

Legal Certainty of the Position of a Notary Appointed as a Member of the Legislative Assembly

Deliatmaja Rizkie Muliawan
Universitas Surabaya, Indonesia
delimukti29@gmail.com

David Hardjo
Universitas Surabaya, Indonesia

Abstract:

The implementation of the notary position by a Substitute Notary on the basis of a Notary's leave due to serving as a member of the legislature in the future is prone to causing legal problems in office. Actions of dual office, interference, and conflicts of interest will be very prone to occur. This legal problem is caused by the conflict of norms within the Notary Position Law. The type of research used in this study is normative juridical legal research. The results obtained show that the regulation of notaries who concurrently serve as members of the legislature does not provide legal certainty for notaries. The regulation is contradictory because even though the notary who is appointed as a member of the legislature has been on leave, his notary office continues to operate and provide services to the community, so technically, there is a dual position for the notary. The concept of future regulations regarding the provisions for notaries who hold dual positions as members of the legislature is to dismiss or dismiss a notary from his position honorably. This regulation is intended to provide certainty and legal protection for the Notary's Position, as well as maintain the moral integrity, intelligence, independence, and professionalism of a Notary.

Keywords: Notary; Legislative Member; Legal Certainty.

Abstrak:

Pelaksanaan jabatan notaris oleh Notaris Pengganti atas dasar cuti Notaris dikarenakan menjabat sebagai anggota legislatif di kemudian hari rawan menimbulkan permasalahan hukum dalam jabatannya. Tindakan rangkap jabatan, campur tangan, dan benturan kepentingan akan sangat rawan terjadi. Permasalahan hukum ini disebabkan oleh adanya pertentangan norma dalam Undang-undang Jabatan Notaris. Jenis penelitian yang digunakan dalam penelitian ini adalah penelitian hukum yuridis normatif. Hasil penelitian yang diperoleh menunjukkan bahwa pengaturan notaris yang merangkap jabatan sebagai anggota legislatif kurang memberikan kepastian hukum bagi notaris. Pengaturan tersebut bersifat kontradiktif karena meskipun notaris yang diangkat sebagai anggota legislatif tersebut telah menjalani cuti, jabatan notarisnya tetap menjalankan tugasnya dan memberikan pelayanan kepada masyarakat, sehingga secara teknis terjadi

rangkap jabatan bagi notaris tersebut. Konsep pengaturan ke depan mengenai ketentuan bagi notaris yang memangku jabatan rangkap sebagai anggota legislatif adalah memberhentikan atau memberhentikan notaris dari jabatannya dengan hormat. Peraturan ini dimaksudkan untuk memberikan kepastian dan perlindungan hukum bagi Jabatan Notaris, serta menjaga integritas moral, kecerdasan, kemandirian, dan profesionalisme Notaris.

Kata Kunci: Notaris; Anggota Legislatif; Kepastian Hukum.

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I. INTRODUCTION

A notary is a public official who is authorized to make authentic deeds as referred to in Article 1 number 1 of Law Number 30 of 2004 which has been amended by Law Number 2 of 2014 concerning the Position of Notary (hereinafter referred to as the Notary Position Law) that 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. The profession of notary is a noble profession (*nobile officium*).¹ It is called *nobile officium* because the profession of notary is very closely related to humanity.² Deeds made by a notary can be a legal reason for the status of property, rights and obligations of a person, because errors in a notarial deed can cause a person's rights to an obligation to be revoked.³

The authority of a Notary has been regulated in Article 15 paragraph (1) of the Notary Law, which states that the authority of a Notary is to make authentic deeds regarding all acts, agreements and determinations required by statutory regulations and/or desired by the interested party to be stated in an authentic deed, guarantee the certainty of the date of making the deed, store the deed, provide a grosse, copy and extract of the deed. Regarding authentic deeds, this is

¹ Habib Adjie, *Hukum Notaris Indonesia*, (Bandung: Refika Aditama, 2008), h.1.

² Habib Adjie, *Lintas Waktu Pendapat dan Pemikiran Hukum Kenotariatan Indonesia*, (Yogyakarta: Bintang Semesta Madani, 2022), h.23.

³ Abdul Ghofur Ansohri, *Lembaga Kenotariatan Indonesia; Perspektif Hukum dan Etika*, (Yogyakarta: UII Press, 2009), h. 25.

regulated in Article 1868 of the Civil Code (hereinafter referred to as the Civil Code) which states that an authentic deed is a deed in the form determined by law, made by or before public officials who have the authority to do so at the place where the deed is made.

The position of a Notary as a public official, in the sense that the authority held by a Notary is never given to other officials, as long as the authority does not become the authority of other officials.⁴ In accordance with these provisions, a Notary is the only official authorized to make authentic deeds regarding all acts, agreements, and determinations required by a general regulation or by an interested party desired to be stated in an authentic deed, all as long as the making of the deed by a general regulation is not also assigned or excluded to other officials or persons.

