The Position of Notary Assembly of Honor or Ethics in the Case of Presumption of Criminal Act in Relation to Notary Public

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ABSTRACT

Indonesian Constitution states that republican state of Indonesia is constitutional state, as in the article 1 point 3 of 1945 Constitution that Indonesia is constitutional state. The main objective of the principle of constitutional state is to ensure legal certainty [law enforcement], order, and legal protection to all Indonesian people based on truth and Justice. The essence of legal protection is to provide sense of safety by the law to everybody, in accordance with their professions including notary Public. The question examined here is what is legal implication of devising legal protection to notary Public in the Act No 30 of 2004 on revision of Indonesian Act no 30 of 2004 on notary public against the verdict of the Constitutional Court No 49/PUU-X/2012? Research method applied to answer the question or the problem is normative study, with legislation approach, conceptual approach, and historical approach. Based on research findings that in the case of presumption of criminal act relating to notary public, in every process of examination (proceedings) relating to notary public, approval by majelis kehormatan notaris (notary assembly of honor or ethics) is a must, as stated in article 66 point 1 of the Act No 2 of 2014 on revision of the Act No 30 of 2004 on notary public.

Keywords: constitutional state, legal certainty, legal protection

INTRODUCTION

Notary public is closely related to Notary's certificate because the notary's main task is to make the certificate or the letter. The certificate is the authentically one made with the objective to create a proof that it has been done a legal act before the notary based on explanations from the parties who are present before the notary as is written down in the notary's letter or certificate, so that it can used as a decisive evidence in case of dispute between the parties and/or in case of lawsuit from other party regarding to the content of the letter.

The certificate of authentic is the strongest and fullest (the most completed) proof needed in the process of proving before the court. Certificate of notary as authentic one can be used as evidence (the written proof or justification) needed in the process of investigation of criminal or civil cases. The proofs needed in the investigating process of criminal case are stated in article 184 point 1 of KUHAP, those are: a) explanation from the witnesses; b) explanation from the experts; c) letter; d) clue; and e) explanation from the defendant.

Whereas in the investigation of civil case, required proofs are stated in the article 1866 of KUHPerdata, those are: a) written proof; b) proof with witnesses; c) allegations; d) confessions; e) oath.

The certificate as authentic can be used as written proof (letter and/or writing) as indicated in the article 184 point 1 of KUHAP and article 1866 of KUHPerdata. Therefore certificate of authentic is one of proofs required in the process of law enforcement, both in criminal and civil laws.

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Devising the certificate of authentic is stated in the article 1866 of KUHPerdata, that is "a certificate of authentic is a certificate in the format specified by laws, made by or before public authority for that case at the place where the certificate is made".

Based on the article 1866 of KUHPerdata, a certificate can be said as authentic, whenever: i) The format is specified by laws; ii) It is made by or before public authority; and iii) It is made in the area of authority from the officer who made the certificate.

The act no 30 of 2004 on notary public, Statute Book of Indonesian republic no 17 of 2004 and Statute Book of Indonesian republic nomor 4432 as revised by the act no 2 of 2014 on revision of The act no 30 of 2004 on notary public, Statute Book of Indonesian republic year of 2014 nomor 3, Statute Book of Indonesian republic nomor 5491 (UUJN) in the article 1 no 1 states that notary is public authority who is in charge of making the certificate of authentic and other authority as is indicated in this act. Based on article 1 no 1 of UUJN can be seen that the certificate made by or before the notary is the certificate of authentic.

The article 66 point 1 of UUJN states that in the interest of trial process, investigators, public prosecutors, or judges with approval from Majelis Kehormatan Notaris have authorities to: a. take copies of Minuta Akta and/or letters attached to Minuta Akta or Protokol Notaris; and b. call the notary to be present in the investigation relating to the Akta (certificate) or Protokol Notaris. Based on The article 66 point 1 of UUJN it can be seen that role and funaction of the Majelis Kehormatan Notaris are very important to ensure legal protection to notary public, especially from the actions of pro justitia committed by apparatus of law enforcement in the integrated criminal justice system. In certain cases, certificate of notary could be considered as ground or source of problem in a case, so that the notary is investigated, even can be brought as witness or the alleged or the accused, and criminally sentenced by the judge.

Based on the aforementioned explanation, this research will focus on how the position of Majelis Kehormatan Notaris in case of allegation of criminal act relating to notary public?

NOTARY PUBLIC AND THE CERTIFICATE IN INDONESIA

Notary is an officeholder or an authority appointed and dismissed by the State via Secretary of Law and Human Rights. Therefore someone appointed to become notary is an authority who provides services to the public, in the making of certificate of authentic and other authority specified by the laws.

