

NOTARY AS A REPORTING PARTY IN THE ERADICATION OF THE CRIME OF MONEY LAUNDERING

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Abstract

The purpose of this study is to find out and analyze the disharmony of notary arrangements as reporting parties in efforts to eradicate money laundering. This research uses qualitative methods and normative juridical approaches, as well as descriptive analytical research specifications. The results of the study indicate that the notary arrangement as one of the reporting parties in the effort to eradicate the money laundering crime regulated through a government regulation has violated the principle that the applicable laws and regulations can only be changed by laws and regulations that are equivalent or higher, has also violated several principles of the formation of good laws and regulations, including institutional principles and also the principle of conformity.

Keywords: *Disharmony; Notary Public; Money Laundering.*

Abstrak

Tujuan dari penelitian ini adalah untuk mengetahui dan menganalisis mengenai disharmonisasi pengaturan notaris sebagai pihak pelapor dalam upaya pemberantasan Tindak Pidana Pencucian Uang. Penelitian ini menggunakan metode kualitatif dan metode pendekatan yuridis normatif, serta spesifikasi penelitian deskriptif analitis. Hasil penelitian menunjukkan bahwa Pengaturan notaris sebagai salah satu pihak pelapor dalam upaya pemberantasan Tindak Pidana Pencucian Uang yang diatur melalui Peraturan Pemerintah telah melanggar prinsip dimana peraturan perundang-undangan yang berlaku hanya dapat diubah oleh peraturan perundang-undangan yang sederajat atau yang lebih tinggi, juga telah melanggar beberapa asas pembentukan peraturan perundang-undangan yang baik antara lain asas kelembagaan dan juga asas kesesuaian.

Kata Kunci: *Disharmonisasi; Notaris; Tindak Pidana Pencucian Uang.*

A. Introduction

The process of changes in society today is a normal phenomenon whose influence spreads quickly to other parts of the world,¹ thanks to discoveries in the field of technology, a revolution, modernization of education, and others events in one place can quickly be known by other communities who live far from the centre of the above events. Changes in society can be about values, rules, patterns of behaviour, organization, the structure of social institutions, social

¹ Ellya Rosana, "Modernisasi Dan Perubahan Sosial," *TAPIS* 7, no. 12 (2011): 31–47.

stratification, power, social interaction, etc.² In modern society, the role of law in social change is more than just theoretical interest only. In many areas of social life, such as education, racial relations, housing, transportation, energy use, and environmental protection, the law has been seen as an essential instrument of change³.

In his theory of law as a tool of social engineering, as quoted by Mochtar Kusumaatmadja, Roscoe Pound states that law can play a significant role in the process of social change. Experience shows that in the United States, especially after implementing the new deal starting in the 1930s, the law was used to bring about changes in the social field. The law created should be based on legal certainty so that in implementing the law, there is no overlap between one legal product and another, such as in the case of reporting obligations by a notary to eradicate money laundering.

Reporting obligations by various professions have been implemented in many countries and positively impact the prevention and eradication of money laundering. Government Regulation of the Republic of Indonesia Number 43 of 2015 concerning Reporting Parties in the Prevention and Eradication of Money Laundering has changed the definition of Reporting Parties to "everyone who according to the laws and regulations concerning the prevention and eradication of money laundering crimes is obliged to submit a report to PPATK"⁴.

Based on the obligations of a Notary as the reporting party regarding the existence of ML, the Ministry of Law and Human Rights of the Republic of Indonesia stipulates the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 9 of 2017 concerning the Application of the Principle of Recognizing Service Users for Notaries, which adds the obligation of a Notary to understand the profile, the aims and objectives of the business relationship, as well as transactions made by service users and beneficial owners through identification and verification.

Notaries are also required to be able to identify whether service users or beneficial owners are classified as low risk or high risk, as well as to monitor the fairness of service user transactions and be responsible for recording transactions and information systems regarding identification, monitoring and providing reports on transactions made by service users⁵. The

² Fatimah Halim, "Hukum Dan Perubahan Sosial," *Al-Daulah* 4, no. 1 (2015): 107–15.