The existence of a notary is considered very valuable and can help community life. Society needs someone whose opinion becomes a guide and whose signature provides a guarantee and strong evidence.⁵ In addition, a notary is a profession that does not side with anyone, so that it can create agreements that protect society in the future. Therefore, in order to be able to do their job well, a notary must comply with all existing and developing rules in society and must also carry out their profession by adjusting the expertise or knowledge they have and complying with the regulations contained in the Notary Law.⁶

Notaries before exercising their authority to make authentic deeds must meet the requirements to be appointed as a Notary. As per the norm in Article 3 of the Notary Law, the requirements to be appointed as a Notary are: 1). Indonesian citizen; 2). devoted to God Almighty; 3). at least 27 (twenty seven) years old; 4). physically and mentally healthy as stated in a health certificate from a doctor and psychiatrist; 5). has a law degree and a master's degree in notary; 6). has undergone an internship or has actually worked as a Notary employee for at least 24 (twenty four) consecutive months at a Notary's office; 7). does not have the status of a civil servant, state official, advocate, or is not currently

⁴ Sandra Irawan, "Kedudukan Notaris Dalam Pembuktian Suatu Perkara", *Paulus Law Journal* 4, No. 1, (2022): 35-46.

⁵ Dian Cahayani, "Kewenangan Notaris Dalam Pembuatan Akta Otentik Berdasarkan Undang-Undang Nomor 2 Tahun 2014 Tentang Jabatan Notaris", *Jurnal Pendidikan Dasar dan Sosial Humaniora* 3, No. 10, (2024): 853-860.

⁶ Adipapa Jefrianto Bondi, dkk. "Peran dan Tanggung Jawab Notaris Dalam Pelayanan Kepada Publik Sesuai Dengan Moral Etika Profesi dan Undang-Undang", *Social Sciences Research Journal* 1, No. 6, (2024): 203-207.

holding another position that is prohibited by law from being held concurrently with the position of Notary; and 8). has never been sentenced to 5 (five) years or more in prison based on a final decision.

After fulfilling the requirements to be appointed as a Notary, the Prospective Notary is obliged to take an oath/promise before the minister as described in Article 4 of the Notary's Position Law, where after taking the oath the Notary is obliged to carry out his or her position in real terms, as well as submit the office address, sample signature, and initials as well as the Notary's official seal or seal to the Minister and other agencies or officials related to the Notary's position as mandated by Article 7 of the Notary's Position Law.

Based on Article 15 paragraph (1) of the Notary Law, the authority granted to the Notary position to serve the community is regulated, that the Notary is authorized to make all authentic deeds related to acts, determinations, and agreements in the field of civil law desired by the interested party and/or required by laws and regulations as long as the making of the deed is not the authority or excluded from other officials and must be in accordance with the provisions of the Notary Law. So it can be understood that the main authority of a Notary is to make authentic deeds, in addition to which there are also other authorities regulated in Article 15 paragraph (2) of the Notary Law. In addition, the Notary must also submit to and comply with the obligations and prohibitions stipulated in the Notary Law.⁷

Notary is a job that is independent, individual work, without a superior, a job of trust and requires strong morals, because its implementation is very vulnerable to various kinds of violations⁸ As stated in the provisions of Article 17 (1) of the Notary Law, it is stated that notaries are prohibited from: 1). Carrying out office outside the area of office; 2). Leaving his/her area of office for more than 7 (seven) consecutive working days without a valid reason; 3). Concurrently as a civil servant; 4). Concurrently serving as a state official; 5). Concurrently serving as an advocate; 6). Holds concurrent positions as leader or employee of a state-owned enterprise, regional-owned enterprise or private enterprise.

⁷ Misbah Imam Subari, dan Justicia Firdaus Kurniawan, "Penggunaan Klausula Proteksi Diri Bagi Notaris Dalam Akta Partij Ditinjau Dari Undang-Undang Jabatan Notaris", *Jurnal Ilmu Kenotariatan* 4, No. 2, (2023): 144-161.

⁸ Hikmal Yusuf Argiansyah, "Proses Penyelesaian Hukum Terhadap Notaris Yang Melanggar Kode Etik Notaris", *Jurnal MLJ* 8, No. 1, (2024): 14-32.

Based on the provisions above, there is one requirement that must be fulfilled to be appointed as a Notary, and also a prohibition to be carried out when already serving as a Notary, namely holding a concurrent position as a state official. The norm in Article 3 letter g jo. Article 17 paragraph (1) letter d of the Notary Position Law clearly states that notaries are prohibited from holding a concurrent position as a state official, one of which is holding a concurrent position as a member of the legislature, either in the regions or at the center. The appointment of a Notary as a member of the legislature is interpreted as holding a concurrent position with a state official.

The Notary Law requires that a person who serves as a notary and will also serve as a state official is not allowed, therefore the Notary is required to complete his notary position first.⁹ However, Article 11 of the Notary Law regulates a different norm, explaining that a Notary who is appointed as a State Official is required to take leave, so the Notary is required to appoint a Replacement Notary.

