



## Abuse of Notary Tenure That Implies Criminal

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### **Abstract**

Notary is a legal profession so that the profession of notary is a noble profession (*nobile Officium*). The deed which is made by the notary can be the legal basis for the status of the property, the rights and obligations of one. Confusion over notarized deed can cause a waiver of a person's rights or the burden of a person on an obligation, therefore notary in the task of his office shall comply with the various provisions of the law number 2 of 2014 on the amendment to law number 30 of 2004 about the Notary Tenure. In the practice of many notary public are found by the parties or other third parties, the notary is often withdrawn as a party to conduct or assist in committing a criminal offence. In law number 2 of 2014 on The Amendment To Law number 30 of 2004 about the notary department there is a vacancy of the norm regarding the criminal responsibility of a notary in the misuse of Notary Tenure. This research aims to analyze the criteria and indicators of Abuse of Notary Office That Implicates Criminal and notary criminal liability in the misuse of notary tenure. This method of research using normative legal, research methods means research using the literature material. The approach is used is a statutory approach, conceptual approach and a case approach. The first result of this research is the criteria and indicators of abuse of the Department of Notary Tenure that Implicates Criminal arising from the admisappropriation of authority which is conducted by the notary stipulated in Article 15 of Law number 2 of 2014 concerning the amendment to the law number 30 of 2004 about the notary tenure. In addition to misuse of authority, the criteria and indicators of abuse of the notary tenure of the criminal arise for not implementing the obligations stipulated in Article 16 paragraph (1) of Law number 2 of 2014 concerning the amendment to law number 30 of 2004 about the notary tenure and the breach of the prohibition set forth in Article 17 paragraph (1) of Law number 2 of 2014 concerning amendment to law Number 30 of 2004 concerning notary. Secondly, the responsibility committed by a notary depends on the mistakes he has made. If the notary violates criminal rules, the notary shall be criminally liable in the form of prison punishment. If the infringed is a civil rules, the notary is subject to a indemnity of the deed and the deed made by the power of the evidence down to be private. Whereas when done is an administrative offence, then the notary can stop from his tenure.

**Keywords:** *Office Abuse; Notary; Criminal*

## Introduction

Indonesia is a legal state (*rechstaat*). It confirms that the government guarantees legal certainty in the life of society, nation and state. The law of the state guarantees the certainty, order, and protection of the law, which is based on truth and justice. Certainty, order and legal protection demands are like, that people's lives require the presence of evidence that clearly determines the rights and obligations of a person as a legal subject in society. To guarantee the certainty of the law, the government created a strict rule of law that governs the conduct of its citizens by creating the law.<sup>1</sup>

The government then created the legal profession to help those with lesser understanding of the legal processes and procedures that they have to conduct in a matter, in order to create awareness for the citizens and the parties towards the legal. The legal professions that we can meet around us include advocates/lawyers or notary public.

Notary is a legal profession so that the profession of notary is a noble profession (*nobile officium*). The deed is made by the notary can be the legal basis for the status of the property, the rights and obligations of one. Confusion over notarized deed can cause a waiver of a person's rights or the burden of a person on an obligation, therefore notary in the task of his office shall comply with the various provisions of the law number 2 of 2014 on the amendment to law number 30 of 2004 about the notary department.<sup>2</sup>

In the practice of many notary public in question by the parties or other third parties, the notary is often withdrawn as a party to conduct or assist in committing a criminal offence.<sup>3</sup> In this case a notary intentionally or accidentally notary public with the parties to make a deed with the intent and purpose to benefit a particular party or the appearer. Setting of the notary authority is clearly stipulated in Article 15 of the Law number 2 of 2014 on the amendment to law number 30 of 2004 about the notary tenure, which mentions that:

- (1) The notary authorized to make an authentic deed of all the deeds, agreements and assignments are required by the legislation and/or desired by the interests to be expressed in the authentic deed, ensuring the certainty of the date of the deed, storing the deed, giving Grosse, copies and quotations of the deed, all of which during the creation of the deed is not also assigned or excluded to other.
- (2) In addition to the authority referred to in paragraph (1), the authorized notary also:
  - a. Confirm the signature and set the certainty of the date of the private letter by registering in the special book.
  - b. Create the private letter by registering in a special book.
  - c. Make copies of the original private letter in the form of a copy containing the description as written and illustrated in the letter concerned.
  - d. Authorizing photocopy matches with the original letter.
  - e. Provide legal counseling in connection with the creation of the deed.
  - f. Make a deed relating to the land.
  - g. Make the Deed of the auction treatise.
- (3) In addition to the authority as referred to in paragraph (1) and paragraph (2), the notary has other authorities that are governed by the laws and regulations.

