

STRENGTHENING THE REGULATORY CONCEPT OF NOTARY SUPERVISION BY THE FINANCIAL SERVICES AUTHORITY IN INDONESIA'S CAPITAL MARKET ACTIVITIES

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ABSTRACT

This study examines the supervision of notaries by the Financial Services Authority in Indonesia's capital market, its implementation, and proposes alternative solutions to strengthen the concept. It provides a comprehensive examination of current supervisory practices, highlighting the effectiveness and challenges of regulatory supervision. The research also proposes alternatives to strengthening the supervisory framework, potentially influencing policy improvements and enhancing governance and integrity of notarial practices.

INTRODUCTION

Activities in the financial services sector have a big role in supporting the economy of a country. If the activity system of a country's financial services sector is healthy, it will support its economic system. On the other hand, if the system of financial services activities of a country is not healthy, it will have a bad impact on the country's economy (Darmawan, 2019). Activities in the financial services sector consist of Banking, Capital Market, Insurance, Pension Funds, Financial Institutions, as well as other financial services institutions. In terms of inflexibility in the financial services sector, there are 2 types, namely Bank Financial Institutions (LKB) and Non-Bank Financial Institutions (LKBB). LKB only covers bank activities, while LKBB covers non-bank activities, including capital markets, insurance, pension funds, financing institutions and other financial institutions (Darmawan, 2019).

Of the several activities in the financial services sector, one of the important activities is the Capital Market. Capital Market is an activity related to Public Offering and Securities trading, Public Companies related to the Securities it issues, as well as institutions and professions related to Securities (Subroto, 2014). In addition, the Capital Market is a means to obtain funds from the public appropriately for companies in the form of Limited Liability Companies (PT) because idle funds can be channeled to productive businesses and also as a means of democratizing the company through the ownership of company shares that go public by some people who own capital or investors who intend to invest their capital through the ownership of shares of the company that goes public (Pramono, 2013).

Indonesia, a country with a legal positivism, has a written constitution and a hierarchy of legislation. Notaries are authorized to make deeds, which are written legal documents. The Notary profession has become essential for ensuring justice, certainty, and effectiveness in the legal process. It is also necessary in the stock exchange (capital market) to assist issuers in going public and meeting continuous disclosure requirements. The Notary profession plays a crucial role in supporting the capital market, ensuring authentic written evidence regarding circumstances, events, or legal acts.

In the case of a company that wants to go public, the company must first form an internal team, appoint an Underwriter, Supporting Profession, and Capital Market Support Institution. The underwriter will later connect the company to the capital market. As a securities underwriter, the Underwriter is obliged to prepare documents and coordinate with the company to appoint the parties

needed in the going public process, including the appointment of Supporting Institutions and Professions such as the Securities Administration Bureau (BAE), and Supporting Professions such as Public Accountants, Legal Consultants, Notaries, and Appraisers (Appraisal) (Pramono, 2013).

Companies that carry out activities in the capital market need professional services to support the capital market. The capital market support profession is an institution/company that is needed to be used as a partner of the issuer in order to hold a public offering (Darmadji & Fakhrudin, 2006). To be able to carry out their duties in the capital market, Notaries must have expertise and knowledge in the field of capital market. Therefore, the Notary must take part in training recognized by the OJK so that he gets a permit in the form of a certificate in the field of Capital Market. Furthermore, the Notary must register himself with the OJK as the executor of the task of regulating and supervising financial services activities in the Capital Market sector and comply with the provisions in the OJK Law and the Financial Services Authority Regulation Number: 67/POJK.04/2017 concerning Notaries Who Conduct Activities in the Capital Market (hereinafter referred to as POJK 67).

The role of Notaries in Capital Market activities is a supporting professional institution by order of the Capital Market Law, OJK Law and Government Regulation Number 12 of 2004 concerning Amendments to Government Regulation Number 45 of 1995 concerning the Implementation of Activities in the Capital Market Sector (hereinafter referred to as the Capital Market PP), as well as POJK 67. The rule is intended to provide a guarantee of legal certainty for business actors who are bound through business contract deeds.

Potential conflicts of interest have occurred to the Notary profession in the capital market, on the one hand they must be independent in carrying out their functions in the capital market, on the other hand they must be rewarded for professional services from their clients and are also obliged to fulfill their responsibilities as a profession. Although Notaries are obliged to comply with the code of ethics and professional standards set by their professional associations and do not contradict the UUPM and or its implementing regulations. In carrying out activities in the field of Capital Market, Notaries are obliged to provide independent opinions or assessments. The Capital Market Notary Code of Ethics is a written and unwritten regulation that underlies the behavior of notaries in carrying out their duties and authorities.

