

# Jurnal Notariil

Jurnal Notariil, Vol. 7, No. 1, May 2022, 32-38

P ISSN 2540 - 797X

Available Online at <https://ejournal.warmadewa.ac.id/index.php/notariil>

E ISSN 2615 - 1545

## QUALIFICATION OF THE PRUDENCE PRINCIPLE OF NOTARY ON IMPLEMENT THE POSITION BASED ON ACT OF NOTARY POSITION

Elisabeth Ayustina Putri Korassa Sonbai\*, Ni Luh Made Mahendrawati and Ida Bagus Agung Putra Santika

**Master of Notary, Universitas Warmadewa , Denpasar, Bali-Indonesia**

\*elisabethayustina97@gmail.com

How To Cite:

Sonbai, E. A. P. K., Mahendrawati, N. L. M., & Santika, I. B. A. P. (2022). Qualification Of The Prudence Principle Of Notary On Implement The Position Based On Act Of Notary Position. *Jurnal Notariil*, 7 (1), 32-38, Doi: <https://doi.org/10.22225/jn.7.1.2022.32-38>

### Abstract

The purpose of this research is to examine and analyze clearly the scope of the Notary prudence principle on implement his/her position so that definitive or limitative limits are found regarding the Notary prudence principle on implement his/her position. The method used is normative legal research. Data collected through basic regulations, laws and regulations, and legal norm. The theories applied such as the theory of legal protection, the theory of legal certainty, and the theory of responsibility. The results of this research indicate that Article 16 paragraph (1) letters a and m describe the implementation of the Notary position, while the provisions of Article 17 instruct the Notary on implement his/her position to stay away from all prohibitions that are not allowed to be carried out in carrying out his duties, one of which is in the form of doing other job that are contrary to religious norms, decency or propriety that can affect the honor and dignity of the position of a Notary. The provisions of UUJN jo. UUJN-P in particular the provisions of Article 16 paragraph (1) letter a as a violation of the fulfillment of the prudence principle and an administrative violation. Thus, as a Notary, it is advisable to comply more with all the provisions of the UUJN jo. UUJN-P, is careful, thorough and thorough in administering the deed, in order to eliminate the bad intentions of those who deliberately blame and place the Notary as committing an unlawful act, both civil and penal.

**Keywords:** notary; UUJN JO. UUJN-P; qualification of the prudence principle

### 1. INTRODUCTION

The position of a Notary as public official assigned by the general authority to serve the public's need for authentic evidence that provides certainty in civil law relationships. As long as authentic evidence still needed by the state legal system, the position of a Notary will still need its existence in the community (Sulihandari & Rifiani, 2013). Based on the provision of Article 16 Paragraph (1) letter a UUJN jo UUJN-P, it is known that a Notary is obliged to act in a trustworthy, honest, thorough, independent, impartial manner and safeguard the interests of the parties involved in legal action on implement his/her position. One of the norms contained in Article 16 Paragraph (1) letter a UUJN jo. UUJN-P above, that is

the norm that requires a Notary to act carefully on implement his/her position, is the research topic or theme in the writing of this thesis. Because the word careful in the article is interpreted as a thorough, scrupulous and prudent attitude for a Notary on implement his/her position as said by M. Luthfan Hadi Darus that: Notary on implement a legal action must always act carefully so that the Notary before taking the decision to examine all relevant facts in its consideration is based on the applicable laws and regulations (Darus, 2017).

In Article 16 Paragraph (1) letter a UUJN jo. UUJN-P in which the provisions do not limitatively or do not clearly provide limits or understanding as well as the meaning and intent of the exact norm as a