<sup>1</sup> Abdul Ghofur Anshori, *Lembaga Kenotariatan Indonesia: Perspektif Hukum Dan Etika*, cetakan pertama, UII Press, Yogyakarta, 2009, p. 13.

<sup>2</sup> Op Cit, p. 46.

<sup>3</sup> Habib Adjie, *Hukum Notariat di Indonesia-Tafsiran Tematik Terhadap UU No.30 Tahun 2004 Tentang Jabatan Notaris*, Refika Aditama, Bandung, 2008, p. 24.

Based on the authority, a notary responsibility arises as an official in charge of creating an authentic deed. Notary in the position of his post if proven to abuse, then it is supposed that notary should be responsible in accordance with the deed that does either responsibility in terms of Administrative Law, Civil Law, Criminal Law. The responsibilities are in accordance with the sanctions stated in Article 84 and 85 of law number 2 of 2014 concerning amendment to law number 30 of 2004 about the notary tenure.

In law number 2 of 2014 on the amendment to law number 30 of 2004 about the notary tenure there is a vacancy of the norm regarding the criminal responsibility of a notary in the misuse of notary tenure.

## **Methodology**

This method of research uses normative legal research methods. Normative legal research is also called legal research doctrinal i.e. legal research using secondary data sources or data obtained through library materials.<sup>4</sup> The approaches used in this study are the statute approach, the conceptual approach, and the case approach.

## **Discussion**

### ***Criteria and Indicators of Abuse of Notary Department of the Criminal***

Any government action required must rely on a legitimate authority. Without the legitimate authority of an official or the State administration agency is unable to perform a government deed. Therefore, the legal authority is an attribute for every officials or for every agency.<sup>5</sup>

Notary Authority in the making of deed, in the provisions of Article 15 of Law number 2 of 2014 on the amendment of Law number 30 of 2004 on the notary tenure, namely:

1. Notary authorized to make an authentic deed of all the deeds, agreements, and assignments are required by the legislation and/or as desired by the interested to be expressed in the authentic deed, guarantee the certainty of the date of the deed, save the deed, give Grosse, copies and quotations of the deed, all during the creation of the deed is not also assigned or excluded to other officers or by any other person which is established by Law.
2. In addition to the authority referred to in paragraph (1), the authorized notary also:
  - a. Confirm the signatures and set the certainty of the private letter by registering in a special book.
  - b. Create the private letter by registering in a special book.
  - c. Make copies of the original private letter in the form of a copy containing the description as written and illustrated in the letter concerned.
  - d. Authorizing photocopy matches with the original letter.
  - e. Provide legal counseling in connection with the creation of the deed.
  - f. Make a deed relating to the land.
  - g. Make the Deed of the auction treatise.
3. In addition to the authority referred to in paragraph (1) and paragraph (2) the notary has other authorities that are regulated in the legislation.

<sup>4</sup> Mukti Fajar dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris*, Cet. 2, Pustaka Pelajar, Yogyakarta, 2013, p.154.

<sup>5</sup> Lutfi Effendi, *Pokok-Pokok Hukum Administrasi*, Bayumedia Publishing, Malang, 2004, p. 77.