The regulation and supervision of the Capital Market in Indonesia was initially regulated by Law No. 8 of 1995. The Capital Market Supervisory Agency, BAPEPAM, is responsible for guidance, regulation, and daily supervision of market activities. However, this role is temporary. The Financial Services Authority (OJK) now takes over this role, ensuring clear duties and functions as regulators and supervisors in financial activities, particularly in the capital market. The OJK does not differentiate between core financial activities or support the capital market, ensuring efficient implementation by all parties involved. However, in practice, this has not been done and has not been accommodated in specific laws and regulations, this is the focus of the author so that the authority of the OJK is strengthened by this research. More than that, with the role of Notaries in the Capital Market, there is still an imbalance of rights and obligations with the supervision carried out by the OJK. The inequality in this case the author interprets that the obligation given by the Notary to the services provided by the OJK as a regulator and the supervisor to the notary as a capital market profession is not balanced, plus the OJK in this case is still passive so that its supervision has not run optimally, the OJK is still closed so that openness becomes a problem.

This study examines the supervision of notaries by the Financial Services Authority in Indonesia's capital market, its implementation, and proposes alternative solutions to strengthen the concept. It provides a comprehensive examination of current supervisory practices, highlighting the effectiveness and challenges of regulatory oversight. The research also proposes alternative solutions to strengthen the supervisory framework, potentially influencing policy improvements and enhancing governance and integrity of notarial practices. This study addresses both theoretical and practical aspects of legal supervision in the financial sector.

METHODS

This research is a normative juridical study focused on examining the application of rules or norms in positive law. The researcher uses a statute approach, a conceptual approach, and an analytical knife, incorporating a philosophical approach. This is due to a lack of synchronization between the applicative theories used—namely, the theory of effectiveness, the instrumental theory, and the theory of legal certainty—and the philosophical order, particularly the theory of justice as mandated in the

preamble to the Constitution, with the provisions in Indonesia's positive law regarding the research focus.

RESULTS

Supervision is any effort or activity to find out and assess the actual reality of the implementation of duties or activities, whether it is in accordance with what it should or not (Gafar et al., 2022). When talking about supervision in the capital market, of course, it cannot be separated from the law enforcement process itself. In the capital market industry, law enforcement is an important thing that cannot be avoided. Likewise, law enforcement is also not easy to do without being accompanied by effective supervision (Anwar, 2008).

The supervisory function by the OJK is carried out based on two pillars, namely supervision is based on the principle of prudence, and supervision is based on the principle of openness (disclosure) (Rahadiyan, 2013). Supervision is based on the principle of prudence to financial institutions such as insurance and pension funds because both institutions manage public funds, so prudent supervision is needed so that fund management activities can be carried out properly. The second pillar is supervision that prioritizes the principle of disclosure. Supervision as intended in practice will be carried out on the capital market industry. In more detail, supervision in the capital market sector includes several things, namely how the obligation of transparency, law enforcement and protection for investors can be carried out properly (Mamuaja, 2017).

Based on the Capital Market Law, supervision of Notaries who operate in the capital market is carried out in the following ways requiring registration for Notaries who want to carry out activities in the capital market, and conduct examinations and investigations of Notaries who are active in the capital market if an event that is suspected of being a violation occurs (Asril, 2018). Registration for Notaries who want to carry out activities in the capital market is carried out with awareness of themselves. If the Notary registers himself, in other words, the Notary is willing to comply with all the rules in the field of capital market. A notary, especially as a notary who is a supporting profession in the capital market, must always have the principle that a notary does not have clients even though the issuer itself appoints and pays for the services provided by the notary. In other words, a notary as the executor of part of the state duties or as a public servant in this case, especially the financier community, cannot name and treat the issuer in question as a client (Amalia, 2020).

The tendency of some notaries not to take issue with an agreement clause, even though according to the notary's conscience the clause is actually confusing or vague, so that it is prone to differences of opinion or disputes in the future, is another example of the notary's lack of appreciation for the principle of independence or an independent and impartial attitude that should be upheld. The author finds several models of financial services supervision in various countries that are also very diverse. According to the Inter-departmental Committee Team of the Draft Law on the Financial Services Authority in an academic paper (Tunisa, 2016):

- 1) The Multy Supervisory Model, which is the regulation and supervision of the financial services sector carried out by more than two authorities. Each financial services industry such as banking, capital market, insurance and other financial services institutions are regulated and supervised by each of the different regulators. This model is applied by several countries such as the United States and the People's Republic of China.
- 2) The Twin Peak Supervisory Model, which is the regulation and supervision of financial services carried out by two authorities whose division is based on the prudential and market conduct aspects. In this model, prudential financial institutions such as banks and insurance companies are in one separate regulatory and supervisory jurisdiction, while stock exchange companies and other financial institutions and all financial services products are in a separate regulatory and supervisory jurisdiction. This model is applied by Australia and Canada.
- 3) The Unified Supervisory Model, which is regulation and supervision by an integrated authority under one institution or body covering the entire financial services sector such as banking, capital market, insurance, and other institutions. The first to implement this model is Norway, followed by Japan, United Kingdom, Germany, South Korea and even Indonesia.

