

THE IMPLEMENTATION OF THE BALANCE THEORY BASED ON JUSTICE VALUES IN THE NOTARY'S POSITION

Bachrudin

Notary and PPAT

Jl R.O. Ulin 19 Cempaka, South Kalimantan, Indonesia

.Fax: (0511) 7664160 E-mail: mynameisbach73.bd@gmail.com

Submitted : 15/02/2019 Reviewed 25/02/2019 Accepted:28/03/2019

Abstract: *The theory of “Value-Based Equilibrium Balance”, is a legal theory built by the author in this paper. This theory constructs the importance of providing legal protection for notaries by balancing between the fulfillment of the basic rights of notaries as holders of rights with humans, and the basic rights of individual notaries as citizens by taking into account the basic values of justice. This type of research is doctrinal legal research or normative in the realm of legal philosophy. The construction of this legal theory is motivated by the existence of competition in the notary office's practice of unhealthy competition. Unfair competition as mentioned previously denies the nature of the position of a notary, influences the perfection of the notary in carrying out his position and makes the entrance for legal interests ensnare the notary as the holder of office. Assume other positions related to decisions or invitations from the government or government or other institutions related to the context of similarity or conformity. This theory is useful to bring the agenda of changes to structural structures that are unfair, specifically in the context of notary ownership and general in the national life.*

Keywords: *Implementation; Theory; Balance; Value of Justice; Position of Notary*

INTRODUCTION

An Indonesian notary belonging to the Latin Notary School (*Latijnse Notariaat*) is a public official appointed by the state by granting authority in terms of making authentic deeds relating to civil relations. The authority of a Notary is the authority of attribution, namely the authority granted directly by the state through Acts Number 2 of 2014 concerning Amendment to Acts Number 30 of

2004 concerning Notary Position (“Acts of Notary Position or UUJN”).

The purpose of forming a notary position is in the context of realizing certainty, order and legal protection regarding acts, agreements, legal provisions and events through authentic deeds made by or before a notary public. To fulfill the public's need for notary services, the government establishes notary positions in each district or city in Indonesia.

Formation of a notary position is a government effort as well as a means of control in order to provide a notary position with a balanced amount to the needs of the people who require legal services in the field of notary, in addition to providing legal protection and guarantees income for a notary level of occupational risk carrying it. One parameter or control device is the average number of deeds made by and / or before a notary every month. Through the policy of notary position formation, it is expected that healthy competition between notaries will be established in carrying out their positions. But in practice, government policies relating to the notary's position formation have not been able to meet the ideal expectations mentioned above.

Based on data from the Directorate General of General Legal Administration of the Ministry of Law and Human Rights of the Republic of Indonesia, until January 2016 the number of notaries in Indonesia reached 15,000 spread throughout Indonesia. Of these, a total of 423 notaries who have received a letter of appointment as a notary have not reported for oath taking, have not reported the existence of their offices and have not activated the Legal Entity Administration System (SABH). Of the total 15,000, only about 8,000 notaries were active in SABH, the remaining approximately 6,577 were not active in SABH.¹ According to Yualita Widyadhari as Chairperson of the Indonesian Notary Association Center for the period 2016-2019 said that until October 2016 the number of notaries in Indonesia reached 17,000.² At present, the

annual growth of new notaries reaches 3,000³. The number is graduates from 39 universities, both public and private, which conduct notary study programs⁴. Based on the data above, it is estimated that there are 46.6% of notaries in Indonesia not actively carrying out their positions.

The big number of non-active notaries raises big questions, what are the causes and how is the solution? Based on the research that the authors did, among them was influenced by the phenomenon of unfair competition that has the potential to lead to free competition, in addition to other factors such as notary position formation policies that are not accurately measured. These phenomena have the potential to lead to liberalization in the practice of notary office, which is characterized by the practice of "fare war" and the practice of "fabrication of deeds". The phenomenon of liberalization has the potential to create economic capitalism, which in turn has the potential to give rise to injustice in the position of notary.

The potential for the birth of an injustice in a notary's office as a *das sein*, cannot be separated from the UUJN as a *das solen* which is a legal umbrella for the Indonesian notary world. Like an umbrella, UUJN functions to provide protection for notary stake holders, including notaries. Noting the phenomenon of unfair competition that occurs in a notary position, indicates that UUJN as *das solen* has not been effective in an effort to provide legal

1 Notariesdigest. 2016. *Tenaga Notaris Kurang Merata di Wilayah Indonesia*. melalui notariesdigest.com. 28 Januari 2016

2 Keterangan disampaikan oleh Yualita Widyadhari, CIIB, S.H., MKn, dalam sambutannya selaku Ketua Umum Pengurus Pusat Ikatan Notaris

Indonesia pada acara Konferensi Wilayah Ikatan Notaris Indonesia Pengurus Wilayah Kalimantan Selatan tanggal 8 Oktober 2016 di Hotel Golden Tulip Galaxy Banjarmasin.

3 Norman Edwin Elnizar. 2017. *Menristekdikti Hapus M.Kn., Begini Sikap Ikatan Notaris Indonesia*, melalui hukumonline.com.22 Desember 2017.

