
THE ROLE AND FUNCTION OF NOTARIES IN MAKING LEGISLATIVE ACTS BASED ON POSITIVE LAWS: THE REGULATORY OBSTACLE OF NOTARY

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ABSTRACT

The profession of a notary has a very important meaning in social life. The notary is a powerful document maker in a legal process that carries out some of the public functions of the state, especially in the field of civil law the profession that performs legal services to the general public who have responsibility with respect to the means of authentic proof such as letters, documents or documents made in writing for various legal acts or other authority based on the wishes and requests of the parties. how the role and functions and the position of the notary in binding on the basis of positive legal glasses should be studied more thoroughly. The method of research is normative jurisprudence with the approach used in this research is the statue approach and the conceptual approach. (conceptual approach). In general, authentic acts relating to civil matters are made by the Notary and used as a means of proof by the parties. The authority of the notary/PPAT in the case of the creation of authentical acts against certain legal acts for the parties who want to do so does not give rise to a responsibility for the act that has been made by notary /PPAT because the role and functions of notaries are clearly only material, formal and material.

Keywords : acts, positive law, notaries, officers.

INTRODUCTION

The field of law, has developed the law profession, one of which is the profession of notary. A profession according to Soetandyo Wignyosubroto has always been characterized by: service activities on the basis of payment of wages or honoraries; the use of high technical competence, and therefore must be filled by a specialized education that is formal; and an ideal work pathway, and supported by the ethical ideals of the society. The field of civil law provides the legal basis for the presence of the notary profession which is very important in social life. A notary is a powerful document maker in a legal process. The Act No. 30 of 2004 on the Office of Notaries, Article 1 states: "A notary is a public official authorized to make authentic acts and other authority as referred to in this Act." A public official is a person who performs some of the public functions of the State, in particular in the field of civil law. As a profession one of the characteristics of which is to have a code of ethics, then notaries in carrying out their duties profession must comply with the Code of Ethics of notaries and other laws and regulations that apply to notaries.

Notaries are one of the professions that perform legal services to the general public, who have the responsibility with respect to the means of authentication of letters, acts as well as documents made in writing on various legal acts or other authority such as validating the signature and establishing the certainty of the date of the letter under hand by registering in a special book, carrying out the verification of the match photocopy with the original letter. The notary's position

is crucial in helping to create legal certainty and protection for the public. Notaries have a very strategic position in the field of civil law, because this profession deals with the most basic and very fundamental matters in any legal act, especially in the civil law field. A society that is the subject and object of every act of law will be heavily burdened with the affairs of the administration of law. The documents relating to the legal acts to be committed will not be properly and according to legal procedures, if they are done by people who are not experts and really master the field, which is why the notaries are present and offer services to help the public.

The Law of the Department of Notaries has jointly used the institution of the Notary as the Department (Notary Branch) and the notary as a profession (notary profession) or the term is equated (equivalent) to its use. The position of a notary as a general officer, in the sense that the authority in the notary has never been given to other officials for as long as such authority does not become authority of the other officers in making authentic acts and other authority, then that authority becomes the notary's authority. Notaries are appointed as public officials, not for their own benefit, but to serve the public in the field of civil law. But notaries are called to serve the state, in addition to having to work professionally and have a noble attitude in order to preserve the dignity of their office. The notary is expected to have a neutral position, so in carrying out his professional duties for and at the request of his client. In the case of taking legal action on behalf of his client, the notary should not be on his client's side either, because the duty of a notary is to prevent the occurrence of problems.

Seeing the work and functions of notaries so vital among them is to provide legal certainty for the parties, it becomes very dangerous if a notary in the exercise of his profession commits misconduct, such as helping to manipulate data and facts in the interests of one party, so that it can harm the other party. A notary who is often summoned to court for a particular case, for example, to explain the act he has committed, or even more so if he has been involved in a criminal case, clearly reduces the notary's credibility in the eyes of the public. Notaries must be professional, which means that notaries must have high-quality technical skills, with a sense of responsibility, guaranteeing legal certainty, working impeccably away from their personal interests and being fair to their clients. A notary who works professionally must abide by the ethics of the notary's profession, in other words a notary in carrying out his profession must be able to demonstrate ethical behaviour. A notary in the provision of services must uphold the noble ideals of the profession in accordance with the demands of the duty of conscience. How the role and function and position of a notary in the exercise of his authority as a public official is the same as other public officials.