Regarding to notary's authorities, it cannot be separated from the articles in the UUJN, particularly article 15 of UUJN, as follows:

1. Notary has authority to make letter of authentic about all acts, agreement, and stipulation required by the laws and/or asked by the parties in question to be stated in the letter of authentic.
2. Notary also has authority:
    a. to authorize signature and set the date of letter underhandedly by registering in special book ;
    b. to book underhanded letters by registering in the special book ;
    c. to make copies from those letters containing explanation as is written down;
    d. to authorize the sameness between the copies and the real or the authentic;
    e. to provide legal upgrading relating to certificate making;
    f. to make certificate relating to land; or
    g. to make certificate of auction report.

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3. In addition to authorities as stated in point 1 and 2, notary has other authority stated in the regulation.

Based on article 1 of UUJN jo. Article 15 of UUJN, it can be seen that notary's main authority is to make certificate of authentic.

Certificate is a proof in writing to be used as instrument of proving. Article 1867 KUHPerdata states that; Proving in writing is applied with authentic writings and underhanded ones. Therefore a certificate that is a written proof can be divided into 2 (two), those are authentic and underhanded certificates.

The authentic is stated in the article 1868 of KUHPerdata: "a certificate of authentic is a certificate made in the format stated by the laws by or before public officer who has authority to do that at the place where the certificate is made."

Based on the article 1866 of KUHPerdata, a certificate can be said as authentic, whenever:

1. The format is specified by laws;
2. It is made by or before public authority; and
3. It is made in the area of authority from the officer who made the certificate.

Definition of the authentic as stated in the article 1868 of KUHPerdata contains at least 3 elements:

First: the format of the authentic has to be specified by the laws: it means that whenever there is a certificate, its format is not specified by the laws, foe example it is only based on government regulation or secretary regulation, then the certificate is not qualified as the authentic;

Second: the authentic is only "born" if the certificate is made by or before a public officer (public authority); it means that, to deny the authenticity of a certificate, it has to be proved by the person in question that the certificate doesn't come from (wasn't made /before) notary as a public authority.

Third: The certificate is made in the area of authority from the officer who made the certificate; it means the authority of notary, as a public officer to make the authentic is also determined in the area of his/her post.

If those elements cannot be fulfilled, then a certificate cannot be qualified as the authentic, but only as underhanded certificate. In this case it requires an expertise of notary to formulate and write down a legal act that is taking place before him/her into a written proof to be called as the authentic. Mistake committed by notary can cause the certificate made before him/her to be downgraded as underhanded certificate, so that he or she will lose credibility from clients, even the worst possibility he/she could be brought in to the court.

The authentic has three powers, those are:

1. Physical proving, that is capability form the certificate to prove itself as the authentic.
2. Formal proving, that is the certificate proves the truth from what the notary see, hear and do.
3. Material proving, that is to prove that the statement in the certificate is true.

Certificate made before or by notary is qualified as authentic based on the format and procedure stated by UUJN, this is in accordance with the opinion of Philipus M Hardjon, that 2 conditions of the authentic are:

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1. The format is specified by laws;
2. It is made by or before public authority.

Irawan Soerodjo suggested that there are 3 essential elements required to fulfill formal condition of the authentic:

1. The format is specified by laws;
2. It is made by or before public authority
3. The certificate made by or before (in front of) public officer who has authority for that and at the place where the certificate is made.

CA Kraan said that an authentic has characteristics as follows: a) A writing (format), made to become a proof from condition as mentioned in the writing and stated by the authority. The writing is also signed by or only signed by the authority in question, b) A writing until there is a proof indicating otherwise, is considered comes from the authority, c) Regulation that has to be fulfilled; the regulation states the procedure of making the certificate (at least it contains date, place where it is made, name and position of the officer who makes it), d) An officer appointed by the state and has independent (onafhankelijk-independence) and impartial (onpartijdig-impartial) characteristic and occupation in doing his/her duties in accordance with article 1868 of KUHPerdata jo. Article 1 of Peraturan Jabatan notaries S. 1980 No 3 (at present Pasal 15 ayat 1 Undang-Undang Republik Indonesia Nomor 30 tahun 2004 tentang Jabatan Notaris), and e) Statement from the fact or act mentioned by the authority is legal relation in the area of private law.

When it is needed, an authentic document can serve as the strongest and fullest proof, especially when inquiry of facts before the judges relating to information in the document of authentic. Although the existence of the authentic is in the field of civil law, but when one talks about proof, it relates to the field of procedural law, both criminal and civil laws.

As for the proofs required in the law-enforcement process of criminal case are stated in article 184 point 1 of KUHAP, those are: a) statement from the witnesses; b) statement from the experts; c) letter; d) clue; and e) statement from the defendant.

Whereas in the investigation of civil case, required proofs are stated in the article 1866 of KUHPerdata, those are: a) written proof; b) proof with witnesses; e) allegations; f) confessions; and g) oath.