prudence principle for the implementation of the Notary's authority in making authentic deed or other authorities as referred to in Article 15 Paragraph (1), Paragraph (2) and Paragraph (3) UUNJN jo. UUNJN-P. This often leads to different interpretation between the exercise of the authority of a Notary and law enforcement when a Notary deed is disputed or becomes evidence in a dispute. For example, an authentic deed is said/postulated to contain a false identity, a false statement and a fake signature in it which leads to accusations that the Notary is not thorough and thorough or does not apply the principle of prudence in carrying out his office. Meanwhile, forgery of letter or giving false information by the party who held the Notary deed is the will or intention of the parties and is not the wish of the Notary even the Notary never knows if the information or letter/document given to him as the basis for making the deed is fake or falsified. This is because the Notary does not have the authority to investigate the truth of the letters or information given to him as the basis for making the deed, as the authority of law enforcer. The Notary has no obligation to find out whether the information from the appearer is true or not, the Notary only matches the data or letters given to him by the parties with the assumption that all information and letters are given in good faith by the Notary in making the deed. In addition, Notary on implement his/her positions are bound by a principle of legal presumption which means that: every government action (public official) is always considered *rechmatig* until it is canceled or better known as *presumptio iustae causa*, meaning that state administrative decisions must be considered valid as long as it has not been proven otherwise. so that in principle it must always be implemented immediately (Lotulung, 1993).

A similar study with this present study have been conducted previously by Saputra et al. (2019) that examined 'Implementation of Notary Prudence Principle in the Cooperative's Deed of Establishment'. The result of their study showed that in the Notary Position Act, it is stipulated that when a Notary in carrying out his duties and positions is proven to have committed a violation, the Notary may be subject to criminal sanctions, civil sanctions, and administrative sanctions. As stipulated in Article 84 of the Law of Notary Position, that the legal consequences for notaries who do not

apply the precautionary principle in carrying out their positions that can lead to a deed only has the power of proof as a private deed or the notary deed can be canceled and if it turns out there legal defect so that the deed loses its authenticity and is detrimental to the parties concerned, the notary may be sued for reimbursement, compensation and interest. In addition, Putri et al. (2020) also conducted a similar study that analyze the implementation of prudence principles in the process of disbursement of credit conducted by PT. Bank Rakyat Indonesia (Persero) Tbk. The result of their study revealed that the constraints encountered in the application of prudence principles on the use of notary Covernote as the basis of disbursement of credit, among others: in terms of juridical, the arrangement on covernotes used as a condition of disbursement of financing has not existed either in the law, government regulations, Bank Indonesia regulation, and in the form of a memorandum of understanding. Covernote is arising based on the habit so that the bank that determines the use of covernote can be a factor that affects the implementation of the principle of banking prudence if each party does not understand clearly about the existence of the related covernote binding collateral. In terms of non-juridical, the constraints encountered are influenced by the factors of law enforcement, facilities and facility, and socio-economic factors of society and culture.

Based on the background and the previous research above, it can be mentioned that it needs to examine and analyze clearly the scope of the Notary prudence principle on implement his/her position so that definitive or limitative limits are found regarding the Notary prudence principle on implement his/her position. Therefore, the purpose of this study is to examine the limit of prudence principle on the implementation of Notary Position and a Notary's responsibility in term of fulfillment the implementation of prudence principle based on UUNJN jo. UUNJN-P.

## **2. METHOD**

This research uses normative research with conceptual method, where in collecting legal material is carried out by conducting a literature study to examine all laws and regulations related to the problems in this research. Moving on from the views and legislation related to the problem by studying the consistency and/

or suitability between one law and another, so as to find the definitions, concepts and principles that are relevant to the the research theme as a support in answering the legal issues made. A statutory approach and a conceptual approach are used. The technique of collecting legal material used in writing this thesis is done by means of library research. The analysis of research material in this thesis uses a qualitative normative analysis.

### **3. RESULT AND DISCUSSION**

#### ***Prudence Principle Based on UUJN jo. UUJN-P***

The prudence principle is one of the important principles that must be applied or implemented by Notary in carrying out his duties as a public official. In UUJN jo. UUJN-P the prudence principle can be find in several articles as follows:

Article 15 UUJN Paragraph (2) letter e UUJN jo. UUJN-P which regulates the Authority of Notary contains an order that every Notary in carrying out his/her duties of office be careful through the authority to provide legal counseling. Because in providing legal counseling, of course, the Notary first explores the things he/she needs to know from the parties about their wishes or desires which will then be poured and formulated as a Notary deed. In that context, the Notary explores from the statements of the parties facing empirical facts and is further qualified as a legal fact so that it can be used as a basis for determining whether an act that is intended or to be carried out in the deed may or may not be carried out. Notaries are authorized to give their legal opinions to say whether the wishes or wishes of the presenters are appropriate or not according to the applicable laws and regulations that it is justified to be stated in an authentic deed.