4 *Ibid*.

protection and give birth to adequate justice for notary positions. Regarding justice in the notary position, it is considered very important, given the existence of a notary position is very strategic in achieving national development goals. In addition, in principle, injustice itself for the notary's office is very contrary to the nature of the notary's position and the philosophy or ideology of the Indonesian nation, namely Pancasila

METHODS

This type of research is doctrinal or normative legal research that is in the realm of legal philosophy. The collection of research data uses primary legal material in the form of laws and regulations, secondary legal material in the form of literature in law, the results of research and scientific journals and tertiary legal materials in the form of non-legal literature, observation or direct observation. Unstructured interviews (free flowing interviews or non-directive interviews) through non random sampling (purposive non random sampling).

ANALYSIS AND DISCUSSION

Notary Principles

The notary in essence has two dimensions or aspects, namely the dimensions of the notary as the general office holder and the notary dimension as individual citizens who fill the notary's position formation. The dimension of a notary as a general office holder (general official) is refer to Article 1868 of the Civil Code, Article 1 number 1 and Article 4 of UUJN, respectively as follows: Article 1868 of the Civil Code: "An authentic deed is a deed made in a law-determined form by or in front of the authorized official for that on the place of the deed made". Article 1 number 1

UUJN: "Notary is a public official authorized to make authentic deeds and has other authorities as referred to in this law or under other laws". Article 4 UUJN:

- (1) "Before carrying out his position, the notary is obliged to take an oath or promise according to his religion be witnessed by the Minister or appointed official".
- (2) "The oath or promise as referred to in paragraph (1) reads as follows: "I swear or promise: that I will obey and be loyal to the State of the Republic of Indonesia, Pancasila and the 1945 Constitution of the Republic of Indonesia, the Acts concerning Notary Position and other laws and regulations. that I will carry out my position with trust, honesty, thoroughness, independence and impartiality. that I will maintain my attitude, behavior and will carry out my obligations in accordance with my professional code of ethics, honor, dignity and responsibility as a notary. that I will keep the contents of the deed confidential and information obtained in the implementation of my position. That I can be appointed to this position, either directly or indirectly, with any name or pretext, never and will not give or promise anything to anyone. "

The position (*ambt*) is defined by Utrecht as a permanent work environment (*kring van vaste werkzaamheden*) which is held and carried out in the interest of the state (public interest) ⁵While the "permanent work environment" is defined by Utrecht as a work environment which can be stated as much as possible -search (*zoveel mogelijk nauwkeurig omsschreven*) and is "*duurzaam*" (cannot be

5 Habib Adjie. 2015. *Karakteristik Yuridis Jabatan Notaris*. melalui www.indonesianotarycommunity.com. 28 Nopember 2015.

changed just like that).⁶

UUJN basically regulates the establishment of a notary office by the state while granting authority over the position. In connection with a notary, then authority is something that is attached to a position formed by the state through UJN, not attached to its official or person. The person is a legal subject who is elected or appointed to hold the position of a notary⁷ and is referred to as an official, in this case a public official (*openbare ambtenaren*). Notary positions are run through their officials or office holders, and in their capacity, notary officials carry out the rights and obligations of the notary office.⁸

In accordance with the principle of legality, UJN is the legal basis for the born of a notary position and the authority of the office. The element of “authority” granted by the law to the notary position means that the notary is given the authority by the state to take care of a part of the state’s affairs, namely the authority or authority in making authentic certificates. Authority is a tool or “*onderdel*” or certain parts of authority or in other words within the authority there is authority (*rechtsbevoegdheden*).⁹ This is in accordance with the definition of authority delivered by Gabrielle Ferrazi, namely as the right to carry out one or more management functions, which

include arrangements (regulation and standardization), management (administration) and supervision (supervision) of a particular matter.¹⁰ According to the analysis of the author, a notary position is a position which is given direct authority by the state in which there is a management authority in the form of delegation of part of the state management sector, namely in the form of notary deed as authentic evidence of community legal actions. The authority directly given by the state through legislation is the authority of attribution, namely authority that is new or original.

Attribution authority is the main and dominant element in a position including a position that provides public services such as a notary. The authority of attribution which is the nature or characteristic of a notary is a position and is not merely a profession or business. The characteristics of the notary as a position are in accordance with the notary mazhab adopted in Indonesia, namely the Latin Notary Mazhab. In the Latin Notary Mazhab, the notary has a style as a functional notary (*Notariat Functionnel*) with the following characteristics:¹¹

1. There is a delegation of authority (*gedelegeerd*) by the state;
2. The notary deed has the power of formal proof;
3. Notary deed has power or execution pow-

6 *Ibid*

7 *Ibid*.

8 *Ibid*.

9 Nuryanto A. Daim 2014. *Hukum Administrasi, Perbandingan Penyelesaian Maladministrasi Oleh Ombudsman Dan Pengadilan Tata Usaha Negara*. Cetakan I. Surabaya: Penerbit Laksbang Justisia, hlm. 39 mengutip dari Ateng Syafrudin. 2000. *Menuju Penyelenggaraan Pemerintahan Negara Yang Bersih Dan Bertanggung Jawab*. Jurnal Pro Justisia Edisi IV. Bandung: Penerbit Universitas Parahyangan. hlm 22

10 Sofyan Hadi. 2012. *Teori Kewenangan (Theorie Van Bevoegdheid)*. Melalui www.academia.edu. 20 Mei 2012 mengutip dari Ganjong. 2007. *Pemerintah Daerah, Kajian Politik dan Hukum*. Bogor: Penerbit Ghalia Indonesia, hlm. 93

11 Habib Adjie. 2009. *Meneropong Khazanah Notaris dan PPAT Indonesia*. Cetakan I Bandung: Penerbit Citra Aditya Bakti, hlm. 1 mengutip dari Komar Andasmita yang mengutip dari Izenic. 1981. *Notaris I*. Bandung: Sumur Bandung, hlm 12

er.

