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LEGAL COUNSELING BY A NOTARY AS A MEANS TO PRODUCE A BALANCED AGREEMENT

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Abstract

The Law on Notary Position authorizes Notaries to provide legal advice to parties related to deeds. Through this legal counselling, it is hoped that conflicts can be avoided in the future. This study analyzes the benefits of legal counselling provided by a notary. The research method used is normative legal research using a statutory approach and a conceptual approach. The results show that the notary public has the authority to provide legal counselling to parties related to deed making, especially those related to agreements. The role of the notary, in this case, is to provide counselling so that the agreement made by the parties is balanced and the parties understand their respective rights and obligations.

Keywords: agreement; legal counseling; notary

1. INTRODUCTION

By its essence as a *zoon politicon* or social creature who cannot live without the help of other people, to meet these various needs, humans will interact with other humans. This interaction is manifested in various forms of legal action. The interaction between fellow human beings requires the existence of signs to limit the interacting parties to do whatever they want, which can harm the other party. To provide these limitations, the State has a role in regulating how legal actions should be carried out.

One of the primary duties, powers of the State is to provide services to the general public. In general, State services are divided into services to the community in the field of public law and services in the civil law court. Furthermore, services to the community in the field of public law

are carried out by the government or the executive. In contrast, public officials carry out services in the field of civil law.

Law is one of the tools needed by all people in filling their lives, especially in the economic system which is entering the era of globalization. This need is in the form of laws, clear legal regulations that have legal certainty as well as firm law enforcement actions from law enforcement officials. One of the legal apparatus in the civil sector is a notary as a public official (*openbaar ambtenaar*) who must be professional because he represents the State in carrying out its social duties and functions in making deeds as evidence in the form of authentic deeds (Prajitno, 2010).

A notary institution is an institution that arises from the need for human relations who require evidence for him regarding

the civil law relationship that exists and/or occurs between them (Darori, 2014). The emergence of a notary institution was based on the need for crucial evidence other than witness evidence (Anshori, 2009). Also, doing authentic deeds by notary institutions is an effort to minimize human nature which is often wrong and forgetful, so that if it is recorded, it can eliminate errors or omissions as well as evidence between the parties.

The community's need for notary services is increasingly developing, and people are increasingly aware of the importance of a notary deed. The public currently has more legal awareness in all their legal actions, be it legal actions in the field of business and banking agreements or other social activities that use notary services to do authentic deeds that bind the parties in their activities.

The role of a notary in the service sector is as an official who is authorized by the state to serve the public in the civil sector, especially the making of authentic deeds as stated in Article 1 paragraph (1) of Law Number 30 of 2004 concerning the Position of a Notary as amended by Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary Public (UUJN) which states that Notaries are public officials who have the authority to make authentic deeds and other powers as referred to in this law. The philosophical basis for the establishment of UUJN is the realization of legal certainty, order and legal protection which is based on truth and justice through deeds that he makes. Notaries must be able to provide legal certainty to the public who use Notary services.

The implementation of a professional position is felt to be increasingly important because the notary position as a general officer is directly facing the interests of the community in providing assistance or services. If this is not appropriately given or professionally, then there will be parties who are harmed as a result of the law from the mistakes or negligence that has

been made by the notary.

When talking about the professional skills of notaries, it is closely related to the quality of notary legal services to the public. The more professional skills of notaries in carrying out their duties as public officials who have the function of regulating legal relations between parties in writing and authenticity, the better the quality of legal services that will be received by the public. The professional ability of a person who points to expertise is supported by mastery of knowledge, experience and high skills (Putra & Anand, 2018).

Notaries in carrying out their duties must have a fair attitude. Fair what is meant is that there is no partiality for anyone, especially regarding the deed that will be drawn up before him. Besides, in carrying out their duties, it is hoped that they will be able to provide legal counselling related to doing deeds to parties so that those who come to the Notary, especially those who come to state the agreement they have made into an authentic deed, can understand what their rights and obligations are at the time of the deed. Perfectly signed. On the other hand, legal counselling by a notary is expected to be able to minimize the occurrence of conflicts between the parties agreeing.

The study about legal counseling has previously conducted by some researchers. Bushido et al. (2019) in their study about 'Notary Authority to Provide Legal Counseling Service Based On Notary Law and Notary Code in Banjarnegara' found that Notary authority in providing Legal counseling to Its clients can be divided into two (2) Criteria, namely a) Legal counseling followed by Creation Deed and b) Legal counseling without being followed by Creation Deed. A similar study also conducted by Ningsih et al. (2019) that examined Legal Position of Notary As A Mediator In Notary-Related Dispute In Connection With The Legal Counseling Obligation. The results of their study showed that the results of the study show

that a notary who acts as a mediator cannot be held legally responsible, because the mediator is a neutral and impartial third party. There is no prohibition for a notary to become a mediator, because the mediator is not a state official, a high state institution, does not carry out state administration, the mediator profession is not classified as a civil servant, advocate, leader or employee of BUMN/D, and a profession that is contrary to religious norms, decency/propriety, which can affect the notary's honor. Based on the background, this study aims to analyze the Notary's authority in providing legal education to the parties who agreed with him.

