

NOTARY MALPRACTICE IN CARRYING OUT THEIR DUTIES AND AUTHORITIES

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Abstract

As an official whose duty and authority is making authentic deeds, a Notary is responsible for all the content of the deed he/ she made and all the information relating to the deed made before/ by him/ her, based on the Official Oath of the Notary and Notary Law. Notary is a noble position (*noblese obligue*), and Notaries are expected to keep their dignity as official. The consequences of such honorable position and authority of Notary is that Notaries are obliged to do everything that is regulated in the Notary Law and obey everything that is prohibited by the law, regulations, and the Notary's Code of Ethics, in carrying out both their duties and authority, Notaries are responsible for any consequences arises from any violation of the position of a Notary. For any malpractice committed by a Notary, a Notary may be held liable to civil and criminal lawsuits. This article explains about: (1) The law and regulations applied to Notary in Indonesia in carrying out their duties and authorities. (2) How does the Notary practice in Indonesia in carrying out their duties and authorities. (3) How the ideal Law and Regulations should be applied to Notary, so that Notary malpractice can be eliminated, or at least reduced, and Notaries can carry out their duties and authorities as they are mandated.

Keywords: *Notary malpractice, authentic deed, Notary's Code of Ethics.*

1. INTRODUCTION

Every society needs a figure whose statements are reliable, trustworthy, whose signature and the seal to provide guarantees and strong evidence of an impartial expert and legal advisor who has no defects (*onkreukbaar* or unimpeachable)¹. The position of a Notary in the community plays an important role to meet the needs of the community in making an authentic deed. Society needs someone with an honorary position who can answer their needs in making authentic deeds, can provide legal certainty, and can provide confidence in the making of written authentic evidence. So, in addition to being responsible to oneself, a Notary is obliged to be legally responsible to the public in providing legal services. The written evidence referred to is the authentic deed as stated in Article 1868 of the Civil Code². As a continuation of Article 1868 of the Indonesian Penal Code, a law was enacted to appoint public officials who were authorized to make an authentic deed and therefore the Notary was appointed as the official³. Notary is an authorized official to make an authentic deed and other authorities as stipulated in the law⁴.

Indonesia is a state law⁵. In the current era of globalization, Notary position play an important role in the society. Administering law as one of the efforts to create legal certainty and legal protection for the society. Administering the law is done in the form of documents, and authentic documents present as strong evidence inside and outside the court. The Notary position exist to serve the society, in particular by making authentic deeds.

¹ Tan Thong Kie, *Buku I Studi Notariat Dan Serba Serbi Praktek Notaris* (Jakarta: Ichtiar Baru Van Hoeve, 2011)., page 162.

² Articles 1866 and 1868 of the Indonesian Civil Code Book. R. Soebekti and R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata* (Jakarta: Pradnya Paramita, 2004).

³ G. H. S. Lumban Tobing, *Peraturan Jabatan Notaris*, 3rd ed. (Jakarta: Erlangga, 1992)., page 33.

⁴ Indonesia, *Law No. 2 Year 2014 concerning of Amendment of Law No. 30 Year 2004 Concerning of Notary Official*, State Gazette No. 3 Year 2014, Additional State Gazette No. 5491, Article (1) number (1).

⁵ Indonesia, *1945 Constitution*, article 1 verse (3).

The function of the State is to provide services to the society in order to improve the general welfare of its citizens⁶. Indonesia as a state of law, also adheres to the principle of the Welfare State, as stated in the 1945 Constitution. So that in short, the Indonesian Law State based on the 1945 Constitution is a Welfare Law State⁷. Indonesia as a Welfare State is a country that is towards justice and shared prosperity in a just and prosperous society text by providing services to the society in order to improve the general welfare of its citizens. Improving the society welfare is also applied in the context of making a good and correct notarial deed with no malpractice actions.

The regulation of the position of Notary was originally regulated in *Staatsblaad* 1860 Number 3, which is currently replaced by Law Number 30 Year 2004⁸ concerning Notary Position and has been amended by Law Number 2 Year 2014⁹ concerning Amendment to Law Number 30 Year 2004 concerning Notary Position. Notary is a Public Official authorized to make authentic deeds and other authorities as referred to in the law.¹⁰

Whereas in carrying out their duties, Notaries are sometimes found doing malpractice in making notarial deeds, which can detriment the interest of the parties related in the deed. The malpractice carried out by the Notaries in making the authentic deed is caused by various factors, including but not limited to honor fee, unfair competition among the Notaries, Notaries acts that violate Notary's Code of Ethics which demean the honor and dignity of the Notary's position, Notaries' limited understanding and knowledge of the rules and laws that are applies, the alignments of Notaries to any side, and/ or the negligence of the Notary himself. Various malpractice cases carried out by the Notary decrease public trust in the position of Notary, which in turn gives bad prejudice to Notary position.

