



Juridical critical coherency concerning the suspension of the notary status who's under guardianship

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Abstract

The reason for dismissing a Notary is that he is under guardianship. The meaning of guardianship is not definitively explained in the Law on Notary Positions, so the meaning of guardianship refers to Article 433 of the Civil Code. This research uses a normative juridical approach which focuses on the application of norms in positive law. The result of this research is that the meaning of pardon in Indonesia is contained in Article 433 of the Civil Code following the Constitutional Court Decision Number 93/PUU-XX/2022. There are unclear norms regarding the dismissal of Notaries who are under supervision based on the Law on Notary Positions so that it is considered insufficient to protect Notaries as public officials.

Keywords: Notary, curatele, civil code

Introduction

Indonesia is a rule of law country as written in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, so that all provisions are based on law. Creating legal certainty is one of the main goals of the rule of law. Certainty, order and legal protection require the existence of evidence that clearly determines the rights and obligations of people or legal entities as legal subjects in society ^[1]. Therefore, written evidence has become a public need and is regulated in Article 1868 of the Civil Code (Civil Code), namely a deed whose form has been regulated by law and made by or in the presence of an authorized public employee is an authentic deed.

Public employees or officials who are mandated by law to make a deed are notaries. Based on Article 1 number 1 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notaries (hereinafter referred to as UUJN), a Notary is a public official who has the authority to make authentic deeds and other authorities as intended in the law. this law or under any other law. The position of a Notary as a deed-making official requires a Notary to be very careful in making a deed so that there are no legal defects and can be held accountable for the deed. The presence of a Notary Public is required by legal regulations with the aim of helping and serving people who need authentic written evidence related to events and/or someone's legal actions ^[2]. This also makes the Notary a position of trust and makes the Notary obliged to keep confidential all matters related to the deed made unless the law determines otherwise.

The authority of a Notary is regulated in Article 15 UUJN, namely making authentic deeds regarding all deeds, agreements and stipulations, validating signatures and determining the certainty of private documents, recording private letters, making copies of original private letters, authenticating photocopies with originals, providing legal counseling related to making deeds, making land deeds and making auction minutes. The authority possessed by a Notary requires that the Notary have good morals and character, be honest, independent, impartial, full of a strong

sense of responsibility to uphold the honor and dignity of a Notary as stated in Article 16 paragraph (1) UUJN. So that Notaries in carrying out their duties and authority cannot be arbitrary and must always follow existing rules.

A Notary can be dismissed from his position if he commits a violation or no longer meets the requirements as a Notary. Dismissal of a Notary is regulated in Article 8-14 UUJN. Notary dismissal is divided into 3 (three), namely honorable dismissal, temporary dismissal and dishonorable dismissal. Respectful dismissal is regulated in Article 8 UUJN, namely if a Notary has died, is 65 (sixty five) years old, at his own request, is physically and spiritually incapable and holds concurrent positions. The temporary suspension of a Notary is stated in Article 9 UUJN, the Notary is temporarily dismissed from his position because he is in bankruptcy proceedings, is under guardianship, has committed a disgraceful act, violated obligations and prohibitions and is serving a period of detention. Then the Notary was dismissed dishonorably because the Notary was declared bankrupt, was under continuous guardianship for more than 3 (three) years, committed acts that undermined the honor and dignity of the Notary and committed serious violations of obligations and prohibitions on office, this is stated in Article 12 UUJN.

As explained above, one of the reasons a Notary can be dismissed from his position is if he is under guardianship. The definition of pardon itself is not specifically defined in the UUJN, but is explained in the Civil Code. Underguardianship based on Article 433 of the Civil Code is for anyone who is always stupid, crazy or dark-eyed and wasteful, even though sometimes he is able to use his mind. Pardon is a situation where a person is considered legally incompetent, so in order to guarantee and protect his rights, the law allows a person to act on his behalf as a representative of the person under the guardianship ^[3].

