

Relevance of the Value of Legal Certainty in the Appointment of Islamic Law Graduates as Notaries

Virdo Lingga^{*)}, Danial Syah^{**)} and Herlina Hanum Harahap^{***)}

^{*)} Arabic, English, Japanese and International Language Institute (AEJI), Malaysia, E-mail: vir dolingga@gmail.com

^{**)} Universitas Islam Negeri Sumatera Utara, Indonesia, E-mail: sh.mhdaniasyah@yahoo.com

^{***)} Universitas Muslim Nusantara Al-Washliyah, Indonesia, E-mail: linahrp4@gmail.com

Abstract. *Sumiritas in the explanation of Article of Act No. 2 of 2014 on the Notary Department has resulted in uncertainty about the position of the Master of Islamic Law/Syari'ah as a Notary. This paper aims to analyze and dissect the issue of the appointment of graduates of Islamic law scholars as notaries. The research method in this writing is normative juridical. Sumiritas Article 3 of Act No. 2 of 2014 on the Notary Position has resulted in uncertainty for the status of a Master of Syari'ah Law as a Notary. This clearly results in uselessness for the Bachelor of Syari'ah Law in terms of the application of expertise and knowledge of Syari'ah law.*

Keywords: Legal; Certainty; Notary; Relevance; Bachelor; Islamic; Law.

1. INTRODUCTION

Indonesia in its development is a state of law that adheres to the civil law system. The consequence of this dimension is that all actions in this country must be based on the laws regulated in Indonesia. While the specific consequence of Indonesia as a country adhering to the civil law system is the necessity of every legal proof and legal act must be able to be proven in the presence of written documents and based on written law as well.¹

¹The position of the Indonesian state as a state of law is basically a manifestation of the idea of the importance of the interpretation of the values of Pancasila and the mandate of the Fourth Paragraph of the Opening of the 1945 NRI Constitution in the state in Indonesia. This is then realized in Article 1 paragraph (3) of the NRI Constitution of 1945 which states that "Indonesia is a state of law". So that all kinds of legal acts in this country must be in accordance with positive law and must be proven in writing. While the correlation between the rule of law and the protection of human rights in Indonesia is stated in Article 28I paragraph (5) of the NRI Constitution of 1945 which reads "to uphold and protect human rights in accordance with the principles of a democratic rule of law, the implementation of human rights is guaranteed, regulated, and enshrined in legislation".

Understanding the state of Indonesia as a state of law has implications for the way of law in the state of Indonesia which is so normative. Such a situation makes the way of law in Indonesia more oriented to written law that is formally recognized by the state. So there is a need for the implementation of written law that can be proven formally and materially well in Indonesia. So it is clear that the way of law in Indonesia is based on the civil law system which has three characteristics, namely the codification, judges are not bound to the president so that the law is the main source of law, and the judicial system is inquisitorial.²

The position of Notary is a position that has an important position in Indonesia as one of the countries adhering to the civil law system.³This is because the Notary has an important role in the continuity of the execution of the deed which is a tool of evidence and an absolute requirement for a particular legal act.) Act No. 2 of 2014 Concerning the Notary Office. Article 1 paragraph (1) of Act No. 2 of 2014 states "A Notary is a public official who is authorized to make authentic deeds and has other authorities as referred to in this law or based on other laws."⁴

The important position of a Notary makes the Notary profession so prestigious in society, so it is clear that the position of Notary is not only seen as a solution in terms of needs in answering legal issues but also as a position that has opportunities in the legal profession and the job market. This situation has clearly made the position of Notary a target for legal persons from various backgrounds of legal education.

Each circle can basically take a Master's (S2) Notary education, however not all circles can be a Notary, to be able to become a Notary a person not only meets the requirements to have passed the Master's Education (S2) Notary alone, but must also meet other requirements. As for the requirements to become a Notary according to Article 3 of Act No. 2 of 2014 on Notarial Position, which is then supplemented by Article 2 paragraph (2) of Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 19 of 2019 on Terms and Procedures for Appointment, Leave, Transfer, Termination, and Extension of Notary Department.⁵

The various requirements above make it clear that the absolute requirement to become a Notary is to be an Indonesian citizen, pious to God Almighty, and be at least 27 (twenty seven) years old as indicated by a photocopy of the resident card, physically and spiritually healthy stated with a health certificate from the doctor and psychiatrist indicated with the original physical health certificate from the hospital doctor. Then a bachelor of law degree and a graduate of the second strata of notarial level are shown with a photocopy of the bachelor of law education degree and the master of notarial education or notarial specialist education that has been legalized.