The position of a Substitute Notary is outlined in the norm of Article 1 number 3 of the Notary Law that a person who is temporarily appointed as a notary to replace a notary who is on leave, sick, or temporarily unable to carry out his/her position as a notary. The purpose of this article is to maintain the continuation of the notary's position as long as the notary's authority is still attached to the notary who is being replaced. So that the appointed Substitute Notary will continue to carry out activities in the office of the Notary who was appointed as a member of the legislature, so that he/she remains active in serving the community. This is certainly contrary to the norm of Article 3 letter g jo. Article 17 paragraph (1) letter d of the Notary Law, that Notaries are prohibited from holding concurrent positions. Meanwhile, with the provisions in the norm of Article 11 of the Notary Law, the Notary who serves as a member of the legislature only carries out leave, while the Position and Office of the Notary continue to run under the leadership of the Substitute Notary.

The implementation of the notary's office by a Substitute Notary on the basis of a Notary's leave due to serving as a member of the legislature in the future is prone to causing legal problems in office. Acts of dual office, interference, and conflicts of interest will be very

⁹ Frendi Sabil, dan David Maruhum Lumban Tobing, "Implikasi Hukum Bagi Notaris Yang Menjadi Pejabat Negara Melebihi Batas Maksimum Waktu Cuti Notaris", *Jurnal Darma Agung* 32, No. 4, (2024): 262-268.

prone to occur, because the Substitute Notary in carrying out his office still uses the attributes of the Notary who is on leave, in this case the Notary's protocol and Notary's Office.¹⁰ So it is very possible that the public who come to meet the Substitute Notary are not because of the Substitute Notary, but because of the identity of the Notary who is on leave because of serving as a member of the legislature.

This legal problem is caused by a conflict of norms within the Notary Law, between Article 3 letter g jo. Article 17 paragraph (1) letter d with Article 11 paragraph (1) relating to the position of the Notary when the Notary holds concurrent positions as a member of the legislature, which in this case is interpreted as a state official. This conflict of norms certainly does not provide legal certainty for Notaries who wish to serve as members of the legislature. Therefore, the author formulates the problems to be studied as follows: First, whether the obligation to take leave for notaries who are appointed as members of the legislature has provided legal certainty. Second, how are the future regulations related to notaries who are appointed as members of the legislature.

The type of research used in this study is normative legal research. The approach method of this study is to analyze how the Responsibility and legal certainty of Substitute Notaries with interrelated regulations. The materials used are from primary, secondary and tertiary sources. The collection of these legal materials is carried out by identifying and inventorying positive legal rules, and examining library materials such as books, scientific journals, research reports, and other sources of legal materials that are relevant to the legal problems being studied. The legal materials that have been collected are then classified, selected and ensured not to conflict with each other, to facilitate analysis and construction. Analysis of legal materials is carried out by interpreting the law (interpretation) and legal construction methods.

II. LEGAL CERTAINTY REGARDING THE OBLIGATION TO TAKE LEAVE FOR NOTARIES APPOINTED AS LEGISLATIVE MEMBERS

Discussion Notary as a public official has the authority to make authentic deeds as written evidence.¹¹ The position of Notary is very

¹⁰ Maxwell Kurniadi, "Kompetensi Notaris Pengganti dalam Menggantikan Notaris yang Cuti Sebagai Pejabat Negara", *Unes Law Review* 6, No. 2, (2023): 4941-4952.

¹¹ Habib Adjie, *Hukum Notaris Indonesia*, Op.Cit. h.20.

important in supporting law enforcement through the implementation of his position as a public official who is authorized to make a legal product, namely an authentic deed that has perfect evidentiary power to help create legal certainty for the community.¹² Notary is a noble legal profession, therefore the Notary profession is a noble profession (*nobile officium*), called *nobile officium* because the Notary profession is so closely related to professions related to humanity.¹³

Notaries in carrying out their authority to make authentic deeds related to all civil legal acts for the benefit of the parties must also comply with the regulations contained in the Notary Law. While holding the position as a notary, they have the right to leave for urgent circumstances. This notary leave is regulated completely and clearly in Articles 25 to 32 of the Notary Law. In addition to urgent circumstances, the Notary Law also regulates leave that must be taken by notaries who are appointed as state officials, namely in Article 11 of the Notary Law.

The leave rules for notaries who are appointed as state officials are not only regulated in the Notary Law, but also in the Regulation of the Minister of Law and Human Rights Number 19 of 2019 concerning the Requirements and Procedures for the Appointment, Transfer, Dismissal, and Extension of the Term of Office of Notaries (hereinafter referred to as *Permenkumham No. 19 of 2019*). The existence of leave rules for notaries who are appointed as state officials is very beneficial for notaries because they can relinquish their position as notaries for some time while they serve as state officials, referring to the KBBI, the meaning of the word leave is to relinquish a position for some time only.¹⁴

Not only does it regulate leave procedures for notaries who are appointed as state officials, the Notary Position Law also regulates honorable dismissal for notaries who are appointed as state officials and do not take leave because they are considered to be holding dual positions as a notary and state official. Unlike the leave taken by

¹² Ade Yuliany Siahaan, dan Aida Nur Hasanah, "Peran Notaris Sebagai Pembuat Akta Otentik Dalam Proses Pembuktian di Pengadilan", *Jurnal Al Usrah* 11, No. 1, (2023): 23-37.