In practice, notaries sometimes found doing malpractice in carrying out their duties and authorities, such as violations found in cases in court (judicial cases) and cases resolved by the Notary Supervisory Council (non-judicial cases). An authentic deed made by a Notary sometimes disputed by one of the parties in the deed because it is considered to be detrimental to its interests. The dispute related to an authentic deeds includes but not limited to denying the contents of the deed, signature and presence before the notary, even the allegations that in the authentic deed is found false information. Some Notaries commit malpractice in executing their position due to lack of knowledge of law and regulations, but also tempted by high-paid fee offered from the clients for making such deed as the clients' required.

The malpractice actions carried out by the Notary harms the parties in the deed and in result, Notary position has lost public trust in the society. To overcome this, the need for certainty and legal protection for the society for the making of an authentic deed by a notary. Apart from that, the Notary also needs to get legal certainty and protection in carrying out his position. When both side, Notary and the parties have the legal certainty and legal protection, then the law is present for justice.

Considering the number of violations of malpractice cases, it is necessary to understand the causes of the notary malpractice cases, and how the ideal legal arrangements that should be applied so as to reduce the number of malpractice cases committed by the Public Notary.

⁶ Bewa Rawagino, *Hukum Tata Negara* (Bandung: Fakultas Ilmu Sosial dan Ilmu Politik Universitas Padjadjaran, n.d.), page 8.

⁷ J. C. T. Simorangkir, *Hukum Dan Konstitusi Indonesia* (Jakarta: PT. Gunung Agung, 1986), pp. 188-189.

⁸ Indonesia, *Law No. 30 Year 2004 concerning Notary Position*, State Gazette No. 117, Additional State Gazette No. 4432.

⁹ Indonesia, *Law No. 2 Year 2014 Concerning of Amendment of Law No. 30 Year 2004 Concerning of Notary Position*, *op. cit.*

¹⁰ Indonesia, *Law No. 30 Year 2004*, *op. cit.*, Article (1) number (1).

Notary as an official position stated by Law Number 30 Year 2004 concerning Notary Position, where the position of Notary as a position that is expected to assist public in making authentic deeds, which in the end, the Notary has a role as a State representative to achieve community welfare.

With the issuance of Law Number 30 Year 2004 concerning Notary Position promulgated on October 6, 2004 in conjunction with Law Number 2 Year 2014 concerning Amendments to Law Number 30 Year 2004 concerning Notary Position promulgated on January 15, 2014, the regulation of the position of Notary has been well applied to the public, especially those who need legal certainty towards making authentic deeds. Nevertheless, the number of Notaries malpractice cases still found inside and outside the court, so that another amendment of Notary Law need to be published, in order to reduce the Notaries malpractice cases. In this article will be elaborated about: (1) The law and regulations applied to Notary in Indonesia in carrying out their duties and authorities. (2) How does the Notary practice in Indonesia in carrying out their duties and authorities. (3) How the ideal Law and Regulations should be applied to Notary, so that Notary malpractice can be eliminated, or at least reduced, and Notaries can carry out their duties and authorities as they are mandated.

2. RESEARCH METHODS

The research was conducted based on a normative juridical approach, including research on the principles of law, sources of law, theoretically scientific legislation that can analyze the issues discussed. In this research, the statute and the legal concept analysis (analytical & conceptual) approach were used. The statute approach was carried out by examining all laws and regulations relating to legal issues that are handled. The statute is the legislation and regulation. Primary legal material consisted of: Law Number 30 Year 2004 concerning of Notary Position, Law Number 2 Year 2014 concerning of Amendment of Law Number 30 Year 2004 concerning of Notary Position, and Notary's Code of Ethics. Whereas secondary legal material consisted of the writings of legal sources that can provide an explanation of primary legal materials, such as law books, journals, legal researches, *et cetera*.

3. ANALYSIS AND DISCUSSION

3.1 Public Notary in Indonesia

Public Notary is a public officer authorized to prepare authentic deed and having other authorities as referred to in UUJN.¹¹ Position as Public Notary is an important part of Indonesian Country as referred to in Article 1 paragraph (3) of the 1945 Constitution of the Republic Indonesia.¹² Through the principles, the State guarantees legal certainty, order and legal protection within society¹³. One of guarantees for the legal certainty is provided through legal protection realized from the strongest and the most complete evidential item having very important role, called Authentic Deed.

Authentic Deed prepared before/ by Public Notary has the most complete and the strongest evidence so that its authenticity is not doubtful (*voldoende bewijs*). Therefore, in exercising his profession, the Public Notary should be careful and guided on any regulations enacted and if the Public Notary is negligent then the general public will be harmed.

¹¹ Indonesia, *Law No. 30 Year 2004, op. cit.*, Article 1 number 1.

¹² Indonesia, *the 1945 Constitution of the Republic of Indonesia, op.cit.*, Article 1 paragraph (3).

¹³ Syafran Sofyan, "Notaris Openbare Amtbtenaren," *Jimly School*, accessed January 31, 2020, <https://www.jimlyschool.com/baca/9/notaris-openbare-amtbtenaren-syafran-sofyan>.

