

# Judicial Review and the Future of Notary in Indonesia

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## Abstract

In 2012 a judicial review toward the article 66 of the notary position act 2004 has been carried out by Kamal Kant. The article deem to be discriminated and against the article 27 (1) and 28 D of the constitution 1945. The article 27 (1) and 28 regulate that all of the people are equal before the law. The article of 66 give the different treatment to the notary when they dealing with the law, the police must have the permission from the supervisory council area (notary supervisory council). The constitutional court judges decided that the article 66 indeed against the constitution and then erase the phrase “with the permission of the supervisory council area”. The constitutional court decision brought a significant change to the notary future. First, there is no need any permission from any council when the police investigate the notary post the constitutional court decision. Second, somehow the constitutional court decision is being the reason of the promulgation of the notary position act 2014.

**Keywords:** notary, act, constitutional court.

## 1. Introduction

Notary in civil law country has a different position compare with common law country, they have a significant and important position due to the legal process especially in proofing session. Meanwhile notary is also a citizen who have an obligations and rights as a citizens. Both of those are the reason of a judicial review to the act of 2004 no 30 on Notary Position in Indonesia. Kant kamal, an entrepreneur brought judicial review to the constitutional court after he had a difficulties in the penal judicial process related to the notary act in issuing a deed. The need of permission from a supervisory council area (notary supervisory council) when the polices, judges, or any legal people if they wanted to investigate notary as regulated in notary act on article 66 is the main specific reason for kant kamal had the difficulties in the law process and in the end did the judicial review.

The judicial review in 2012 have brought a significant changes to the notary future in Indonesia. This article will highlight on the notary position after the constitutional court decision regarding to the judicial review of article 66 the act of 2004 no 30 on notary Position.

## 2. Judicial Review

Montesque in “the spirit of law” (“L’Esprit des Lois”) separate state power into three branches, legislative power, executive and judicial power. Legislative power is the power to make laws, in the Indonesian government system held by the Representative Council (Dewan Perwakilan Rakyat/DPR) together with the president. Executive power is the power to run the government system held by the president along with all the structures, while the judicial power is the power of judgment, the power to judge and enforce the law. Strict separation is very difficult to do, although those three powers have different roles “*as it is impossible to make a rigid separation of the three branches of power. Even though those branches have different powers and do not intervene with each other, they are interconnected for the functioning of the state administration by maintaining the mechanism of checks and balances*”<sup>1</sup>. In constitution amendment, Indonesia with the presidential system try to purify the separation of powers, but it is difficult to maintain the purity of the separation of powers due to the living values that exist in society. Apart from that, based on article 24 paragraph ( 2 ) of the constitution 1945, judicial power is carried out by a Supreme Court and judicial bodies bellows, namely General Court , the Religious Courts , military courts , the Administrative Court and by a Constitutional Court .

Just like the other judicial actors, the constitutional court held with independently. Constitutional Court has an equal rank to others constitutional state organ. .Constitutional Court as judicial organ would free from intervention of others state organ<sup>2</sup>. With the nine judges chosen by the president, Representative Council, and the supreme court, constitutional court has the authority to do judicial review of the act against the constitution 1945, the authority to decide disputes between state institutions, decide dissolution of a political parties, decided disputes of the election results (Article 10 paragraph 1 of Act Number 24 of 2003 on the Constitutional Court) and also give a decision on the opinion of the Parliament related to the allegations of betrayal against the State, corruption, bribery, other felonies or deed other despicable conducted by the President and / or vice President (Article 10 paragraph 2 of Law Number 24 of 2003 on the Constitutional Court).

<sup>1</sup> Mahfud MD, “Separation of Powers and Independence of Constitutional Court of Indonesia”, the 2nd Congress of the World Conference on Constitutional Justice in Rio de Janeiro, Brazil on 16-18 January 2011. Pg 2.

<sup>2</sup> Harjono, “The Indonesian Constitutional Court”, Constitutional Court of The Republic of Indonesia, Pg 2.