¹³ Habib Adjie, *Lintas Waktu Pendapat dan Pemikiran Hukum Kenotariatan Indonesia*, *Op.Cit.*, h.24.

¹⁴ Amelia Meynanda Puspitasari, dan Aan Efendi, "Perlindungan Hukum Notaris Pengganti dalam Pemeriksaan sebagai Saksi di Pengadilan Berdasarkan Rahasia Jabatan Notaris", *Jurnal Kajian Konstitusi* 2, No. 2, (2022): 124-156.

notaries who are appointed as state officials, for notaries who are dismissed because they do not take leave procedures and have held dual positions, they may not necessarily be able to become a notary again even though their term of office as a state official has ended.

Although the Notary Position Law does not regulate the reappointment of notaries who have been honorably dismissed, Article 81 paragraph (1) of the Minister of Law and Human Rights Regulation No. 19 of 2019 stipulates that notaries who resign for reasons of holding concurrent positions as civil servants, advocates, or holding other positions that are prohibited by law from being held concurrently with other positions must manually or electronically notify the regional supervisory board regarding the end of their term of office and at the same time propose another notary as the protocol holder.¹⁵

In Article 3 letter g in conjunction with Article 17 paragraph (1) letter d in conjunction with Article 17 paragraph (2) of the Notary Position Law, it is stated that notaries are not permitted to hold concurrent positions as State Officials. So when a notary is appointed as a member of the legislature, he is obliged to complete his notarial position first.

Then in Article 12 letter l in conjunction with Article 50 paragraph (1) letter 1 of Law Number 10 of 2008 concerning the General Election of Members of the People's Representative Council, Regional Representative Council, and Regional People's Representative Council (hereinafter referred to as the Legislative Election Law) that the requirements to become a participant in the election of members of the DPR, DPD, DPRD are to be willing not to practice as a Notary. The existence of this regulation emphasizes that someone who wants to become a state official is not allowed to practice as a notary. Not only when they have been appointed as a State official, but also when they are still participants in the general election of legislative members.

However, Article 11 paragraph (1) of the Notary Law stipulates that when a Notary holds a concurrent position as a State Official, he/she is required to take leave, by appointing a Substitute Notary who holds the protocol temporarily as per Article 25 paragraph (3) of the Notary Law. Therefore, when a Notary is appointed as a Member of the Legislature,

¹⁵ Syahrul Isbani Fajriansyah, "Kewenangan Majelis Pengawas Notaris Dalam Menjalankan Fungsi Pengawasan Terhadap Notaris Yang Melanggar Etika Profesi", *Jurnal Fatwa Hukum* 7, No. 1, (2024): 1-20.

he/she is required to submit a leave to the Central Supervisory Board with a leave period as long as he/she serves as a member of the legislature (5 years/Period). When submitting a leave application, the Notary is required to appoint a Substitute Notary for the duration of his/her leave period.¹⁶

A substitute notary is explained in Article 1 number 3 of the Notary Law, namely a person who is temporarily appointed as a notary to replace a notary who is on leave, sick, or temporarily unable to carry out his/her duties as a notary. The purpose of this article is to maintain the continuation of the notary's position as long as the notary's authority is still attached to the notary who is being replaced. The appointed substitute notary will continue to carry out activities in the office of the notary who was appointed as a member of the legislature, so that he/she remains active in serving the community.¹⁷

In order for a person to be appointed as a substitute notary, there are several conditions that must be met, in Article 33 paragraph (1) of the Notary Law, namely: 1). Indonesian citizen (WNI); 2). Have a Bachelor of Laws degree (undergraduate); and 3). Have worked in a notary's office for at least 24 (twenty four) consecutive months.

The function of a substitute Notary is no different in terms of authority and responsibility related to his/her function as a Notary.¹⁸ A substitute Notary only replaces a Notary while the Notary is absent, there are several parties who are authorized to appoint or inaugurate a substitute Notary based on the length of time the Notary takes leave. The criteria are: 1). Taking leave of less than 6 (six) months will be appointed by the Regional Supervisory Council (MPD), Regency / City level; 2). Taking leave for 6 (six) months to 1 (one) year will be appointed by the Regional Supervisory Council (MPW), Provincial level; and 3). Taking leave of more than one (one) year will be appointed by the Central Supervisory Council (MPP), National level.

This is in accordance with the provisions of the Regulation of the Minister of Law and Human Rights Number 16 of 2021 concerning the

¹⁶ I Made Stefanus Teguh Oprandi, dkk., "Akibat Hukum Akta yang dibuat oleh Notaris Pengganti Berdasarkan Peraturan Perundang-Undangan Jabatan Notaris", *JIHHP* 4, No. 6, (2024): 2280-2289.

¹⁷ Astra Vigo Putra, dkk. "Kedudukan Notaris Yang Mengambil Cuti Karena Diangkat Menjadi Anggota Legislatif", *Recital Review* 5, No. 1, (2023): 63-93.

¹⁸ Efendi Saputra, dan Moh. Saleh, "Tanggung Jawab Notaris Atas Tindakan Yang Dilakukan Notaris Pengganti Ditinjau Dari Undang-Undang Jabatan Notaris", *Jurnal Pendidikan dan Ilmu Sosial* 2, No. 2, (2024): 283-295.