Then the notary is required to carry out his authority professionally is a logical consequence of granting authority in a position. Regarding how the notary must act professionally, it has been regulated in the UUJN as an integral part of forming a notary office and granting authority. Based on the analysis above, the nature of a notary is a position, while to exercise authority in his position, the notary must carry it out professionally.

Notary as a public official, based on the analysis of the author, philosophically has three essences, namely:

1. As a finalist cause (the original purpose), namely a notary as a position (general official). That because the born of a notary as a position is a goal of national origin, it is motivated by the state's need to ensure certainty, order and legal protection regarding conditions, events or legal actions which require authentic deeds made by or before public officials;
2. As a materialist cause (material reason), that is, a notary in carrying out his position must have special expertise which is fundamental to a public position that carries out part of the state's authority in civil matters, namely in making authentic deeds;
3. As a formalist cause (because of form), that is, a notary in carrying out his position must act professionally in accordance with the provisions stipulated in legislation governing the position of the notary and the implementing regulations. Because professionalism is required because of the mandate of the law so that the formal aspects of the holding of a notary office are fulfilled, namely authentic certificates have the power of outward proof (*uitwen-*

digebewijskracht), formal proofing force (*formale bewijskracht*) and material evidentiary force (*materiele bewijskracht*).

As a general position (*finalist causation*), then in the notary office there is also a materialist causation in the form of special expertise that must be possessed, fundamental and attached to and desired by the notary's office, not merely as a characteristic of a profession, requires the position to be carried out in accordance with the provisions stipulated in the UUJN as well as implementing regulations so that the formal aspects of the notary office are fulfilled.

Notary as a position (*public office*), implies that the notary carries out part of the duties and functions of the state, namely through authentic deeds made before him, the law requires to guarantee the law and order regarding legal actions and events in the field of civil law, as in the framework of supporting national development as mandated in the Preamble of the 1945 Constitution of the Republic of Indonesia ("1945 Constitution of the Republic of Indonesia") including promoting public welfare based on social justice, all within the framework of the state law of Pancasila. This is in line with the concept of the state of Pancasila law in which the functions of the state law and the functions of the welfare state are contained in addition to the distinctive functions and privileges of Indonesia, namely the Pancasila state.

The requirement of a notary public to carry out his position in accordance with the aforementioned nature, should be avoided forms of unfair competition in the practice of notary office. In this regard, the state is obliged to provide legal protection for notary positions, the realization is through UUJN.

Indeed, this has been mandated by UUJN in the section Considering letter (c) as follows: “that a notary as a public official who runs a profession in providing legal services to the public, needs to get protection and guarantees in order to achieve legal certainty”.

A notary, besides having dimensions as a public official, the person concerned also has dimensions as individual citizens who fill the notary’s position formation. As individual citizens, the notary has the right to legal protection from the state as a manifestation of the natural rights of citizens. Legal protection which should be given by the state relating to and or which will affect the nature of the notary’s position is legal protection in order to establish healthy competition in the practice of notary office. Building healthy competition in the notary office aims to realize justice in the economic field for individual notary holders so that the notary can carry out his position in accordance with his nature and be able to carry out his position on an ongoing basis. The estimated 46.6% of notaries in Indonesia who are not active, shows that there is a discontinuation of the notary in carrying out his position, and this certainly denies the nature of the notary’s position as a *finalist cause*.

Notaries as individual citizens have natural rights or human rights that must be protected by the state, so that notary individuals can carry out their positions on an ongoing basis and in accordance with the nature of office, as stated in the 1945 Amendment IV Constitution, which can be grouped as follows:

1. Article which contains aspects of legal protection, namely protection provided by law in the form of:
 - a. fair recognition, guarantee, protection and legal certainty before the law;

- b. the right to work and decent livelihood, to maintain life and obtain justice in the economic field; that is:

Article 27 paragraph (2):

“Every citizen has the right to work and a decent living for humanity”.

Article 28 A:

“Every person has the right to live and has the right to defend his life “.

Article 28 H paragraph (1):

“Everyone has the right to live in physical and spiritual prosperity, to live and get a good and healthy environment and the right to receive health services”.

Article 28 H paragraph (2):

“Every person has the right to receive facilities and special treatment to get the same opportunities and benefits in order to achieve equality and justice”.

2. Article containing aspects of morality and justice; that is:

Article 28 J paragraph (1):

“Every person must respect the human rights of others in orderly life in society, nation and state”.

Article 28 J paragraph (2):

“In exercising their rights and freedoms, each person must submit to the restrictions set by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, security and public order in a democratic society “.

Article 33 paragraph (1):

“The economy is structured as a joint effort based on the principle of kin-

ship”.

