

The Role of Jurisprudence as Form of Legal Prescriptions: a Case Study of Notaries in Indonesia

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Abstract: - As a primary source of law, jurisprudence is a reference in constituting legal prescriptions for notaries in their works as public officials. Due to strengthening jurisprudence in the Indonesian legal system, jurisprudence cannot be ignored by the notary officeholders. Therefore, the main issue is whether jurisprudences have a role in constituting legal prescriptions for notaries in their works as public officials or not. This study was designed using a qualitative approach. Data analysis was conducted in a deductive-qualitative approach with a writing model carried out by "writing in contexts. The results showed that state law (laws) is the primary legal basis for doing authentic deeds by notaries. The implementation of the law must take precedence to achieve the goal of legal certainty in doing authentic deeds. As a result of strengthening the role of jurisprudence in Indonesia, notaries should also attend to the existence of jurisprudence. The purpose of enforcing jurisprudence by the notary is as an effort to (i) fill the legal avoidance, (ii) complete the applicable legal procedures, (iii) become a legal prescription for notaries, (iv) become a source of positive law, (v) keep abreast of legal developments in society, (vi) serve as test material for notaries and (vii) get a new legal construction that replaces the old legal concept. In conclusion, jurisprudence is one of the sources of law which must also be considered and paid attention to by notaries.

Key-Words: - State law, Notaries, Jurisprudence and Legal system

Received: November 5, 2020. Revised: January 12, 2021. Accepted: January 19, 2021. Published: February 2, 2021.

1 Introduction

As these days, the issue regarding notarial law are increasingly important to be studied. Notarial law is an emerging autonomous field in legal study. Currently, the theoretical aspect of notarial law is developing at a significant pace, making it attractive to legal practitioners, professors, and observers alike. This phenomenon resulted in various academic writings with Notarial Law as its focus [1].

Notarial law has its object of study, notaries. A notary means as a public official with unusual powers for a non-judicial officer [2]. There is also another

view that defined a notary as a law enforcer in unpure pro Justitia means [3]. Thus, it can be understood that a notary as a public official has a specific scope of authority, namely in the civil law system, with the main task of creating authentic written evidence. Through this authority, [4] believes that the notary's office is closely related to the public office.

Therefore, in carrying out their authority as a public official, the notary acted on a limited basis and only authorized (bevoegd) in doing authentic deeds in the field of civil law only and is not authorized to do deeds in the field of public law (publiek-

rechtelijkeken) [5]. Specifically, for latijnse notariat, their authority in civil law is only to exercise the control of legal validity of transactions and authenticate contracts in only three service areas, namely real property services, family services, and corporate services [6]. Therefore, since Indonesian notaries belong to the ranks of latijnse notariat with its association, the Indonesian Notary Association (INI), joins the International Union of Latin Notaries (UINL) on May 30, 1997, in Santo Domingo, Dominica as its 66th member (<http://ini.id/sejarah.php>).

The above three services are included in the Indonesian Notarial Law. Regarding the existence of notaries in Indonesia as adherents of latijnse notariat like other countries with civil law system, there are interesting things to be examined about the existence of the notaries, that is their obligation to strictly follow written legal norms as the consequence of civil law system, where the consistency in law enforcement is of utmost importance to achieve justice [7]. The existence of such a thing implied that Indonesian notaries strictly follow written rules in exercising their authority as public officials.

Based on the above narrative, the authors decide to re-examine the existence of jurisprudence regarding the creation of authentic deeds by notaries. It is essential to discuss since the legal development in this field is quite dynamic, where the role of jurisprudence in all legal systems is increasingly relevant [8]. The increasing role of jurisprudence was easily understandable, given the growing skepticism in the ability of legislation to accommodate relevant events that occurred in practices [8].

The function of jurisprudence is none other than to fill the legal vacuum and to realize the same legal standards / legal certainty [9]. The filling of the legal vacuum occurred due to the shortcomings of written laws and regulations, so that jurisprudence must fill their place [9]. Many written laws are considered inadequate or lagging the facts/ social realities that exist, although there are also those who disagree with the statement that the "law always lags behind real events" (*het rechtinkt achter de feiten aan*) [10]. However, these shortcomings are needed to improve the legal system through *rechts vinding* that manifests in court decisions.