Notary or general officer in carrying out its functions, has the obligation as contained in Article 16 paragraph (1) of Law number 2 of 2014 on the amendment of Law number 30 of 2004 on the notary tenure, namely:

- a. Acting trustful, honest, equitable, independent, immoral and safeguard the interests of the parties concerned in the act of law.
- b. To make a deed in the form of an deed minuta and the saving portion of the Protocol notary
- c. To embed letters and documents, as well as fingerprint in the deed minuta.
- d. Issuing Grosse Deed, a copy of the deed or deed by deed minuta
- e. Provide services in accordance with the provisions of this law, unless there is a reason to reject it.
- f. Confidential all things concerning the deed made and any information obtained for the deed in accordance with the oath/pledge of office, unless the law determines otherwise.
- g. Bind the deed made in 1 (*one*) month into a book containing more than 50 (*fifty*) deeds and if the number of the deed could not be contained in a single book, the deed could be bound into more than one book, and recorded the number of deed minuta, month and year of its creation on the cover of each book.
- h. Make a list of protest deed towards not to be paid or not to be received the securities.
- i. Make a list of deeds relating to wills in the order of the time of the deed.
- j. Submit a list of deeds as referred to in letter I (*point 9*) or a list of nil that pertains to wills to the list of wills in the center of the regulation that will hold business affairs in the field of law within 5 (*five*) days in the first week of the following month.
- k. Records in the Repertorium date of a will list of wills at the end of each month.
- l. Have a stamp that contains the symbol of the Republic of Indonesia and in the space that it is marked is written name, title, and place of position in question.
- m. Read the deed in front of the appearers by being attended by at least 2 (*two*) witnesses or 4 (*four*) special witnesses for the creation of olographic testament, and signed at that time also by the complains, witnesses and notary
- n. Received a notary candidate internship

The prohibition for notary is governed by Article 17 paragraph (1) of Law number 2 of 2014 concerning the amendment to Law number 30 of 2004 of the notary tenure, namely:

- a. Perform positions outside the territory of office.
- b. Leave the territory of his office more than 7 (*seven*) consecutive without a legitimate reason.
- c. Concurrently as a civil servant.
- d. Concurrently serving as state officials.
- e. Concurrently serving as an Advokad.
- f. Concurrently serving as the leader or officer of a state-owned enterprise, a regional-owned enterprise or a private business entity.
- g. Concurrently serving as Land Deed Official and/or Class II Auction Office outside the seat of notary public.
- h. To be surrogate notarized.
- i. Do the work contrary to religious norms, morality, or decency that can affect the dignity of the office of notary public.

Basically, the form of a notarial deed which contains the deeds and other matters of notarized notary, generally must follow the provisions of the laws and regulations that apply, only in the practice deed which is made notary often arise problems. This is due to notarial errors in the making of deed both intentional and negligence.<sup>6</sup>

<sup>6</sup> Sjaifurrachman, Habib Adjie, *Aspek Pertanggung jawaban Notaris dalam Pembuatan akta*, CV. Mandar Maju, Bandung, 2011, p. 22-25.

The aspect of notarial accountability arises because of errors (*Schuld*) committed in carrying out a job title and the fault is inflicting harm to other people who ask for notary services. So that the measures against the Law (*Wederrechtelijk*) of the notary can be asked to answer the civil, administrative and criminal proceedings even though in law number 2 of 2014 about the amendment to law number 30 of 2004 about the notary department does not regulate criminal sanctions.

In Article 103 The Criminal Code mentions that:

*“The provisions of chapter I until chapter VIII of this book also apply to acts which by other statutory provisions are threatened with criminal, unless otherwise provided by law.”*

There are exceptions in Article 103 of the Criminal Code, i.e. the provisions of the law outside of the Criminal Code specify another or different explicitly exception to the validity of Article 103 of the Criminal Code and other laws determine discreetly the exception of all or part of Article 103 of the Criminal Code. In addition to Article 103 that is the legal basis of the validity of special criminal acts also found in Article 63 paragraph (2) of the Criminal Code.

In Article 63 paragraph (2) the Criminal Code mentions that:

*“If an act enters into a common criminal order, also governed by a specific criminal order, then only that particular is applied.”*

From this Article can be interpreted if there is a deed that can be sentenced according to criminal provisions that are special beside the general criminal, then the special criminal provisions that are used, otherwise if the special criminal provisions do not regulate, then the violation will be imposed general criminal, the Criminal Code. Therefore, in the event of a criminal offence carried out by a notary criminal can be penalized in the Criminal Code even though the law number 2 of 2014 on the amendment of Law number 30 of 2004 about the notary tenure does not regulate criminal sanctions.

