

The Juridical Analysis of the Implementation of the Notary's Recusal Rights in Maintaining the Confidentiality of the Contents of the Deed

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Abstract. *This research aims to analyze: 1) The application of the notary's right of recusal in maintaining the confidentiality of the contents of the deed he or she has made as regulated in the UJUN is not absolute, considering that it is still possible if other laws order it. Thus, the Notary cannot use his Right of Rejection if the deed he makes is related to Corruption Crimes (Law Number 31 of 1999 which has been amended by Law Number 20 of 2001 concerning the Eradication of Corruption Crimes) and Tax Violations (Law Number 14 of 2002 concerning the Tax Court). The use of the Right of Refusal when a Notary is a witness in a court trial is not immediate, meaning it takes effect immediately. But if the notary wants to use his right of refusal, he is obliged to come and fulfill the summons and must make a letter of request to the judge who is hearing/examining the case, that the notary will use his right of refusal. Upon the Notary's request, the Judge examining the case in question will determine whether to grant or reject the Notary's request. 2) The legal consequences for a notary who discloses the confidentiality of the contents of the deed he or she has made may result in sanctions, namely criminal threats, civil threats and sanctions according to the Law on Notary Positions ranging from a reprimand to dishonorable dismissal . However, notaries will be given legal protection for Notaries who reveal the contents of the deed, namely Notaries who reveal the contents of the deed with the approval of the interested parties to maintain public trust in the Notary profession and/or Notaries who, because of their position, are asked to explain the contents of the Deed they have made before the court, automatically the Notary receives legal protection as a witness and is free from all charges.*

Keywords: Notary; Rejection; Right.

1. Introduction

The development of legal science and the need for law in society is increasing form of agreement applied. The agreement is increasingly developing along with the development of the times, to obtain certainty and legal protection, the community pours the agreement into an authentic deed. Article 1868 of the Civil Code requires that a deed have the power of authentic evidence, it must be made by an authorized Public Official. So not everyone can or may make an authentic deed, but only public officials who are authorized by law to make authentic deeds.¹ A notary is an official who is tasked with making authentic deeds. The purpose of making written agreements before or made by a notary is so that the deed becomes an authentic deed that can be used as strong evidence if at some point there is a dispute between the parties or there is a lawsuit from another party.²

The journey of notaries in Indonesia has developed in accordance with the development of the State and nation of Indonesia. Contemporary Indonesian history records that in the reform era there was a significant change in the notary institution. This change was marked by the success of the Reform order government in enacting Law Number 30 of 2004 concerning the Position of Notary (UUJN), which was later updated by Law Number 2 of 2014.³

A notary is a public official who is authorized to make authentic deeds and other authorities as referred to in Law Number 2 of 2014 concerning the amendment to Law Number 30 of 2004 concerning the Position of Notary. In its explanation, it is stated that a notary is a public official who is authorized to make authentic deeds as long as the making of certain authentic deeds is not specifically for other public officials. The need for written agreements to be made before a notary is to ensure legal certainty and to fulfill strong evidentiary laws for the parties to the agreement.⁴

The instrument for denial for a Notary is confirmed as one of the obligations of a Notary formulated in Article 16 paragraph (1) letter e UUJN and letter f UUJNP, that a Notary is obliged to keep confidential everything regarding the deeds he has made and all information obtained for the purpose of making the deed in accordance with the oath/promise of office, unless the law determines otherwise. This obligation to deny must be carried out and carried out by the

¹Maslikan, Sukarmi, Notary's Authority in Making Authentic Deeds Related to Cooperation Contracts, *Jurnal Akta*, Volume 5 Number 2 March 2018, p.15

²Kunni Afifah, 2017, Responsibilities and Legal Protection for Notaries in Civil Law Regarding the Deeds They Make, *Lex Renaissance Journal*, Number 1 Volume 2, p.150