³ Samsir Salam, "Hukum Dan Perubahan Sosial (Kajian Sosiologi Hukum)," *Tahkim* 9, no. 1 (2015): 160–69.

⁴ Fauziah Lubis, *Advokat Vs Pencucian Uang* (Yogyakarta: Deepublish, 2020).

⁵ Nevy Varida Ariani, "Beneficial Owner: Mengenali Pemilik Manfaat Dalam Tindak Pidana Korporasi," *Jurnal Penelitian Hukum De Jure* 20, no. 1 (2020): 78.

Notary is also required to terminate the business relationship with the service user if the service user refuses to comply with the principle of recognizing service users or if the Notary doubts the veracity of the information submitted by the Service User. The Notary is obliged to report the action as a Suspicious Financial Transaction to PPATK. The Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 9 of 2017 also imposes administrative sanctions on Notaries who do not apply the principle of recognizing service users, whose types and procedures for imposing sanctions are carried out by the provisions of the notarial laws and regulations⁶.

Notary relations with the community and the state have been regulated in Law no. 30 of 2004 concerning the Position of Notary (later called UUN) along with other laws and regulations. Meanwhile, the relationship between a Notary and a Notary professional organization is regulated through the Notary Code of Ethics established and enforced by the Notary organization. A notary code of ethics is a logical consequence of and for a job called a profession. Even an opinion states that a Notary, as a public official who is entrusted with, must adhere to the laws and regulations and his professional code of ethics because, without a code of ethics, the dignity and worth of his profession will be lost. The existence of a relationship between the code of ethics and UUN gives meaning to the Notary profession itself. The UUN and the Notary code of ethics require that Notaries in carrying out their duties as public officials, in addition to being subject to UUN, must also obey the professional code of ethics and must be responsible to the community they serve, professional organizations (Indonesian Notary Association or INI) as well as to the state. With this relationship, a Notary who ignores the overall dignity of his position in addition to being subject to moral sanctions, reprimanded or dismissed from his professional membership can also be dismissed from his position as a Notary⁷.

There is a contradiction in the obligations of the Notary as regulated in the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 9 of 2017 with the oath of office that the Notary must pronounce before carrying out his position. The position of the oath/promise of office has an essential role for a Notary as a public official who is given the

⁶ Rahma Putri Prana, "Peran Notaris Sebagai Profesi Penunjang Pasar Modal Dalam Upaya Perlindungan Hukum Terhadap Investor Untuk Menghindari Kerugian Akibat Praktik Manipulasi Pasar Di Pasar Modal," *Repertorium: Jurnal Ilmiah Kenotariatan* 8, no. 1 (2019): 53.

⁷ Ineke Bombing, "Pengawasan Terhadap Pejabat Notaris Dalam Pelanggaran Kode Etik," *Lex Privatum* 4, no. 2 (2015): 110.

authority to do an authentic deed and has other authorities as specified in the UUJN. A notary as a position of trust is obliged to keep a secret regarding the deed he made and the information/statement of the parties obtained in the deed unless the law instructs him to disclose the secret and provide the information/statement to the party requesting it. Violations committed by a Notary on his oath of office are also a violation of the Notary's professional code of ethics⁸. Contradictions also occur with the obligations of a Notary under Law no. 2 of 2014 in Article 16 paragraph (1) letter f, which expressly requires the Notary to keep everything about the deed he made and all information obtained for doing the deed by his oath of office, unless the law provides otherwise and imposes sanctions on the Notary who violating these provisions in the form of verbal warnings, reprimands, temporary dismissal, honourable discharge or dishonourable discharge⁹.

B. Research Method

This study uses a qualitative method with a normative juridical approach and descriptive-analytical research specifications. The primary legal materials used are various laws and regulations related to the Notary Position and the Eradication of the Crime of Money Laundering in Indonesia. The secondary legal materials used are derived from books and journals related to the problems to be studied. The technique of collecting legal materials is a literature study and will be analyzed in a normative-qualitative manner.