Basically, the authority of judicial review is a part of the principle of judicial control to the legislation products in order to conform to the legal norms in hierarchy<sup>1</sup>. Judicial controls means supervision conducted by the judicial agencies<sup>2</sup>. In general, there are two types of judicial review, strong and weak judicial review judicial review.

*strong judicial review gives judges the right to strike down legislation deemed inconsistent with the provisions of a rigid constitution. Under this model, the only way legislators can formally override a judicial invalidation of a law is through constitution-amending legislation which can only be adopted following an amendment rule that requires some form of qualified legislative majority (and/or, in some cases, popular ratification in a referendum). This is the model of judicial review present in most countries in North and South America, as well as in Europe. The second model, 'weak judicial review', gives ordinary legislative majorities the final word on the validity of all laws. However, judges have the duty of interpreting legislation in a rights-consistent way (if this is not possible, they are sometimes allowed to make non-binding declarations of inconsistency) or to initially 'strike down' the law in question. This model is currently present in several commonwealth jurisdictions, but it is also exemplified in some nineteenth- and early twentieth-century Latin American constitutions<sup>3</sup>.*

The authority of judicial reviews in Indonesia conducted by two institutions, supreme court and constitutional court. The authority of judicial review conducted by the Supreme Court is limited to the judicial review of the laws below to the act toward the act in the level of cassation. (article 24 A para (1) the constitution 1945), while, the authority of judicial review conducted by the constitutional Court is the review of the constitutionality of the act toward the constitution 1945 (article 24 C the constitution 1945). This judicial review reason regarded to the Han Kelsen stufenbau theory, according to this theory, law is a hierarchical norm, the lower norms must be accordance with the upper norms, and judicial reviews is a way to control that obedience. 317 act had been reviewed by the constitutional court from 2003 until 2014<sup>4</sup>, including the judicial review of the act no 30 of 2004.

### 3. Notary as a citizens and notary as a public officer

Notary profession has long been known in Indonesia, even long before Indonesia's independence during the reign of the Dutch colonial. At first the presence of a notary is due the need of European people who lived in Indonesia in effort to create an authentic deed in the field of trade<sup>5</sup>. Nowadays the existence of the notary is important for the individual people and a corporation and it becomes more significant due to the civil providing. The notary is needed to make authentic written proof regarding to the legal act done by the people. The authentic deed has a perfect power of proof and binding the both part. Notary and the deed can be interpreted as a state effort to create legal certainty and legal protection for the society<sup>6</sup>. And even some regulation obliged some legal act done with authentic deed i.e the establishment of the corporation.

Notary at first is a private notary which assign by the public power to serve the need of authentic proof needed to give legal certainty in civil relationship... based on a history, notary is a public officer appointed by the state to do the public services to gain legal certainty as an officer who make civil authentic deed<sup>7</sup>. Notary as an officer stated in the Act No 2 of 2014 (the amendment of the act no 30/2004), it is stated in article 1 that notary is a public officer who have the authority to make the authentic deed and other authority based on this act or another act.

Notary have the authority to make an authentic deed, ensure the deed publication, keeping the deed, giving the grosse, copied and the citation of the deed, legalizing a signature, deciding the certainty of the unauthentic deed date by registering in special book, etc. based on that article, the notary has an exclusive authority in making the deed which have a strength proofing power in civil law. *"In fact, whether it concerns creating legal entities, amending articles of incorporation, writing and amending of wills, handling of land transfers, verifying the legality of a transaction, or performing other acts related to family law, hardly any legal*

<sup>1</sup> Zainal Arifin Hoesein, "Judicial Review di Mahkamah Agung RI, Tiga Dekade Pengujian Peraturan Perundang-undangan" (Supreme Court Judicial Review, Three Decade of Judicial Reviews), PT Raja Grafindo Persada: Jakarta, 2009, Pg 41

<sup>2</sup> Ni'matul Huda & Nazriyah, "Teori dan Pengujian Peraturan Perundang-undangan (Theory and The Judicial Review), Nusa Media Publishing: Bandung, 2011, Pg 125.