### ***Notary Criminal Liability in the Abuse of Notary Department***

In criminal law there is the principle of “*Geen Straf Zonder Schuld*” means that there is no criminal without error. Mistakes are always aimed at inappropriate deeds, i.e. doing something that should not be done or not doing something that should be done. The mistake in a foreign language called *Schuld* is the psychological state of a person dealing with the deeds that he/she does in such a way that based on the circumstances the perpetrator can be disfigured for his actions.<sup>7</sup> Also one can not be convicted if not doing a deed in which the deed is done is a deed prohibited by the law in accordance with the principle of legality that we are accused of the legality of *nullum delictum nulla poena sine praevia lege poenali* means not sentenced to a deed if there is no law or rules governing the prohibition of such acts.<sup>8</sup>

Nowadays, there are many criminal cases that ensnare notary to the court and have been sentenced to court. As for the notary that was sentenced to criminal one of which is found in verdict number 54/Pid. B/2016/PN Mtr.

Based on the ruling by the Assembly of judges based on the facts in the proceeding, the defendant's deed of notary has fulfilled all elements of Article 374 of the Criminal Code which its elements as follows:

<sup>7</sup> *Ibid*, p. 114.

<sup>8</sup> Moeljatno, *Asas-Asas Hukum Pidana*, Edisi revisi, Renika Cipta, Jakarta, 2008, p. 25.

### 1. Element of Whosoever

That is what is meant by anyone who is the subject of law that is able to do legal measures and to him can be accounted for what he is doing. That in the conference on the description of the witnesses and the defendant himself was revealed that the accused Eti Susanti with the identity above in a state of physical and spiritual that in this case do a legal act and for the act can be accounted for him. While inside the defendant was not found the excuse of forgiving and rightly.

### 2. The element intentionally and against the law has something that is wholly or partially belonging to another person and the goods are in his power not because of wickedness.

That what is meant by deliberately is to desire and realize the deeds that she/he does. In the trial of the witnesses and defendants themselves who have become the fact of the law that if the month of April 2012 the defendant as the notary has received a job to make a sale and purchase deed from a witness of the Made Puanya that represented the power by I Gusti Ayu Putu Chandry Punar with buyer Marazzi Maurizio.

That the land area of 50 *are* belongs to the victim of the Made Puanya and the land has been sold to Marazzi Maurizio and his wife Ambre with a total price of Rp. 4.75 billion (*four billion seven hundred and fifty Million rupiah*) with a payment through the accused Eti Susanti as a notary public located at Raya Senggigi streey, District Batu Layar District West Lombok and the process of sales was strengthened to the witness I Gusti Ayu Putu Chandri Punar with the deed of power to sell the numbers 20 and 27 dated 27 April 2012.

That money had not been submitted to the names that had been determined by the accused Eti Susanti is Rp 79.472.000 (*seventy nine million four hundred seventy two thousand rupiahs*) at the time of receiving the transfer from the buyer Maurizio 3 times with a total of Rp 968.975.000 (*nine hundred sixty eight million nine hundred seventy Five thousand rupiahs*) and should be directly paid to the seller but the defendant did not do so there were the following transfer details:

- a. Transfer Phase 1 of Rp. 15 million (*fifteen million rupiah*) through BNI Bank dated 25 July 2012 at 12:47:06 for Management process merger and certificate separatin.
- b. Transfer Phase 2 of 50,000 Euro or equal to 66,000 US dollars via Post Finance on August 2, 2013
- c. Transfer Phase 3 of Rp. 271.025.000 (*two hundred seventy one million twenty-five thousand Rupiahs*) through BNI Bank on September 30, 2013 at 13:34:21 and the defendant also handed in part to the victim amounting to Rp 212,025,000 (*two hundred twelve million rupiah twenty five thousands rupiah*) had been carried out repeatedly and the raid was carried out by the defendant gradually and the defendant left Rp 59 million (*fifty nine million rupiah*) so the total that had been darkened by the defendant amounted to Rp 79,472,000 (*seventy nine million four hundred seventy two thousand rupiah*).

That the judge used the figure of Rp 79,472,000 (*seventy nine million four hundred seventy two thousand Rupiahs*) was based on the testimony of the witness Marazzi Maurizio as land buyers who sent money to the defendant and there is a difference of numbers with the information of the other witness because the exchange rate difference to the dollar so that the judges use the lowest number of more profitable for the defendant.