C. Result and Discussion

Along with the development of business activities in Indonesia, the role of the Notary in making the deed of establishment of a business entity and legal entity is increasingly needed, both business entities in the form of Firms, Limited Liability Companies (CV) and Limited Liability Companies (PT). Welcoming such rapid business development, the Government of the Republic of Indonesia through Government Regulation of the Republic of Indonesia Number 43 of 2015 concerning Reporting Parties in the Prevention and Eradication of the Crime of Money Laundering in conjunction with Law no. 8 of 2010 concerning the Prevention and Eradication of

⁸ Moh Sodik, "Relevansi Kewajiban Ingkar Notaris Dalam Menjalankan Jabatannya (Analisis Pasal 16 Huruf f Undang-Undang Nomor 2 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 Tentang Jabatan Notaris)," *Lex Renaissance* 1, no. 2 (2017): 133.

⁹ I Ketut Rai Setiabudhi and Gde Made Swardhana, "Sanksi Hukum Terhadap Notaris Yang Melanggar Kewajiban Dan Larangan Undang-Undang Jabatan Notaris," *Acta Comitas* 1 (2017): 110–21.

the Crime of Money Laundering has also added a Notary as one of the parties required to submit reports on money laundering offences to PPATK.

The addition of a Notary as a reporting party based on the Elucidation of Government Regulation of the Republic of Indonesia Number 43 of 2015 is intended to protect the reporting party from lawsuits, both civil and criminal, because based on the results of PPATK research, Notaries are also vulnerable to being used by perpetrators of money laundering crimes to hide or disguise the origin of assets resulting from criminal acts by hiding behind the provisions of the confidentiality of professional relations with service users who are regulated by the provisions of laws and regulations. This is considered in line with the recommendation issued by the FATF, which states that certain professions that carry out Suspicious Financial Transactions (TKM) for the benefit of or for and on behalf of service users are required to report the transaction to the Financial Intelligence Unit (in this case the PPATK).

The reporting obligation by this profession has been implemented in many countries and has had a positive impact on the prevention and eradication of money laundering. This Government Regulation of the Republic of Indonesia Number 43 of 2015 also changes the definition of the Reporting Party to "everyone who according to the laws and regulations regarding the prevention and eradication of the crime of money laundering is obliged to submit a report to the PPATK"¹⁰.

Based on the obligations of a Notary as the reporting party regarding the existence of ML, the Ministry of Law and Human Rights of the Republic of Indonesia stipulates the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 9 of 2017 concerning the Application of the Principle of Recognizing Service Users for Notaries, which adds the obligation of a Notary to understand the profile, the aims and objectives of the business relationship, as well as transactions made by service users and beneficial owners through identification and verification.

Notaries are also required to be able to identify whether service users or beneficial owners are classified as low risk or high risk, as well as to monitor the fairness of service user transactions and be responsible for recording transactions and information systems regarding identification, monitoring and providing reports on transactions made by service users¹¹. The Notary is also required to terminate the business relationship with the service user if the service

¹⁰ Lubis, *Advokat Vs Pencucian Uang*.

¹¹ Ariani, "Beneficial Owner: Mengenal Pemilik Manfaat Dalam Tindak Pidana Korporasi."

user refuses to comply with the principle of recognizing service users or if the Notary doubts the veracity of the information submitted by the Service User. The Notary is obliged to report the action as a Suspicious Financial Transaction to PPATK. The Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 9 of 2017 also imposes administrative sanctions on Notaries who do not apply the principle of recognizing service users, whose types and procedures for imposing sanctions are carried out by the provisions of the notarial laws and regulations¹².

The relationship of a Notary with the community and the state has been regulated in the UUJN and other laws and regulations. Meanwhile, the relationship between a Notary and a Notary professional organization is regulated through a Notary code of ethics established and enforced by a Notary organization. A notary code of ethics is a logical consequence of and for a job called a profession. There is even an opinion that states that a Notary, as a public official who is entrusted with must adhere not only to the laws and regulations but also to his professional code of ethics, because without a code of ethics, the dignity and worth of his profession will be lost. The existence of a relationship between the code of ethics and UUJN gives meaning to the Notary profession itself. The UUJN and the Notary code of ethics require that Notaries in carrying out their duties as public officials, in addition to being subject to UUJN, must also obey the professional code of ethics and must be responsible to the community they serve, professional organizations (Indonesian Notary Association or INI) as well as to the state. With this relationship, a Notary who ignores the overall dignity of his position in addition to being subject to moral sanctions, reprimanded or dismissed from his professional membership can also be dismissed from his position as a Notary¹³.