Article 33 paragraph (4):

“The national economy is organized based on economic democracy with the principle of togetherness, efficiency with justice, sustainability, environmental insight, independence and by maintaining a balance of progress and unity of the national economy”.

3. Article which contains aspects of state responsibility for the protection, promotion, enforcement and fulfillment of human rights; that is:

Article 28 I paragraph (4):

“Protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government”.

Article 28 I paragraph (5):

“To uphold and protect human rights in accordance with the principles of a democratic legal state, the implementation of human rights is guaranteed, regulated and set forth in legislation”.

The State of the Republic of Indonesia as a legal state which is explicitly set forth in the 1945 Constitution of the Republic of Indonesia Article 1 point 3, has the consequence that in every and all aspects of life the state is always based on state law. The concept of state law (*Rechtstaat*) relates to the concept of state function, where in the concept of legal state, the function of the state is to guarantee the implementation of the life of the nation according to state law and guarantee justice to its citizens.¹²

Based on the description above, there are two important things that must be given by the state in the context of legal state, in the form of protection and guarantees against notaries as positions as mandated by UUJN section Consideration letter C and to notaries as individual office holders as mandated by the NRI Constitution 1945, namely:

- a. fair recognition, guarantee, protection and legal certainty before the law;
- b. the right to work and decent livelihood, to maintain life and obtain justice in the economic field.

The problem is whether the UUJN (*das solen*) as a statutory regulation that must inspire the 1945 Constitution of the Republic of Indonesia, is sufficient in providing legal protection for the position of a notary? According to the author: UUJN has not provided legal protection and produced adequate justice for notary positions. In the reality of the practice of notary office (*das sein*), there are phenomena and / or facts regarding the lack of legal protection for notaries in an adequate and fair manner. Some of the phenomena and / or facts referred to, according to the author's analysis are even “*denial*” of the nature of the position of a notary; among others are:

1. Number or formation of notary positions in an area that is considered to exceed the capacity of the region in order to maximize the function of notary positions;
2. Formation of notary positions is not followed by arrangements in UUJN or implementing regulations regarding the form of fair competition among notaries in car-

12 Muntoha. 2013, *Negara Hukum Indonesia Pasca Perubahan UUD 1945*. Cetakan I Yogyakarta:

Penerbit Kaukaba Dipantara, hlm. 1.

rying out their positions, consequently in practice there are forms of unfair competition such as “*tariff war*” which in turn can trigger “*fabrication of deeds*”, which potentially ignoring the fulfillment of the “facing” element which is characteristic of authentic certificates.

3. There is an assumption from some people who thinks that the notary profession is related to a job not as an official position, this affects people’s treatment to the notary;
4. The process of establishing legislation (*rechtsvorming*) and the process of legal discovery (*rechtsvinding*) through a judge’s decision, in some cases is considered to ignore the nature of the position of a notary, for example:
 - a. The Decision of the Supreme Court of the Republic of Indonesia Number 702 K / Sip / 1973, September 5th, 1973 concerning the verdict that the functionary notary only recorded (wrote down) the will of the parties involved, there was no obligation of the notary to investigate materially about what was stated by the viewers. *Judex Facti* should only cancel the “legal actions” of the parties, not cancel the “notary deed”. *Judex Facti* decisions are considered to ignore the nature of the position of a notary.
 - b. The decision of the Supreme Court of the Republic of Indonesia Number 3199 K / Pdt / 1992, October 27th, 1992 concerning the ruling that the proof of authentic deed is not the only requirement for a legal fact, the judge must pay attention to the evidence in the form of a subordinate letter which can cripple authentic proof. This is not in accordance with the position of a notary in Indonesia which is included in the Latin Notary Mazhab or Civil Law, where the notary deed is appreciated before the court as evidence. This is different from the notary included in the Anglo Saxon School, where the deed produced by a notary in the Anglo Saxon School is not an authentic deed and is not counted before the court as evidence. The parties still have to prove the content and truth at the court.
 - c. Decision of the Constitutional Court of the Republic of Indonesia Number 49 / PUU-X / 2012, March 23, 2013 concerning the verdict of Material Test Article 66 paragraph (1) of the Republic of Indonesia Acts Number 30 of 2004 concerning Notary Position of the 1945 Republic of Indonesia Constitution by canceling the phrase “ with the approval of the Regional Supervisory Board “. The decision contradicts the Decision of the Constitutional Court of the Republic of Indonesia Number 72 / PUU-XII / 2014, 26th of August 2015 concerning Verdicts Article 66 paragraph (1) Law of the Republic of Indonesia Number 2 Year 2014 concerning Amendments to Republic of Indonesia Acts Number 30 Year 2004 concerning The Notary’s position on the 1945 Republic of Indonesia’s Constitution, the decision actually rejected the petition of the applicant who submitted a request for cancellation of the phrase “with the approval of the Honorary Board of Notaries”. The Honorary Board of Notaries is a new form that replaces

the Regional Supervisory Board after the amendment of Act Number 30 of 2004 to Act Number 2 of 2014 concerning Notary Position.