Public Notary has main duties to prepare authentic deed with respect to any actions, agreement, and decision required by any laws and regulations and/or desired by any party concerned for declaration in authentic deed, guarantee the certainty of date of the deed preparation, keep the original deed, provide photocopy, copy and quote of the deed, all of which is carried out insofar as the preparation of the deed is not assigned or excepted to any other officer or other person specified by law.¹⁴

Public Notary also has any other duties to make legalization, *waarmerking*, *copy colationee*, acknowledgement to the true photocopy of the original, provide legal counseling in relation to the preparation of deed, prepare certificate related to land affairs (in his capacity as PPAT/ Land Deed Official), prepare the deed of minutes of auction.¹⁵

On any deed he prepared, Public Notary has obligation to read out the deed, and that read out, or not read out must be stated at the end of the deed. Objectives of the foregoing are to make each party knows whether at the time of preparation the deed is read out or not. If the deed was read out, then each of the appearing persons is considered to have known the contents of the deed.

Public Notary has obligations such as having existing office with address, and they have to act honest, careful, neutral, and guard the interest of the parties, to make the notarial deed and keep it safe in Notary protocol, issue the copy of the deed, giving service to the society (unless there is lawful reason to refuse), keeping secret of the parties testimonies, to make bundle of the deed, to make the deed list, protest list, testament list and report it to the Indonesian Law and Human Rights Department monthly, giving free notarial service to the poor society, showing the deed only to the parties, their hereditary, or the rightful party by law. Notary Law Number 30 Year 2004 applies the principles of refusal rights (*verschoningsplicht*) of Public Notary. Public Notary who is asked to act as witness may refuse or is discharged from his obligations to give testimony.¹⁶

Prohibitions to Public Notary shall have intentions to guarantee legal certainty for any people using the Public Notary services, and to simultaneously prevent unfair competition among the Notaries Public in performing their profession. Prohibitions for the Public Notary are set forth in Article 17 paragraph (1) of UUJN.¹⁷ The prohibitions are also specified in Chapter III Article 4 of the Amendment to the Public Notary Code of Ethics as a result of the Extraordinary Congress of the Indonesian Public Notary Association held in Banten on 29-30 May 2015.¹⁸ Sanctions to any Public Notary who make violation of the aforesaid provisions may be in the form of oral warning, written warning, suspension, honorable discharge, or dishonorable discharge.¹⁹ Laws and regulations regulating Public Notary in Indonesia exist since the era of Dutch East Indies colonial until today, which we can see in Codes of Civil Law that still regulates Public Notary in carrying out their position to the society.

The theory of Lawrence M. Friedman, which mentions three main elements of the legal system that determine the success of law enforcement, as follows: first legal Structure, including legal institutions, law enforcement officers, and law enforcement systems. Existing legal

¹⁴ Indonesia, *Law No. 2 of 2014, op. cit.*, Article 15 paragraph (1).

¹⁵ *Ibid.*, Article 15 paragraph (2).

¹⁶ *Ibid.*, Article 1909 paragraph (3) in conjunction with Article 16 paragraph (1) e), f) of UUJN.

¹⁷ Indonesia, *Law Number 30 of 2004, op. cit.*, Article 17 paragraph (1).

¹⁸ *Kongres Luar Biasa Ikatan Notaris Indonesia* (the Extraordinary Congress of the Indonesian Public Notary Association), *op. cit.*, Chapter III, Article 4.

¹⁹ Indonesia, *Law Number 30 of 2004, op. cit.*, Article 85.

structure in the notarial sector lays on Notary Regional Supervisory Council (Majelis Pengawas Daerah Notaris/ MPDN). When a Notary malpractice occurs regarding authentic deed made before/ by Notary, the injured party can report to the Notary Supervisory Board (Majelis Pengawas Notaris) and the initial inspection is carried out by the Notary Regional Supervisory Council (MPDN), followed to the next level with the Assembly Regional Notary Supervisor (Majelis Pengawas Wilayah Notaris/ MPWN), and at the final level with the Notary Central Supervisory Council (Majelis Pengawas Pusat Notaris/ MPPN).

Second legal Substance/ Substance Rule of the Law, encompassing all written and unwritten rules, both material law and formal law. In the field of notary, the legal substance is Notary Law (Undang-undang Jabatan Notaris/ UUNJN), including Law Number 30 Year 2004 concerning Notary Position, Law Number 2 Year 2014 concerning Amendments to Law Number 30 Year 2004 concerning Notary Position, Indonesia Law and Human Right Minister Regulations, Notary Ethics Code, Articles of Association/ Bylaws of the Indonesian Notary Association (INI), jurisprudence and other relevant implementing regulations and third, legal Culture, is an emphasis on the culture in general, habits, opinions, ways of acting and thinking, which direct the social forces in society²⁰. In the notarial sector, legal culture concerns how the behavior of a Notary in carrying out his position in accordance with the regulations of the Public Notary and the Notary Ethics Code that applies.