A person is declared under pardon after going through several processes. Before being declared a person under guardianship, the entitled party must first submit a request which is then followed by an examination of the person ^[4]. In the case of a Notary who will be declared as a person under guardianship, the Notary can defend himself during

the examination process. As stated in Article 9 paragraph (2) UUJN which reads "Before the temporary dismissal as intended in paragraph (1) is carried out, the Notary is given the opportunity to defend himself before the Supervisory Council in stages." Then the determination of pardon will be made by the Minister of Law and Human Rights. So declaring a Notary as a person under guardianship cannot be done arbitrarily and must be done by an authorized party.

However, as is known, Notary is a position held by someone who meets the requirements as a Notary. The meaning of the word pardon should be differentiated between notaries as the general public and notaries as public officials who carry out duties based on law. As explained above, the UUJN does not specifically define the meaning of pardoning a Notary. Understanding the meaning of pardon as intended in the Civil Code is shown to Notaries as the general public. The absence of separation and consideration of norms regarding pardon between Notaries as members of the public and Notaries as officials has resulted in a blurring of norms (vaguely). Due to the ambiguity and unclear norms that occur, the author is interested in discussing the coherence of the regulation of the temporary dismissal of Notaries who are under guardianship with the principles of law and the value of justice.

Research method

This research uses a juridical-normative study which focuses on the application of existing norms in positive law. In his analysis, the author conducted a study of various formal legal regulations relating to the dismissal of notaries who are under guardianship. Then look at the inconsistencies and disharmonization between related regulations. This research uses a statutory approach and a conceptual approach.

Results and discussion

The meaning of 'underguardianship' in the development of law in Indonesia

In Indonesia the word underguardianship comes from the basic word "ampu" which in the KBBI means prop or support which is then given the affixes "peng" and "an". The term pardon itself comes from Dutch, namely curatele, and in English, namely Custody. Several terms that emerged from this amnesty are Curandus which means the person under the care and Curator, namely the person who takes care. Underguardianship based on the KBBI is defined as a process, method, act of caring: people who are under all legal actions are represented by their guardian. Underguardianship is a condition where a person who, due to their personal characteristics, is deemed incapable of acting for themselves in carrying out a legal act^[5]. PNH Simanjuntak in his book believes that pardon is a legal effort to place someone who is an adult to be the same as someone who is not yet an adult^[6]. Underguardianship can also be interpreted as an institution that regulates adults who for some reason need protection, such as: disturbed minds and minds, people who are wasteful and people who are deemed unable to act for themselves^[7].

Underguardianship itself is included in the scope of civil law, which in material civil law is divided into 4 (four) parts, namely^[8]:

- a. Individual Law (Personenrecht)
- b. Family Law (Familierecht)
- c. Property Law (Vermogensrecht)
- d. Inheritance Law (Erfrecht)

Underguardianship is included in family law because usually the relationship between the person being cared for and the person being cared for is related by blood or family^[9]. contained in Book 1 CHAPTER XVII of the Civil Code. According to Article 433 of the Civil Code, pardon is "Every adult who is always in a state of stupidity, madness or dark eyes, must be placed under pardon, even if he is sometimes able to use his mind. An adult may also be placed under custodial care for extravagance."

Adults who are in a state of stupidity, madness, dark eyes and wastefulness the main requirement in determining whether someone should be under guardianship. The Civil Code does not explain comprehensively the definitions of "dumb", "crazy" and "dark-eyed". However, according to the KBBI, "dumb" can be interpreted as having a very dull brain; not intelligent; ignorant; stupid. Furthermore, "crazy" in the KBBI is interpreted as memory sickness; mental illness. And the term "dark eyes" in the KBBI is defined as not being able to think clearly; rampage; dark eyes.