³Rita Permasari, Akhmad Khisni, 2018, Legal Immunity for Notaries Who Reveal Secrets, Position, *Journal of Deeds*, Volume 5 Number 2, p.26

⁴Abdul Jalal, Suwitno, Sri Endah Wahyuningsih, 2018, Involvement of Notary Officials in Unlawful Acts and Participation in Criminal Acts in Document Forgery, *Jurnal Akta*, Volume 5 Number 1, p.228

Notary. It can be carried out with limitations as long as the Notary is examined by any agency that seeks to request a statement or information from the Notary relating to the deed that has or has been made by or before the notary concerned.⁵In accordance with the provisions of Article 54 of the UUJN which states that "Notaries can only provide, show or notify the contents of the deed, Grosse Deed, Copy of the deed and extract of the deed to persons who have a direct interest in the deed, heirs or persons who have rights, unless otherwise determined by statutory regulations."

Requests to request information from a Notary regarding a report, according to Article 66 of the UUJN, a Notary who will be summoned by the Police, Prosecutor's Office or Judge, then the agency is required to request approval from the Notary Honorary Council (MKN).⁶As stated in Article 322 of the Criminal Code on disclosing secrets, against people who commit violations of leaking secrets while because of their position they are required to keep them secret, then the person can be subject to criminal sanctions in prison or a fine. Some notaries may not fully understand or apply the right of denial carefully, which can result in potential violations of privacy and information security of parties involved in legal transactions.

2. Research Methods

The approach method in this study is the statute approach. This type of research is included in the scope of normative legal research. The type and source of data in this study are secondary data obtained from literature studies. The analysis in this study is prescriptive.

3. Results and Discussion

3.1. Implementation of the Notary's Right to Refute in Maintaining the Confidentiality of the Contents of the Deeds He Makes

It has become a principle of public law that a public official, before carrying out his office legitimately, must first take an oath. As long as this has not been done, then the office may not or cannot be carried out legitimately.⁷Notaries must keep confidential matters related to their position. Notaries are obliged to keep confidential the contents of their deeds, even Notaries are obliged to keep confidential all information starting from the preparation of the deed until the completion of the making of a deed. If they are made witnesses in a case, they can use their right to withdraw as witnesses.⁸

⁵Habib Adjie, 2009, Indonesian Notary Law (Thematic Interpretation of Law Number 30 of 2004 Concerning the Position of Notary, Refika Aditama, Bandung. p. 89

⁶Ibid.,, p.24.

⁷GHS Lumban Tobing, 1996, Notary Regulations, Erlangga, Jakarta, p. 55.

⁸Ida Ayu, 2022, The Use of Notary's Right of Refusal Related to the Obligation to Implement Official Secrecy, *Justicia Sains: Journal of Legal Studies*, Volume 06 Number 02, p.312

Based on Criminal Procedure Law, Civil Law and Criminal Law are regulated in Article 170 paragraph (1) of the Criminal Procedure Code, Article 1909 paragraph (2) of the Civil Code and Article 322 paragraph (1) of the Criminal Code. A Notary is often asked to testify in cases such as forgery which is a criminal act. In legal science, the act of forgery is divided into 2 things, namely:⁹

1. Forgery of material law, such as signatures or writings in a Notarial deed being forged after the deed has been made by the Notary.
2. Intellectual legal forgery, such as information contained in a notarial deed is incorrect information.

In accordance with Article 186 of the Criminal Procedure Code which states that expert testimony is what an expert states in court. The explanation of the article explains that this expert testimony can be given at the time of examination by investigators or public prosecutors which is stated in a form of report and made by binding an oath at the time a notary receives a position or job. Everyone according to criminal procedure law can be appointed as an expert witness, namely having knowledge and experience of the matter.¹⁰If a notary reveals the secret of the position entrusted to him, then he is threatened with a criminal penalty based on Article 322 of the Criminal Code which states "Anyone who intentionally reveals a secret that he is required to keep because of his position or profession, whether which is now, or previously, threatened with a maximum imprisonment of 9 (nine) months or a maximum fine of Rp. 600,- (six hundred rupiah)."¹¹