Has undergone an internship or has actually worked as a Notary employee for at least 24 (twenty-four) consecutive months in a Notary's office on his own initiative or on the recommendation of a Notary Organization after passing strata two notarial indicated with the original certificate of internship in the office Notaries known by the Notary

²Sunaryati Hartono, (1991), *Politik Hukum Menuju Satu Sistem Hukum Nasional*, Bandung: Alumni, p. 32.

³Choky R. Ramadhan, (June), Konvergensi Civil Law dan Common Law di Indonesia dalam Penemuan dan Pembentukan Hukum, *Mimbar Hukum*, Volume 30, No. 2, Universitas Gadjah Mada, June 2018, p. 215.

⁴Enju Juanda, (2015), Eksistensi Dan Problematika Profesi Notaris, *Jurnal Galuh Justisi*, Volume 3, No. 2, 2015, p. 179.

⁵Estikharisma Harnum and Akhmad Khisni, (2017), Perbedaan Kewenangan Dan Syarat Tata Cara Pengangkatan Antara Notaris Dan Notaris Pengganti, *Jurnal Akta*, Vol. 4 No. 4 Desember 2017, p. 512-513.

Organization or information have worked as employees of Notaries who have obtained a recommendation from the Notary Organization in the shortest time 24 (twenty four) consecutive months after passing strata two 2019, No.990-6 notarial or notary specialist education . Not status as a state official, state official, lawyer, or is not acting in another department which is by law prohibited to be combined with the Notary department is indicated by a statement letter without status as a state official, state office, lawyer, or is not acting in another department which is by law prohibited to be combined with the Notary department. Has never been sentenced to imprisonment based on a court decision that has acquired permanent legal force for committing a crime punishable by imprisonment for 5 (five) years or more by showing the original certificate of local police records.⁶

Based on the existing requirements, it is seen that the requirements for a law degree is one of the absolute requirements in the appointment of a person as a Notary. In the development of the degree of Bachelor of *Syari'ah* Law is often considered different from the degree of conventional Bachelor of Laws. This distinction is based on the fact that there are different scientific backgrounds, where the Bachelor of Law departs from modern law which has a role in the sustainability of modern positive law in this country, while the Bachelor of *Syari'ah* Law is a Bachelor of Islamic law which is more on the study of Islamic law which is not widely used in this country.⁷ This view has clearly resulted in the dichotomy of the Bachelor of Laws and Bachelor of *Syari'ah* Law degrees. This has clearly resulted in discrimination and marginalizing the Bachelor of *Syari'ah* Law in terms of the appointment of Notaries.

This paper aims to analyze and dissect the issue of appointing graduates of Islamic law scholars as notaries which has been known together that graduates of Islamic Law have not gained a bright spot in the profession of Notary today due to a special scientific background in Islamic law.

2. RESEARCH METHODS

The research method in this writing is normative juridical, so the study conducted in this writing is a study of legal regulations, especially related to the law related to the position of Notary and about the degree of Bachelor of Islamic Law.

3. RESULTS AND DISCUSSION

Normative Study on the Position of a Master of Islamic Law as a Notary

In the development of the question of the position of the Master of Islamic Law in the appointment of the Notary Office occurred due to the existence of multiple interpretations of the position of the requirements of the Master of Law for the appointment of the Notary Office. This is seen in the sound of Article 3 of Act No. 2 of 2014 on the Notary Office which states that:

The requirements to be appointed as a Notary as referred to in Article 2 are:

- a. Indonesian citizen;

⁶Febriyan Adis Firmansyah and Habib Adjie, (2018), Keabsahan Ujian Pengangkatan Notaris Sebagai Syarat Pengangkatan Notaris, *Jurnal Komunikasi Hukum*, Volume 4, No. 3, August 2018, Universitas Pendidikan Ganesha, Bali, p. 17.

⁷ <https://justisia.com/2019/yamin-perubahan-gelar-shi-menjadi-sh-tak-jamin-kesetaraan/>, Accessed March 12, 2021.

- b. fear the Almighty God;
- c. be at least 27 (twenty -seven) years old;
- d. physical and spiritual health expressed by a certificate of health from a physician and psychiatrist;
- e. holds a bachelor of law degree and a graduate of the strata of two notarial levels;
- f. has undergone an internship or has actually worked as a Notary employee for at least 24 (twenty-four) consecutive months in a Notary's office on his own initiative or on the recommendation of a Notary Organization after passing the second strata of notary;
- g. does not have the status of a state official, state office, advocate, or is not currently acting in another department which is by law prohibited from being conjoined with the Notary department; and
- h. has never been sentenced to imprisonment based on a court decision that has acquired permanent legal force for committing a crime punishable by imprisonment for 5 (five) years or more.