- d. Government Regulation Number 24 of 2016 concerning Amendment to Government Regulation Number 37 of 1998 concerning Land Deed Making Officials (PPAT) which is effective from the date of promulgation, namely June 27th, 2016. In Article 12 paragraph (1) states that the PPAT work area is a province; originally was one district or city. This is considered to be able to open a breach of the code of ethics and reduce the professionalism of positions. This provision can encourage the liberalization of positions if it is not followed by the right implementing regulations in its regulation along with quality supervision in order to enforce the position code of ethics.
5. In the law enforcement process, there are still law enforcers who have not finished viewing the notary as a position, so that the notary is still equated with individual citizens in general who must be treated equally (“truly the same” or “the same”) before the law, including in the case of asking for information, calling or requesting evidence, without regard to a “trust” attached to or attached by the state to the individual notary, namely the position.

Unhealthy competition as a result of the denial of the notary position’s nature, has the potential to create economic inequality and unfairness which in turn results in economic justice between the notary public and the continuity of the notary’s office is not realized.

Unfair Competition in the Notary Position Practice

The author defines Unfair Competition in Notary Position Practices is “competition between notaries in carrying out their positions carried out in a manner that is dishonest or fraudulent or unfair or against the law or that inhibits fair competition, which can lead to violations of the code of ethics and Acts of Notary Position and notary justice in the economic field as office holders “. Based on these definitions, there are three categories of forms of unfair competition in the practice of notary positions, namely:

1. dishonest or fraudulent competition;
2. unfair competition and
3. competition against the law.

The author defines “Dishonest Competition or Cheating” is “competition between notaries conducted by not heeding office ethics and or efforts that hinder the realization of fair competition in the practice of notary office”. “Dishonest or fraudulent competition” can be done by:

1. offering services covertly, either through staff or notary employees or through marketers or intermediaries;
2. offering services at low cost under the agreed fees of the association (Indonesian Notary Association);
3. practice the “*tariff war*”;
4. make unethical efforts by making access barriers or entry barriers, to prevent or eliminate other notaries from entering into fair competition, for example by making an agreement on fees (*tariffs*) under the agreed terms of the Indonesian Notary Association, giving tips or remuneration regular services or fees for each transaction made with the notary concerned.

The author defines “Unfair Competition” is “competition between notaries conducted by not heeding the nature of the position of a notary, ignoring the truth and justice mission carried by the notary in accordance with the nature of his position, both truth and justice relating to the community as recipients of notary services in making notary deeds as well as truth and justice relating to fellow colleagues who are notary office holders who constitute a body part called the notary office “. “Unfair competition” can be carried out by carrying out the practice of “deed manufacturing” which sacrifices the “face to face” element in making a notary deed.

The author defines “Competition Against Law” is “competition between notaries carried out by not heeding and / or violating the provisions in UUJN as well as implementing regulations or statutory regulations relating to notary positions”. “Competition against the law” in notary office practices can be done by:

1. ignoring the “face to face” element in the signing of a notary deed;
2. ignoring the procedures stipulated by legislation as a condition that must first be fulfilled before the signing of a notary deed can be done;
3. consider ordinary things or make it as a habit, if there is a client who asks for various reasons to sign a notary deed simultaneously or different days and notary people tend to pass the request;
4. consider ordinary things or make it as a habit, by representing the signing of a notary deed to staff or notary employees;
5. carry out the practice of “*fabricating deeds*” which sacrifice the “face to face” element in making a notary deed;
6. practice “deed cannibalism”, namely notary actions that do not treat notary deeds

not as they should be mandated by UUJN, so that a deed is at risk of loss, the power of outward proof (*uitwendigebewijskracht*), formal proofing force (*formale bewijskracht*) and material proof power (*materiele bewijskracht*), for example:

- a. for example, with the consideration of saving stamp costs, the notary person does not attach the seal to the notary deed, this will damage the power of outward proof (*uitwendigebewijskracht*);
- a. ignoring the “facing” element which will damage the formal proofing force (*formale bewijskracht*);
- b. change the contents of the deed (which is the statement of the parties) which will damage the power of material proof (*materiele bewijskracht*);
- c. let a notary deed incomplete, this can damage the strength of outward proof (*uitwendigebewijskracht*), the power of formal proof (*formale bewijskracht*), as well as the strength of material proof (*materiele bewijskracht*) of a notary deed.

The three categories of forms of unfair competition have the potential to violate the principles of legal protection, both for notaries as holders of positions and for the public as users of notary services who need written evidence in the form of notary deeds that can be used as evidence in a civil manner. Violation of the principles of legal protection is a form of denial of recognition of human rights.

The Balance Theory Based on Justice Value

The Balance Theory based on justice value is included in the Law Protection Theory

group. Although at first the theory was intended for the office of notaries, the author intends to function the legal theory as a generalization that generally applies to other positions born by the state through legislation or circumstances or other legal situations or events that have a context of similarity or conformity.

The proposition of The Balance Theory based on justice value is built on the following statements or propositions:

“Balanced legal protection and value based on justice for office holders can be realized by balancing between the fulfillment of basic rights of individuals as holders of human rights and basic rights of individuals as citizens through the establishment of legal regulations and or law enforcement based on values based on Pancasila with the aim of respecting the dignity of office in accordance with its essence “.