That the defendant Eti Susanti never asked for permission to the seller of the Made Puanya or to his power was witness I Gusti Ayu Putu Chandra Punar in using the money for his personal interests.

That the reason the defendant withheld the money because the notary fee had not been paid and thus the element deliberately and against the law had something that was wholly or partially belonging to another person and the goods are in his power not because evil had been fulfilled.

3. Element is done by the person who holds the items related to his job or office or because gets wages Based on the fact revealed in front of the trial that if the month of April 2012 the defendant as the notary had received a job to make the sale and purchase deed from the witness of the Made Puanya which was represented the power of I Gusti Ayu Putu Chandra Punar with the buyer Marazzi Maurizio.

That area of 50 *are* land area was belonged to the victim Sang Made Puanya and the land was sold to Marazzi Maurizio his wife Ambre with a total price of Rp. 4.75 billion (four billion seven hundred and fifty Million rupiah) with a payment through the accused Eti Susanti as a notary public that is addressed at the Senggigi Highway in Batu Layar district West Lombok and the process of sales was made to witness I Gusti Ayu Putu Chandry Punar with the deed of power to sell the numbers 20 and 27 dated 27 April 2012.

That money that has not been submitted to the names that have been determined by the accused Eti Susanti is Rp 79,472,000 (seventy nine million four hundred seventy two thousand rupiahs) at the time of receiving the transfer from the buyer Maurizio 3 times with a total of Rp 968.975.000 (nine hundred sixty eight million nine hundred seventy Five thousand rupiahs) and should be directly paid to the seller but the defendant did not do so that is the following transfer details:

- a. Transfer Phase 1 of Rp. 15 million (fifteen million rupiah) through BNI Bank dated 25 July 2012 at 12:47:06 for management process merger and separation of certificates.
- b. Transfer Phase 2 of 50,000 Euro or equal to 66,000 US dollars via Post Finance on August 2, 2013
- c. Transfer Phase 3 of Rp. 271.025.000 (Two hundred and seventy one million twenty-five thousand Rupiah) through BNI Bank on September 30, 2013 at 13:34:21 and the defendant also handed in part to the victim of Rp 212,025,000 (two hundred twelve million two twenty-five thousand rupiah has been carried out repeatedly and the raid was carried out by the defendant gradually and the defendant left Rp 59 million (fifty million rupiah) so the total that has been darkened by the defendant for Rp 79,472,000 (seventy nine million four hundred seventy two thousand rupiah)

That the defendant Eti Susanti never asked for permission to the seller of the Made Puanya or to his power is witness I Gusti Ayu Putu Chandry Punar in using the money for his personal interest.

That the defendant reason withheld the money because the notary fee has not been paid. That thus the elements that people do relate to their work or position or because they have been fulfilled.

Based on the elements of section 374 of the Criminal Code to be accused to the defendant has been fulfilled, the tribunal concluded that the defendant has been legally and conclusive to commit a criminal offence as the District Attorney's charged.

The civil liability of Notary Public from Article 65 number 2 of 2014 on the amendment to law number 30 of 2004 about the notary department does not clearly explain the limitation of the time of notarial liability for their deeds. So if the notary personally wronged in the creation of an authentic deed that is not in accordance with the provisions set forth in the law number 2 of 2014 on the amendment of Law number 30 of 2004 about the Tenure of Notary then cause losses on one party on the making of the deed then the notary can be sued to the court to pay the cost of damages and interest.

The prosecution of these damages and interest can be submitted by the appearer who feels harmed to the court using the provisions of Article 1365 of the Civil Code which mentions that:

*“Any unlawful action that brings harm to another person requires the person because his mistake in issuing the loss reimbursed the loss”*

In addition to the criminal and civil liability, the notary public can also be held accountable by the imposition of administrative sanctions. After the enactment of Law number 2 of 2014 concerning the amendment of Law number 30 of 2004 on Notary Tenure, the allotment of administrative sanctions for a notary directly refers to Article 8, 9, and 12 of law numberr 2 of 2014 on the amendment of law number 30 of 2004 on the Tenure of Notary, because the old provisions governing about the allotment of administrative sanctions against notary persons have been removed.