This is then reaffirmed by Article 2 paragraph (2) of the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 19 of 2019 on the Terms and Procedures for Appointment, Leave, Transfer, Termination, and Extension of Notary Office which states that:

The requirements as referred to in paragraph (1), must be proven by the completeness of supporting documents that include:

- a. photocopy of resident identification card;
- b. a photocopy of a legalized birth certificate;
- c. original physical health certificate from the hospital doctor;
- d. original certificate of spiritual health from a psychiatrist or psychiatric specialist of the hospital which is still valid or no later than 1 (one) year from the date of issue;
- e. a photocopy of a law degree and a master's degree in notarial education or a notarial specialist education that has been legalized;
- f. original certificate of internship in the Notary's office known by the Notary Organization or information has worked as a Notary employee who has obtained a recommendation from the Notary Organization in the shortest time 24 (twenty four) consecutive months after passing strata two 2019, No.990- 6 notarial or notarial specialist education;
- g. a statement letter not having the status of a state official, state office, lawyer, or not currently acting in another department which by law is prohibited to be conjoined with the Notary department; and
- h. original certificate of local police record.

Based on the above explanation, it is clear that a Bachelor of Law graduate is one of the absolute conditions for a person to become a Notary or not. However, these two provisions also do not have clarity in terms of the meaning of the Bachelor of Laws. In the explanation of Article 3 of Act No. 2 of 2014 on the Position of Notary does not clearly explain the recognition of the equivalent of a Bachelor of Laws, in this case including the degree of Bachelor of Islamic Law.

In the explanation of Article 3 of Act No. 2 of 2014 on the Position of Notary is only mentioned quite clearly while in the supplementary explanation is also not explained

about the position of education degree equivalent to Bachelor of Laws can or cannot be a Notary.

This is different from Act No. 18 of 2003 on Advocates, in Article 2 paragraph (1) of Act No. 18 of 2003 on Advocates states that "who can be appointed as an Advocate is a graduate with a background in higher legal education and after education specifically the profession of Advocate implemented by the Advocate Organization".⁸

Then Article 3 of Act No. 18 of 2003 on Lawyers states that:

1. To be appointed as an Advocate must meet the following requirements:
 - a. citizen of the Republic of Indonesia;
 - b. residing in Indonesia;
 - c. does not have the status of a state official or state office;
 - d. be at least 25 (twenty-five) years old;
 - e. bachelor's degree with a background in higher legal education as referred to in Article 2 paragraph (1);
 - f. pass a test held by the Advocate Organization;
 - g. internship of at least 2 (two) years continuously in the office of Advocate;
 - h. has never been convicted of committing a felony punishable by imprisonment for 5 (five) years or more;
 - i. behave well, honestly, responsibly, fairly, and have high integrity.
2. Advocates who have been appointed based on the requirements as referred to in paragraph (1) may practice by specializing in certain fields in accordance with the requirements determined by legislation.

Explanation of Article 3 of Act No. 2 of 2014 on the Position of Notary that does not contain the position of *Syari'ah* law graduates can be appointed as Notaries has resulted in multiple interpretations in the meaning of *Syari'ah* law graduates as Notaries. Such a situation has been used as a basis for the inability to appoint a Master of *Syari'ah* Law graduate as a Notary.

Sumiritas in the explanation of Article 3 of Act No. 2 of 2014 Concerning the Notary Office resulted in a conflict between Article 3 of Act No. 2 of 2014 Concerning the Notary Office with Article 28C paragraph (1) of the Constitution of the Republic of Indonesia in 1945 which states:

Everyone has the right to develop themselves through the fulfillment of basic needs, the right to education and to benefit from science and technology, art and culture, in order to improve the quality of life and for the welfare of mankind.

Sumiritas Article 3 of Act No. 2 of 2014 on the Notary Office is also in conflict with Article 28D paragraph (1) of the Constitution of the Republic of Indonesia in 1945 which states that "everyone has the right to recognition, security, protection and legal certainty and equal treatment before the law". This issue is automatically also contrary to the Social justice for all the people of Indonesia, namely the Fifth Point of Pancasila.

⁸ Muslim Zainuddin, (2016), Peluang Dan Tantangan Sarjana *Syari'ah* Dalam Menggeluti Profesi Advokat Pasca Undang-Undang No. 18 Tahun 2003: Studi Kasus Di Banda Aceh Dan Aceh Besar, *Jurnal Kajian Ilmu Hukum dan Syari'ah*, Volume 1, Number 1, 2016, p. 74.