Organizational Structure and Work Procedures, Procedures for Appointment and Dismissal, and Budget of the Notary Supervisory Board (hereinafter referred to as Permenkumham No. 16 of 2021).

The leave application submitted by the Notary will then be considered and assessed by the authorized official so that the application can be accepted or rejected by the authorized official to grant leave permission.¹⁹ Referring to the provisions of Article 28 of the Notary Law, if in urgent circumstances, the husband/wife or blood relatives in a direct line from the Notary can also submit a leave application to the Supervisory Board. The explanation of the norm of Article 28 of the Notary Law states that what is meant by urgent circumstances is in the case where a Notary does not have the opportunity to submit a leave application himself because the Notary concerned is temporarily unable to do so.

The provisions related to taking leave and appointing a substitute notary that must be carried out by a notary when appointed as a member of the legislature are contrary to the prohibition on notaries from holding concurrent positions as state officials. The problem of concurrent positions is apparent because in Article 32 paragraph (1) of the Notary Law it is explained that a notary who is on leave is required to submit a notary protocol to a substitute notary.²⁰ So that in carrying out his duties, namely making deeds, a substitute notary uses the notary's office and notary protocols belonging to the notary who is on leave or the notary he is replacing. Therefore, even though the Substitute Notary is running the office, the parties come to the notary's office to have a deed made on behalf of the Notary who is on leave due to serving as a member of the legislature.

This certainly creates a conflict of interest in office, because what the general public knows is that the one responsible for everything in the notary's office is the notary who currently serves as a member of the legislature.²¹ This provision is what creates a conflict of interest for notaries who are appointed as members of the legislature.

¹⁹ Cut Faridah, dkk. Kewenangan Majelis Pengawas Wilayah Notaris Dalam Menetapkan Notaris Pengganti, *Jurnal Meukuta Alam* 2, No. 1, (2020): 10-23.

²⁰ Krisdiana, "Kriteria Keadaan Mendesak dalam Pengaturan Hak Cuti bagi seorang Notaris", *Jurnal Impresi* 1, No.1, (2022): 1-7.

²¹ Nur Cahyaningsih, dan Akhmad Khisni, "Netralitas Notaris Sebagai Anggota Legislatif: Studi Tentang Peran Notaris Cuti Sebagai Anggota Legislatif Terhadap Notaris Pengganti Terhadap Akta-akta Yang Dibuatnya", *Jurnal Akta* 4, No. 2, (2017): 174-182.

Legal certainty is defined as a state of certainty where there is conformity between the provisions and objectives that have been determined since the formation and implementation of the law.²² Legal certainty refers to clear, permanent and consistent implementation, and its implementation cannot be influenced by subjective circumstances.²³

Lon Fuller said regarding the theory of legal certainty, that there are 8 (eight) principles, namely:²⁴

1. A legal system must contain standard rules, and must not contain or consist of decisions that are merely ad hoc.
2. The rules that have been made must be announced so that people know the norms, and can be used as a guideline for behavior.
3. There must be no retroactive rules, which will damage the integrity of the rules intended to apply in the future.
4. A rule must be formulated in a formula that can be easily understood.
5. A legal system must not contain rules that contradict each other.
6. Rules must not contain demands that exceed what can be done. This means that they must not demand behavior beyond the capabilities of the person being regulated.
7. There must be no habit of frequently changing rules, because it will cause people to lose orientation.
8. There must be a match between the regulations that are enacted and their daily implementation or enforcement in real cases.²⁵

The eight principles according to Fuller above are affirmative, meaning that the creation of laws must be adjusted to the eight principles. So that the achievement of legal certainty must meet the 8 aspects that have been explained above, one of which is that a legal rule

²² Fadhil Yazid, "Legal Certainty In the Ease Of Effort In the Era Of Industrial Revolution 4.0 Related To Notary Profession", *Nomoi Law Review* 1, No. 2, (2020): 197-215.

²³ Nuzul Shinta Nur Rahmasari, dkk. "Penggunaan Barcode pada Tanda Tangan Notaris Dilihat dari Perspektif Teori Kepastian Hukum", *Jurnal Reslaj* 6, No. 6, (2024): 2983-2997.

²⁴ Petrus Bello, "Sahkah Hukum Yang Buruk Secara Moral? Perdebatan Antara Lon Luvois Fuller Dan H.L.A. Hart", *Jurnal Honeste Vivere* 33, No. 2, (2023): 98-112.

²⁵ *Ibid.*

must not contain rules that contradict each other.²⁶ Therefore, in a regulation related to something must be in harmony and must not contradict each other, because if this happens it will certainly cause many legal problems.

The legal provisions in the Notary Law that Notaries who hold concurrent positions as legislative members (state officials) are only required to take leave in Article 11 paragraph (1) of the Notary Law are very contradictory to the prohibition on Notaries holding concurrent positions as state officials in Article 3 paragraph (1) letter g jo. Article 17 paragraph (1) letter d of the Notary Law. Because even though Notaries who are appointed as legislative members have taken leave, their notary offices continue to operate and provide services to the public, so that technically there is a dual position for the Notary's position. Of course this does not provide legal certainty, due to the conflict of norms.