Legal structure in Notarial sector is the Notary Regional Supervisory Board (Majelis Pengawas Daerah Notaris/ MPDN), Notary Area Supervisory Board (Majelis Pengawas Wilayah Notaris/ MPWN), and Notary Central Supervisory Assembly (Majelis Pengawas Pusat Notaris/ MPPN). Whenever there is Notaries malpractice cases arise, MPDN can take actions after receiving report from the society.²¹ After investigated by MPDN, the cases will go to the next procedure to MPWN, and then to MPPN. Legal substance in Notarial sector is the Notary Law. Notary malpractice case that violate the Notary Law for example is violation of Article 13 of Law Number 30 Year 2004, which reads:

“The notary is dishonorably discharged by the Minister because he was sentenced to prison based on a sentence that has obtained permanent legal force for committing a crime that is threatened with imprisonment of 5 years or more.”

Legal culture in Notarial sector can be seen in the behavior of the Notaries themselves, how they conduct according to the Notary Law and Notary's Code of Ethics. Notaries malpractice cases regarding of the legal culture as a violation of Article 12 letter c Notary Law Number 30 Year 2004, which regulate that notary is dismissed with no respect if it violates the dignity of the position of the Notary.²² The elucidation of Article 12 letter c Notary Law Number 30 Year 2004 states that the intended acts are gambling, drinking, drug use, immoral acts.²³

Another theory can be applied is Gustav Radbruch's theory, which teaches 3 (three) basic elements of law, which is justice, expediency and legal certainty. Where legal certainty in the notarial sector is in the Notary Law Law Number 30 Year 2004 concerning Notary Position, Law Number 2 Year 2014 concerning Amendments to Law Number 30 Year 2004 concerning Notary Position, Indonesia Law and Human Right Minister Regulations, Notary Ethics Code,

²⁰ Lawrence M. Friedman, *The Legal System, A Social Science Perspective* (New York: Russel Sage Foundation, 1975), pp. 12-16.

²¹ Indonesia, *Law No. 30 Year 2004, op. cit.*, article (71) letter e.

²² *Ibid.*, Article 12 letter c.

²³ *Ibid.*, Elucidation of article 12 letter c.

Articles of Association/ Bylaws of the Indonesian Notary Association (INI), jurisprudence and other relevant implementing regulations.

In terms of expediency, it can be seen that clients benefit from obtaining an authentic deed which can be used as the strong evidence when legal actions committed. In terms of justice, the Notary Law gives protection to the parties that made the authentic deeds, whenever Notaries malpractice case arise, the public can report to the Notary Regional Supervisory Board (MPDN) for the case settlement. The Notary Law also gives Notaries the right to deny a summons from the Police/ Public Prosecutor with their own reasonable reason. The Notary Honorary Council's decision will give permission/ to refuse the Police/ Public Prosecutor summons to the Notary. Legal protection for both the public and Notaries is a form of justice provided by the Notary Law.

3.2 Regulation and Supervision of Public Notary

3.2.1 Regulation on Public Notary Position

For any violation of law and regulation by Notary, Notary may be subject to sanctions by the Notary Supervisory Council in the form of verbal warning, written warning, honorable discharge, dishonorable discharge.²⁴ Civil charges and criminal charges could also subject to the Public Notary through court. In case of trial resolved by the Notary Supervisory Council.

It is necessary to make supervision on violation made by the Public Notary, as set forth in Article 67 of the Law Number 2 of 2004. Supervision to the Public Notary shall be executed by the Minister of Laws and Human Rights of the Republic of Indonesia who delegates his authorities to the Notary Supervisory Council.²⁵

A matter related to the Notary Supervisory Council where the Chairman of Regional Supervisory Council is always held on *ex officio* basis by the Head of Regional Office of the Ministry of Laws and Human Rights of the Republic of Indonesia, and such position as the Head of Regional Office of the Ministry of Laws and Human Rights of the Republic of Indonesia quickly changes in bureaucracy, the newly appointed official/ the Head of Regional Office of the Ministry of Laws and Human Rights of the Republic of Indonesia can not perform his duties either as the Chairman of Regional Supervisory Council or as the Chairman of Regional Honorary Council before being inaugurated by the Laws and Human Rights of Republic of Indonesia Minister, and therefore, this causes many malpractice cases of the Public Notary could not handled properly.

3.2.2 Supervision of Public Notary in Carrying Out their Authorities

Supervision to Public Notary is required for Notary in carrying out their authorities, to comply with their official oath and with the laws and regulations. Before legislated by Notary Law Number 30 Year 2004, supervision to Public Notary conducted by District Court.²⁶ Furthermore, the authorities of supervision and examination to Public Notary, after the legislation of Notary Law, belong to the Minister of Laws and Human Rights which in execution thereof the Minister shall form the Notary Supervisory Council. The Minister as the Head of Department of Laws and Human Rights of the Republic of

²⁴ Law No. 30 of 2004, *op. cit.*, Article 85.