The certificate as authentic can be used as written proof (letter and/or writing) as indicated in the article 184 point 1 of KUHAP and article 1866 of KUHPerdata. Therefore certificate of authentic is one of proofs required in the process of law enforcement, both in criminal and civil laws.

Document made by or before notary, is the authentic, whoever denies it as the authentic, he or she must prove otherwise. The objective of the authentic to be made is the document can be used as strong evidence, whenever dispute arises between parties or a charge is leveled by other party.

Notary's document as certificate of authentic is clearly stated in the UUJN, particularly in the article 1 no 7 of UUJN that "notary's document is the authentic made by or before the notary in accordance with the format and procedure stated in these laws."

Because of notary's document is the authentic, it requires expertise and responsibility from the notary to guarantee the authenticity of a certificate, so that it cannot be downgraded into underhanded certificate.

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UUJN had stated procedure how to make the certificate to become authentic and cannot be downgraded into the underhanded as follows:

1. Article 16 point 1 letter l of UUJN states that notary must read the certificate in front of those who appear before him/her with at least 2 witnesses and it is signed instantaneously by people who appear, witnesses and the notary
2. Article 16 point 7 of UUJN states that "perusal as indicated at point 1 letter l is not obligatory to be performed, if those who appear (the attendants) want the certificate not to be read because they have read, known, and understood the content, provided that it will be mentioned in the conclusion and every sheet of paper Minuta Akta is initialed by the attendants, witnesses, and the notary.'
3. Article 16 point 8 of UUJN states that, "if one of conditions as indicated at point 1 letter l and point 7 cannot be fulfilled, the certificate in question only has the power of proving as underhanded certificate."
4. Article 16 point 9 of UUJN states that, "statement as indicated at point 8 is not valid for making the certificate of testament.'

As long as procedures of incurring notary's certificate as stated in statements defined in the UUJN are fulfilled and followed, every notary's certificate cannot be downgraded into underhanded certificate, so that it can guarantee legal certainty (rule of law) as a proof, the strongest and fullest letter formally. The proof of the underhanded and the authentic must fulfill formulation about legality of an agreement based on article 1320 BW and materially bind the parties who incur it (article 1338 BW) as an agreement that has to be fulfilled by the parties (pacta sun servanda).

Protocol consists of certificate minutes (minuut-akte), registers and yearly registers of notary's certificate (reportoria). It is not including in the word protocol, signs (stukken) given by people to a notary for making a certificate (WNPR of 1874 no 254 and 260). Therefore the minutes is an integral part of notary's protocol, and must be protected by the notary and/or recipient of the protocol as long as he/she still performs his/her duties as notary.

THE POSITION OF MAJELIS KEHORMATAN NOTARIS (MKN) IN CASE OF PRESUMPTION OF CRIMINAL ACT RELATING TO NOTARY PUBLIC

The article 66 point 1 of UUJN states that in the interest of trial process, investigators, public prosecutors, or judges with approval from Majelis Kehormatan Notaris have authorities to : a. take copies of Minuta Akta and/or letters attached to Minuta Akta or Protokol Notaris; and b. call the notary to be present in the investigation relating to the Akta (certificate) or Protokol Notaris.

The article 66 of UUJN has juridical implication that every notary cannot be questioned and charged before the court, particularly in criminal case resulting from allegation of criminal act committed by the notary without having approval from MKN.

The role of the MKN position is very important and vital to ensure legal protection against notary public in case of criminal-act allegation related to the minutes. This can be implemented by refusing to give the approval of taking copies of the minutes and investigating the notary by police, public prosecutor or judge, except an adequate proof has been found according to results of investigation carried out by the MKN about malpractice in incurring notary's certificate.

According to Benedictus de Spinoza, the aim of the state is to create peace, tranquility, and to get rid of fear. To achieve the aim people have to obey all rules and laws. Otherwise, natural

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condition (no state) will arise again. So the state should have absolute power against its people.

The writers agree with the opinion suggested by Benedictus de Spinoza about the aim of the state, but disagree that in order to achieve the aim only the people who must obey the laws. The writers suggest that the state (organs of the state) must also obey the laws, if this is violated, it can cause disharmonious condition resulted from discrimination between obligations of the people (citizens) and organs of the state, so law and order cannot be achieved.

CONCLUSION

Position of Majelis Kehormatan Notaris (MKN) is very important to guarantee legal protection against notary public, especially in case of allegation of criminal act relating to notary public. Before carrying out investigation to the notary and/or copies of the minutes, apparatuses of law enforcement particularly investigator, public prosecutor and judge must have approval first from Majelis Kehormatan Notaris as stated in the article 66 point 1 of UUJN.

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