<sup>3</sup> Joel I Colon-Rios, "A New Typology Of Judicial Review Of Legislation", Global Constitutionalism, Volume 3, Issue 02, July 2014, Pg 143 - 169

<sup>4</sup> "Rekapitulasi Perkara Pengujian Undang-undang" (judicial review case recapitulazio), www.mahkamahkonstitusi.go.id, (accessed on 15 October 2014)

<sup>5</sup> Hartanti Sulihandri & Nisya Rifiani, "Prinsip-Prinsip Dasar Profesi Notaris Berdasarkan Peraturan Perundang-undangan Terbaru" (notary basic principle based on the new regulation). Dunia Cerdas: Jakarta, 2013, Pg 2-3

<sup>6</sup> Ibid

<sup>7</sup> Ibid

*act takes place in civil law countries without encountering the intervention of a notary public*<sup>1</sup>.

The significant of the notary position obliged them to obey the notary regulation as well as the ethical code. The act of notary position obliged the notary to be trusted and independent, giving the services to the community, keeping a secret that he make etc. Due to the constitutional rights protection of the civil society, the notary have to obey those obligation. On the other hand, a notary is also a citizens who have a constitutional rights and obligation.

Citizens Constitutional rights of stipulated in the constitution as a protection from the possibility of the State acts<sup>2</sup>. A constitutional rights also can be seen on a reciprocal with the State constitutional obligation. Every state constitutional obligations stipulated in the constitution 1945, concluded their constitutional rights as integral part to the state obligation<sup>3</sup>. For example, the principle of equality before the law which is set forth in Article 27 paragraph (1) of the Constitution, this principle contain citizens constitutional right and also citizens obligation. Every citizen guaranteed to the equal position before the law, the existence of equal access to everyone to get justice including through the courts, even it contains any of the other obligations to carry out a legal process in order to support justice for those who ask for. It is unavoidable that the Notary as an officials who issued the deed is required as a related parties in a civil process in which he has a duty as citizens to ensure those judicial process.

### 5. Judicial Review and the Future of Notary

Judicial review is conducted to the Article 66 of the Notary Possition Act 2004, the article of 66 stipulated that:

- (1) For the purposes of judicial proceedings, investigators, prosecutors, or judges with the approval of the Regional Supervisory Council have the authorities to:
  - a. take a photocopy of Deed and / or letters attached to Deed or Notary Protocol in Notary storage; and
  - b. ask Notary to be present in the examination relating to the deed that he made or protocols that in his storage.

With the approval of the Supervisory Council of Regions Phrases considered to have impaired a constitutional right regarding to the right of equality before the law and legal certainty. Losses occur when notary can not be called as a witness because the police did not obtain permission from the Regional Supervisory Council When the legal process for the ongoing case, and it is deem to give a loses due to the unequal treatment. the equality before the law stipulated in article 27 paragraph (1) of the Act of 1945 and Section 28D (1) of the Act of 1945. Article 27 paragraph (1) of the Constitution stipulate that “All citizens are equal before the law....”

While, article 28D para (1) stipulate that: Everyone has an equal right of recognition, security, protection, and legal certainty, and equal treatment before the law.

The judges decided that the phrase of “with the approval of the Regional Supervisory Council” do not have the binding force since that these phrase is against the constitution 1945. Based on that deciding, there is a change in Article 66 of Law Number 30 of 2004 and become:

- (1) For the purposes of judicial proceedings, investigators, prosecutors, or judges have the authorities to:
  - a. take a photocopy of Deed and / or letters attached to Deed or Notary Protocol in Notary storage; and
  - b. ask Notary to be present in the examination relating to the deed that he made or protocols that in his storage.

Post Constitutional Court Decision, the police can immediately proceed the notary without the consent of the Regions Supervisory Council when the notary stumble to a criminal case. But it has to be noted that those regulation is not retroactive, meaning that the provisions relating to the obligations of the notary in the proceedings only can be applied to the cases that occur after the constitutional court decision.

In the criminal law, the corresponding Notary serves as a witness who testified in accordance with what is known, heard, and seen by him (testimonium de auditu principle). In practice they are called as a “witness deed”, because his testimony is limited to the information concerning the issuance of the deeds.