Furthermore, the supervision carried out by the OJK on financial services institutions consists of two forms, namely (Santi, 2017):

- 1) Inside supervision, which is supervision carried out by the OJK on financial services institutions by directly visiting the financial services institution concerned and then

conducting an inspection. This supervision can be carried out periodically or at an unspecified time.

- 2) Outside supervision, which is supervision carried out by receiving reports from the financial services institution concerned. These reports can be in the form of monthly, quarterly, semester and annual reports.

Of the two forms of supervision above, the implementation of supervision of the capital market supporting profession has not been carried out, whether it is with inside or outside supervision, this is shown by the OJK only present at the first time of registration as a capital market support profession, then collecting the mandatory contributions of notaries, and also the revocation of notary licenses that are problematic in the capital market. Thus, it is not said to be effective if indeed the OJK only supervises its financial institutions, but it is also important to supervise the professions that support the capital market, especially notaries.

The supervision can only be started when the notary registers. based on POJK 67, every notary who will operate in the capital market is required to apply for registration and licensing to the OJK. Notaries who have been registered with the OJK are then obliged to submit periodic reports as regulated in POJK Number 67/POJK.04/2017. During this registration period, the Organizer has been able to carry out full activities by receiving assistance from the OJK which continuously evaluates. No later than 1 (one) year after registration, the Organizer is required to submit an application to obtain a permit from the OJK.

The implementation of supervision of notaries in the capital market by the OJK is impossible to be separated from the role of the I.N.I which is a bridge for business actors (issuers) and regulators to provide best practice recommendations in the context of making regulations that are able to support industry growth. The implementation of supervision is also not without obstacles. Some of the obstacles faced today include the regulation of notaries who operate in the capital market which requires coordination across sectors/authorities. The implementation of supervision of notary activities as a supporting profession in the capital market involves several sectors. However, the current condition is that there is no centralized department (OJK notary department) to solve all problems with the role of notaries in the capital market from the OJK side, In addition, the pace of innovation that is so fast is sometimes unable to be balanced by the speed of regulators so that many problems are delayed in solving. In addition, the problem of certification in the field of capital market to notaries related to assessments in coordination with the OJK is also one of the obstacles because it cannot go hand in hand. In fact, issuer companies generally need the role of notaries to support legal documents for them.

Thus, the author is of the view that every regulation and implementation of supervision of notaries must meet the element of legal certainty so that the implementation of supervision produces effectiveness and also fairness for all parties operating in the capital market. In this paper, the researcher specifically uses 3 theories to answer the gaps that occur in the realm of regulation and the implementation of supervision of notaries by the OJK, the three theories are the first theory of legal certainty from Hans Kelsen, the second theory of legal effectiveness from Soerjono Soekanto, and the third theory of justice from Aristotle.

- 1) According to Hans Kelsen, law is a system of norms. A norm is a statement that emphasizes the aspect of "should" or *das sollen*, by including some rules about what to do. In this case, Hans Kelsen emphasized 2 aspects about legal certainty itself, namely, the rule of law and the hierarchy of legislation (Muhtadi, 2014). From Kelsen's opinion above, it is understood by the author that a rule called a norm must be of a proper nature, meaning that the norms made through laws and regulations must be a reference for the life of the nation in carrying out its activities, including in this case the OJK's supervision activities to notaries in capital market activities in Indonesia.
- 2) According to Soerjono Soekanto, a law will be implemented effectively if it meets 5 (five) factors, namely: the legal factor itself, the law enforcement factor, the facility or facility factor, the community factor, and the legal culture factor (Hutauruk et al., 2021). From Soerjono's opinion above, it is understood by the author that the supervision of notaries by the OJK must fully meet the five factors to be said to be effective or not the implementation of supervision. The law will not be effective if there is a discrepancy between the five elements of the legal system. Just like the legal machine works to move the wheel of justice, if one of the spare parts does not work, it will have an impact on the running of the machine.

- 3) According to Aristotle, legal justice can be seen from the two models created by him, namely the distributive justice model and the commutative justice model (Sembiring, 2018). Distributive justice is justice that demands that everyone gets what they are entitled to, so it is proportional (Nasution, 2017). Here, what is considered fair is if the notary gets what he is entitled to proportionally. So that distributive justice is related to the determination of rights and the fair distribution of rights in the relationship between notaries and other notaries, in the sense of what should be given by the state, in this case the OJK to its citizens, in this case notaries and issuers. On the other hand, commutative justice concerns the issue of determining fair rights among several equal human beings, both between physical and non-physical human beings (Nasution, 2017).

