

The Legal Protection for The Use of A Notary's Right of Refusal in Investigations

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Abstract. *One of the responsibilities of a notary in carrying out his position in accordance with his obligations and promises of office is to keep everything about the deed he makes confidential. This writing, thus, aims to find out and analyze the procedures for using the rights and obligations of refusal by notaries in investigative examinations and the forms of legal protection for notaries who are examined in the criminal justice process. This research employed normative legal research methods emphasizing document study or library research. A normative juridical approach was carried out by reviewing and studying library materials in the form of statutory regulations relating to the problem under study. The notary's right of refusal applies relatively in the sense that if there are more specific rules that invalidate the right of refusal, the notary cannot exercise his right of refusal. The form of legal protection for notaries who are examined in the criminal justice process is contained in the UUJN (Act on Notary Position), in Article 66, stating that in carrying out a summons, law enforcement officials must request permission from the Notary Honorary Council. Legal protection, according to the Notary Honorary Council, is to supervise and inspect notaries so that they continue to walk the right path in accordance with the law; when a notary is summoned in a criminal case, the Notary Honorary Council has the authority to allow it to be examined or not.*

Keywords: *Legal; Notary; Protection; Refusal; Right.*

1. INTRODUCTION

For the sake of creating a democratic life, protecting human rights, and realizing equitable prosperity, it is necessary to establish a rule of law. Law is a set of rules enforced to regulate relationships between individuals and between individuals and their society. The principle of the state of law itself is to guarantee legal certainty, order, and protection, which has truth and justice as its core. According to Sudikno

Mertokusumo, in law enforcement, three elements must generally be considered, i.e., legal certainty (*rechtssicherheit*), expediency (*zweckmassigkeit*), and justice (*gerechtigkeit*).¹

The Indonesian state as a state of law based on Pancasila and the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) guarantees legal certainty, order, and protection. Guarantees of legal certainty, order, and protection in society require the existence of writing as a form of deeds, agreements, and legal provisions that have the strongest and fullest evidentiary power.²

For that reason, society needs someone whose information is reliable and trustworthy, whose signature and seal (stamp) provide guarantees and strong evidence, i.e., an impartial expert and advisor who has no defects (*onkreukbaar* or unimpeachable), who keeps his mouth shut and make an agreement that can protect it in the days to come.³ In this case, the official in question is a notary.

Under Act Number 2 of 2014 concerning Amendments to Act Number 30 of 2004 concerning the Position of Notaries (hereinafter referred to as UUJN-P), a notary is a Public Official who is authorized to make authentic deeds and has other authorities as intended in this law or under any other law. Articles 1870 and 1871 of the Civil Code state that an authentic deed is a perfect means of proof for both parties and the heirs.

A notary functions as a person who has a professional position and at the same time as a Public Official who is responsible for the authentic deeds he makes, in the form of deeds he makes, and other tasks assigned to him based on statutory regulations, such as making auction minutes. The rights, obligations, and responsibilities of a notary are regulated and protected by values, legal norms, and ethical norms. The consequence of a notary as a Public Official is the obligation to adhere to the general principles of good administration, which include legal certainty, orderly state administration, public interest, openness, professionalism, proportionality, and accountability.⁴

One of the responsibilities that must be fulfilled by a notary in carrying out his position in accordance with his obligations and promises of office is to keep everything regarding the deeds he makes confidential. This is as stated in the notary's oath of office as regulated in Article 4 section (2) of Act Number 30 of 2004 concerning the Office of Notaries (hereinafter referred to as UUJN).⁵ In line with this oath of office, the obligation to keep confidentiality is also stipulated in Article 16 section (1), point f, UUJN-P, which states that a notary is obliged to keep confidential everything regarding the deed he makes, and all information obtained to make the deed in accordance with his oath/promise of office, unless the law determines otherwise. This obligation

¹ Ni Luh Putu Sri Purnama Dewi, dkk, 2018, "Hak Ingkar Notaris sebagai Wujud Perlindungan Hukum", *Jurnal Acta Comitatus*, Vol. 1 No. 1, p.146

² Dekky Septio Pramanda, dkk, 2023, "Perlindungan Hukum terhadap Notaris Terkait Kewajiban Notaris untuk Merahasiakan Isi Akta dalam Proses Pemeriksaan di Tahap Penyidikan", *Tanjungpura Acta Borneo Journal*, Vol. 1 No. 2, p.113

³ Tan Thong Kie, 2011, *Serba Serbi Praktek Notaris*, Ichtiar Baru Van Hoeve, Jakarta, p.449

⁴ Oemar Moechtar, 2017, *Dasar-Dasar Teknik Pembuatan Akta*, Airlangga University Press, Surabaya, p.9

⁵ Anandiaz Raditya Priandhana, 2021, "Perlindungan Hukum terhadap Notaris dalam Proses Penyidikan (Studi Putusan Mahkamah Konstitusi Nomor 16/PUU-XVIII/2020)", *Jurnal Indonesian Notary*, Vol. 3 No. 12, p. 732

ensures that a notary does not tell or reveal anything regarding the deed he has made, not only from the general public but also from anyone and under any circumstances, unless otherwise provided by law. Consequently, a notary is given a special right called the right of refusal.