RESEARCH METHOD

The method of research carried out is a normative jurisprudence with the approach used in this research is a statue approach and a conceptual approach. (conceptual approach). The data used uses secondary data, namely the Notary Act, as well as primary data by conducting an interview with a Notary. Research data will be analyzed to find concrete solutions.

RESULTS AND DISCUSSION

Position of Notaries in Binding Based on Positive Legal Track

As a scientific study, the role and function of a notary in making an act of binding is related to his professional responsibilities, not his personal. Given that the roles and functions of notaries in making the act of bonding are related to the responsibility of his profession, it is part of the "Law of Covenant". In the context of the desire to know where a law is placed in the national legal

system, it is necessary to pay attention first to some of the elements that must be fulfilled in order to be called a law. Friedman pointed out that in a legal system there must be three elements, namely: Legal substance, containing the rules of law. The law is identical to the law; The legal structure, which includes the institutions and the law enforcement apparatus. Institutions such as the police, the prosecutor's office, the judiciary and the judicial office. Whereas the legal apparatus such as police, prosecutors and judges.; Culture contains practices and habits, though beyond substance and structure but these habits affect institutions and apparatus.

The three elements that Friedman has put forward above, the Kenotariatan law can be said to be part of a national legal system in Indonesia, i.e: Legal Substance. The first element, namely the substance of the law, was the enactment of the Act No. 30 of 2004 on the Department of Notaries and was last amended by the Law No. 2 of 2014, as mandated by the NRI UUD in 1945. Articles 20, 21 and 24 of this Act mean all matters relating to the jurisdiction and profession of a notary is subject to and exercises its functions on the basis of the Act. Therefore, there is a need for a protection and guarantee to the notary in order to the legal certainty elaborated into the Act of the Notary Office. Despite this, there is also a Code of Ethics of the Profession of Notaries as a guideline for notaries in carrying out their duties and functions. Legal Structure The legal structure can be seen in the existence of the association of the profession of notaries. The association is often known as the INI (Indonesian Notary Office) and there is also the organization of the Supervisory Assembly, both at the regional level and at the central level. Notaries in the performance of their duties and functions as public officials are authorized to make authentic acts and other authorities. Such authority is granted to the Notary due to positive legal regulations derived from the constitution of the State and appointed and/or appointed by the Minister of Law and Human Rights of RI. Legal Culture The culture is heavily influenced by the fact that notary services in the development process are increasingly increasing as one of the legal needs of society. A society in its development is in great need of legal certainty. Legal certainty can be realized through authentic acts made by a notary, as a legal product of the notary himself. On the basis of this, it can be concluded that the "law of nationality" is part of the Indonesian national legal system.

Positive legal perspective, in a hierarchical order of legal regulations as regulated by Article 7 of the Act No. 12 of 2011 on the Creation of Legislative Regulations, the "Kenotariatan Law", in this case the Law of the Department of Notaries, is part of the national legal system of Indonesia. In other words, the legal position of the kingdom is in the second position as a law under the 1945 NRI UUD. Reviewed from the perspective of the fields of law, among them: Civil Law, Criminal Law and State Administration Law/State Order Law which is also part of the Indonesian national legal system, "Kenotariatan Law", is among or in the three such laws, because: 1) Civil law: A notary's act is legally binding between the parties that make the act of a notary. 2) Criminal law: The Law of the Department of Notaries does not regulate criminal sanctions, but notaries may be subject to criminal sanction in the exercise of the duties and functions of the notary profession. However, they cannot be immediately arrested and prosecuted, but must pass through the Assembly of Notaries, both at the regional level and at the central level. 3) Law of State Administration/Law of the State: A notary is a General Office appointed and/or appointed by the State, in this case the Minister of Law and Human Rights of the RI. Notary is an extension of the hand in the case of "legal document", that is: making certain acts. The act made by a notary has the same legal force as the law made by the legislative body.