²⁵ Law No. 2 of 2014, *op. cit.*, Article 67.

²⁶ Indonesia, Law Number 8 of 2004 regarding Amendment to Law Number 2 of 1986 regarding General Court.

Indonesia has duties to assist President in administering partly the government affairs in the field of laws and human rights as set forth in Article 67 of the Law Number 30 of 2004.²⁷

Supervisory Council is an entity having authorities and obligations to make supervision and patronage on Public Notary.²⁸ Supervision to Public Notary is intended that the Public Notary in exercising his professional duties will fulfill any requirements and execute his duties pursuant to the provisions of the prevailing laws for the benefit of general public. Principal duties for supervision to Public Notary are intended to make any rights and authorities or obligations granted to Public Notary in exercising his duties as set forth in relevant basic regulation, are always exercised according to law, morality, and professional ethics for protection guarantee and legal certainty to the public. Form of supervision may be differentiated into preventive and repressive supervisions. Preventive supervision will be conducted before the issuance of government decision/ruling. Repressive supervision will be executed after the issuance of government decision/ ruling, so that it is corrective in nature and cures an incorrect action²⁹. On the other hand, patronage is a curative action of anything made by Notary Supervisory Council to Public Notary in exercising his position and provides guarantee on legal certainty and protection to his service users and people in general covering the patronage of Public Notary behavior, and Public Notary professional performance.³⁰

3.3 The Role of Notary Supervisory Council in Supervising Public Notary

Notary Supervisory Council is an entity having authorities and obligations to make supervision and patronage on Public Notary.³¹ Its role is to protect the society as the service user of Public Notary according to the Justice Theory, Utility Theory, and Legal Certainty Theory.

Notary Supervisory Council comprises of Sub-regional Supervisory Council (MPD), Regional Supervisory Council (MPW), and Central Supervisory Council (MPN). Notary Supervisory Council (MPN) shall be appointed by the Minister of Laws and Human Rights RI. Supervision by the Minister of Laws and Human Rights RI shall be delegated to MPN.³²

Each of the Supervisory Council has different domicile, where the Sub-regional Supervisory Council (MPD) is domiciled in Regency/ Municipality³³, and the Regional Supervisory Council (MPW) is domiciled in Provincial Capital³⁴, and the Central Supervisory Council (MPW) is domiciled in State Capital.³⁵

There are 3 (three) elements of Notary Supervisory Council which comprises of 3 (three) persons from the Government, 3 (three) persons from Public Notary Organization, 3 (three) person from the Academic Community. In exercising their duties, the Supervisory Council will

²⁷ Indonesia, *Law Number 30 of 2004, op. cit.*, Article 67.

²⁸ *Regulation of Minister of Laws and Human Rights RI No. M.02.PR.08.10 of 2004 in conjunction with Regulation of Minister of Laws and Human Rights RI No. 40 of 2015*, Article 1 paragraph (1).

²⁹ Diana Hakim Koentjoro, *Hukum Administrasi Negara* (Tangerang: Ghalia Indonesia, 2004), page 73-74.

³⁰ Indonesian Minister Law and Human Rights, *Regulation of Minister of Laws and Human Rights of Republic of Indonesia No. M.02.PR.08.10 of 2004, op. cit.*, Article 1 number 5.

³¹ Ministry of Laws and Human Rights, *Regulation of Minister of Laws and Human Rights RI Number 40 of 2015*, Article 1 number 2.

³² *Law No. 30 of 2004, op. cit.*, Article 67.

³³ *Ibid.*, Article 69 verse (1).

³⁴ *Ibid.*, Article 72 verse (1).

³⁵ *Ibid.*, Article 76 verse (1).

be assisted by Inspection Council and Supervisory Council Secretariat.³⁶ Inspection Council have duties to conduct initial inspection and trial preparation, whereas Sub-regional and Regional Supervisory Council Secretariat have duties to provide support on administration, technical inspection and work program preparation, budget, and report to the Supervisory Council, whereas Central Supervisory Council Secretariat have duties to make development on administration, human resources, budget, means and infrastructures, and trial management of the Notary Supervisory Council. Notary Supervisory Council is the only authorized institution to supervise, inspect, and impose sanction for Public Notary

All levels of Notary Supervisory Council (MPN), namely MPD (Sub-regional Supervisory Council), MPW (Regional Supervisory Council) and MPP (Central Supervisory Council) have their respective authorities.

Authorities of Sub-regional Supervisory Council (MPD) are set forth in Article 66 of UUJN regarding the taking of photocopy of the minutes of deed or any document attached to the minutes of deed or Notary protocol and Notary summons by Investigator/ Prosecuting Attorney/ Judge. The authorities are absolute to Sub-regional Supervisory Council (MPD), not owned by either MPW or MPP.³⁷ However, based on the last amendment to the Notary Law Number 2 of 2014, the authorities change into Authorities of the Notary Honorable Council.