The prudence principle can be seen and explored in the provisions of Article 16 paragraph (1) letter a UUJN jo. UUJN-P carrying out his/her position Notary must act trustworthy, honest, thorough, independent, impartial and protect the interests of the parties involved in legal actions because carrying out the office carefully means that the Notary in carrying out his position always follows according to and based on the applicable laws and regulations that are directly or indirectly related to the procedures for making an authentic deed other than UUJN jo. UUJN-

P. With the fulfillment of all statutory provisions, it is certain that the implementation of the duties of the Notary's office can meet the formal requirements so that the Notary deed is able to realize the power of formal proof of the deed. Then the obligation of the Notary in Article 16 paragraph (1) letter m determines to read the deed before the appearer in the presence of at least 2 (two) witnesses, or 4 (four) witnesses specifically for the making of an private will, and signed at that time by the appearers, witnesses and Notary. The values contained in the above provisions are a manifestation of the prudence principle in carrying out the duties of a Notary, because by reading the deed by the Notary to the appearers and in the presence of witnesses, it is intended that the deed made or organized by/in the presence of the Notary is truly a formulation of the wishes of the appearers to the appearers.

By reading the deed to the appearers, it is hoped that one of the parties or the parties does not use the argument that everything contained in the deed is not understood, even the argument is not his/her desire. So that reading the deed to the appearers is an act of the Notary to be able to eliminate the denial of one of the appearers which can harm the other appearers, as well as to negate the demands to the Notary, that the Notary does not carry out the principle of prudence in administering the deed. Furthermore, the qualification of prudence principle on implements the position of Notary in are also reviewed in the provisions of Article 17 UUJN jo. UUJN-P concerning the prohibition of Notary.

#### ***Prudence Principle in Practice of Notary Position Implementation***

In carrying out his/her duties and positions, that is making authentic deed, the actions of Notary who have fulfilled the orders or obligations required by UUJN jo. UUJN-P as well as all the provisions of laws and regulations that apply to the making of an authentic deed, as well as avoiding all its prohibitions have not guaranteed freedom from legal problems both in the realm of notarial, civil and even penal law. These legal problems are usually born because of a dispute between the parties in a Notary deed that arises as a result of a breach of contract from one party to another or the non-fulfillment of the rights of one of the parties as specified in the deed, so that from the formal side it

looks like a dispute was born as a result of the making of a deed by the parties and/or in the presence of a Notary with the argument that the Notary made a fake deed or participated or provided the opportunity to enter false information into an authentic deed and other arguments which in the end the Notary was qualified to be careless or does not carry out the precautionary principle in carrying out his/her duties.

The description above is the result of the researcher's observations as a result of this research which can be described as legal facts that occur in notary practice as follows:

#### *Prudence Principle of Notary on Civil Case*

Whereas the parties disputed the contents of the deed in which the seller argued that the person concerned had never intended to sell the things stated in the notarial deed in the form of a binding deed of sale and purchase agreement (PPJB) and deed of attorney to sell, and it was argued that all documents were in the form of an identity card (KTP) and Family Card (KK) which are used as the basis for determining self-identity and the authority to act by one of the parties, that is the seller, are false statements or falsified documents.

In the dispute, the Notary was argued in the lawsuit that the Notary neglected to explain the contents of the deed so that the plaintiff, that is the seller, felt that his rights were impaired due to the negligence of the Notary. Likewise, regarding the use of documents which according to the plaintiffs are fake or falsified, arguing that the Notary has intentionally given the opportunity to defendant 1 (one) to use fake or falsified documents so as to harm the rights of the plaintiffs.