Procedures for the allotment of administratif sanctions against the notary is governed further in Article 4 through Article 13 of the regulation of the Minister of Justice and Human Rights Nomot 61 year 2016 on procedures for the enforcement of administrative sanctions against notary are:<sup>9</sup>

1) Authority of Regional Supervisory Assembly (*Majelis Pengawas Daerah/MPD*)

In the event of a notary offence or reported or based on the results of the examination, the regional supervisory assembly will do such things as:

- a. Calling the notary in question
- b. Make the News of the event inspection of reported and the news of the findings of the examination results of the notary protocol
- c. Submit reports to the regional supervisory assembly.

2) The authority of Regional Supervisory Assembly (*Majelis Pengawas Wilayah/MPW*)

Arrangement about the authority of MPW in the allotment of administrative sanctions, in particular sanctions are written warning to the notary has been determined in Article 5 of the regulation of the Minister of Justice and Human Rights of the Republic of Indonesia number 61 of 2016 about procedures for the enforcement of administrative sanctions on notary public. In the provision it is mentioned that there are three types of sanctions that can be dropped by the MPW (Regional supervisory assembly) to a notarized notary, which includes:

- a. First written warning sanctions
- b. Second written warning sanctions
- c. Third written warning sanctions

3) The authority of the Central Supervisory Panel (*Majelis Pengawas Pusat/MPP*)

The arrangement of the authority of the supervisory centre of the notary public is determined in Article 6 to Article 7 of the Minister of Justice and Human Rights Regulation of the Republic of Indonesia number 61 of 2016 about procedures for the procedure of administrative sanctions on notary public.

There are two powers of the central Supervisory Assembly, which include:

1. Impose temporary dismissal sanctions on notary.
2. Proposal to the Minister in the form of:
  - a. Termination with respectful

<sup>9</sup> Salim.HS, *Peraturan Jabatan Notaris*, Sinar Grafika, Jakarta, 2018, p. 213.

b. Termination with unrespectful

### **Conclusion**

The criteria and indicators of abuse of the notary tenure of the criminal is arising from the misuse of authority committed by the notary stipulated in Article 15 of Law number 2 of 2014 concerning the amendment of Law number 30 of 2004 about the notary tenure. In addition to misuse of authority, the criteria and indicators of abuse of the notary tenure of the Criminal arise for not implementing the obligations stipulated in Article 16 paragraph (1) of Law number 2 of 2014 concerning the amendment to law number 30 of 2004 about the notary tenure and the violation of the prohibition set in Article 17 paragraph (1) of Law number 2 of 2014 concerning amendment to law number 30 of 2004 concerning notary tenure.

The form of responsibility performed by a notary depends on the mistakes of he/she is made. If the notary violates criminal rules, the notary shall be criminally liable in the form of prison sentence. If the infringed is a civil code, the notary is subject to a breach of the deed and the deed made by the power of the evidence down to the private deed. Whereas when done is an administrative offence, then the notary can be stopped from office.

### **Suggestion**

To the notary, in carrying out its duties must always refer to the law number 2 of 2014 about the amendment to law number 30 of 2004 about the notary department with always paying attention to the authority and carrying out its obligations and not violating the restrictions set forth in the law number 2 of 2014 on the amendment to Law number 30 of 2004 on the Tenure of Notary.

The need for special arrangement of criminal acts related to the notary tenure in Law number 2 of 2014 on the amendment to law number 30 of 2004 about the notary tenure. Law number 2 of 2014 on the amendment to law number 30 of 2004 about the notary tenure should be used as a guideline in determining the criminal act related to the notary public. The statutory limitation of the criminal act shall be measured under law number 2 of 2014 concerning the amendment to law number 30 of 2004 about the notary tenure, meaning that deeds committed by a notary public violate certain provisions in law number 2 of 2014 concerning amendment to law number 30 of 2004 about the tenure of notary. This is important because it is possible that according to law number 2 of 2014 on the amendment to law number 30 of 2004 about the notary department, notarized deed has been in accordance with the provisions of law number 2 of 2014 concerning amendment to law number 30 of 2004 about the tenure of notary, while the law enforcement officers are a criminal act.

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