Based on these propositions, there are several variables that make up the building of the theory, namely:

1. The Variable Legal Protection, the authors define it as follows:
“Legal protection is a state effort through the government to provide recognition and protection of human dignity, both preventive and repressive, through the establishment of legal regulations and the implementation or enforcement of law, within the framework of the state of Pancasila”;
2. Balance variables, which the authors define as follows: “Balance is a balanced state between two things or two different conditions which tend to be opposite so that both become balanced or comparable”;
3. Variable Value of Justice, which the authors define as follows: “The value of

justice is the quality of justice in accordance with its essence, namely justice as appropriateness or obedience (equity¹³) or fairness or justice (justice as fairness¹⁴), which is based on a social justice orientation”.

4. Position Variables, which I define as follows: “Position is a special scope of work that is sustainable with special functions and authorities granted by the authority giving authority with the status as a legal subject supporting rights and obligations, in an organized rule”.
5. Harkat Variables and Position Dignity, which the authors define as follows: “Position and dignity is the degree of glory and the degree of dignity of office that must be maintained by office holders and other stakeholders as a form of respect for office”;
6. Variable Position Essence, which I define as follows: “The nature of office is the true meaning of office, namely the legal subject supporting rights and obligations that have meaning as finalist cause (cause of origin), materialist cause (material cause) and formalist cause (cause of form).

That legal theory was built based on two basic ideas, namely:

1. The idea of balance.
The balance here means a balance between two notary interests, namely a notary as a position and a notary as individual office holders. These two interests in practice often clash or contradict each

13 E. Sumaryono. 2012. *Etika Profesi Hukum. Norma-Norma Bagi Penegak Hukum*. Cetakan VII. Yogyakarta: Penerbit Kanisius, hlm.133.

14 Budiono Kusumohamidjojo. 2016. *Teori Hukum. Dilema Antara Hukum Dan Kekuasaan*. Cetakan I. Bandung: Penerbit Yrama Widya, hlm.294.

other. This is motivated by differences in the nature and characteristics of the rights and obligations of the notary as a position with the rights and obligations of the notary as an individual citizen. This difference is motivated by the application of the rights and obligations of the notary public, namely:

- a. Notary as a position is only attached to basic rights (other than basic obligations);
- b. Notaries as individual citizens adhere to human rights (other than basic obligations) and basic rights (other than basic obligations).

Human rights are rights acquired by or inherent ¹⁵in every human being as a consequence he is born into a human being, regardless of his citizenship. Human resources are the essential rights of every human being derived from natural law with the main source being God's law. Therefore, the nature and characteristics of its applicability are universal. Whereas the basic rights are the rights obtained by every human being as a consequence he becomes a citizen of a country. Basic rights are the actualization of human rights whose births are adapted to the situation and environmental conditions that are local namely the state or sourced from the state. Therefore, the nature and characteristics of its application are particular¹⁶. Based on the nature of the application of rights, human rights and basic rights inherent in notaries as individual citizens have broader characteristics, rights, outreach or flexibility, more abstract rights, greater and stronger claim rights, compared

to the basic rights inherent in the notary as a position that has more rigid characteristics, is more concrete, tighter and more regulating so as to provide a "barrier" in the form of regulations and restrictions relating to position.

2. The Idea of Justice Value, which contains comparative ideas and ideas of decency or appropriateness.

Justice as appropriateness is not merely synonymous with comparability. Justice as appropriateness is justice as a 'part' of virtue. Comparability and propriety are the values contained in justice. Comparability is a value that places the same general proportion on the subject of the recipient of justice while propriety is a value that smooths the value of equality in justice.

In relation to justice which is embodied in legislation¹⁷, obedience is a "guardian" of the law, both in its manufacture and in its implementation. *Kepatutan* is the idea of "fairness" in the preparation of legal regulations and functions as "rectification" or "straightening" of written laws¹⁸, as well as providing possibilities for the assessment and rearrangement of a legal regulation (reconstruction).

Justice with obedience is justice that does not only determine equality but justice which determines the content of moral values in it. Justice provides a measure of fairness in a general or universal way, but in the reality of life, not everything can be measured on matters of a general nature. There are special sizes in special conditions whose measuring instruments are propriety or appropriateness. This combi-

15 Andrey Sujatmoko. 2015. *Hukum HAM Dan Hukum Humaniter*. Cetakan I. Jakarta: Penerbit PT. RajaGrafindo Persada, hlm. 21.

16 *Ibid.*

17 E. Sumaryono. *Op.Cit.* hlm. 134.

18 *Ibid.*

nation of equality in justice and propriety in justice is the Justice Value Base.

In an ideal conditions, namely when developing healthy competition in the practice of notary office, two notary interests, both as a position and as individuals, can go in harmony and in tandem. With the establishment of healthy competition, through a notary office he holds, a citizen who is appointed as a notary has the opportunity to obtain a decent life in accordance with the position risk he carries. Thus, the rights of individuals as citizens, especially for decent livelihoods are fulfilled. But on the contrary, if there is unfair competition in the practice of notary office; especially if it happens massively; then at that moment the two interests mentioned above can clash or contradict each other. That unfair competition in the notary office practice, which is marked, among others, by tariff war, practice of certificate deed, position cannibalism practices and deed cannibalism practices, can be the entry point for potential violations of the code of ethics and notary office rules and the inability of notary to maintain the office operations due to fierce unfair competition that occurs. Violations of the code of ethics and / or notary position rules can bring a notary public to legal issues that result in a notary having the potential to face legal problems so that the notary can be dishonorably discharged or the notary must pay substantial compensation to the parties due to negligence in carrying out his position, and not impossible causing bankruptcy in individual notaries. This is where the role of the state is needed in order to provide legal protection for notaries in a balanced and equitable manner. Balanced by paying attention to the two dimensions of a notary, both as a position and as an individual citizen holder. Fairness is based on the basis

of the value of justice.