This commutative justice is the basis for the OJK to levy on all capital market notaries who have STTD to pay the levy. OJK in this case does not look at the condition of the notary, whether the capital market notary with STTD is active or not. In addition, OJK also does not conduct regular cross-checks on notary membership, this causes an imbalance in services for notaries who indeed have a definite and consistent partner with notaries who have just joined and do not have any relationship in the capital market. From the construction of Aristotle's concept of justice, according to the author, distributive justice can provide a sense of fairness for capital market notaries who have STTD against OJK levies. So that distributive justice is the duty of the government to its citizens, in this case the notary of the capital market who has an STTD, to determine what can be demanded by citizens in their country which is proportional (Aristoteles, 1997).

From Aristotle's opinion above, the author's opinion is the construction of justice which imposes an obligation on lawmakers to pay attention to it in formulating the concept of justice into a law and regulation that applies in Indonesia. This aims to create justice according to the proportion of each citizen. So that in making regulations, we must look at and consider distributive justice. If you look at the contribution or role of notaries supporting the capital market with other supporting professions such as public accountants, then the role of notaries is very minimal, as mentioned by the previous author, then it is unfair if notaries and accountants must be equated as capital market support professions. Considering that the accounting profession plays many roles and activities in the capital market.

Based on the above presentation, the author conveys the following proposals with the theoretical approach used, namely the theory of legal certainty, legal effectiveness and the theory of justice as follows:

- 1) Make changes to existing regulations that regulate the role of notaries in the capital market. This should include clarification of the role of notaries in capital market transactions, the requirements that must be met by notaries, and the authority of the OJK in supervising notaries. In this case, the OJK should make changes to the OJK regulation, namely POJK Number 67/POJK.04/2017 concerning Notaries Carrying Out Activities in the Capital Market with the addition of the provisions of the Chapter on Separate Supervision carried out by the OJK in order to realize legal certainty. This chapter can be inserted after the provisions regarding Chapter VII concerning Substitute Notary. This means that the Supervision of Notaries is Chapter VIII in POJK 67. The supervision chapter contains articles that regulate about:
 - A) The supervision system from notary registration, notaries operating in the capital market to the imposition of sanctions against notaries when carrying out capital market activities, is carried out in a transparent manner that can be accessed from electronic media.
 - B) Appointment of a notary by the OJK in accordance with the notary's work area as stipulated in the UUJN Article 18 Paragraph (2)
 - C) The systematic model of regulation and supervision of notaries in the OJK can be seen or adopted to the UUJN Article 67 which specifically regulates the existence of the Supervisory Council but the formation of a division or equivalent directorate by the OJK specifically to supervise notaries as a supporting profession in the capital market.
- 2) The implementation of notary supervision is currently still passive, therefore from the mandate of the article added regarding the existence of divisions or equivalent directorates by the OJK, it is hoped that the position of the OJK in supervising notaries will be more active in accordance with the concept of inside and outside supervision that has been carried out to other financial institutions. In addition, the implementation of effective supervision, especially

regarding the appointment of notaries, is due to the regulation in UUJN Article 18 paragraph (2) which states that the working area/area of the notary position covers the entire provincial area from the place of his position. This means that the notary is authorized to make a deed as long as the legal act is carried out within his work area, which covers all provinces in the place where the notary is located. This is to avoid the birth of deed defects that cause the deed to be canceled, even null and void. If such a thing is found by the OJK supervisor actively, the notary will be subject to sanctions.

- 3) Efforts to strengthen the concept of supervision by the OJK can use the Unified Supervisory Model, which means that one-stop supervision is centralized by the OJK as the sole supervisor of financial institutions to form a division or equivalent directorate in the OJK to realize justice. This division is in charge of supervising, accepting registrations, checking deeds, providing sanctions and even determining the appointment of notaries for the needs of issuers and is strengthened by the concept of inside supervision for the formed division so that supervision of notaries is carried out actively, namely direct supervision (visit) of notary offices registered in the capital market to carry out supervision and inspection. The concept of outside supervision is also still applied by this division, namely by receiving reports from notaries who are active in the capital market. One of the outside concepts is to provide periodic reports on notary activities in the capital market. With this concept of inside and outside supervision, the OJK is transparent, namely by announcing and uploading all series of notary activities in the capital market to the OJK website so that notary activities in the capital market are transparent and known to the public.

CONCLUSION

The Financial Services Authority (OJK) has introduced a separate supervision chapter to improve supervision of notaries in the capital market. However, the implementation is not effective due to the OJK's passive role. To strengthen supervision, the OJK should apply inside and external supervision. The Unified Supervisory Model could be applied to strengthen supervision, forming a division or directorate that focuses on supervision of notaries as a supporting profession in the capital market. This division can appoint notaries needed by issuers, contributing to the national economy, creating job opportunities, and improving the investment climate. Future research could explore its practical implications.

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