The description above, the main issue in this article is whether jurisprudences have a role in constituting legal prescriptions for notaries in their works as public officials or not. This issue was examined to justified jurisprudence position in Indonesian Notarial Law. Therefore, to conclude coherent and systematic findings, this article will explore the written law for notaries in creating

authentic deeds. Then, we will examine the role of jurisprudence to create legal prescriptions for notaries.

2 Methodology

This study is designed using a qualitative approach. According to [11], the qualitative research begins with assumptions and interpretive/theoretical frameworks that inform the study of research problems in addressing the meaning individuals or groups ascribe to a social or human problem [11]. Data analysis was conducted in a deductive-qualitative manner with a writing model carried out by "writing in contexts," which is a type of writing that will ignore text that has no context with the contents of this paper [12].

3 Results and Discussion

3.1 The Creating Authentic Deeds

The creation of written evidence was due to human's moral corruption in fulfilling their agreements. It was due to the honesty crisis within humans as social beings, which results in fraud and neglect of carrying out their duties. They prioritize their self-interest over their commitment. Therefore, the conflict of interest is unavoidable. Based on those issues, arise an idea to record all legal actions into a written form that has better legal certainty compared to a verbal agreement. On this issue, [13] state that such record is a means to minimize the consequence of human nature that is often wrong and forgetful; therefore, the conversion to written form was done to solve those issues and serve as evidence between parties [13].

These days, that task was trusted and handled by notary's office as a professional and independent firm that offers various legal services. A notary is an independent third-party that creates written evidence with high evidentiary values, thus ensuring the rights and obligations of related parties in the form of Authentic Deed. Moreover, a notary's office is confirmed as a trusted third party in UINL congress in Paris, France, on 19th-20th October 2016 [14].

As a professional who must construct authentic deed, a notary shall have a certain degree of education, for they dedicate their duty for public good instead of personal gain [15]. Therefore, a notary in their work must master positive norms and uphold moral values. In other words, a notary works strictly formal, whereas statutory laws serve as a core legal instrument to realize legal certainty, order, protection, and justice for the people.

The above arguments are in line with the demands for notary's office. On exercising their authority, a notary is obliged to follow the rule of the

game as prescribed on statutory laws. Regarding this matter, [16] states that a notary's authority to construct authentic deeds are based on (1) Law on Notary Office/ Change on Law on Notary Office (UU Jabatan Notaris/ UU Jabatan Notaris-Perubahan); (2) Related laws that determined an act or legal action must be made in the form of an authentic deed; and (3) Other regulations that determined an act or legal action must be made in the form of an authentic deed [16]. It must be done and maintained by a notary on the basis that if the rule of law is not fulfilled or a mistake is made on the deed made by a notary, then it can lead to deprivation of a person's rights or burdened someone for an obligation [17]. This legal consequence put a notary to the risk of facing criminal charges in court. It also could be a legal basis for injured parties to file civil claims to notaries.

Regarding the above elaboration, the Law on Notary Office strictly regulated the legal-formal requirements. Law on Notary Office mentions authentic deed on the following articles: Article 16 paragraph (9), Article 41, Article 44 paragraph (5), Article 48 paragraph (3), Article 49 paragraph (4), Article 50 paragraph (5), Article 51 paragraph (4), and Article 52 paragraph (3) [18]. Therefore, it could be assured that legal certainty is the primary objective of an authentic deed; hence statutory laws serve as the primary legal basis for creating authentic deed by a notary.

3.2 The Role of Jurisprudence on Creating Legal Prescriptions

Considering previous arguments, to provide answers to the issues raised in this article, the authors will first explain the concept of jurisprudence to justify related legal issues. Through this explanation, it is hoped that the role of jurisprudence in creating legal prescriptions for notaries in Indonesia will be identified. Lexical-terminologically speaking, jurisprudence is a part of *ratio decidendi*, the rationale for the court decision [8]. On the other hand, literal-terminologically speaking, the term "jurisprudence" came from latin "iurisprudentia", which means legal science [19]. The Dutch used the term "jurisprudence" differently from the Britons. In British, "jurisprudence" means judge-made law, case law, precedent, or precedential decision [8].