Authorities of Regional Supervisory Council (MPW) are not only set forth in UUJN but also specified in the Regulation of the Minister of Laws and Human Rights of the Republic of Indonesia Number 40 of 2015.

MPW is authorized to impose sanction specified in Articles 73, 85 of Notary Law, and Article 26 of the Regulation of the Minister of Laws and Human Rights of the Republic of Indonesia Number M.02.PR.08.10 of 2004.³⁸

Authorities of Central Supervisory Council (MPP) are not only set forth in UUJN, but also specified in the Regulation of the Minister of Laws and Human Rights of the Republic of Indonesia Number M.02.PR.08.10 of 2004, and the Decree of the Minister of Laws and Human Rights of the Republic of Indonesia Number M.39-PW.07.10 of 2004.

Authorities of MPP are set forth in Article 77 of UUJN.³⁹ Imposition of administrative sanction shall be applied in stages from the lightest sanction until the most severe sanction. In certain case, Public Notary who commits serious violation to professional obligation and prohibition may be directly imposed by administrative sanction without applying sanction in stages.

3.4 Notary Honorable Council

Notary Honorable Council (MKN) is an entity having authorities and obligations to provide approval or rejection on investigation and judicial process.⁴⁰ This entity is formed to protect a good reputation of Public Notary from Investigator, Prosecuting Attorney, or Judge with respect to the taking of the minutes of deed and Notary summons. It means that the Investigator from police can not directly call the Notaries for judicial process. Since the renewal

³⁶ *Ibid.*, Articles 17-18.

³⁷ Indonesia, *Law Number 30 of 2004, op. cit.*, Article 66.

³⁸ Ministry of Laws and Human Rights RI, Decree of *Minister of Laws and Human Rights of Republic of Indonesia Number M.39-PW.07.10 of 2004 regarding Supervisory Council's Duties*, number 2 items 1 and 2.

³⁹ *Law No. 30 of 2004, op. cit.*, Article 77.

⁴⁰ Ministry of Laws and Human Rights, *Regulation of Minister of Laws and Human Rights Number 7 of 2016 regarding Notary Honorable Council*, Article 20.

of Notary Law by 2014, there are any alterations to the provisions of Public Notary summons mechanism, particularly in Article 66. Beside the addition of paragraph in the Article 66, there is also Article 66A as insertion.

Notary Supervisory Council (MPN) and Notary Honorable Council (MKN) have similarity in case of patronage on Public Notary. Difference of both institutions is that Notary Supervisory Council (MPN) is an entity having authorities and obligations to conduct patronage and supervision to Public Notary⁴¹ while Notary Honorable Council (MKN) is an entity having authorities to carry out patronage on Public Notary and obligations to provide approval or rejection on investigation and judicial process, on the taking of photocopy of the minute of deed and Notary summons to be present in examination related to deed or notary protocol kept by Public Notary.⁴²

3.5 The Ineffective Law Enforcement of Public Notary's Authority

3.5.1 The Ineffective Law Enforcement of Public Notary's Authority from the Regulatory Aspect

Ineffective law enforcement reviewed from regulatory aspect can be seen from **the authorities of Sub-Regional Supervisory Council (MPD)** only limited to giving recommendation of sanction without having the authorities of execution.⁴³ Pursuant to Notary Law, the authorities of Sub-Regional Supervisory Council (MPD) should include dispute settlement by issuing binding decision, except appealed. Furthermore, Inspection Council needs authorization to close the access of Notary who fails to immediately remedy mistake when sampling test is conducted. In this case, the mechanism of dispute settlement easily accessed by the public and effective dispute settlement, as requirement for effective law enforcement, is not achieved⁴⁴.

Other weakness on regulation related to Notary Supervisory Council which they can only act whenever there is a report from public regarding the violation of Public Notary authorities, without such report, no legal action can be taken, whereas there are many findings of violation by Notaries Public.⁴⁵

Other issue is that **there are any Notaries Public who hold double positions**. Legal conception on the formulation of Article 11 (obligatory leave as Government Official) and Article 17 of UUJN (prohibition of double position) is contrary to each other, so that no legal certainty is applied to Public Notary appointed as Government Official, and Article 17 paragraph (2) of UUJN Number 2 of 2014 doesn't specify strict sanction for any violation of the double position prohibition.⁴⁶ Effectiveness of law according to Lon Fuller

⁴¹ *Ibid.*, Article 1 paragraph (3).

⁴² *Ibid.*, Article 1 paragraph (1).

⁴³ Ministry of Laws and Human Rights RI, *Decree of Minister of Laws and Human Rights RI No. M.39-PW.07.10 of 2004 regarding Guidelines for Implementation of Notary Supervisory Council's Duties* Dated 28 December 2004, *loc. Cit.*, specifying that Examination Team only existing in Sub-regional Supervisory Council. Report submitted by the public to MPD will be examined in trial and further submitting recommendation to MPW for follow-up.