R. Subekti and Tjitrosoebadio, "the act is derived from the Latin *acta* which means "schrift" or letter and the word "acta" is a shaped form of "actum" meaning "acts". Moreover, according to R.Subekti as quoted Sutarno says that, "The act is meant as a letter or writing intentionally made

and signed, containing the events that are the basis of a right to be used as a means of proof". It is a letter signed, made to be used as evidence and used by the person for whose purposes it was made. Then according to Sudikno Mertokusumo: "A letter is a signed letter, which contains the events that form the basis of a right or a bond made from the beginning deliberately for proof". According to some of the opinions of the legal experts above on the interpretation of the Act, there are some elements of the interpretations of the act, among others: 1. a letter intentionally made. 2. signed by the parties. 3. intended or made to be used as a means of proof of an event.

The same is true of Victor Situm, who said, "Not all letters can be called acts, but only certain letters that meet certain conditions can be said acts". According to Victor Situm's statement above, the elements of the act must meet the criteria that they are deliberately made and signed with a view to serving as evidence against an event that forms the basis of a particular right. Thus, a letter said as an act must be able to serve as evidence in court. Thus, any authentic act made by a notary at the will of the parties or letters intentionally made by the parties, or requested by the notary to be drawn up at the request of those parties and signed by them before the notaries can be used as a means of proof of an event. According to article 1866 of the Covenant, the instruments of proof are made up of : a. written proof. b. evidence with witnesses. c. allegations. d. confessions and oaths.

As stated in article 1866 above, an act is a means of proof of writing. Proof by writing according to article 1867 is, "proof by written writing is done with authentic writings as well as with writings under the hand", and the same thing is also mentioned by Sutarno who says that: "There are two forms of act: Authentic Act; and Underhand Act". As regards the authentic act, it is regulated in article 1868 of the Covenant, which states that, "an authoritative act is an act which, in the form prescribed by law, is made by or in the presence of the public officials authorized for it in the place where the act is made". Sudikno Mertokusumo says that: "An authentic act is the act made by an official authorized to it by the authority, in accordance with the provisions established, with or without the assistance of the interested party, which records what is requested to be loaded therein by the interested person". According to the meaning of the authentic act referred to in Article 1868 of the Constitution and the definition of authoritative act according to Sudikno Mertokusumo, then the so-called authentic act that meets the conditions among others: The act made by the law, or the act made in the presence of the officials appointed by law. The form of an act shall be determined by law, and the manner of making it shall be according to the provisions of the law. The place where the authorities made the act.

An authentic act made by or in the presence of an authorized official called a public official, but when the person who makes it unspoken or unauthorized official or its form is defective then according to M. Yahya Harahap "the act is invalid or does not qualify for the formality of an authentic act therefore cannot be treated as an authoritative act, but such an act has the value of force as an act under hand on condition when the act is signed by the parties". M. Yahya Harahap is appropriate in Article 1869 of the Covenant that, "an act which, due to the inability or inability of the above-mentioned officer, or because of a defect in its form, cannot be treated as an authentic act, yet has force as written under the hand, if it is signed by the parties". In addition, an act made by an official without authority and without the ability to make it or not qualify, can not be considered an authentic act, but only have force as an act under hand if it is signed by the parties concerned with the act.

The officials referred to in the Covenant as mentioned above, among others, "Notaries, Panitera, Jurusita, Civil Registry Officers, Judges and so on". Whereas according to Sutarno about the officials mentioned in the covenant is also not much different, "notaries, judges, officers at the

court, civil registry officers and in its development a Camat because of his position as the Act Maker Office (hereinafter called PPAT)". Thus, as mentioned by Sudikno Mertokusumo and Sutarno, it can be said that a Notary Act, a Judge's Decision or Appointment, a Report of Events made by a Court Officer or a Court Panitera, a Marriage Act made by the Civil Registrar / Office of Religious Affairs, a Birth Certificate produced by a civil Registrar, Acts made by PPAT such as an act of sale of land / house are authentic acts.