The terms "dumb", "crazy" and "dark-eyed" have similar characteristics to the terms mental disability and/or intellectual disability. According to the explanation of Article 4 paragraph (1) of Law Number 8 of 2016 concerning Persons with Disabilities (Law on Persons with Disabilities), intellectual disability is when a person's thinking function is disturbed due to below average intelligence or slow learning, mental disability and down syndrome. Then in the explanation of the same article it is also explained that mental disability is someone whose thinking, emotional and behavioral functions are disturbed, for example schizophrenia, bipolar, depression, anxiety, personality disorders, autism and hyperactivity. So "dumb", "crazy" and "dark eyes" are part of mental disability and/or intellectual disability. Therefore, according to Article 32 of the Law on Persons with Disabilities, some people with disabilities can also be declared incompetent and must be placed under guardianship based on a district court decision. According to law, people who are adults who suffer from memory problems must be placed under amnesty (curatele). Then adults who are placed under guardianship are also caused when they sell out their wealth. In the case of memory sickness, each family member is the party who has the right to request underguardianship (curatele). It's different if an adult is under pardon because he sold off his wealth, then requests for pardon can only be made by very close family members^[10]. If a person feels that his reason and thoughts are weak and he feels incapable of taking care of his own interests well, he can ask for his own underguardianship. This is in accordance with Article 434 of the Civil Code. Requests for pardon must be submitted to the District Court of the jurisdiction of the person whose pardon is requested. In the request process, it is also mandatory to explain the evidence and/or witnesses which show that the person for whom pardon is being requested is truly stupid, crazy, dark-eyed or extravagant. This is based on Articles 436 and 437 of the Civil Code.

The appointment of a curator is then carried out in the form of a determination issued by the Court based on evidence and the judge's belief. If a guardian (curator) has been appointed, a guardian (curator) will be appointed who will be placed in charge of matters relating to the personal person or assets of the person being supervised. This is as stated in Article 441 of the Civil Code. However, there is a Constitutional Court Decision Number 93/PUU-XX/2022

(MK Decision) which changes the provisions of Article 433 of the Civil Code. This decision changes the contents of Article 433 of the Civil Code so that it reads "Every adult, who is always in a state of being stupid, crazy or dark-eyed, is part of a person with mental disabilities and/or intellectual disabilities, can be placed under guardianship, even if he is sometimes competent. use his mind. "An adult may also be placed under guardianship because of his extravagance." Article 433 of the Civil Code after the Constitutional Court's decision defines that people who are stupid, crazy or dark-eyed, who are included in the category of people with permanent mental disabilities and/or intellectual disabilities, are not required to be under guardianship. in administering their civil rights.

The term pardon is also often heard in matters related to bankruptcy. According to Article 1 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as the Bankruptcy Law and PKPU), bankruptcy is a general confiscation of the assets of a bankrupt debtor whose management and settlement are carried out by a curator under the supervision of a judge. supervisor. In this case, the debtor is under the care of a curator appointed by the District Court to manage and dispose of his assets and assets.

So there are differences in the construction of the meaning of pardon in the Civil Code and pardon in the Bankruptcy Law and PKPU. Underguardianship in the Civil Code is interpreted with the aim of protecting parties who are incompetent in managing themselves personally or their assets. Meanwhile, in bankruptcy construction, underguardianship is interpreted as a process to guarantee the fulfillment of obligations or the distribution of assets of a debtor who has been declared bankrupt to his creditors.

Looking at the differences above, there are also differences in duties between a supervisor and a curator. A guardian manages the personal assets and assets of the person being supervised in accordance with Article 449 jo. 441 Civil Code. Where the curator only takes care of the bankruptcy assets and does not take care of the personal management of the bankrupt debtor, in accordance with Article 69 of the Bankruptcy Law and PKPU. Apart from that, the trustee only carries out management duties while a curator carries out management and settlement duties if the debtor is in a state of invention ^[3].

Coherence of regulations regarding the temporary dismissal of notaries under guardianship

Notary is a position given to someone with the authority to make authentic deeds. Regulations regarding the position of Notary are regulated in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (UUJN). Before being appointed as a Notary, prospective Notaries must fulfill the requirements set out in Article 3 UUJN. And then the Notary candidate takes an oath/promise before the Minister or other official appointed according to his religion. A Notary must fulfill his duties and obligations and not do anything that is violated in the UUJN. If a Notary violates the provisions contained in the UUJN, he may be subject to sanctions in the form of a written warning, temporary dismissal, honorable dismissal and dishonorable dismissal.