This legal fact can be seen in the Decision of the Denpasar District Court Class IA Number: 601/Pdt.G/2019/PN Dps on September 9, 2020, based on the decision above that legally a Notary cannot be qualified as neglecting the application of the precautionary principle only on the basis of interpretation of one of the parties whose rights have only been impaired by their own mistakes. That Notary who has read out the contents of the deed and confirmed or recorded a person's personal data based on the documents he explained to the Notary or submitted by the parties to the Notary but has never been denied the untruth is not the Notary's negligence, namely an error in the implementation of

the precautionary principle in carry out the duties of a Notary.

In such a case, Notary who has confirmed the empirical facts as juridical facts that have previously been submitted to the Notary and then confirmed by the appearers and subsequently stated in the deed as the contents of the deed is the will and desire of the appearers, as well as the truth of the document. A Notary accepts and considers everything contained in a document to be true as long as the documents are submitted and given to the Notary by the parties concerned

#### *Prudence Principle of Notary on Penal Case*

Another juridical fact that the researcher can explain is that there was a Notary penalized because the Notary is considered negligent and does not apply the prudence principle in the process of making the deed of attorney to sell land by the parties on the product of the deed of attorney to sell his/her property. In this case the Notary has implemented the prudence principle as regulated in Article 15 UUJN jo. UUJN-P by checking the original Certificate of Building Use Right (HGB), the original copy of the Sale and Purchase Binding Deed (PJB), the Deed of Attorney to Sell, the Identity Card (KTP) submitted by the parties to the Notary. However, in this case, the reported party hid the fact that the Deed of Sale and Purchase Binding Agreement (PPJB) and the Deed of Attorney to Sell submitted to the Notary had been previously canceled. So that the police consider the Notary to have committed a penal act to help (Article 56 of the Penal Code) for helping the reported to commit a crime with the PPJB Deed and the Attorney to Sell Deed made by him. Whereas according to legal facts, the reported party done breach of contract and according to the facts of the trial, the Notary does not benefit at all from the transaction of making the Power of Attorney for the Deed of Sale and Purchase of Land, but the party who benefits is the reported party. Juridical facts based on the Judicial Review Decision Number 20 PK/Pid/2020 show that in the Notary case if the Notary has been negligent in the process of making the Deed of Power to Sell Land between the seller and the buyer, this is an administrative matter as a Notary/PPAT not a criminal realm and cancels the Court's decision Denpasar High Number 27/PID/2019/PT. DPS on 27 June 2019.

In receiving information and documents

from the parties, Notary bound by a formal principle that applies to Notary practice, that is the principle of legal presumption which means that: every government action (public official) is always considered *rechmatig* until there is a cancellation or better known as *presumptio iustae causa*, meaning state administrative decisions. must be considered valid as long as it has not been proven otherwise, so in principle it must always be implemented immediately.

### **Violation on Notary Position Implementation**

Violation of the law in carrying out the position of Notary is an act of violating or not respecting the law in this case UUJN jo. UUJN-P in the process of making a Notary deed so that there is the potential for violation of the right or obligation of the appearers or parties in the Notary deed.

The discussion above is in line with the topic of discussion regarding the qualification of the prudence principle of notary on implement the position based on act of notary position, so that the notion of violation of law in the exercise of office can be understood as an act of a Notary that violates the provisions of UUJN jo. UUJN-P in carrying out the deed.

In UUJN jo. UUJN-P violation of Notary position implementation known as a violation in the administrative field if the Notary violates the provisions of certain articles as regulated in Article 85 UUJN jo. UUJN-P which determines:

“Violation of the provisions as referred to in Article 7, Article 16 paragraph (1) letter b, Article 16 paragraph (1) letter c, Article 16 paragraph (1) letter d, Article 16 paragraph (1) letter e, Article 16 paragraph (1) letter f, Article 16 paragraph (1) letter g, Article 16 paragraph (1) letter h, Article 16 paragraph (1) letter i, Article 16 paragraph (1) letter j, Article 16 paragraph (1) letter k, Article 17, Article 20, Article 27, Article 32, Article 37, Article 54, Article 58, Article 59, and/or Article 63”

In addition to not carrying out the provisions in UUJN jo. UUJN-P as described above is an administrative violation, a violation in the form of not carrying out obligations and not avoiding the prohibition as determined by the Notary Code of Ethics as well as a violation in the administrative field.