The obligation of a Notary to keep his deeds confidential according to the provisions that have been discussed can be set aside for certain reasons. The Right to Refute can be set aside if there is a higher interest demanding the disclosure of official secrets and there are exceptional provisions that exclude or set aside the application of official secrets provisions and violate the existence of the Right to Refute, namely Article 66 paragraph (1) letters a and b UUJN which states that for the interests of the judicial process, Investigators, Public Prosecutors, or Judges with the approval of the Notary Honorary Council have the authority to:

1. 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 storage.
2. Summoning a Notary to attend an examination relating to a deed he has made or a Notarial Protocol which is in the Notary's custody.

Notaries as public officials who have official secrets who are required to maintain and defend in accordance with the law and in accordance with the absolute

⁹Alfi Afandi, 2004, *Inheritance Law, Family Law, Evidence Law*, Rineka Cipta, Jakarta, p. 200.

¹⁰Djoko Prakoso, 1988, *Evidence and Probative Power in Criminal Processes*, Liberty, Yogyakarta, p. 82.

¹¹Dian Pramesti Stia, 2008, *The Role of Notaries in the Judicial Process in Relation to the Obligation to Maintain Official Confidentiality in the City of Surakarta*, Thesis, pp. 75-76.

oath/promise of office to keep the deeds and information obtained in making the deeds confidential, with the existence of this article of the law their position becomes weak. However, if a notary is asked to reveal official secrets for the benefit of the judicial process, investigators, public prosecutors or judges who are authorized to take photocopies of deeds and/or letters attached to the minutes of the deed and the notary must be present at the examination related to the deeds he made or the notary protocol, then the notary based on Article 170 of the Criminal Procedure Code in conjunction with Article 54 UUJN in conjunction with Article 16 Paragraph (1) letter e UUJN, has the right to submit an application to the judge to be released from the obligation as a witness to reveal official secrets, namely regarding all matters entrusted to him because of the work, dignity or position of a notary which requires him to keep secrets, where the judge will make a decision, whether to approve or reject the application, it is very dependent on the considerations of the judge's decision.¹²

The term right of denial is a translation of *verschonningsrecht*, which means the right to be exempted from providing testimony as a witness in a civil or criminal case. This right is an exception to the general principle that everyone who is called as a witness is required to provide that testimony. The right of denial is a form of legal protection for notaries by law in order to provide testimony in court. The right of denial is the right to refuse to provide testimony in court. The refusal is not limited to the matters stated in the deed he made, but all the facts related to the deed. This right is not only limited to that right, but is an obligation not to speak.¹³

Notaries, as a legal instrument, have the right to disapprove as officials professional public must uphold their oath of office not to reveal the contents of their deeds, on the other hand notaries must stand in the interests of the state which refers to the public interest in order to complete the legal process in court so as to produce a just, beneficial decision and guarantee legal certainty, as regulated in the last sentence of Article 16 paragraph (1) letter f UUJN-P, that unless the law determines otherwise, and the last sentence of Article 54 paragraph (1) UUJN-P that, unless otherwise determined by statutory regulations.

The application of the notary's right to refuse to maintain the confidentiality of the contents of the deed he has made has several provisions, namely:

1. The limits of a notary's authority to maintain confidentiality in relation to the notary's right to revoke

¹²Sjaifurrachman, 2011, *Aspects of Accountability Notary Public In Making a Deed*, Mandar Maju, Bandung, p. 45.