Application of The Balance Theory based on Justice Value in a notary position is by implementing legal protection for notaries in UUJN, especially but not limited to protection against unfair competition in the practice of notary office. The legal protection can be grouped into four categories, namely:

1. legal protection relating to notary position formation policies;
2. legal protection for the realization of decent income for the position of a notary;
3. legal protection relating to equal rights and opportunities in accessing the economy and / or income;
4. legal protection relating to justice in carrying out the position of notary

“Legal Protection for Notaries” itself is defined by the author as “progressive efforts of the state through the government to provide recognition and protection of the dignity of notaries, both as office holders (public officials) and as individual citizens, both preventive and repressive, through the formation of regulations law and the implementation or enforcement of law, within the framework of the state of Pancasila”.

Based on this definition, there are two different interests relating to the notary, namely the interests of the notary in his capacity as a position and notary interest in his capacity as a citizen individual. In each of these interests contained the rights and obligations that must be protected by the state. The objectives of the legal protection are:

1. Maintaining the maintenance of the notary's title;
2. Realizing justice in the implementation of notary positions;
3. Realizing economic democracy in a notary position oriented to social justice;

4. Maintain the continuity of the position of the notary.

To achieve the objectives of the legal protection, progressive steps need to be taken to reconstruct the UUJN by including at least four package loads, namely:

1. Arrangements regarding notary divisions and the choice to practice solitary (independent) or practice by opening or through an office with a notary;
2. Regulations regarding the minimum limit or value of honorarium that can be received by a notary for the legal services it provides;
3. Regulations regarding procedures and ways of controlling the fulfillment of the “face to face” element;
4. Regulations regarding the control system for the quality of the implementation of positions and notary position code of ethics.

The basis for consideration of the inclusion of these four packages in the UUJN reconstruction is as follows:

1. Provisions on notary inclusion are intended as an effort to prepare prospective notaries to become notaries with integrity, have reliable skills and expertise related to legal mastery of notary and deed-making techniques as well as deep understanding and appreciation of UUJN and notary codes of ethics. There is an option to practice by opening or through an office with a notary; either with a new notary fellow or join a senior notary; intended as a constructive effort to build a system of notary in Indonesia that is strong, professional and dignified. The positive things that are expected to be achieved by practicing through an office with a notary are as

follows:

- a. Absorption occurs with new notaries and old notaries who are inactive or not practicing;
- b. Many and too heavy workloads can be handled by notaries who are members of a notary association, because the notaries can share the task;
- c. The high initial investment costs and monthly operating costs can be reduced or more economical and for new notaries who set up offices with notaries with fellow new notaries can be easier to achieve break even point (BEP);
- d. Fulfillment of the “facing” element can be more assured, because when a notary colleague is unable to carry out his position, it can be replaced by another notary colleague, in such a condition, the deed is made before the notary who replaces it, this prevents the practice of “fabricating deed”;
- e. Encouraging professionalism in carrying out positions and preventing the birth of unfair competition, because notaries are expected to be able to carry out their positions through joint offices with notaries so that the distribution of notary legal services can be more evenly distributed;
- f. Through the notary system, the office with the notary can grow into a strong office because it is supported by junior notary candidates who undergo an internship, notary juniors undergoing work placements and notaries of fellow *maathscap* partners, while staff recruitment or employees who do not have special expertise in notary (for example high school gradu-

- ates or undergraduate) can be further reduced so as to reduce the risk of staff or employee errors in carrying out their work. Notary colleagues in offices with notaries can share in the management of staff or employees;
 - g. The potential for consultation or the use of notary legal services by the community can be even greater;
 - h. Supporting the implementation of a national economy based on economic democracy, the principle of togetherness (joint effort), economic justice that maintains a balance between progress and economic unity.
2. Provisions on the minimum fee of honorarium that can be received by a notary for legal services provided are intended as an effort to:
 - a. Preventing the birth of a “tariff war”, which based on Article 36 paragraph (3) of the UUJN which sets the maximum honorarium opens a gap to take advantage of the lower limit of maximum value which has the potential to trigger the “tariff war”;
 - b. Increase and maintain notary income at a reasonable level in accordance with occupational risk;
 - c. Support the provisions of notary divisions and the choice of opening an office with a notary, because with a decent income, notaries are expected to be more interested in choosing to practice in an office with a notary than to practice solitary (independent);
 - d. Prevent unfair competition in the practice of notary office;
 - e. Maintain impartiality and professionalism in carrying out the position of notary.
 3. Provisions on procedures and how to control the fulfillment of the “face to face” element are intended as an effort to:
 - a. Prevent unfair competition in the practice of notary office, especially the practice of “tariff war” and “fabrication of deeds”;
 - b. Supporting the notary divisions and the choice of opening offices with notaries, because with the procedure to control the fulfillment of “face to face” elements, service and fulfillment of notary legal services needed by the community can be more evenly distributed, so that the notary is able to provide guarantees and protection obtain a decent income, so that notaries are expected to be more interested in choosing to practice in an office with a notary than to practice solitary (independent);
 - c. Preventing notaries from getting caught up in legal matters that originate from not meeting the “face to face” element;
 - d. Support the achievement of the objectives of social justice in accordance with the principles of the state of Pancasila.
 4. Provisions on the control system for the quality of the implementation of positions and the notary code of ethics are intended as an effort in order to:
 - a. Maintain and develop notary integrity and morality in carrying out their positions;
 - b. Maintain, improve and or build legal quality in the implementation of notary positions;
 - c. Maintain, improve and or build the quality of notary services in the context of providing legal services to the