In the Notary's Code of Ethic based on

the Decree of the Extraordinary Congress of the Indonesian Notary Association, Banten, 29-30 May 2015 it is regulated about the obligations that must be carried out in Article 3 and the prohibition of Article 4 which may not be carried out while the Notary is carrying out his position. So that administrative violations in carrying out the duties of a Notary's position from the perspective of the code of ethics are when the Notary does not carry out what must be done according to the provisions of Article 3, and Article 4 when the Notary does not avoid the prohibitions that should not be carried out in carrying out his position.

### **Responsibility and Sanction Against Notary Position Violation**

Bearing all the actions that result is the definition of a meaning of the word responsibility. The occurrence of an element of error or intentional doing something that harms and endangers someone or for the loss of goods or so on. The occurrence of errors in use by the user causes the losses experienced must obtain responsibility. The loss caused by the other party for the mistake made must be properly held accountable according to the suffering he suffered for the loss (Putra et al., 2020).

In the event of a violation in the implementation of the duties of a Notary, as specified in Article 85 UUJN jo. UUJN-P, normatively will give responsibility which is usually called administrative responsibility, that is the responsibility of a Notary born based on the provisions of Article 16 paragraph (1) number 9 UUJN jo. UUJN-P stipulates that if one of the requirements as referred to in paragraph (1) letter m and paragraph (7) is not fulfilled, the deed in question only has the power of evidence as private deed.

If one observes the provisions of Article 16 paragraph (1) number 9 above, in the event that the implementation of the position of a Notary is not in line with the norms contained in UUJN jo. The UUJN-P administratively will only give responsibility as a result of the change in the authenticity status of the deed he/she made into a private deed. In such case, the administrative sanctions specified in UUJN jo. UUJN-P which can be imposed on a Notary.

In relation to the above, Hadjon (1998) said that:

... Against a Notary who has violated the law, an administrative sanction may

also be imposed on a Notary, which broadly includes the following administrative sanctions:

- a. Government coercion (bestruurdwang);
- b. Withdrawal of favorable decisions (permits, payments, subsidy);
- c. Imposition of administrative fines;
- d. Imposition of forced money by the government (dwangsom)

The administrative sanctions are in the provisions of Article 85 UUJN jo. UUJN-P is determined to be 5 (five) such as:

1. Verbal reprimand;
2. Written reprimand;
3. Temporary suspension;
4. Dismissal with honor;
5. Disrespectful dismissal.

However, in practice, in the event of a violation of the implementation of the position of a Notary, the responsibility and administrative sanctions as described above are not enough. Because what is often sought by parties is for a Notary to be asked and given sanctions in the form of responsibility and civil and penal sanctions when there is a violation of the implementation of the position of a Notary.

Responsibility and civil sanctions for Notary are often postulated to be born as a result of violations of the implementation of office as stipulated in Article 84 UUJN jo. UUJN-P which determines:

"Actions of violations committed by a Notary against the provisions of Article 16 paragraph (1) letter i, Article 16 paragraph (1) letter k, Article 41, Article 44, Article 48, Article 49, Article 50, Article 51, or Article 52 which result in a deed only has the power of evidence as an private deed or a deed becomes null and void, it can be a reason for the party suffering losses to sue, reimbursement of costs, compensation, and interest to Notary.

In addition to administrative responsibilities and civil responsibilities as described above that can be requested from a Notary in the event of a violation of the performance of office, penal responsibility can also be requested as a follow-up or impact of an administrative violation.

Notary can be qualified to commit penal act as a follow-up impact of violating the exercise of office in the form of making and falsifying letters, using or ordering other people to use fake letters, ordering

to enter false information into an authentic deed, and receiving gifts or promises to move them to do or not do so does something related to his position, he can be subject to penal sanctions if the Notary is proven guilty.