M. Yahya Harahap said that, "in general, authentic acts relating to civil affairs are made by notaries". Article 1 paragraph 1 of Act No. 30 of 2004 on the Department of Notaries states that, "The notary is the public official authorized to make authentic acts and other authority as referred to in this law". However, in Article 1868 of the Covenant, only about authentic acts, describes what is called authentic acts, while about public officials in that article does not give any explanation or understanding. Ahmad Sanusi argues that there are other officials assigned to make authentic acts based on other articles in the Covenant or in the rules or other provisions that are excluded from the authority of the Notary among others: Civil Records issued by the Occupation Service pursuant to Article 4 of the Covenant. Act made by PPAT on the basis of Article 6 paragraph (2) and Article 7 of Government Regulations No. 24 of 1997 on Land Registration in conjunction with Government Regulation No. 37 of 1998 on the Regulations of the Department of Land Act Makers. A testamentary act in the battlefield made in the presence of an officer of the minimum rank of a lieutenant, with two (two) witnesses, under article 946 of the Covenant.. The captain of the ship or Nahkoda or Mua'lim may make an act of will for the passengers who are facing devotion in the presence of two (two) witnesses according to Article 947 of the Covenant. If a contagious disease occurs in a place and a stranger is not allowed to enter, the Notary is not present, the General Officer (Bupati or Camat) may make a will in the presence of two (two) witnesses according to Article 948 paragraph (1) of the Covenant, as well as in the event of an earthquake, sickness or accident resulting in death, rebellion or other major natural disaster in circumstances where death is seriously threatened, while within nine (nine) kilometers there is no Notary".

A contract is an agreement between two or more persons about something, whether written or oral. The parties that make a contract, each has rights and obligations to the other party. All current contracts are made in written form with the intention of facilitating proof before trial later on. According to article 1233 of the Covenant, every alliance is born of a covenant and a law. Contracts in Indonesian law, namely the Burgerlijk Wetboek (BW) are called "overeenkomst" which, when translated into Indonesians, means agreement. According to Peter Mahmud Marzuki, that agreement has a broader meaning than a contract. A contract refers to the idea of a commercial advantage obtained by both parties, while an agreement can mean a social agreement that does not necessarily benefit both parties commercially. One reason why an agreement by many people is not always equal to a contract is because in the sense of a contract contained in article 1313 of the Covenant. The agreement does not contain the word "a contract made in writing". According to Black's Law Dictionary, "contract: An agreement between two or more persons which creates an obligation to do or not to do a particular thing". Free translation: a contract is an agreement that has legal consequences. According to this definition, a contract is an agreement between two or more persons that creates an obligation to do or not do a particular thing.

Validity of an Act made by a Notary/PPAT

As has been explained earlier that: "Act is a letter signed that contains the events that form the basis of a right or alliance made from the beginning deliberately for proof". Based on the statement then in this study also discusses the validity of an act made by a Notary/PPAT. Authority of the Notary/PPAT in the drafting of the Act

Article 1, paragraph 1, of Act No. 30 of 2004 on the Office of Notaries states that the Notary is “the public officer authorized to make authentic acts and other authority as referred to in this Act”. Furthermore, in Article 1 of paragraph 7, of Law No. 30, of 2004 concerning the Department of Notarians states that: “The notary act is an authoritative act made by or in the presence of the notary in the form and manner prescribed in this Law”. The notary is also authorised to certify the signature and establish the date of the handwritten letter. This handwriting, if signed and recognised by the parties signing and legalized by a notary, is also a perfect means of proof. According to article 1 para. 1 of Government Regulation No. 37 of 1998 concerning the Office of the Land Act Maker (hereinafter referred to as PP No. 37, 1998) which states that, “PPAT is a public office authorized to make authentic acts concerning certain legal acts relating to the right to land or the right of ownership to a household unit”. Furthermore, in article 1, para. 4 of PP No.37, 1998 it is stipulated that: “the PPAT act is an act made by the PPAT as proof that it has performed a certain legal act concerning land rights or ownership rights to a house unit”.

According to article 15, paragraphs 1 and 2 of the Act No. 30 of 2004 on the Office of Notaries, a notary is the General Officer authorized to produce authentic acts made by or in the presence of the notary and the letter under his hand. The notary, therefore, is a Public Officer who does not restrict himself to certain legal acts in the drafting of the act except those which are prohibited or contrary to the applicable laws. Article 1 paragraph 1 and number 4 of PP No. 37 of 1998 stipulate that PPAT is the General Office competent in the preparation of authentic acts concerning certain legal acts relating to the right to land or the right of ownership to the unit of housing, so PPAT limits itself to the formulation of acts against certain legal actions concerning the land right or the ownership of the unit and the provisions which are contrary to the regulations of the laws in force.

