic evidence by affirming the principle of absolute authenticity of notarial deeds and by affirming the right of denial.

If there are allegations of deed forgery and include false information in the notarial deed or legalized underhanded deed, against the will of the accused or suspected of being against the Public Notary, then the parties accusing the alleged forgery must or must be proven otherwise (the accusing person must prove the occurrence of the forgery).

If there are allegations of extortion, embezzlement or fraud or other crimes against the Notary Profession in carrying out his / her duties of authority, the parties who accuse it are obliged to prove otherwise with at least two perfect evidence (valid) as regulated in the Criminal Procedure Code of a Notary in carrying out his / her duties and authority of office receives an accusation and a lawsuit for a particular or general crime, then MKNW in the shortest possible time can summon the Notary and conduct an examination of the accusation. And from the results of the examination which becomes perfect evidence, according to the principle of absolute authenticity and the rest, according to the concept of a rule of law based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

Conclusion

1. It is found that a legal action or violation committed by a notary regarding the authentic deed that they have made qualifies as a criminal act. In practice, it is found that the fact that a legal action or violation committed by a Notary that usually be subjected in to administrative or civil sanctions or a notary's code of ethics, but instead it is classified as a criminal act. Criminal law schemes with civil law and state administration will not cross or overlap. There is resistance by legal experts if they are not professionally included in the criminal offense scheme.
2. Legal reconstruction is needed because unprofessional action is more precisely in the realm of violating the professional code of ethics. Factors that hinder law enforcement, namely legal and law enforcement factors, the bias between criminal and civil factors, facilities and facilities for law enforcement as well as community and cultural factors, and other obstacles, namely organizational, personal, operational and managerial barriers, reconstruction of the ideal construction of legal policies against notary as a witness and authentic deed evidence that he or she makes based on the value of justice.

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¹⁰ Widodo, Wahyu & budoyo, spto & Galang Windi Pratama, Toebagus. (2018). The Role of Law Politics on Creating Good Governance and Clean Governance for a Free-Corruption Indonesia in 2030. 10.36478/sscience.2018.1307.1311.

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