¹³Bagus Gede, 2017, *Yuridi S's Analysis of Notary's Right to Refuse in Cases of Examination According to the Notary Law and the Notary Code of Ethics*, *Acta Comitatus Journal*, volume 1, p.109

Notaries in their position as witnesses (civil cases) can request to be released from the obligation to provide testimony because their position according to the law requires them to keep it confidential. According to Article 1909 paragraph (3) of the Civil Code. In this case, the notary has an obligation to deny not for the notary's own interests but for the interests of the parties who have entrusted the making of the Deed to the notary. Article 54 of the Notary Position Law states that Notaries can only provide, show or notify the contents of the deed, Grosse Deed, Copy of Deed and Excerpt of Deed to people who are directly interested in the deed, heirs or people who have rights, unless otherwise determined by statutory regulations. From this article, it is clear that notaries are ordered not to provide, show or notify the contents of the deed except to those who are directly interested. Such as when the parties related to the deed are in dispute and there is another party who wants to get news and then meets the notary who made the deed, then the notary must use his Right of Refusal in order to protect the interests of the parties to him.

In determining how far the notary's right of denial extends, the starting point must be the obligation for notaries not to speak about the contents of their deeds, in the sense of both what is stated in their deeds and what is notified or conveyed to them in their position as notaries, even in court, except in cases where there are higher interests or in cases where the notary, by a prevailing statutory regulation, expressly releases them from their oath of secrecy.

2. The procedure for summoning a notary as a witness by an investigator relates to the deed made and how to defend the notary's right to rebuttal. Article 66 of the UUJN Law Number 2 of 2014 concerning the Position of Notary regarding the taking of minutes of deeds and summoning of Notaries, which states:

- a. For the purposes of the judicial process, investigators, public prosecutors or judges with the approval of the Notary's Honorary Council have the authority to:
 - 1) 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 storage.
 - 2) Summoning a Notary to attend an examination relating to a deed he has made or a Notarial Protocol which is in the Notary's custody.
- b. The taking of photocopies of the minutes of the deed or letters as referred to in paragraph (1) letter a, shall be followed by a report of the handover.

The application of the right of denial is not only to protect the Notary but also to protect the interests of the client. Because the Notary may not disclose the contents of the deed. For example: if asked by a journalist, then a Notary is not

allowed to provide any information regarding the deed or information obtained in making the deed. However, when in court, it is mandatory to disclose the contents of the deed that we made. Different when the Notary is in front of an investigator, the Notary can choose whether to provide information or not and this is where the right of denial is used.¹⁴

Notaries in their positions in exercising the right of denial are required to exercise their right of denial because the oath that has been taken and the obligation to keep the deed confidential to other parties is a code of ethics rule that must be obeyed by Notaries in their positions of trust. The importance of maintaining the confidentiality of the deed is to protect the privacy of the parties. If a Notary cannot keep his client's secret from other parties, then public trust in his position can decrease and cause the Notary to fail. The right of denial in this case is not absolute, but does not have to be exercised if there are other provisions that require the right not to be exercised. This provision is not widely known by Notaries themselves, let alone the public, therefore the expansion of knowledge regarding the right of denial must be complete because it is not only in civil law, but has entered the realm of criminal law where it has been stated that if it concerns matters concerning the State, the Notary for violating his right of denial is exempt from all demands and legal sanctions.

3.2. Legal Consequences for Notaries Who Reveal the Confidentiality of the Contents of Deeds They Make

The Notarial Deed will be used as evidence, not infrequently the notary is also ordered to open the contents of the deed and other information, concerning the deed. In general, the notary concerned will be summoned by investigators (police) or public prosecutors (prosecutors) as witnesses to be asked for information regarding the deed and other information concerning the deed. A notary who is submitted in this law enforcement process, according to the law can refuse or withdraw from the obligation as a witness. The right to refuse the obligation is called the act of denial (*Verschoningsplicht*) or (*Verschoning Splicht*).¹⁵

The right to refuse is a form of legal protection for notaries by law in order to provide testimony in court. The Right to Refuse, namely the right to refuse to provide testimony in court. This legal protection is not solely used in the sense that a Notary is a position that is immune to the law, but rather the legal protection is for the professionalism of a Notary. Especially to protect the interests of the parties that have been stated in an authentic deed, where the deed will become a state archive that should be protected.