In principle, notaries and public officers are the authorities authorized to make authentic documents. Only notaries can make authoritative documents of general nature and letters in hand but can not make prohibited documents and authentic documents issued by other offices such as marriage documents issuing by the Office of Religious Affairs, birth certificates issued of the Civil Registry Office, News of Events made by the Panitera or the Judge of the Court, judgments and court ordinances issuing the judges of the local State courts and others. While PPAT is the only public official who can make the authentic documents concerning certain legal acts relating to property or property rights to the House Association such as sale, exchange, donation, admission to a company (income), joint distribution of rights, granting of land use/ownership rights, violation of rights of ownership and discharge of rights. In addition, notaries and PPAT who are respectively as General Officers can take up positions as PPAT pursuant to Article 7 paragraph (1) PP No. 37 Year 1998. PPAT may take office as a Notary under Article 7 para. (1) PP No. 37 of 1998 which states that, “PPAT can take up office as Notary, Consultant or Legal Adviser”. In addition, the legal acts that can be taken up under the provisions of Article 2 para. (2) PP No.37, of 1998 are as follows: a. sale buy. b. exchange. c. entry into the Company (income). d. sharing of rights. e. granting of the right of use of the building/right of use on the land of ownership. f. grant of the rights of holding. g. authorization of the charge of the Rights of Holding. As has been stated above about the notary who can seize office as a PPAT, then his authority is not much different in the creation of authentic documents. According to Mariam Darus Badruzaman, there are several powers of a notary covering four things, namely: 1. "The notary must have authority as long as it relates to the act that he has made. 2. The notary should have all authority regarding the people for whose benefit the act has been made. 3. The notary must have all the authority concerning the place where the act was made. 4. The Notary must be all about the time of the act." It may be said that

if an act is made by or in the presence of an official not authorized for it, then it is not an authentic act, but only valid as an act under hand if the parties have signed it. This is in accordance with the provisions of article 1869 of the Covenant which states that, "an act due to the incompetence or inability of the above-mentioned officer or due to a defect in its form, cannot be treated as an authentic act, yet has force as written under the hand, if it is signed by the parties". Although PPAT may take office as a notary under the provisions of Article 7 (1) PP No. 37 of 1998, but the act made by PPAT is based on certain legal acts as referred to in Article 2 (2) PP No 37 of 1998 concerning the right to land or the right of ownership on the land unit. Thus, the authority of a PPAT to make all authentic acts relating to the legal act in Article 2, paragraph (2) PP no. 37 from 1998 namely sale, exchange, grant, entry into the company (inclusion), sharing of the rights, granting the rights of use of buildings / use of the land of the ownership rights, the granting of reference rights and granting a waiver of reservations on the rights to land and ownership of the house unit located in the area of his work.

As for the authority of the PPAT, it is in accordance with Article 3 (1) of PPAT No. 37 of 1998 which states that: "In order to carry out the substantive duties as referred to in Article 2, a PPAT has authority to make authentic acts concerning all legal acts as mentioned in Article 2 (2) of paragraph (2) concerning the right to land and the right of ownership of the unit of housing located in its area of work". In addition to the authorization of the CPAT, because a PPATE can take up the position as a notary under Article 7 (1) of CP No.37 of 1998, according to the results of the research that has been carried out that there is an addition of authority from the PPATE, that is to say, PPAT is authorized against the people for whose benefit the act is made, but it is forbidden to make acts for PPAT himself, husband or wife, family members and even in a straight line without limits and in straight lines to the side to both degrees, becoming a party to the law in the act which is concerned either by self or by acting or by the power of another party.