As stipulated in Article 8 paragraph (1) UUJN, a Notary's honorable dismissal is carried out if a Notary has died, is

more than 65 (sixtyfive) years old, at his own request, is mentally and physically unable to carry out his office duties continuously for more than 3 (three) years and holding concurrent positions. Then the temporary dismissal from his position is stated in Article 9 paragraph (1) UUJN, namely if a Notary is in bankruptcy proceedings, is under guardianship, commits a disgraceful act, commits an offense and is serving a period of detention. Furthermore, Article 12 UUJN regulates dishonorable dismissal from his position if, on the recommendation of the Notary Central Supervisory Council, he is declared bankrupt based on a court decision, is under continuous guardianship for more than 3 (three) years, commits an act that undermines the honor and dignity of the Notary's position and commits serious violation of obligations and prohibitions of office.

As mentioned in the background, underguardianship itself is not defined comprehensively in the UUJN. However, Article 433 of the Civil Code following the Constitutional Court's decision defines pardon as a condition where a person is in a state of being stupid, crazy and dark-eyed as well as being an adult who is wasteful.

Underguardianship is basically a situation where a person is unable to act for and on behalf of himself due to several reasons such as being stupid, crazy, dark-eyed and wasteful. As explained in the first discussion, the interpretation of the meanings of "dumb", "crazy" and "dark eyes" can be interpreted as part of people with mental disabilities and/or intellectual disabilities. Which is required to be under pardon if the condition is "dumb", "crazy", and "dark-eyed" if it is a permanent condition.

Then, one of the classifications of a Notary being honorably dismissed is because he is physically and spiritually unable to carry out his office duties continuously for more than 3 (three) years. The definition of physical is something related to physical activity and spiritual is mental which includes emotional, psychological and social ^[11]. Which of these definitions explains that a Notary can be honorably dismissed because he is physically and mentally unhealthy for a period of more than 3 (three) years. Physically and mentally unhealthy people can be classified as people with mental disabilities and/or intellectual disabilities based on the explanation of Article 4 paragraph (1) of the Law on Persons with Disabilities. So being physically and mentally unhealthy can cause a person to be under protection.

The rules for temporarily dismissing Notaries also regulate Notaries who will be temporarily dismissed if they are under guardianship. There is no further explanation regarding the period of time the Notary is under guardianship in the temporary dismissal of the Notary. The rules for dishonorable dismissal classify dishonorable dismissal as if a Notary has been under supervision continuously for more than 3 (three) years.

In this case, if we refer to the meaning of "pardon" in the Civil Code, there is a blurring of norms between honorable dismissal and dishonorable dismissal. This is because one of the reasons for a Notary's honorable dismissal is being physically and spiritually incapacitated for 3 (three) consecutive years which can also be interpreted as mental disability and/or intellectual disability which can be placed under guardianship. So, if interpreted broadly, the conditions for honorable dismissal and dishonorable dismissal regarding Notaries who are under guardianship have the same requirements. Meanwhile, if you are dishonorably dismissed, this will result in the Notary no

longer having the authority to carry out his or her position as well as lowering the Notary's dignity ^[12].

So based on this, the norms regarding the meaning of pardon in the Civil Code and pardon in the UUJN are unclear. This creates legal uncertainty regarding the rules regarding the dismissal of Notaries who are under guardianship. This legal uncertainty can cause losses to the Notary, which means it does not fulfill the value of justice because the character of justice is fair, legal and valid according to law ^[13].

Conclusion

1. The term pardon in Indonesian laws and regulations is comprehensively contained in Article 433 of the Civil Code, and several laws that were issued afterwards use the term pardon but do not provide a concrete definition regarding the meaning of pardon in each law. So the meaning of pardon generally refers to the provisions of Article 433 of the Civil Code which has been amended in the Constitutional Court Decision Number 93/PUU-XX/2022, namely that adults who are always stupid, crazy or dark-eyed are part of people with mental disabilities and/or intellectual disability, can be placed under guardianship, even if he is sometimes able to use his mind. An adult may also be placed under pardon for his extravagance.
2. Regulations regarding the dismissal of Notaries who are under guardianship still have unclear meaning in terms of regulations and implementation. The occurrence of unclear norms regarding the dismissal of a Notary who is under guardianship allows a Notary to suffer losses. Apart from that, it is felt that the regulations contained in the Law on the Position of Notaries are not sufficient to protect Notaries as public officials carrying out statutory duties, so they do not fulfill the principles of legal certainty and justice.

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