[20] stated that jurisprudence is, as in a court in general (judicature, *rechtspraak*), namely the implementation of law in the real sense of the claim that rights are carried out by an independent body and held by the state and free from any influence or anyone by giving a decision that is of a binding and authoritative nature [20]. On the other hand,

jurisprudence can also mean the teachings of the law or doctrine in the court decision [20]. Meanwhile, Marwan Mas said that jurisprudence in a broad sense is a judge's decision or law made by a court, which consists of four types, namely:

Permanent jurisprudence, namely all decisions of judges, has permanent legal force and purely judicial. The judge's decision was based on a similar series used as a benchmark in deciding a case (standard *arresten*).

Non-permanent jurisprudence, namely all previous judges' decisions are not based on standard *arresten*, or decisions based on previous judges' decisions that have permanent legal force.

Semi-judicial jurisprudence, all court decisions based on the request of an applicant who applies, for example, the appointment of adoption, determination of name changes, etc.

Administrative jurisprudence, namely the Supreme Court Circular Letter (SEMA) which only applies administratively and is binding internally within the scope of the judiciary. (Marwan Mas, 2015). Also, Sidharta supposed that if a claim from the official website of the Supreme Court states that the Supreme Court of the Republic of Indonesia Decision No. 777K / Pid.Sus / 2010 is referred to as jurisprudence; he believes that there are at least four propositions that are worthy of being identified as "candidates" for the jurisprudence: (i) All acts committed before being prohibited by statutory regulations are acts outside the object of punishment. (ii) All violations of business permits that are free from criminal charges are forms of action that are outside the criminal law. (iii) All calculated real estate losses outside the assumption of the number of state losses regarding the Corruption Eradication Act and (iv) All forms of unlawful exclusion of a criminal offender whose actions are carried out together with other perpetrators are inconsistent decisions and contradicting justice [8].

Based on the arguments above, in relation to the duties exercised by notaries, it is not impossible that there is a legal vacuum in the inauguration of an authentic deed. This vacuum obliges notaries to find another legal justification to legitimate their legal basis on creating authentic deed. Therefore, jurisprudence is a relevant legal source to be used as a consideration by notaries on creating authentic deed. The sole reason for this argument is jurisprudence meant to fill the vacuum written laws left. In this case, [8] stated that: "Essentially, jurisprudence contains *rechts vinding* that were born through the incompleteness and the absent of existing formal laws. Normally, jurisprudence add values to

existing formal laws and expanding it, rather than narrowing it [8].

In addition, a notary's office highly prioritized legal procedure. This means a notary must exercise their duty even into technical aspects. There are several jurisprudences containing norms regarding legal procedure that must be followed by notaries. For example, Jurisprudence of Supreme Court of the Republic of Indonesia No. 792K/Pdt/2002 dated January 3 2002 which stated that peace agreement agreed by both parties without coercion and both parties are legally eligible to enter into agreement, even though one or both parties are in detention, is legitimate on the face of law. In addition, in the jurisprudence rules of the Supreme Court of the Republic of Indonesia No. 589 K / Sip / 1970 dated March 13, 1971 stated that a letter of evidence that was not stamped (*zegel*) and submitted to the court is not legitimate court evidence.

If we based on *rechts vinding* that includes two important aspects, which are legal elements or legal sources and factual elements, then the legal elements are not only revolve around written laws, but also revolve around legal doctrines, jurisprudences, treaties, and customary laws [10]. Therefore, jurisprudence is a solid basis for a legal prescription for notaries since it was one of the legal sources. Moreover, if we stick to the concept of a progressive notary, all legal sources should become a reference for notaries in creating their authentic deeds.

In regard of progressive notary concept, [13] believes that the progressive notary must be understood as progressive in a mindset that always acts not only based on positive legal norms, but also explores various forms of legal actions that can be poured or formulated into authentic deeds [13]. If the concept of "exploring various forms of legal action" is further discussed, then the work of the notary seems to be almost identical as the work of judges who are obliged to explore, follow, and understand the legal values and sense of justice that lives in society. The difference lies in terms of the essence of work. The judges resolve disputes (repressive) through court decisions as legal products while notaries are preventing disputes (preventive) through authentic deeds as legal products.

Why jurisprudence? The reason was based on the concept of law itself, whereas put written laws and jurisprudence on the same position in legal sources. [21] stated that jurisprudence and both written and customary law are parts of positive law [21]. [22] viewed jurisprudence as a part of positive law. Statutory law is binding for all persons within its jurisdiction, whereas court decision only binds specific persons in which their name stated in the

decision. However, if the court decision was recognized as jurisprudence, then it could bind all persons like statutory law did. Hence the existence of jurisprudences is relevant in filling the statutory vacuum laws left.