Regarding the addition of authority from the PPAT who seizes the office as a Notary, then for a PPAT is prohibited to commit certain legal acts and regulated in Article 23 paragraph (1) PP No. 37 Year 1998 which stipulates that: PPAT prohibits making acts when for PPAT himself, husband or wife, family consciousness and family in a straight line without limit of degree and in a line straight to side until the second degree, are parties in the legal act in question either by acting alone or through the power or becoming the power of another party. The opinion of Van Dunne quoted by Mariam Darus Badruzaman states that based on the notary's authority over the act he made, it is said that: "an agreement occurs through a process consisting of three phases: the pre-contract phase, the contract phase and the post-contractual phase". The stages or stages carried out in an agreement or legal act either by the notary or the PPAT, among others : The pre-contractual phase is usually an agreement on the substance of the agreement and at this stage, if no agreement is found between the parties wishing to conclude the arrangement, then the contract phase will not be resumed, but if a deal is found among the parties then it will be continued to the contract stage; Contract phase, usually at this stage of the agreement on the contents of the contract already exists, so that this phase can be proceeded to the post-contractual phase; The post-contractual stage, usually at this stage, has reached a detailed agreement with the signing of the agreement, then the rights and obligations between the parties making the contract are cumulative.

The authority of the Notary/PPAT in relation to the creation of authentic acts against certain legal acts for the parties who wish it would give rise to a liability for the act made by the Notar/PPat, even if the act is in accordance with the wishes of the parties and does not violate the provisions of the laws in force because the creations and contents of such acts are made on the will and discretion of the sides. If, later on, there is a dispute between the parties making the act or

against a third party, then the notary/PPAT party cannot be sued to be liable for the act he has made in the Court, the position of notary /PPAT is only as an expert witness in the trial.

Notary acts and PPAT as evidence in the trial

A declaration of will and agreement of the parties to a particular legal act referred to in an act made by a notary and a PPAT is an authentic evidence that can be used in a trial if there is a dispute later on for the parties concerned or one of them with a third party. The act made by a notary and PPAT is an authentic act because the act is an act done by a Public Officer as has been specified in Article 1 letter 7 of the Law No. 30 Year 2004 on the Department of Notaries for the notary act, whereas for the act of PPAT as defined in Article 4 letter 1 of the Act No. 37 Year 1998. The most important function of an act is as a means of proof : The power of proof of birth, that is, the power of evidence based on birth, what appears at birth is that the letter appears like an act, is considered as an act unless proven otherwise. The power of formal proof, that is to say, the power of the formal proof concerns providing certainty of the facts, that officials and parties declare and do what is contained in an act. The power of material proof, i.e. the force of material evidence, gives certainty of the substance of an act, gives assurance of the event that the official or the parties declare and do as contained in an act. The act made by a Notary/PPAT also has proof power as an authentic act consisting of:

The power of proof is innate as an authentic act. It means that the act of the Notary and the PPAT is recognized as an authentic act because it is made by a General Officer based on the provisions of the applicable laws or in accordance with his authority, namely, on the basis of the UUJN and PP No. 37 of 1998; The power of proof of a formal as an authentic act means that the notary's act and the PPAT formally prove the truth of what was seen and heard from the parties who subsequently produced the act by the Notary and PPAT; The power of material proof as an authentic act. This means that the notary's and PPAT's acts substantially assure or guarantee the authenticity of the time or date, place and signature of the parties about what the parties wish to produce their acts by the Notary and the PPAT.

CONCLUSION

As for the proof power of an authentic act as a perfect proof force, it is in accordance with Article 1870 of the Covenant which states that, "An authentic act gives between the parties and its heirs or those who have a right from them a perfect evidence of what is loaded in it". "The proof strength of the authoritative act is the external proofing power, so that the authentic act shown shall be considered and treated as an autentique act unless it can be proven otherwise that the act is not an auth. The theories put forward by the legal experts concerning the probative power of the act made by the Notary and PPAT can then be said that the act notary and the PPAT as an authentic act that can be used as a means of proof when there is a legal problem but not the notary/PPAT can not be prosecuted must be responsible for the act that he has made such in the Trial or Court because the authentic act made on the will and will of the parties and notary only perform the duties and responsibilities with his authority as a public official. The authentic acts of the notaries and the PPAT have a formal proofing power, meaning that the notary and PPAT acts prove the truthfulness of what was seen, heard and done by the parties, so that they can guarantee the truth of the identity of the sides, the signatures of the parties and the places where the act was made and the parties guaranteed the testimony described in the act in question. In addition, the authoritative documents of the Notary and the CPAT have the substantive probationary power, which means that the acts in question have the certainty as a valid means of proof between the parties.

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