2. METHOD

This study uses a normative legal research method to find solutions to problems of existing legal problems (H Isnaini & Utomo, 2019). The research approach used is a statute approach and a conceptual approach.

3. DISCUSSION

The Republic of Indonesia is a constitutional state. The principle of the rule of law is to guarantee the existence of certainty, order and protection of the law, which has the essence of truth and justice in society. The Notary is a public official who is given partial authority by the State, and every action must be based on law. The position of a notary is the position of a state official or public official, based on the provisions in the UUJN, and a general official is a person who carries out some public and state functions, especially in the field of civil law.

In carrying out its duties and obligations, a notary must be by the applicable Prevailing Laws, and an obligation is something that must be carried out so that the deed made becomes an authentic deed. Notaries as public officials have to provide services to members of the public who need their services in making written evidence, especially in the form of authentic deeds in

the field of civil law. The existence of a notary is an implementation of the law of proof (Budiono, 2008).

The purpose of doing a deed before a notary is as strong evidence if at any time there is a dispute between the parties or there is a civil suit or a criminal charge from another party. If there is a civil suit or a criminal charge from one of the parties, the Notary may be involved in the matters of the parties concerning the deed drawn up by the Notary (Utomo & Safi'i, 2019). According to Wawan Setiwan, General Officials are state organs that are equipped with general powers, have the authority to exercise part of the general power, have the authority to exercise part of the State's power to make written and authentic evidence in civil law (Adjie, 2008b).

The status of a notary as a public official is an honourable position given by the State attributively through the law to someone whom he trusts and who appoints him the Minister according to the provisions in Article 2 of the UUJN which states "Notaries are appointed and dismissed by the Minister". The Minister referred to in Article 2 of the UUJN is the Minister of Law and Human Rights as affirmed in Article 1 number 14 of the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 19 of 2019 concerning Terms and Procedures for Appointment, Leave, Transfer, Dismissal, and Extension. Term of Office of Notary, which states: "The Minister is the Minister of Law and Human Rights". By the appointment of a Notary Public by the Minister, a Notary can carry out his duties freely, without being influenced by the executive body and other bodies. The purpose of freedom here is so that the Notary profession will not be afraid to carry out its position so that it can act neutral and independent (Adjie, 2008a).

Notary as an official who is authorized to make deeds or authentic written evidence in the field of community economy in particular. In addition to the

need for social life arrangements related to individual and family civil law relationships related to property, rights and obligations in the form of a marriage relationship, marital property, will and inheritance by the Civil Code, all deeds made by and before the notary are other than concerning legal certainty as a means of written evidence regarding the place, time, date, month, year, content/material, right time, witnesses, objects, subjects and signatures as well as ensuring expiration (verjaring) (Hatta Isnaini & Wanda, 2017).

In carrying out his office, a Notary must remember that the deed made by or before him is an authentic deed which becomes a state document/archive, and the agreement stated therein becomes law for those who make it, by Article 1338 of the Civil Code which states "all agreements, which is made legally valid as law for those who make it. An agreement cannot be withdrawn other than by agreeing the two parties or for reasons that are stated by law to be sufficient for that. An agreement must be carried out in good faith".

In carrying out their duties and profession as a public official, they must adhere to the applicable rules, notary in carrying out their profession not solely for their interests. Still, they must also serve the interests of the public in general, by their function, namely serving the public interest. Thus, the notary must behave and be honest, humble and able to maintain the confidentiality of the deed he makes, so that the authenticity of the deed he makes can be maintained. In making a notary deed, one of the notary's obligations is to constrict the wishes of the parties in the form of a notary deed by the arrangement as stipulated by the UUJN. All the parties' information is compiled in the form of a draft deed before it is read by the notary to the parties so that the parties are aware clearly whether all the wishes of the parties have been contained in the form of the notary deed or not (Utomo, 2019).

Notaries, as explained, actually carry

out some of the functions of the state in providing legal protection for their people, have the authority to make authentic deeds as perfect evidence for parties who need to protect their rights and interests. Herein lies the "glory" of the notary's position, where through its authority to make authentic deeds and other powers are to provide legal certainty, order and legal protection to people in need, therefore notaries are required to always comply with all laws and regulations and code of ethics. Related to the position and profession.