III. FUTURE ARRANGEMENTS FOR NOTARIES APPOINTED AS LEGISLATIVE MEMBERS FROM THE PERSPECTIVE OF LEGAL CERTAINTY

Discussion Notary is an honorable profession given by the State based on laws and regulations. Notary itself is defined as a person who has the authority to present legal products in the form of deeds.²⁷ Notary as a Public Official (*Openbaar Ambtenaar*) is obliged to always demonstrate professionalism because Notary represents the State to carry out the duties and functions of his position in making deeds as evidence in the form of Authentic Deeds.²⁸

Notaries are required to act professionally in carrying out their duties. This is in line with the mandate in Article 16 paragraph (1) letter a of the Notary Law which expressly stipulates that notaries are required to behave in a trustworthy, honest, fair, independent, impartial/neutral manner and will maintain their attitude, behavior, and will carry out their obligations in accordance with the code of ethics. If a notary violates either the provisions of the Notary Law or the Code of Ethics, the notary concerned may be subject to sanctions in the

²⁶ Muhammad Rusydi, "Hukum dan Moral: Mengulik Ulang Perdebatan Positivisme Hukum Dan Teori Hukum Kodrat H.L.A Hart & Lon F. Fuller", *Jurnal Al Wasath* 2, No. 1, (2021): 1-7.

²⁷ Habib Adjie, *Hukum Notaris Indonesia*, *Op.Cit.* h.20.

²⁸ Wahyu Satya Wibowo, "Integritas Notaris Sebagai Pejabat Pembuat Akta Autentik dalam Undang-Undang Jabatan Notaris", *Recital Review* 4, No. 2, (2022): 323-352.

form of a written warning, temporary dismissal, honorable dismissal or dishonorable dismissal.²⁹

The legal certainty expected from the existence of this law is not limited to the existence of such regulation, but legal certainty will arise when the law enforces a norm clearly, permanently and consistently.³⁰ Clear enforcement indicates that the regulation of a norm must be stated explicitly in the law, and must not cause doubt which results in multiple interpretations in interpreting the norm. Permanent enforcement means that the law must be solid and must not be easily changed, which of course raises doubts in society about the norms regulated in the law.

Consequential implementation means that the application of norms must be in accordance with what is contained in the laws and regulations, and must not be implemented differently from what has been regulated in the law. This is an indicator of the fulfillment of legal certainty in the implementation of a law.

The leave procedure for a notary who is appointed as a State Official by appointing a replacement notary and submitting a protocol to the replacement notary is contrary to the prohibition on holding a position for a Notary. This is because the notary leave procedure is considered to be an act of holding a dual position and results in a conflict of interest in the position.

Conflict of interest in office will affect the performance of a notary and state official.³¹ For a notary who has been on leave from his position, he no longer has any authority over his office. However, his name is still written and stated as a notary in the making of the deed head. In addition, his name is still listed on the nameplate installed in front of his office. So that what the public knows is that the person concerned is still practicing as a notary. In fact, if reviewed or associated with Article 12 letter 1 of the Legislative Election Law, the requirements to become a participant in the election for members of the

²⁹ Dani Harianto, "Diskresi Majelis Kehormatan Notaris Terkait Perlindungan Profesi Notaris Dalam Perspektif Hukum Administrasi", *Jurnal Cendikia* 4, No. 3, (2024): 286-296.

³⁰ Abdul Rahmat Budiono, *Pengantar Ilmu Hukum*, (Malang: Bayumedia Publishing, 2005), h. 22.

³¹ Stevanus Lieberto, "Trias Politika Dalam Hubungannya Dengan Kemandirian Dan Ketidakberpihakan Profesi Notaris", *Indonesia Notary* 3, No. 2, (2021): 35-47.

Regional Representative Council are to be willing not to practice as a public accountant, advocate/lawyer, notary, PPAT, and not to carry out work as a provider of goods and assets related to state finances and other work that can cause a conflict of interest with the duties, authorities, and rights as a member of the DPD according to laws and regulations.

Regarding members of the Regional People's Representative Council of Regency/City or Province and Central Government in Article 50 paragraph (1) letter 1 of the Legislative Election Law, it is stated that they are willing not to practice as public accountants, advocates/lawyers, notaries, PPAT, and not to carry out work providing goods and services related to state finances and other work that can cause a conflict of interest with the duties, authority, and rights as members of the DPR, Provincial DPRD, and Regency/City DPRD in accordance with laws and regulations. The existence of this regulation emphasizes that someone who wants to become a state official is not allowed to practice as a notary. Not only when they have been appointed as State Officials, but also when they are still participants in the legislative election.³²

Conflict of interest in office will affect the performance of a notary and state official. This is proven by his name still written on the nameplate of the notary's office and is stated as a notary in the making of the deed head. So that the public knows that the person concerned is still practicing as a notary. Although a notary who has been on leave does not have any authority over his office, for a notary who is on leave and appoints a replacement notary there is a risk of holding a dual position. Because it is possible that a notary who is on leave can still influence and enter the territory of the replacement notary.