⁴⁴ Soerjono Soekanto, *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum* (Jakarta: P.T. Rajagrafindo Persada, 2002), page 80.

⁴⁵ *Regulation of Minister of Laws and Human Rights RI No. M.02.PR.08.10 of 2004* and interview with Mister Nur Ichwan, S.H., as the Head of Legal Service Division of the Ministry of Laws and Human Rights of the Republic of Indonesia of East Kalimantan Province on October 2019, explaining that the Sub-regional Supervisory Council practically encounter supervisory obstacles because the Sub-regional Supervisory Council may take action only after obtaining report from the public.

⁴⁶ *Law No. 2 of 2014, op. cit.*, Article 11 paragraph (1) in conjunction with Article 17 paragraph (2).

requires consistency in legal conception. Formulation of norm set forth in the articles is inconsistent in legal conception to Public Notary appointed as Government Official. Hopefully, in subsequent amendment to UUJN any articles as mentioned above will be altered with clear and consistent legal concept to avoid conflict. Accordingly, it is necessary to amend the Notary Law to solve the issues.⁴⁷

3.5.2 The Ineffective Law Enforcement of Public Notary's Authorities from the Law Enforcer Aspect

Weak/ ineffective law enforcement regarding Public Notary/s authority from the aspect of law enforcer can be seen from institutional issues of Notary Supervisory Council (MPN) and Secretariat of Notary Supervisory Council. The Notary Supervisory Council pursuant to Articles 67 and 68 of UUJN has no sufficient budget and administration personnel support so that the organization of patronage and supervision is not well planned. Notary Supervisory Council Secretariat appointed to assist Sub-Regional Supervisory Council (MPD), Regional Supervisory Council (MPW), and Central Supervisory Council (MPP) is ineffective and unable to be executed optimally because the position is not their principal duties.

Requirements for effective law enforcement are legal system certainty, administration support, mechanism of dispute settlement easily accessed by the public, and effective dispute settlement.⁴⁸ Although MPN has institutional structure, but its structural institution is not an institution with management organization having management structure, budget, and any other supports, and accordingly MPN position should be confirmed.

Other impact of the institution of MPN is insufficient support from administration personnel as a normal office, and therefore, the organization of patronage and supervision is not well planned. There are no personnel who prepare patronage and supervision planning that must be carried out within 1 (one) year, plus no budgeting support, and this makes the institution of Supervisory Council (particularly MPD) not optimal in performing their works.

Issues include **the membership of the Supervisory Council** comprised of 3 (three) elements, from Government, Public Notary, and Academic Community. Pursuant to Article 67 of UUJN, the Supervisory Council can not make optimal contribution in performing their duties because of not their principal duties. Any other issues include the elements of government/ academic community sometimes having little understanding on notarial law so that patronage and supervision are less effective.

Other issue that **supervision to MPD shall be conducted at least 1 (one) time within 1 (one) year**, whereas there are many Notaries Public in some Regencies/Municipalities, so that supervision can not be executed effectively. In addition, MPD is passive in examining any complaint from the public as set forth in Article 23 paragraph (1) f) of the Regulation of the Minister of Laws and Human Rights of the Republic of Indonesia Number 40 of 2015 specifying that, 'receiving complaint from the public with respect to any alleged violation of the code of ethics of the Public Notary or

⁴⁷ Interview with Mister Dr. Bambang Rantam Sariwanto, S.H., as Secretary General of Ministry of Laws and Human Rights of Republic of Indonesia and Chairman of Central Supervisory Council in November 2019.

⁴⁸ *Ibid.*

any breach of the provision of Law.”⁴⁹ contrary to Article 1 paragraph 5 of the Regulation of the Minister of Laws and Human Rights of the Republic of Indonesia No. M.02.PR.08.10 of 2004 specifying that, ”Supervision is any activity being preventive and curative in nature including patronage conducted by the Supervisory Council to Public Notary.”⁵⁰

Accordingly, MPD should be provided with authorities to make preventive and curative supervision by amending the Regulation of the Minister of Laws and Human Rights of the Republic of Indonesia Number 40 of 2015 in order to more protect the public interest.

3.6 Notary Malpractice in Indonesia

As we have known that Notary is an honored title to those who hold it, yet we see some weakness/ ineffectiveness in law enforcement regarding Notary’s authorities from regulatory aspects and law enforcers. These weaknesses combine with the Notary’s character’s themselves create the opportunities to do some malpractice we sometimes find in reality.

In the practice of implementing notarial position regulations according to Notary Law, often found disharmony between these laws and their application by the Notaries, where in their practice, with the discovery of several cases, the Notary does not carry out his position in accordance with the provisions of the laws and regulations. Cases of violations committed by a notary can be found both in the court (judicial case) and outside the court (non judicial case). This is not in accordance with the aspect of expediency, where the existing legal arrangements and have provided legal certainty for the community, as if it is not useful to provide legal protection for the community.