With regard to the harmonization of law, Hans Nawiasky stated that the rule of law is a layered system in which consists of four major groups, namely:⁹

- a. *Staatsfundamentalnorm* (State Fundamental Norms);
- b. *Staatsgrundgesetz* (State Basic Rules / State Principal Rules);
- c. *Formal Gezets* (Formal Law);
- d. *Verordnung & Autonome Satzung* (Implementing Rules & Autonomous Rules).

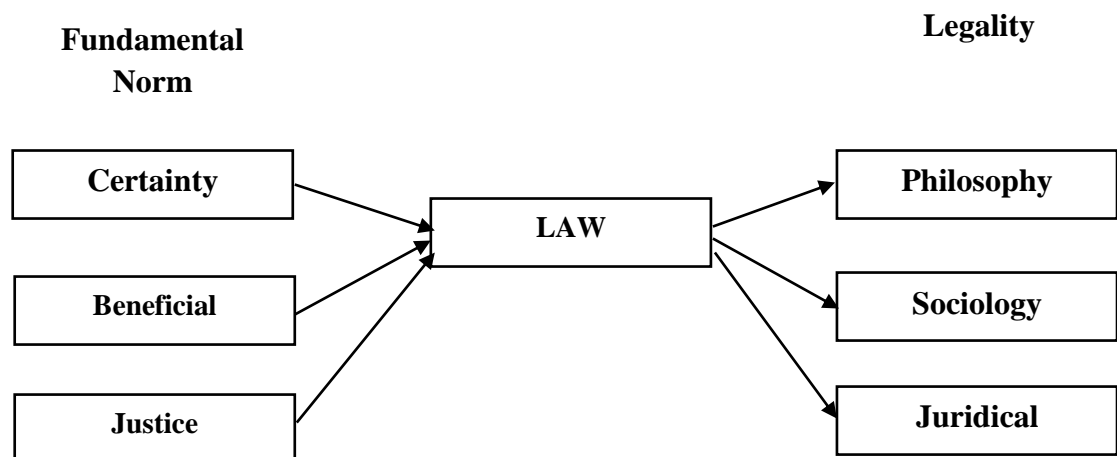
The issue of *Sumiritas* Article 3 of Act No. 2 of 2014 Concerning the Notary Office has shown the existence of disharmonization between Article 3 of Act No. 2 of 2014 Concerning the Notary Office as *Formal Gezets* (Formal Law) with Article 28C paragraph (1) The State Constitution of the Republic of Indonesia in 1945 and Article 28D of the State Constitution of the Republic of Indonesia in 1945 as *Staatsgrundgesetz* (State Basic Rules / State Principal Rules), this is automatically also contrary to the Fifth Order of Pancasila as *Staatsfundamentalnorm* (State Fundamental Norms).

1. The Relevance of the Value of Legal Certainty in the Appointment of Bachelor of Islamic Law Graduates as Notaries in the Grammatical Study of Law

Radbruch wrote that in law there are 3 (three) basic values, namely:¹⁰

- a. Justice (*Gerechtigkeit*);
- b. Benefit (*Zweckmassigkeit*); and
- c. Legal Certainty (*Rechtssicherheit*).

These three legal values were then demonstrated by Satjipto Rahardjo as follows:¹¹



These three values often experience spannungsverhältnis that result in the law not being able to run smoothly. This can be seen in the issue of *Sumiritas* Article 3 of Act No. 2 of 2014 on the Notary Office which resulted in the issue of legal uncertainty.

⁹Hans Nawiasky, (1948), *Allgemeine Rechtslehre als System der rechtlichen Grundbegriffe*, Ed. 2, Benziger: Einseideln/Zurich/Koln, p. 31.

¹⁰Mario Julyano and Aditya Yuli Sulistyawan, (2019), Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum, *Jurnal Crepido*, Volume 01, No. 01, UNDIP, July 2019, p. 14.

¹¹Dewa Gede Atmaja, (2018), "Asas-Asas Hukum Dalam Sistem Hukum", *Jurnal Kertha Wicaksana*, Volume 12, No. 2, 2018, p. 146.

Such a situation is clearly contrary to the value of benefits, especially for graduates of the Master of *Syari'ah* Law. Karl Larenz said that "legal principles are the measures of ethical law that give direction to the formation of law".¹² This view shows that the existence of the issue of *spannungsverhältnis* between the value of legal certainty and the value of legal utility has resulted in the policy of appointing a Bachelor of *Syari'ah* Law as a Notary.

4. CONCLUSION

Sumiritas Article 3 of Act No. 2 of 2014 on the Notary Position has resulted in uncertainty for the status of a Master of *Syari'ah* Law as a Notary. This clearly results in uselessness for the Bachelor of *Syari'ah* Law in terms of the application of expertise and knowledge of *Syari'ah* law.

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¹² Ibid.

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