The notary's right of refusal then becomes a matter of debate when there is a judicial process that requires the involvement of a notary to be questioned as a witness. This is because, as a notary, he must uphold his oath of office and comply with the provisions in Article 16 section (1) of UUJN-P to keep everything and information related to his deed confidential. On the other hand, a notary is also seen as an Indonesian citizen who must fulfill his obligations as a witness so that he is not said to have committed a criminal act with a criminal threat as regulated in Article 224 of the Criminal Code.

When a notary performs an action outside or exceeds his authority, whether intentionally or unintentionally, due to his negligence, this action will be considered an unlawful act.⁶ In order to prove whether a notary is involved in a criminal act, an investigation process must be carried out by the authorized party. According to Article 66 section (1) of UUJN-P, summoning a notary for the investigation process who is suspected of committing a criminal act must obtain prior approval from the Notary Honorary Council. The procedure for obtaining approval from the Notary Honorary Council is that the investigator must provide a letter of application to the Notary Honorary Council to carry out the investigation process against the notary who is suspected of committing a criminal act.

2. RESEARCH METHODS

This research used normative legal research methods emphasizing document study or library research.⁷ A normative juridical approach was performed by reviewing and studying literature materials in the form of statutory regulations related to the problems under study.⁸ Accordingly, this research focused more on the use of secondary data. The secondary data in question was a source of research data obtained indirectly through a literature study. This data came from research results in the form of journal articles, books, and archives that are not published or that have been generally published.⁹

3. RESULT AND DISCUSSION

3.1. Procedures for Using the Rights and Obligations of Refusal by Notaries in Investigations

The notary has an obligation to produce evidence in the form of an authentic deed, which contains the wishes of the parties appearing before the notary. The notary only determines the intentions/desires of the parties regarding a legal act, and the notary puts it in written form.

⁶ Santia Dewi, 2015, *Panduan dan Praktik Notaris*, Pustaka Yustisia, Yogyakarta, p.12

⁷ Peter Mahmud Marzuki, 2016, *Penelitian Hukum*, Edisi Revisi, Cetakan ke 12, Prenadamedia Group, Jakarta, p. 55.

⁸ Amiruddin dan Zainal Asikin, 2010, *Pengantar Metode Penelitian Hukum*, Rajawali Pers, Jakarta, p. 118.

⁹ Bahder Johan Nasution, 2008, *Metode Penelitian Ilmu Hukum*, Mandar Maju, Bandung, p. 87

Based on this, it can be said that the position of notary itself is a position of trust. Thus, to protect public trust and interests, the notary should keep confidential all legal acts outlined in the contents of the deed and all information provided to the notary in making the deed.

The notary is truly responsible for the deed he or she makes if a dispute arises in the future over the deed made before the notary. The responsibility of a notary in criminal cases, especially in the process of proving at trial, can be called upon when problems arise, thereby requiring the notary to provide information and testimony relating to the formal and material aspects of the contents of the deed.

Further, a notary is obliged to be responsible for the authenticity of the deed he makes. However, in the process of examining criminal cases, summoning a notary is not as easy as summoning ordinary people, and this is very different. Article 66 UUJN regulates the procedure for summoning a notary by an investigator and prosecutor, who must ask permission from the Notary Honorary Council. This is because this article provides legal protection as a Public Official without strong initial evidence that the deed is an indication of a criminal act and/or there is an allegation that a notary is involved or has participated in committing a criminal act related to the deed he made.¹⁰

Before carrying out his duties and position, a notary as a Public Official is obliged to take an oath/promise as stated in Article 4 Section (2) of UUJN-P, which reads:

"I swear/promise that I will obey and be loyal to Indonesia, Pancasila, the 1945 Constitution of the Republic of Indonesia, Act on Notary Positions, and other laws and regulations. I will carry out my position in a trustworthy, honest, thorough, independent, and impartial manner. I will maintain my attitude and behavior and carry out my obligations in accordance with the professional code of ethics, honor, dignity, and responsibility as a notary. I will keep the contents of deeds and information obtained in the performance of my office confidential. To be appointed to this position, either directly or indirectly, under any name or pretext, I have never and will not give or promise anything to anyone."