According to Tan Thong Kie, society needs someone whose statements are reliable, trustworthy, whose signature and seal (stamp) provide strong evidence, an impartial expert and an advisor who is flawless (onkreukbaar or unimpeachable), who kept his mouth shut and made a covenant that would protect him in the days to come. If an advocate defends someone's rights when a difficulty arises (Kie, 2000).

Notary as an extension of the government to serve people who need evidence in the form of an authentic deed is expected to have qualified scientific quality to provide a sense of security for people who come to the Notary and be able to provide legal certainty and legal protection. To achieve this goal, it is required in Article 3 letter e of the UUJN that to be appointed as a Notary, one must have a law degree and graduate from the bachelor's level notary. With these conditions, it is expected that a notary is a person who controls the law, especially in the field of private law, so that the deed he makes can protect the interests of the community.

In essence, authentic deeds contain the formal truth by what the parties have notarized to the notary. However, the Notary Public must ensure that what is contained in the Notary Deed has been understood and is by the wishes of the parties, namely by reading it so that the contents of the Notary Deed are exact, as well as providing access to information

regarding the relevant laws and regulations for the parties signing the deed. Thus, the parties can decide freely whether to agree or not to agree to the contents of the Notary Deed that will be signed. The signature on an authentic deed serves as a sign of approval of the obligations attached to the deed. After the deed is signed by the tappers, witnesses and notary public, the deed has become a perfect deed. It is called the Minuta Deed according to Article 1 point 8 UUJN which states: "Minuta deed is the original deed which includes the signature of the tappers, witnesses. and Notary Public, which is kept as part of the Notary Protocol".

The agreement as to the starting point for a legal act, which involves more than one party and creates rights and obligations between the parties involved, has many definitions or meanings that can be seen from various sources (Utomo, 2020). The various definitions or meanings regarding the Agreement do not cause differences regarding the elements in an Agreement. Each Agreement has the following elements:

The existence of a legal code of agreement, either in writing or not in writing.

There are legal subjects which support the rights and obligations in the agreement.

There is an achievement, namely the object of the agreement, which can be an act of giving something, doing something, or not doing something.

There is an agreement between the parties to the agreement.

Legal consequences are arising from the agreement in the form of rights and obligations.

Rights are an enjoyment obtained by the parties, while obligations are a burden for the parties. The five elements are elements that are always in agreement (Walidani & Adjie, 2018).

The provisions of Article 1319 of the

Civil Code imply 2 (two) types of agreements, namely an agreement that has a unique name and an agreement that is not well known with a particular name. A treaty that has a unique name is also known as a Nominate Agreement, while an agreement that is not well known with a specific name is known as an Innominate Agreement. Nominate agreement is an agreement known in the Civil Code because it is regulated and mentioned in several Articles of the Civil Code, such as sale and purchase agreements, exchange, lease, civil partnership, grants, borrow and use, and debt insurance. At the same time, the Innominate Agreement is an agreement that grows and develops in practice and was not yet known when the Civil Code was enacted. The nominee is an agreement that is categorized as a form of Innominate Agreement, namely an agreement that arises, grows and develops in society because there is no specific regulation regarding it. It is not explicitly stated in the articles of the Civil Code (Sebastian & Adjie, 2018).

The attitude of mutual respect and respect for the rights and obligations of a contract is the goal of the agreement as desired. The agreement made in a contract does not always work well; in fact, it can also lead to conflict if one of the parties does not fulfil the agreed performance. Disputes can also occur in a standard contract if there are values regulated therein that are not by the purpose of the contract or are contrary to higher regulations.

The purpose of legal principles in contracts as explained by Mariam Darus Badruzaman is to ensure justice, legal certainty and provide economic benefits for the parties to make contracts according to their functions. The function of the application of the principle of balance is used to build legal construction and place the legal position of the parties in the cooperation contract so that they are equal, precise and concrete. Another function, which is directed at the substance of the law, includes the

contents of the contract, such as the regulation of rights and obligations in contractual relationships that are not contrary to law, public order and morality (Syaifuddin, 2001).

The principles mentioned above are used as the basis for every person who commits. They will carry out a legal action in agreeing with due observance of the legal terms of the agreement as stipulated in Article 1320 of the Civil Code that in conducting an agreement must fulfil the validity of the agreement, namely first, there is an agreement from the parties to make a contract/agreement, second, the parties who will agree must be legally competent, third, there is a sure thing, and fourth, a legal cause. If the parties have fulfilled the legal requirements above, they will legally bind themselves to fulfil their respective rights and obligations.

The conditions for the validity of the agreement are manifested in a notary deed. The personal requirements are stated at the beginning of the deed, and the objective requirements are stated in the Deed Body as the contents of the deed. Therefore, if at the beginning of the deed, especially the terms of the parties before the Notary Public do not meet the personal requirements, then at the request of a particular person the deed can be cancelled. If the contents of the deed do not meet the objective requirements, then the deed is null and void.