In the civil law, a notary can be serves as a witness (evidence of witnesses) or expert witness (evidence of expert testimony). Because the civil law only concerns private interests of the dispute parties, the notary position was strongly influenced by the litigants (plaintiff or defendant).

Based on the notary obligations, Notary as a public officials only obliged to record or perform administrative work from his client agreements and issuing a deeds, so that a notary does not intervene in the

<sup>1</sup> Dante Figueroa, “The Evolving Role of the Latin American Notary Public”, ILSP Law Journal

<sup>2</sup> Maruarar Siahaan, “Hak Konstitusional di dalam UUD 1945” (constitutional rights on constitution 1945), [elsam.or.id](http://elsam.or.id) (accessed on 2 September 2014)

<sup>3</sup> Ibid

making of agreement. Those obligation is often create a hidden defect deed as a loophole for the parties who have a bad faith, hidden defect deed is a doubtful deed, but the existence of this deed is beyond the knowledge of the notary.

A notary will not confirm the validity of his client agreement, he simply "legalize" the agreement in the form of a deed, this become a way to the "notary criminalization". The decision of the constitutional court has implications related to legal acts performed by notary. Due to the constitutional court decision, the principle of precautionary and accuracy is emphasized by the Notary when he issued a deed to avoid the possibility of being lodged in a criminal cases related to the issuance of deed.

In 2014, the notary act being amendment with the promulgation of the act no 2/2014. The new act also changes the article 66 with adding 2 paragraph. And so the article 66 become:

- (1) For the purposes of judicial proceedings, investigators, prosecutors, or judges with the approval of the Notary honorary council have the authorities to:
  - a. take a photocopy of Deed and / or letters attached to Deed or Notary Protocol in Notary storage; and
  - b. ask Notary to be present in the examination relating to the deed that he made or protocols that in his storage.
- (2) Report is needed due to intake of the photocopy of the Deed or the letters as stated in para (1) letter a.
- (3) The accepting or rejecting answer of the permission must be given in 30 work days started from it is accepted by the Notary honorary council.
- (4) The council deem to accept when they are not given the respond in 30 work days.

Regarding to the permission of the notary legal process, the amendment give the Region Supervisory Council function to the Notary Honorary Council with some limitation as stated in article 66 para (3) and (4). The Notary Honorary Council is a new agencies and have no regulation yet.

Regarding to the council, the act of 2014 no 2 only give one regulation as stipulated in article 66 A as follows:

- (1) Regarding to the development, minister establish notary honorary council.
- (2) There are 7 (seven) member of the council, consist of:
  - a. Notary, 3 persons
  - b. Government, 2 persons
  - c. Expert or academics, 2 persons.
- (3) Ministerial regulation will regulate the job, function, requirements and procedures for appointment and dismissal, organizational structure, work procedures, and budget of the council for the further regulation.

Notary Honorary Council was originally designed to be held in every area, but until now there is only one council held in Jakarta. So that when there is a local Notary lodged in criminal cases, the police will have a direct contact to the notary because there is no council in the local area.

Based on that, it can be said that the legal system has not been able to run. Regarding to the Lawrence Friedman theory on the legal system which is consist of the structure of the law, the substance of the law, and legal culture. Legal system working when all of the three component is exist. Related to this research, the legal system is not running because it is not supported by the legal structure, namely the absence (establishment) Honorary Notary council in the area, although the substance (rules, which in this case is the Act No. 2 of 2014) has been formed. The establishment of the council will take time, so it can be said that a legal system is a process that is not instant.

Moreover, the background of the promulgation of the Notary Position act was full with an interest, article 66 of this article indicate that the equality before the law has not been accepted by all of the people, there is an effort to go back to the time before the constitutional court gave the decision through this act by establishing the new council. In the future there is a possibility to do judicial review related to this article in order to bring back the equality before the law.

## 6. Conclusion

The constitutional court decision brought a significant change to the notary future. First, there is no need any permission from any organization when the police investigate the notary post the constitutional court decision. Second, somehow the constitutional court decision is being the reason of the promulgation of the notary act 2014. While it takes a time to get the act of 2014 to be well implemented in Indonesia legal system.

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