Guaranteeing the law that applies consistently and can be obeyed by the community is very important, as it is known that Indonesia adheres to the concept of a state of law as stated in the constitution which has implications for every element of community life must be regulated by law.³³ As also explained by Radbruch, there are three

³² Winda Oktavia, dkk. "Kepastian Hukum Pengawasan Majelis Pengawas Notaris Terkait Notaris Yang Melakukan Rangkap Jabatan", *Jurnal Sentri* 3, No. 1, (2024): 46-56.

³³ Totok Yanuarto, dkk., "Putusan Nihil Ditinjau melalui Perspektif Teori Kepastian Hukum", *Jurnal Preferensi Hukum* 4, No. 3, (2023): 444-453.

elements of legal ideals that must exist proportionally, namely legal certainty (*rechtssicherheit*), justice (*gerechtigkeit*) and benefit (*zweckmasigkeit*). When associated with the theory of law enforcement, it must fulfill these three principles.³⁴ So that in addition to legal certainty, the aspects of benefit and justice are also important values and must be guaranteed by a law.

The aspect of benefit that is normed in the law does not only cover its contents, but also includes its implementation. This is in line with Satjipto Rahardjo's opinion which states that the benefit of the law must be considered, where in the implementation of a law, the comparison between the benefits that will be received by the community and the sacrifices that must be made must be proportional.³⁵ So it can be seen that one of the objectives of the law is to provide the greatest possible benefit for the community. Fulfillment of the aspect of legal certainty and also the aspect of benefit will create justice that will be felt and enjoyed by the entire community, which leads to the law as a source of law that is used as a guideline in community life.³⁶

The position of Notary as referred to in the Notary Law as a profession that has a great responsibility in determining the direction of law in Indonesia, this is because it is closely related to efforts to increase legal awareness in society.³⁷ Therefore, Notaries must have high idealism in carrying out their duties and responsibilities as the obligations of Notaries as stated in Article 16 paragraph (1) of the Notary Law that Notaries must be honest, thorough, independent, impartial, and protect the interests of parties related to legal acts.³⁸ Notaries must act carefully and precisely and thoroughly in order to

³⁴ Fence M Wantu, "Antinomi Dalam Penegakan Hukum Oleh Hakim", *Jurnal Mimbar Hukum* 19, No. 3, (2007): 304-316.

³⁵ Edgar Hartanto, "Penaan Pajak Penghasilan Bagi Ahli Waris Atas Tambahan Penghasilan Yang Diperoleh Dari Warisan", *Jurnal Magister Hukum Argumentum* 6, No. 1, (2019): 1077-1085.

³⁶ David Rizky Purba, dkk., "Kepastian Hukum Akta yang dibuat dan Ditandatangani Oleh Notaris Pengganti yang Pengangkatannya Batal Demi Hukum", *Jurnal Multidisiplin Indonesia* 2, No. 2, (2023): 426-435.

³⁷ Valentine Phebe Mowoka, "Pelaksanaan Tanggung Jawab Notaris terhadap Akta yang Dibuatnya". *Jurnal Lex Et Societatis*, Vol. 2, No. 4, (2014): 54-68.

³⁸ Salim HS, *Teknik Pembuatan Akta Satu (Konsep Teoritis, Kewenangan Notaris, Bentuk, dan Minuta Akta)*, (Jakarta: Raja Grafindo, 2015), h. 33.

provide legal certainty for those appearing in carrying out their authority.³⁹

The authority of a notary has been clearly regulated in Article 15 paragraph (1) of the Notary Law that a Notary has the authority to make authentic deeds regarding all acts, agreements and determinations required by statutory regulations and/or desired by the interested party to be stated in an authentic deed, guarantee the certainty of the date of making the deed, store the deed, provide grosse, copies and extracts of the deed, all of which as long as the making of the deeds is not also assigned or excluded to other officials or other people determined by law. Based on the granting of this authority, it is clear that a notary is a profession that demands great responsibility to serve the interests of the community.⁴⁰

When a Notary is on leave because he/she is appointed as a legislative member in the same area as the notary's office, it is very easy to enter the authority of the substitute notary.⁴¹ So it is possible that the notary can influence and enter the authority of the substitute notary's performance. If this happens, then the notary who is on leave because he/she is a state official can be said to have held a dual position. In order to avoid the possibility of a conflict of interest and procedural conflict between Article 3 letter g in conjunction with Article 17 paragraph (1) letter d of the Notary Law with Article 11 paragraph (1) and Article 25 paragraph (3) and Article 32 paragraph (1) of the Notary Law, the intermediary method that can be taken by a notary who is appointed as a state official is to implement the dismissal of a notary from his/her position when the person concerned is appointed as a state official.⁴²

There are several reasons to suggest the dismissal of a notary when he/she becomes a State official. First, Article 3 letter g of the Notary

³⁹ Khafid Setiawan, dkk., "Notaris Dalam Pembuatan Akta Kontrak Yang Berlandaskan Prinsip Kehati-hatian", *Jurnal Ilmu Kenotariatan* 2, No. 2, (2021): 43-52.