¹⁴Prasetya Agung, 2016, Limits of the Obligation to Maintain Confidentiality of Notaries in Relation to the Notary's Right to Refuse Based on the Law on the Position of Notary, *Jurnal Akta*, Volume 3 Number 4, p. 5

¹⁵Laurensius Arliman, 2016. Notary's Right to Deny (*Verschoningsplicht*) or Obligation to Deny (*Verschoning Splicht*) in the Notary Law, *Doctrinal Law Journal*, Volume 1, Number 1, p. 7

The protection mechanism for Notaries in the threat of summons in the court process up to the taking of minutes of deeds and Notary protocols, is regulated in Article 66 paragraph (1) CHAPTER VIII concerning Taking Minutes of Deeds and Summoning Notaries. Notaries in the case of providing notarial testimony have the right not to speak even in court as long as it does not conflict with other laws and regulations.

The legal consequences for a notary in using his right to remain silent before the court are, firstly, that the notary must be released from the obligation to be a witness or to give testimony before the court, if he uses the right to deny. Because legally, the testimony to be given according to his knowledge is considered contrary to the oath of office or violates the secrecy of office. Secondly, it releases the notary from all legal claims from interested parties, if the right to deny is rejected by the judge/adjudicator or according to the provisions of the law he is required to give testimony before the court.

The legal consequences for a notary who reveals the confidentiality of the contents of a deed he has made are:

1. Criminal Threats

A notary who reveals the secret of the position entrusted to him/her is threatened with criminal penalties based on Article 322 of the Criminal Code. From the explanation above, it can be concluded that a notary must maintain his/her right to deny the confidentiality of the deed he/she made as long as it is not related to the interested parties or because the law determines otherwise, such as when the notary is asked to be a witness in court.

2. Civil Threats

If a notary or notary employee leaks the contents of a deed to another person who is not concerned and causes losses to the interested parties, then the notary can be sued in a civil lawsuit based on Article 1365 of the Civil Code which states that every unlawful act that causes losses to another person requires the person whose fault it is that the loss is caused to be compensated for the loss.

3. Sanctions according to the Notary Law

Violation of the obligation to maintain the confidentiality of the position may result in the notary being subject to sanctions by the Notary Supervisory Board, this is in accordance with the provisions of Article 85 of the Notary Position Law, including verbal warnings, written warnings, temporary dismissal, honorable dismissal, dishonorable dismissal by the Minister upon the recommendation of the Central Supervisory Board.

According to Philipus M. Hadjon's legal protection theory, legal protection is the protection of dignity and honor, as well as recognition of human rights owned by

legal subjects based on general provisions against injustice or as a collection of regulations or rules that will be able to protect something else.¹⁶

Legal protection for Notaries aims to ensure that the rights, authorities and obligations of Notaries in carrying out their duties as provided by UUJN and the Code of Ethics are carried out based on applicable provisions, both based on law and based on professional morals and ethics, in order to ensure legal protection and legal certainty for the Notary profession and the public interest. Thus, a sense of calm, peace and guaranteed legal protection will be created for Notaries in carrying out their duties as Public Officials. Notaries will feel protected because all inspection actions are carried out after careful inspection and research by the Supervisory Board as stipulated in Article 66 of UUJN, but the Supervisory Board cannot provide any protection to Notaries who are proven guilty in carrying out their Notary position.¹⁷

Law is an inseparable part of human society so that in society there is always a legal system, there is a society there are legal norms (*ubi societas ibi ius*). This is meant by Cicero that the legal system must refer to respect and protection for the dignity of human beings. The law seeks to maintain and regulate the balance between the interests or desires of selfish individuals and common interests so that there is no conflict. The presence of law actually wants to uphold the balance of treatment between individual rights and common rights. Therefore, in essence the law must be certain and fair so that it can function properly.¹⁸