So, in the event that it is legally proven that a penal act has occurred as a result of a violation of the implementation of position, then the Notary can be held penal responsible. The forms of responsibility, as in judicial practice in general, include 3 forms of responsibility:

1. Responsibilities as experts;
2. Responsibilities as witnesses;
3. Responsibilities as a suspect.

#### **4. CONCLUSION**

From the results of the discussion above, it can be concluded that 1) Limitation of the prudence principle implementation for Notary in carrying out his/her position in the form of carrying out all the provisions contained and determined in UUJN jo. UUJN-P in particular the provisions of Article 15 paragraph (2) letter e, Article 16 paragraph (1) letters a and m and Article 17. 2) Violation of the law in carrying out the position of a Notary is an act of violating or not fulfilling the provisions of UUJN jo. UUJN-P in particular the provisions of Article 16 paragraph (1) letter a as a violation of the fulfillment of the prudence principle and an administrative violation. In such case, the limit of the Notary's responsibility is in the form of administrative responsibility. Moreover, it can be suggested that 1) To Notary are advised to comply more with all provisions of UUJN jo. UUJN-P, be prudent, thorough, and scrupulous in carrying out the deed, so that it can eliminate the bad intentions of parties who deliberately blame and place the Notary as committing an unlawful act, both civil and penal, such as: participating in helping one party who aims to criminalize the other party by using the deed. 2) To the Government and the Parliament (DPR) to improve the provisions regarding the precautionary principle in the UUJN and UUJN-P in the future, by providing more detailed and clear arrangements so that there are no longer blurred norms regarding the limits of the precautionary principle in carrying out the position of a Notary as regulated in Article 16 paragraph (1) letter a UUJN jo. UUJN-P concerning the obligation of a Notary to act carefully in the process of making a deed. So that

later the Notary in the process of making the deed has definite and clear guidelines to prevent legal problems from arising in the deed he makes in the future.

## REFERENCE

- Act Number 30 of 2004 concerning the Position of a Notary (State Gazette of the Republic of Indonesia of 2004 Number 177, Supplement to the State Gazette of the Republic of Indonesia Number 4432).
- Act Number 2 of 2014 concerning Amendments to Act Number 30 of 2004 concerning the Position of a Notary (State Gazette of the Republic of Indonesia of 2014 Number 3, Supplement to the State Gazette of the Republic of Indonesia 5491).
- Code of Civil law
- Code of Penal Law.
- Darus, M. L. H. (2017). *Hukum Notariat dan Tanggung Jawab Jabatan Notaris*. Yogyakarta: UII Press.
- Hadjon, P. M. (1998). *Perlindungan Hukum Bagi Rakyat Indonesia*. Surabaya: Bina Ilmu.
- Lotulung, P. E. (1993). *Beberapa Sistem Tentang Kontrol Segi Hukum Terhadap Pemerintah*. Bandung: Citra Aditya Bakti.
- Notary Code of Ethic.
- Putra, I. K. M., Mahendrawati, N. L., & Arini, D. G. D. (2020). Penerapan Pasal 1320 KUH Perdata Terhadap Tanggung Jawab Penjual Dalam Perjanjian Jual Beli Barang Melalui Media Internet. *Jurnal Analogi Hukum*, 2(1), 73–77. doi:<https://doi.org/10.22225/ah.2.1.2020.73-77>
- Putri, M. K., Dewantara, R., & Aju Wisnu, D. (2020). The Implementation of Prudential Principles in Liquidating Credit Using Covernote Notary. *International Journal of Multicultural and Multireligious Understanding*, 7(7), 436. doi:10.18415/ijmmu.v7i7.1865
- Saputra, G. W. D., Rodliyah, R., & Pria Suhartana, L. W. (2019). Implementation of Notary Prudence Principle in the Cooperative's Deed of Establishment. *International Journal of Multicultural and Multireligious Understanding*, 6(4), 297. doi:10.18415/ijmmu.v6i4.983
- Sulihandari, H., & Rifiani, N. (2013). *Prinsip-Prinsip Dasar Profesi Notaris*. Jakarta: Dunia Cerdas.