A legal action is an act whose consequences are regulated by law, whether it is carried out by one party (one-sided) or that of two parties (two sides). According to Chainur Arrasjid, what is meant by unilateral and two-party legal actions are as follows: a) Unilateral legal actions, namely legal actions carried out by one party only and giving rise to rights and obligations on one party as well, for example making a will and giving an object (grant). b) Two-party legal actions, namely legal actions committed by two parties and giving rise to rights and obligations for both parties (reciprocity), for example making buying and selling

agreements, leasing and others (Arrasjid, 2001).

The agreement is one source of the engagement and can even be said to be the general source of the engagement. An agreement according to Herlien Budiono is "a legal act that causes a relationship, changes, removes rights, or creates a legal relationship and in this way, the agreement creates legal consequences which are the objectives of the parties." The agreement as a form of commitment between two parties that gives rise to rights and obligations for the parties must meet the requirements based on the Agreement Law to be valid legally and be accountable before the law. Regulations regarding the conditions that must be fulfilled in an agreement are regulated in Article 1320 - Article 1337 of the Civil Code, Part Two in Chapter Two concerning engagements that are born out of a contract or agreement. The existence of an agreement as a source of engagement is evident in Article 1233 of the Civil Code, which states "Every engagement is born good because of a good agreement because of the law". The agreement only creates rights and obligations in property law, not in other areas of law.

The legal product of a notary is an authentic deed in the form of a notary deed, and not all public officials have the authority to do so. Notaries must have good knowledge and abilities to be able to pour the wants and needs of the community into a deed. The tappers come to the notary so that their legal actions or actions are formulated into an authentic deed by the notary's authority, then the notary makes a deed at the request or desire of the tappers, so in this case, it provides a basis for the notary and the parties who have a legal relationship. The notary must guarantee that the deed has been done by the predetermined legal rules so that the deed protects the interest concerned. Based on statutory provisions, a notary is assigned to do the right deed required by law. Legal counselling or explanations regarding the provisions of

this law are provided to assist in making the deeds required, and this constitutes an integral part that cannot be separated from one another.

Providing legal counselling by a notary public to interested parties in connection with doing authentic deeds that will be made more leads to advice to provide legal understanding related to legal acts that will be written into the Deed. In this case, the Notary provides an understanding of the parties regarding the provisions in the Prevailing Laws relating to legal actions that will be carried out by the parties. With the legal understanding provided by a notary public, it is hoped that legal certainty can be created by the provisions of the prevailing laws and regulations and provide benefits to the parties. Even though the parties later accepted the legal understanding provided by the Notary, in the end, the legal understanding obtained by the parties from the Notary Public remained the party's statement. It became the full responsibility of the parties.

The notary who provides legal counselling can be likened to providing legal advice because in providing legal counselling or legal advice, a notary, in this case, provides an indication or explanation in the area of law that is being faced or needed by the parties. The provision of legal counselling by a notary public can influence the parties in making choices to determine their legal action. Regarding the application of the principle of freedom of contract, it is entirely up to the parties to make their choice, while the notary maintains the legal guidelines.

In principle, the notary is passive in serving the parties who face him. The notary is only tasked with recording or writing in the deed what the parties explain, has no right to change, reduce or add to what the parties explain. Such an attitude is considered too rigid, therefore at present, there is an opinion that notaries have the authority to: a) Constant or determine what is happening before his eyes; b) Therefore, he has the right to constrict or determine the facts he has

obtained to straighten out the contents of the deed that are more appropriate. Furthermore, according to Yahya Harahap, the passive character in terms of the ratio is not absolute. Still, it is flexed relatively concerning the application, that in principle the notary is not authorized to investigate the truth of the information stated by the parties.

Regarding the information submitted by the parties that is contrary to statutory regulations, public order, and morality, the notary must refuse to make the requested deed. UUJN authorizes notaries to provide legal counselling in connection with the making of deeds with the aim that the parties can understand the applicable law so that the law can institutionalize and even inspire each of the parties concerned. The aim is not just to provide information or information regarding the law that needs to be known, but to strive to foster and increase the legal awareness of the parties concerned, so that legal compliance and compliance arise, based on the assumption that the law is by applicable values or which he embraces.

4. CONCLUSION

Notaries in carrying out their duties must have a fair attitude. Fair what is meant is that there is no partiality for anyone, especially regarding the deed that will be drawn up before him. UUJN authorizes notaries to provide legal counselling in connection with doing deeds with the aim that the parties can understand the applicable law and can understand what their rights and obligations are when the deed is signed ultimately. Also, legal counselling by a notary is expected to be able to minimize the occurrence of conflicts between the parties agreeing.

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