There is a contradiction in the obligations of the Notary as regulated in the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 9 of 2017 with the oath of office that the Notary must pronounce before carrying out his position. The position of the oath/promise of office has an essential role for a Notary as a public official who is given the authority to do an authentic deed and has other authorities as specified in the UUJN. A notary as a position of trust is obliged to keep a secret regarding the deed he made and the information/statement of the parties obtained in the deed unless the law instructs him to disclose

¹² Armansyah and Triastuti, "Beneficial Ownership Dan Kewajiban Pelaporan Atas Transaksi Keuangan Mencurigakan," *Adil: Jurnal Hukum* 9, no. 2 (2018): 1–17.

¹³ Bombing, "Pengawasan Terhadap Pejabat Notaris Dalam Pelanggaran Kode Etik."

the secret and provide the information/statement to the party requesting it. Violations committed by a Notary on his oath of office are also a violation of the Notary's professional code of ethics. Contradictions also occur with the obligations of a Notary under Law no. 2 of 2014 in Article 16 paragraph (1) letter f, which expressly requires the Notary to keep everything about the deed he made and all information obtained for doing the deed by his oath of office, unless the law provides otherwise and imposes sanctions for the Notary who is violating these provisions in the form of verbal warnings, reprimands, temporary dismissal, honourable discharge or dishonourable.

Efforts to overcome the obstacles to preventing money laundering offences by giving obligations to the Notary as the reporting party also creates a dilemma for the Notary in carrying out his position, which is bound by the confidentiality of the client (confidentiality of client). The obligation of a reporter for the profession cannot be equated with the reporting party to financial service institutions (banking, insurance, financing) or other institutions. Because the profession is run as a person with all the risks that come with it, including criminalization, of course, the profession's compliance in carrying out its obligations as a reporter must also be served to the maximum by law enforcement officers. It is a challenge for each profession to determine whether an act or action qualifies as a suspicious transaction or not; this is because each profession does not necessarily know and control, they may not even understand how to detect and assess an incident or actions are included in the category of suspicious financial transactions.

In addition, UUJN does not authorize Notaries to carry out investigations to investigate whether the parties who made the authentic deed have good intentions and intentions or have bad intentions. The Notary has no obligation to investigate the material truth of the identity of the parties who appear before the Notary to make a deed or the object being transacted. The authentic deed made by the Notary essentially contains the formal truth according to what the parties have notified the Notary¹⁴. The Notary must include that what is contained in the Notary deed has genuinely been understood and by the wishes of the parties, namely by reading it so that the contents of the Notary deed become apparent, as well as providing access to information, including access to the relevant laws and regulations for the Notary. The party is signing the

¹⁴ Dedy Pramono, "Kekuatan Pembuktian Akta Yang Dibuat Oleh Notaris Selaku Pejabat Umum Menurut Hukum Acara Perdata Di Indonesia," *Lex Jurnalica* 12, no. 3 (2015): 249.

deed. Thus the parties can freely determine and agree on the contents of the notarial deed to be signed¹⁵.

In the principle of secrecy of the position carried out by a Notary, there is also a general legal provision, namely Article 170 paragraph (1) of the Criminal Procedure Code (from now on referred to as the Criminal Procedure Code), which affirms that "those who because of their work, dignity or position are required to keep secrets.", can ask to be released from the obligation to give testimony as witnesses, namely about things that have been entrusted to them." The secrecy of the position attached to the legal umbrella of the Notary's position and the criminal procedural law mentioned above is a benchmark that the Notary must carry out to carry out his obligations to keep the contents of the deed secret only to parties who have a direct interest in the deed, as evident in the provisions of Article 54 UUJN which states that a Notary can only provide, show or notify the contents of the deed, grosse deed, a copy of the deed or an excerpt of the deed to people who have a direct interest in the deed, heirs, or people who have rights unless otherwise stipulated by laws and regulations.