The consequence of violation of the Notary Law and regulation is that Notary is responsible for the deed he made, and the Notary may be subject to sanctions in accordance with the violation he has committed. A notarial deed may be canceled or become null and void if it violates the law and regulation in Notary Law.

When viewed from the legal structure, legal substance, and legal culture, the regulation of the position of Notary still needs to be refined. If viewed from the legal structure, in the Notary Supervisory Council, where the Regional Supervisory Council can only act to overcome malpractice carried out by the Notary when there is some public report. If viewed from the legal substance, there are several regulations regarding the position of a Notary that can be refined to reduce malpractice taken by a Notary. If viewed from a legal culture, the practice of Notaries in carrying out their positions needs to be directed at improving the moral quality and knowledge of the Notaries, so that the number of Notary malpractice cases that occur can be reduced.

In the practice of implementing the regulations of the Public Notary, there are many violations as in the provisions such as breaking the oath/ promise of a Notary's position and in carrying out his/ her office must act honest, thorough, independent, impartial, and safeguard the interests of parties involved in legal actions, notary obligation to keep their behavior, and will be

⁴⁹ Indonesia, Regulation of *Minister of Laws and Human Rights of Republic of Indonesia No. 40 of 2015 regarding Organization Structure, Procedures of Member Appointment, Member Discharge, and Working Management of Supervisory Council*, *op. cit.*, Article 23 paragraph (1) f).

⁵⁰ Indonesia, Regulation of *Minister of Laws and Human Rights of Republic of Indonesia No. M.02.Pr.08.10 of 2004 regarding Procedures of Member Appointment, Member Discharge, Organization Structure, Working Management, and Procedures of Examination by Notary Supervisory Council*, *op. cit.*, Article 1 number 5.

dishonorably dismissed from his position by the Minister if he/ she commits a violation of the dignity of the position of the Notary, obligation to read the deed in front of the parties, in reality it is often not read by the Public Notary, prohibition for Notaries for serving as advocates, prohibition to make a deed in a state of leave, the act of notarization should have been made by his substitute. In the Notaries malpractice cases, there is a Notary which in a state of leave, makes a deed in front of his clients. The deed made in Notary's leave status will have no authenticity, since it violates the Notary Law.

When Notary commits malpractice, such as not reading the deed in front of the parties, the sanction is Notary could get written reprimand or temporary termination for 6 months from their position, and the deed will lost its authenticity.

When Notary dropping their honor fee arbitrarily shows that their violating the Notary Ethic Code of Conduct which can lead them to get both verbal and written reprimand, and their membership removed from the Notary Organization (Ikatan Notaris Indonesia).

Notary Law provides legal protection for Notary who has carried out his position in accordance with the law and his oath, as reflected in Article 66 UUJN Number 2 of 2014, which stated if there is a summon from the Investigator/ Public Prosecutor to Notary for examination, this must be with the permission of the Notary Honorary Assembly (Majelis Kehormatan Notaris/ MKN), with the aim of the Notary concerned being summoned before the Notary Honorary Assembly, so that Notary Honorary Assembly can get explanation from the deed he made, and if the Notary Honorary Assembly considers that the deed he/ she made is in accordance with Notary Law, then the summons request will be rejected. This is because Public Notary is a noble position that needs to be protected from such criminalization. An ideal law and regulation regarding the position of a Public Notary should give legal certainty and protection for the public using their services, as well as guarantees of legal certainty and protection for the position of a Public Notary.

4. CONCLUSION

Notary as a public official authorized to issue authentic deed and other authorities as referred in Notary Law. Public Notary service is required by the society for issuing authentic deed which can provide legal certainty. Law and regulation regarding the position of Notary as stated in the law, implementing regulations, Notary Ethics Code, and other related regulations, but the existence of such regulation has not been able to eliminate the occurrence of malpractice in Notaries in Indonesia.

Notary, both in world and Indonesian history, hold a noble position (*noblese oblique*) for giving such notarial service to the society, but nowadays we could find some malpractice in notary's deed making. The weakness/ ineffectiveness in law and regulation, the law enforcers, and the Notary's character's themselves has created opportunities for such malpractice which decrease the nobility position itself. When some malpractice occurred, Notary could get sanctions both from the Notary organization (INI) and through the court sentence.

Ideal arrangement related to the implementation of the Position of Notary, such as giving authorization for Notary Supervisory Board (MPN) to take action against Notaries who violate the oath of office and the implementation of the Notary's position, not only based on public reports, but can also be based on law facts (for example: court sentence), providing an equivalency test from the Indonesian Ministry of Law and Human Rights to prospective Notaries to be appointed, expanding authority of the Sub-Regional Supervisory Council (MPD), giving authorization for Notary Supervisory Council from initially passive to active with preventive supervision, cooperation between the Indonesian Ministry of Law and Human Rights with the police in the context of law enforcement

and legal protection for public who need Notary services could help numbers of notaries malpractice cases to reduce, and the legal certainty, expediency, and justice can be served to the public.

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