A notary is a public official who has been given legal protection by law in order to provide testimony in court. The legal protection provided by law is through the right to refuse. The right to refuse, or also called the right to refuse or the right to ask to be released from being a witness, exists in several positions, which are granted by law. The refusal is not only limited to what is stated in the deed he made, but also all the facts related to the deed. The right to refuse is a consequence of the obligation to keep something known confidential.¹⁹ After the enactment of Law Number 30 of 2004 concerning the Notary position, there were several changes to the provisions governing Supervision and Guidance carried out by the supervisory and guidance board before the Notary Position Law (UUJN), Supervision, examination and imposition of sanctions on Notaries were carried out by the judicial body that existed at that time. The Notary Supervisory Board generally has the scope of authority to hold hearings to examine alleged violations of the code of ethics or violations of the

¹⁶CST Kansil, 1989, Introduction to Indonesian Law and Legal System, Balai Pustaka, Jakarta, p. 40

¹⁷Prasetya Agung, 2016, Limits of the Obligation to Maintain Confidentiality of Notaries in Relation to the Notary's Right to Refuse Based on the Law on the Position of Notary, *Jurnal Akta*, Volume 3 Number 4, p.6

¹⁸Rahmad Hendra, Notary's Responsibility for Authentic Deeds Whose Applicant Uses a False Identity, *Journal of Legal Science*, Volume 3 Number 2, pp. 123-124.

¹⁹A. Kohar, 1984, *Notaries Communicating*, Bandung, Alumni, p. 156.

implementation of the Notary position. The Notary Supervisory Board has the authority to hold hearings to examine:

1. There is an alleged violation of the code of ethics.
2. There are allegations of violations in the implementation of the duties of a Notary.

The behavior of Notaries who carry out their duties as Notaries that can interfere with or affect the implementation of the Notary's duties. The Notary Supervisory Board carries out several coaching activities every year, usually the coaching is carried out by the Regional Supervisory Board and the Regional Supervisory Board.

4. Conclusion

The implementation of the notary's right of denial in maintaining the confidentiality of the contents of the deeds he has made as regulated in the UUJN is not absolute, considering that it is still possible if other laws require it. Thus, a Notary cannot use his Right of Refusal if the deed he has made is related to Corruption (Law Number 31 of 1999 which has been amended by Law Number 20 of 2001 concerning the Eradication of Corruption) and Tax Violations (Law Number 14 of 2002 concerning the Tax Court). The use of the Right of Refusal when the Notary is a witness in a court trial is not immediate, meaning it applies immediately. However, if the notary will use his right of denial, he must come and fulfill the summons and must make a letter of application to the judge who is trying/examining the case, that the Notary will use his Right of Refusal. Upon the Notary's request, the Judge examining the case in question will determine whether to grant or reject the Notary's request. If the judge grants the Notary's request, the notary does not need to testify. But if the judge rejects the Notary's request, then the Notary needs to testify, and based on the Notary's statement as a witness in court, if anyone is harmed by the Notary's statement, then the Notary cannot be sued based on Article 322 paragraph (1) of the Criminal Code because the Notary did it on the judge's orders. The notary's right to rebut can only be exercised for things such as very close family relationships, the danger of being subject to criminal penalties and position, work and official secrets. The legal consequences for a notary who reveals the confidentiality of the contents of the deed he made are possible sanctions, namely criminal threats, civil threats and sanctions according to the Notary Law from reprimands to dishonorable dismissal. However, notaries will be given legal protection for Notaries who reveal the contents of the deed, namely Notaries who reveal the contents of the deed with the consent of the interested parties to maintain public trust in the Notary profession and/or Notaries who because of their position are asked to explain the contents of the Deed he made in court, automatically the Notary gets legal protection as a witness and is free from all charges. A notary must use his right to refuse to act in order to protect and keep confidential the contents of the deed he has made. If the notary is still asked

about the contents of the deed, the notary must indicate the statutory regulations that require him to keep confidential the contents of the deed he has made.

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