The Unitary State of the Republic of Indonesia (NKRI) is a legal state that requires concepts informing laws. The applicable law, if formed using a good concept, which is well planned, then the law in the form of legislation owned by the Republic of Indonesia will be a good law that reflects justice¹⁶. Therefore, the concept of forming legislation in Indonesia must be strictly by the fundamental norms and principles informing laws and regulations.

A legal system can be called a legal system because it is not just a collection of rules¹⁷. The link that unites it so that such a pattern of unity is created is a matter of its validity. The bond of the system is also created by applying these legal regulations. This practice ensures the creation of a unified arrangement of these rules in the time dimension. The means used to carry out the practice, such as interpretation or uniform patterns of interpretation, lead to creating a system bond.

Fuller put forward one opinion regarding the size of the existence of a legal system on eight principles which are more than just a requirement for the existence of a legal system but also provide qualifications for the legal system as a legal system that contains a particular

¹⁵ I Wayan Arya Kurniawan, "Tanggung Jawab Notaris Atas Akta Yang Tidak Dibacakan Dihadapan Para Penghadap," *Acta Comitas* 3, no. 3 (2018): 489–99.

¹⁶ Ferry Irawan Febriansyah, "Konsep Pembentukan Peraturan Perundang-Undangan Di Indonesia," *Perspektif* 21, no. 3 (2016): 221.

¹⁷ Fajar Nurhardianto, "Sistem Hukum Dan Posisi Hukum Indonesia," *TAPIS* 11, no. 1 (2015): 34–45.

morality, which he calls the principles of legality, namely, a legal system. Must contain regulations (must not only contain ad hoc decisions)¹⁸; The regulations that have been made must be announced; There should be no retroactive rules; Regulations must be arranged in an understandable formula; A system must not contain rules that conflict with each other; Regulations must not contain demands that exceed what can be done; There should be no habit of changing the rules frequently to cause one to lose orientation, and there must be a match between the regulations promulgated and their daily implementation¹⁹.

In Fuller's opinion, the failure to create such a system not only gave birth to a flawed legal system but something that cannot be called a legal system at all²⁰. Informing the law, guidelines are needed so that the legal products issued later will be vital for the sake of the law and can be implemented in the future. Starting with the establishment of Law no. 10 of 2004 concerning the Establishment of Legislation which was later refined by Law no. 12 of 2011 concerning the Establishment of Legislation, every legal product formation has a basis and guidelines. Law No. 12 of 2011 is the legal basis for forming legislation at both the central and regional levels. This law was formed to create an orderly formation of laws and regulations so that the conception and formulation of norms are solid, round and harmonious, do not conflict with each other and overlap with each other.

Through this law, it is hoped that all institutions authorized to form laws and regulations have specific, standardized and standardized guidelines in the process and method of forming laws and regulations in a planned, integrated and systematic manner. As a legal state with a legal level, it must attach importance to the hierarchy of legislation informing legislation, especially the constitution as the highest law. Several principles are used in forming laws and regulations, including the basis of laws and regulations, always using laws and regulations as a reference for the formation of laws and regulations. Only specific laws and regulations can be used as a juridical basis for forming regulations. Laws and regulations that are still in force can only be abolished, revoked or amended by equal legislation or higher legislation, and new laws and regulations override old laws or *lex posterior derogat legi priori*²¹.

¹⁸ Dhaniswara K Harjono, "Pengaruh Sistem Hukum Common Law Terhadap Hukum Investasi Dan Pembiayaan Di Indonesia," *Lex Journalica* 6, no. 3 (2009): 180–94.

¹⁹ S. Andi Sutrasno, "Kajian Normatif Pasal 1 Ayat 3 Undang-Undang Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak," *Rechtstaat* 8, no. 1 (2014): 3.

²⁰ Zaidah Nur Rosidah, "Sinkronisasi Peraturan Perundang-Undangan Mengenai Perkawinan Beda Agama," *Al-Ahkam* 23, no. 1 (2013): 6, doi:10.21580/ahkam.2013.23.1.70.