⁴⁰ Ahmad Farich Sultoni, "Batas Pertanggungjawaban Notaris atas Pembuatan Akta Otentik", *Jurnal Ilmu Kenotariatan* 2, No. 1, (2021): 69-90,

⁴¹ Karnita Putri Luciana, dkk., "Kedudukan Dan Pertanggung Jawaban Hukum Notaris Pengganti Dalam Menjalankan Tugas Notaris Yang Diangkat Menjadi Pejabat Negara", *Unizar Law Review* 5, No. 1, (2022): 46-64.

⁴² Maraja Malela, *Perlindungan Hukum Terhadap Notaris Yang Telah Diberhentikan Berdasarkan Pasal 13 Undang Undang Jabatan Notaris*, *Jurnal Sapientia et Virtus*, Vol. 4., No. 2., 2019. h. 103 – 120.

Law means that the position of a notary is strictly prohibited from being held concurrently or combined with a State official. Not only for someone who has become a notary, but also applies to prospective notaries. Second, look at the rules in other professions that apply dismissal when the person concerned is appointed as a State official, such as the rules for Advocates and PPAT.

In Article 20 paragraph (3) of Law Number 18 of 2003 concerning Advocates, it is explained that an advocate who becomes a state official does not carry out the duties of the Advocate profession while holding the position. Then in Article 10 paragraph (2) of Government Regulation Number 37 of 1998 which has been amended by Government Regulation Number 24 of 2016 concerning the Regulation on the Position of Land Deed Making Officials (hereinafter referred to as PPAT) it is explained that PPAT is honorably dismissed when holding concurrent positions as a state official.

The existence of a firm decision, namely the prohibition of carrying out professional duties for Advocates and the honorable dismissal of PPAT who choose to become state officials will not result in dual positions with state officials. So that the profession concerned gets legal certainty that is true and clear. Different from the rules contained in the notary profession which provide provisions for leave procedures and submitting protocols to replacement notaries which are at risk of dual positions.

Based on the description above, notaries who choose to become state officials are better off simply applying the provisions of Article 17 paragraph (1) letter d of the Notary Law in conjunction with Article 17 paragraph (2) letter c of the Notary Law which applies honorable dismissal for notaries who become state officials. And for Article 11 paragraph (1) of the Notary Law which applies leave for notaries who become state officials, this must be removed from the Notary Law. So that the provisions for leave in other articles such as Article 25 and Article 32 of the Notary Law only apply to leave due to illness, vacation, performing the Hajj pilgrimage, and other urgent circumstances.

If the leave procedure for notaries who have been appointed as state officials has been abolished, then the dismissal procedure will apply for notaries who have been appointed as state officials by implementing the stages of dismissal as regulated in the Law on the

Position of Notaries and Permenkumham No. 19 of 2019.⁴³ So that with the enactment of Article 3 letter g in conjunction with Article 8 paragraph (1) letter e and Article 17 paragraph (1) letter d in conjunction with Article 17 paragraph (2) letter c of the Law on the Position of Notaries further strengthening that notaries are prohibited from holding concurrent positions as state officials, creating clear rules and legal certainty for notary positions.

The construction of this norm is expected to be able to provide a form of legal regulation that can achieve the values of certainty, benefit and justice. Because with clear and concrete regulations, it will not provide an opportunity for the implementer of the law to interpret other norms intended by the legislators. So that Notaries or Prospective Notaries can carry out the duties entrusted by the community to them as members of the legislature properly and also provide legal certainty for themselves. The construction provided is also expected to minimize the gap between *das sein* and *das sollen* which causes other legal problems.

IV. CONCLUSION

The legal provisions in the Notary Law that a Notary who holds concurrent positions as a member of the legislature (state official) do not provide legal certainty for the Notary. This is due to the conflict of norms in Article 11 paragraph (1) of the Notary Law which only requires Notaries to take leave when appointed as a member of the legislature, which is contrary to the prohibition on Notaries holding concurrent positions as members of the legislature in Article 3 paragraph (1) letter g in conjunction with Article 17 paragraph (1) letter d of the Notary Law. The two regulations are contradictory because even though a Notary who is appointed as a member of the legislature has taken leave, his notary office continues to operate and provide services to the public, so that technically there is a dual position for the Notary's position.

The concept of future regulations regarding the provisions of Notaries who hold concurrent positions as members of the legislature is by dismissing or dismissing a notary from his position honorably. This means that in the future, the only norm that applies to notaries who are

⁴³ Ahmad Farich Sultoni, *Batas Pertanggungjawaban Notaris atas Pembuatan Akta Otentik*, Jurnal Ilmu Kenotariatan, Vol. 2, No. 1, ((2021)), h. 69-90.

appointed as state officials is the norm that states dismissal if a notary holds concurrent positions as a state official, namely Article 3 paragraph (1) letter g in conjunction with Article 17 paragraph (1) letter d in conjunction with Article 8 paragraph (1) letter e of the Notary Position Law and eliminating the norm that regulates leave for notaries if appointed as state officials, namely Article 11 of the Notary Position Law. This regulation is intended to provide certainty and legal protection for the Notary Position, as well as maintain the moral integrity, intelligence, independence and professionalism of a Notary.

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