Provisions regarding the obligation to keep confidentiality are also regulated in Article 16 section (1), point f, which stipulates that:

"Keep confidential everything regarding the deed he or she makes and all information obtained to make the deed in accordance with the oath/promise of office unless the law stipulates otherwise."

Other statutory regulations, which also regulate the obligation to keep confidentiality, can be seen in the following provisions:

1. Article 170 section (1) of the Criminal Procedure Code reads: Those who, because of their work, dignity, or position, are required to keep secrets can ask to be released from the obligation to provide information as witnesses, namely about matters entrusted to them.
2. Article 1909 of the Civil Code and Article 146 *Herziene Indonesich Reglement* (HIR) section (3) read: Anyone who, because of his or her position, job, or position, is

¹⁰ Tulus Pujiono, 2006, "Penerapan UUPA Belum Optimal", *Majalah Renvoi*, No. 7.43.IV Edisi 3, p.25

required by law to keep something confidential, but only regarding matters entrusted to him because of his position, job, and position.

3. Act Number 5 of 1986, amended by Act Number 9 of 2004, amended again by Act Number 51 of 2009, in Article 89, section (1), point b, reads, "Every person who because of his dignity, work, or position is obliged to keep confidential everything related to that dignity or position."

Departing from the statutory provisions mentioned above, it can also be interpreted that there is a recognition of the position of a notary that, in fact, the notary has an obligation not to speak or, more precisely, not to provide information regarding information obtained by him because of his position, except to certain parties who are permitted or ordered by law.

A notary who is involved as a witness in a case, whether a civil or a criminal case, must obtain approval from the Notary Honorary Council. Based on the provisions of Article 66 Section 1 of UUJN, it is explained that for the judicial process, investigators, public prosecutors, or judges, with the approval of the Notary Honorary Council, have the authority to take photocopies of the minutes of the deed and/or letters attached to the minutes of the deed or notary protocol in the notary's custody and summon notary to attend examinations relating to notarial deeds or protocols that are in the notary's custody.¹¹

The emergence of this provision is intended for the benefit of the judicial process, so investigators must first obtain approval from the Notary Honorary Council. This denotes that there is confidentiality and that it is not easy to take a photocopy of the minutes of the deed and/or letters attached to the minutes of the deed or notary's protocol in the notary's custody and summon the notary to attend an examination relating to the deed he made on the notary's protocol, which is located in the notary's custody.

Article 26 of the Minister of Law and Human Rights Regulation Number 7 of 2016 concerning the Notary Honorary Council elucidates that taking minutes of deeds and/or notarial letters in the notary's custody is carried out in the event that:

1. There are allegations of criminal acts related to the minutes of the deed and/or letters attached to the minutes of the deed or notary protocol in the notary's custody.
2. The right to sue has not yet expired based on the provisions regarding expiration in the laws and regulations in the field of criminal law.
3. There is a denial of the validity of the signature of one or more parties.
4. There are allegations of reductions or additions to the minutes of the deed.
5. There are allegations that the notary has postponed the date (*antidatum*).

Article 20 states that the authority of the Regional Notary Honorary Council based on the decision of the Regional Notary Honorary Council meeting includes:

¹¹ Erdi, dkk, 2020, "Perlindungan Hukum Terhadap Notaris Dalam Melaksanakan Hak Dan Kewajiban Ingkar Notaris Pada Saat Penyidikan Kepolisian Negara Republik Indonesia", *Delegalata: Jurnal Ilmu Hukum*, Vol. 5 No. 2, p.14

1. Examination of notaries whose approval is requested from the Regional Notary Honorary Council by investigators, prosecutors, or judges
2. Providing approval or rejection of requests for approval to take photocopies of deed minutes and/or letters attached to deed minutes or notary protocols in the notary's custody
3. Providing approval or rejection of requests for approval to summon a notary to attend investigations, prosecutions, and judicial processes relating to notarial deeds or protocols that are in the notary's custody

Moreover, Article 21 section (1) explains that when examining a notary, the Chair of the Regional Notary Honorary Council forms an examination panel consisting of three people, consisting of every member of the Regional Notary Honorary Council. In Article 21 section (2), it is stated that the examination panel, as intended, consists of one chair who is also a member and two members. Article 21, Section (3) further elucidates that in carrying out an examination, the examining panel is assisted by a secretary.