- public;
- d. Supporting the notary divisions and the choice of opening offices with notaries, because with the control system on the quality of the implementation of positions and notary positions, the office with notaries can grow into a strong office, so notaries are expected to be more interested in practicing in offices with notaries compared to practicing solitary (independent);
 - e. Preventing notaries from getting caught up in legal issues stemming from the poor quality of implementation of positions and notary code of ethics and poor quality of notary services;
 - f. Maintaining the mandate that is attributed by attribution by the state to the notary, with the provisions of the control system on the quality of the implementation of the position and the notary code of ethics based on the Latin Notary Mazhab based on Pancasila.

CONCLUSION

The balanced legal protection and value based on justice for notaries can be realized by balancing between the fulfillment of basic rights of notaries as positions with human rights and basic rights of individual notaries as citizens through the establishment of legal regulations and or law enforcement based on values based on Pancasila with the aim of respect for the dignity of office in accordance with its nature. For this reason, efforts to reconstruct the UUJN along with its implementing regulations, by incorporating concepts and technicalities in establishing healthy competition in the notary office practice are considered very important, in order to

provide legal protection and bring justice to the notary public.

BIBLIOGRAPHY

- Adjie, Habib. 2009. *Meneropong Khazanah Notaris dan PPAT Indonesia*. Cetakan I Bandung: Penerbit Citra Aditya Bakti
- Adjie, Habib. 2015. *Karakteristik Yuridis Jabatan Notaris*. melalui www.indonesianotarycommunity.com. 28 Nopember 2015.
- Daim, Nuryanto A. 2014. *Hukum Administrasi, Perbandingan Penyelesaian Maladministrasi Oleh Ombudsman Dan Pengadilan Tata Usaha Negara*. Cetakan I. Surabaya: Penerbit Laksbang Justisia
- Elnizar, Norman Edwin. 2017. *Menristekdikti Hapus M.Kn., Begini Sikap Ikatan Notaris Indonesia*, melalui hukumonline.com. 22 Desember 2017.
- Ganjong. 2007. *Pemerintah Daerah, Kajian Politik dan Hukum*. Bogor: Penerbit Ghalia Indonesia
- Notariesdigest. 2016. *Tenaga Notaris Kurang Merata di Wilayah Indonesia*. melalui notariesdigest.com. 28 Januari 2016
- Hadi, Sofyan. 2012. *Teori Kewenangan (Theorie Van Bevoegdheid)*. Melalui www.academia.edu. 20 Mei 2012
- Komar Andasasmita yang mengutip dari Izenic. 1981. *Notaris I*. Bandung: Sumur Bandung
- Kusumohamidjojo, Budiono. 2016. *Teori Hukum. Dilema Antara Hukum Dan Kekuasaan*. Cetakan I. Bandung: Penerbit Yrama Widya
- Muntoha. 2013, *Negara Hukum Indonesia Pasca Perubahan UUD 1945*. Cetakan I Yogyakarta: Penerbit Kaukaba Dipantara
- Sujatmoko, Andrey. 2015. *Hukum HAM Dan Hukum Humaniter*. Cetakan I. Jakarta:

Penerbit PT. RajaGrafindo Persada

Sumaryono, E. 2012. *Etika Profesi Hukum. Norma-Norma Bagi Penegak Hukum*. Cetakan VII. Yogyakarta: Penerbit Kanisius

Syafrudin, Ateng. 2000. *Menuju Penyelenggaraan Pemerintahan Negara Yang Bersih Dan Bertanggung Jawab*. Jurnal Pro Justisia Edisi IV. Bandung: Penerbit Universitas Parahyangan

Widyadhari, Yualita dalam sambutannya selaku Ketua Umum Pengurus Pusat Ikatan Notaris Indonesia pada acara Konferensi Wilayah Ikatan Notaris Indonesia Pengurus Wilayah Kalimantan Selatan tanggal 8 Oktober 2016 di Hotel Golden Tulip Galaxy Banjarmasin

Legislation

Republic of Indonesia 1945 Constitution, Amendment IV

Republic of Indonesia Acts Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition

Republic of Indonesia Acts Number 39 of 1999 concerning Human Rights

Republic of Indonesia Acts Number 2 of 2014 concerning Amendment to Republic of Indonesia Acts Number 30 of 2004 concerning Notary Position