²¹ Rosidah, "Sinkronisasi Peraturan Perundang-Undangan Mengenai Perkawinan Beda Agama."

Government Regulation Number 43 of 2015, which adds a Notary as the reporting party has violated one of the principles in which an equivalent or higher statutory regulation can only change the applicable laws and regulations, has also violated several principles of the formation of laws and regulations. Good things include institutional principles and also the principle of conformity. Departing from the intention to protect the Notary as the reporting party from civil and criminal lawsuits, as stated in the Elucidation of Government Regulation Number 43 of 2015, it has unwittingly put the Notary in an increasingly vulnerable position to be considered as participating as perpetrators of money laundering, which poses a more significant threat to Notaries to obtain lawsuits, both civil and criminal, from the parties involved.

As the bearer of the legal profession, a Notary is obliged to comply with the applicable laws and regulations as stipulated in the Government Regulation Number 43 of 2015. However, a Notary as a public official whose authorities and obligations have been regulated in the Law on Notary Positions is required to maintain the confidentiality of the deed he made by the provisions of Article 4 paragraph (2), Article 16 paragraph (1) letter f and Article 54 paragraph (1) UUJN. It has become a debate on legal issues to date regarding the contradictory validity of Government Regulation Number 43 of 2015 for Notaries because the profession of a Notary as a reporting party is not explicitly regulated in the Money Laundering Law, while the position of Government Regulation Number 43 of 2015 is under the Act. So it should not be able to override the highest provision, namely UUJN, as the highest legal umbrella for the Notary profession to maintain the confidentiality of the deed he made.

The hierarchy of laws and regulations in Article 7 paragraph (1) of Law no. 12 of 2011 can be known briefly through a scheme that shows a discrepancy between the applicability of Government Regulation Number 43 of 2015 and the UUJN. Based on these regulations, it can be seen that the existence of Government Regulation Number 43 of 2015 does not have binding legal force for the Notary profession because hierarchically, it is contrary to a higher regulation, namely UUJN, therefore the implementation of obligations for Notaries in their responsibility to keep office secrets as has been stated. Regulated in the UUJN, it can only be opened if it is regulated in law or the content material must be stated explicitly in the law, not in the form of the legislation under it. In this case, the legislators should coordinate with the relevant agencies to create overlapping conditions between sectors and fields of law in the Indonesian legal system..

The hierarchy of laws and regulations regulated in Law Number 12 of 2011 was adopted from the *stufenbau* theory (*stufenbau des rechts* theory) proposed by Hans Kelsen. According to

Hans Kelsen, a lower norm is determined by a higher norm, and so on and ends by a higher one, the basic norm being a consideration for the truth of the entirely legal system. Stufenbau's theory was inspired by the opinion of his student named Adolf Merkl, who argued that a legal norm that is above it originates and is based on the norms above it. However, downwards it also becomes the basis and becomes a source for the legal norms below it, so that a legal norm has a relative validity period (*rechtskraht*) because the validity period of a legal norm depends on the legal norms above it so that if the legal norms above it are revoked or abolished, then the legal norms below are revoked or erased²².

D. Conclusion and Recommendation

Disharmonization of the arrangement of a notary as a reporting party to eradicate the crime of money laundering that Government Regulation Number 43 of 2015, which adds a notary as a reporting party which is contrary to the Law on Notary Positions, has violated one of the principles where the applicable laws and regulations are only can be changed by laws and regulations that are equivalent or higher has also violated several principles of the formation of good laws and regulations, including institutional principles and also the principle of conformity. These principles are by Stufenbau's Theory, that lower norms are determined by higher norms, and so on and end by a higher, basic norm into consideration for the truth of the entire existing legal system.

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²² Aan Eko Widiarto, "Implikasi Hukum Pengaturan Hukum Acara Mahkamah Konstitusi Dalam Bentuk Peraturan Mahkamah Konstitusi," *Jurnal Konstitusi* 16, no. 1 (2019): 36–37, doi:10.31078/jk1612.

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