The panel of examiners, as referred to, has the authority to examine and give approval or rejection to requests from investigators, public prosecutors, or judges regarding the taking of photocopies of minutes of deeds and letters attached to minutes of deeds and/or notary protocols in notary storage and summoning notaries (Article 21 Paragraph (5)). Each examination result of the panel of examiners, as intended, is reported to the Chair of the Regional Notary Honorary Council. The Chair of the Regional Notary Honorary Council is required to send a report every month to the Chair of the Central Notary Honorary Council (Article 21 Paragraph (6)).

The conditions and procedures for summoning a notary are regulated in Article 27 of the Minister of Law and Human Rights Regulation Number 7 of 2016 concerning the Notary Honorary Council, where the granting of approval to investigators, public prosecutors, or judges for the judicial process in summoning a notary is carried out in the event that:

1. There are allegations of criminal acts related to minutes of deeds and/or notarial letters in the notary's custody.
2. The right to sue has not yet expired based on the provisions regarding expiration in the laws and regulations in the field of criminal law.
3. There is a denial of the validity of the signature of one or more parties.
4. There are allegations of reductions or additions to the minutes of the deed.
5. There are allegations that the notary has postponed the date (*antidatum*).

The notary cannot be blamed regarding the information/testimony he gives regarding the deed he made before the investigator during the investigation process because it is in the interests of the ongoing legal process and supports the disclosure of the truth of the criminal case.

A notary can exercise the right of refusal against the criminal justice process if it aligns with the notary's obligations in carrying out his or her position as regulated in Article 16 section (1) and Article 54 UUJN-P. The notary concerned can notify the contents of

the deed to parties who have no interest in the deed he has made, provided that he does not deviate from applicable law.

The notary's statement is not only limited to what is stated in the deed he executed but also covers all the facts related to the deed. Regarding the notary's oath of office, under Article 66 UUJN, the Notary Honorary Council approves the examination of the notary so that his action of disclosing the contents of the deed is not a violation of the law because the law has ordered it. If a notary discloses the contents of a deed before a court of law at the request of a law enforcer (judge), the notary cannot be held criminally liable on the grounds that he has disclosed something that should be kept confidential regarding the contents of the deed which he executed by another party. Thus, referring to this, the right of recusal for investigative purposes in the context of the criminal law enforcement process and the public interest cannot be used by notaries because the law provides legal protection when notaries encounter law enforcement officials related to the investigation process.

Additionally, when a deed executed by or in the presence of a notary has indications of a criminal act, the notary must release or ignore the obligation to keep confidentiality regarding the contents of the deed because it is in the public or state interest, as well as assisting the legal process. Referring to Article 16 section (1), point e, and Article 54 UUJN, office confidentiality can be waived if one's job, whether current or previous, is punishable by a maximum imprisonment of nine months or a maximum fine of nine thousand rupiahs. Higher interests that require a notary to provide testimony or information so that the notary is released from his or her oath of office are in accordance with applicable laws and regulations.

The notary's oath of office and the notary's code of ethics both contain the notary's office confidentiality. In a position of trust, a notary is obliged to safeguard the secrets entrusted to him by the person who uses the notary's services. Office confidentiality is not only an ethical provision but also a legal principle provided by the *Verschoningsrecht*. In Article 170 of the Criminal Procedure Code, it is stated that:

"Notaries, because of their position, dignity, and work, are obliged to keep secrets and are exempt from testifying."

Sanctions against a notary who discloses his office confidentiality by ignoring the right of refusal attached to him may be subject to sanctions:

1. Criminal Sanctions

This sanction is given if the notary violates Article 322 section (1) of the Criminal Code, which carries a maximum prison sentence of nine months or a maximum fine of IDR 9,000.-.

2. Civil Sanctions

This sanction is given if the notary violates Article 1365 of the Civil Code as an unlawful act with the sanction of a lawsuit for compensation.

3. Administrative Sanctions

This sanction is regulated in Article 54 UUJN, which can be subject to sanctions in the form of a written warning, temporary dismissal, honorable dismissal, or dishonorable dismissal.

4. Notary's Code of Ethics Sanctions

Chapter IV Article 6 concerning Sanctions states that what will be imposed for violations of the code of ethics includes a notice, warning, suspension (temporary dismissal) from association membership, *onzetting* (dismissal) from association membership, and dishonorable dismissal from association membership.

The notary's right of refusal is relative in the sense that if there are more specific rules that invalidate the right of refusal, the notary cannot exercise his right of refusal. However, suppose no statutory regulations are found that specifically do not limit the use of the right of refusal. In that case, the notary is obliged to use his right of refusal, which has been explicitly regulated in the notary's oath of office in Article 4 section (2) UUJN. It needs to be emphasized that the position of a notary is a position of trust.