Considering previous arguments, those are the basis for notaries on exercising their duty. The mastery of legal materials reflects how serious and how to update a notary in catching up on the development of the legal system. Therefore, notaries must understand all legal aspects regarding authentic deed, not only the techniques to create it. Bernard [23] stated that the mastery of judicial thinking with the core of legal reasoning and intellectual mastery of the entire legal system is necessary. On a similar view, [24] stated that notarial works are not the same with routine works. Notarial works are not as easy as they seem. Even though statutory law gave an authority to do an authentic deed to notaries, it does not give the technical steps to create it [24]. Therefore, it is of utmost importance for notaries to master legal materials in their works.

Another reason that needs to be addressed is that jurisprudence is dynamic and follows the development of law in society, hence the need for notaries to know the latest law development in society. Regarding this matter, [15] stressed that local wisdom is one of the legal sources for notaries in making authentic deeds. This argument was based on Book III of the Indonesian Civil Code (KUH Perdata) that opens any possibilities for related parties to make an agreement as free as possible in front of a notary [15], as long as the agreement do not conflict existing legal provisions. However, if we stressed the legal safety aspect for notaries in exercising their duty, this concept is quite risky, causing notaries to be sued and charged in court. Therefore, it is safe to say that a notary cannot fully consider such an act in doing an authentic deed. Local wisdom is subject to change that follows its dynamic local values.

For example, the Supreme Court of the Republic of Indonesia Decision No. 1048 K/Pdt/2012 is claimed to erase local wisdom in East Nusa Tenggara. The following is the quotation of the jurisprudence: "In East Nusa Tenggara, especially in Roten Dao, which adopts the patrilineal inheritance system which results in girls not being entitled to the inheritance of their parents, the Supreme Court has seen this system as no longer following the development of local wisdom and opposing one of the human rights, namely the right to obtain justice as stated on in Law No. 39 of 1999 on Human Rights and Supreme Court of the Republic of Indonesia No. 179/Ksip/1961 dated November 11, 1961."

The above decision was used as a legal basis for notaries in Roten Dao on giving legal advice to their clients. It is to argue that an inheritance system based on such a patrilineal system is no longer relevant under the existing local wisdom. So that if there is a request to make an inheritance certificate with the contents oppose this jurisprudence, the notary may be refuse such request based on above legal argument. Thus, it can be said that it is better if the two sources of law (doctrine or customary law) are contained first in the decision that has been confirmed as jurisprudence to become a source of law for the notary in doing an authentic deed. It will further guarantee the legality and legal certainty and safeguard the notaries from exercising duty outside of their authority and facing criminal charges.

Lastly, through jurisprudence, a notary could construct a new legal concept, along with the birth of the Constitutional Court. On its development, the term "jurisprudence" could also be used to refer to Constitutional Court Decisions regarding specific legal issues [25]. For example, Constitutional Court of the Republic of Indonesia No. 18/PUU-XVII/2019 regarding Judicial Review of Law No. 42 of 1999 on Fiduciary Security. The court granted the request and notaries now have additional authority, namely creating fiduciary security deed.

4 Conclusions

As explained in previous section, this study concludes that the statutory laws are the primary legal source for notarial legal services. In this case, written laws act as legitimacy for notaries to converting their clients' agreements and will into authentic deeds. It was done to minimize the abuse of authority given to notaries and to realize the legal certainty of the authentic deed itself. In its development, however, the existence of jurisprudence is not to be taken quickly on the creation of legal prescriptions for notaries. A lot of legal developments in Indonesia were contained in jurisprudences. The existence of jurisprudences fills the legal vacuum and the needs of society. For making notarial works more effective, the existence of jurisprudences should be considered by policymakers. Jurisprudence acts as a means of control in the creation of authentic deed and fills the vacuum written laws left. Therefore, legal prescriptions derived from jurisprudences should being considered by notarial practitioners.

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Contribution of individual authors to the creation of a scientific article (ghostwriting policy)

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Ahmad Syauqi Thirafi writing – methodology, validation and analysis.

Sources of funding for research presented in a scientific article or scientific article itself

We would like to thank Universiti Malaysia Terengganu (UMT) for supporting this research publication and one form of research collaboration with Universitas Diponegoro (UNDIP).

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