3.2. Form of legal protection for notaries according to Act Number 2 of 2014 concerning Amendments to Act Number 30 of 2004 concerning Notary Positions

UUJN recognizes the existence of notaries who act as Public Officials who need to receive legal protection in carrying out all their official duties, namely notaries in positions and not notaries as individuals. Legal protection of notary rights is the result of the transformation of interests carried out through the legislative process in protecting lawmakers or parliament so that notary rights must be respected, protected, and obeyed.

UUJN has regulated the form of legal protection that can be provided to notaries who carry out their duties as Public Officials. This is reflected or written in Article 66 section (1) UUJN regarding taking minutes of deeds and summoning notaries, which states:

"For the judicial process, investigators, public prosecutors, or judges with the approval of the Notary Honorary Council have the authority to:

- a) Take a photocopy of the minutes of the deed and/or letters attached to the minutes of the deed or notary protocol in the notary's custody and
- b) Summon the notary to attend an examination relating to the notarial deed or protocol, which is in the notary's custody."

3.3. Form of legal protection for notaries according to the Notary Honorary Council

The Panel of Judges of the Constitutional Court, with Constitutional Court Decision Number 49/PUU-X/2012 dated May 28, 2013, has granted a judicial review of the provisions of Article 66 section (1) UUJN requested by Kant Kamal. The ruling essentially states that the phrase "with the approval of the Regional Supervisory Council" does not have binding legal force because it is contrary to the 1945 Constitution of the Republic of Indonesia. Thus, the examination of legal processes involving notaries no longer requires the approval of the Regional Supervisory Council (hereinafter referred to as the MPD).

This is done with the aim of maintaining the nobility and dignity of the notary institution at the legal level so that there is no arbitrariness on the part of investigators in summoning notaries to be questioned in the judicial process. With the existence of the Notary Honorary Council, it is expected that it can provide optimal legal contributions for notary institutions in carrying out their duties as legal protection institutions. Regarding the regulation regarding the position and form of legal protection of the Notary Honorary Council, in fact, it has not been explicitly regulated in the UUJN-P or other forms of statutory regulations.¹²

The position of the Notary Honorary Council in providing legal protection for notaries is an independent institution because, in this case, its existence is not a sub-section of the government that appointed it. In exercising its authority to issue a decision, the Notary Honorary Council is not influenced by other parties or institutions so that their decisions cannot be contested. Therefore, the Notary Honorary Council only has the role of protecting the notary profession, not the notary's personality. Thus, when a notary commits or is suspected of committing a criminal act that is not related to the duties of the notary position, investigators do not need to ask for approval from the Notary Honorary Council to examine it. In this case, the absolute authority of the Notary Honorary Council is only limited to the profession of a notary carrying out his or her position, whether the notary has fulfilled his or her functions and duties according to the applicable laws and regulations.

The legal protection given to notaries (positions) is regulated in Article 66 UUJN-P. Article 66 of the UUJNP stipulates the formation of a Notary Honorary Council consisting of representatives of notaries, the government, and academics, which functions as a legal protection institution for notary positions related to deeds made by or before them.¹³

4.CONCLUSION

The notary's right of refusal is relative in the sense that if there are more specific rules that invalidate the right of refusal, the notary cannot exercise his right of refusal. However, suppose no statutory regulations are found that specifically do not limit the use of the right of refusal. In that case, the notary is obliged to use his right of refusal, which has been explicitly regulated in the notary's oath of office in Article 4 section (2) UUJN. The form of legal protection for notaries who are examined in the criminal justice process is contained in the legal protection according to the UUJN, which is in Article 66, that law enforcement officers must request permission from the Notary Honorary Council when summoning them. Legal protection, according to the Notary Honorary Council, is to supervise and inspect notaries so that they continue to walk on the right path in accordance with the law; when a notary is summoned in a criminal case, the Notary Honorary Council has the authority to allow an examination or not.

¹² Martalena, 2020, "Urgensi Perlindungan Hukum terhadap Notaris Oleh Majelis Kehormatan Notaris (MKN) dalam Dugaan Tindak Pidana yang Dilakukan Oleh Notaris Pada Tingkat Penyidikan", *Jurnal Swara Justisia*, Vol. 4 No. 2, p.164

¹³ Irene Dwi Enggarwati, 2015, "Pertanggungjawaban Pidana Dan Perlindungan Hukum Bagi Notaris Yang Diperiksa Oleh Penyidik Dalam Tindak Pidana Keterangan Palsu Pada Akta Otentik". *Jurnal Mahasiswa Fakultas Hukum Brawijaya*, Vol. 1 No. 1, p.16

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