

# NOTARY AND LEGAL ARRANGEMENT OF CRIMINAL LAW: LEGAL PROTECTION FOR NOTARIES FACING CRIMINAL CASES

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## Abstract

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This study aims to analyze the legal protection for a notary either as a witness or as a suspect in the investigation stage of the deed he/she made. This study is important because notaries often face legal issues regarding the authentic deeds they produce. This study combines normative legal research and empirical law. In-depth interviews with notaries who have been examined as witnesses or suspects for the authentic deed made are carried out in depth. The results of this study indicate that investigators did not obtain prior approval from the Notary Honorary Council when examining a notary. Notaries are required to reveal client secrets during examinations, which infringes on their right to refuse. To provide adequate legal protection for notaries, in the future the Notary Honor Council must be empowered so that investigators cannot examine them without the panel's approval. In addition, the notary's right of refusal also needs to be used as a means of legal protection. In addition, further research regarding the examination of notaries at the trial stage needs to be carried out to obtain a comprehensive picture of legal protection for notaries.

**Keywords:** Legal Protection, Notary, Deed, Right of Refusal, Notary Honorary Assembly

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## 1. INTRODUCTION

This study focuses on legal protection for notaries who face criminal cases either as witnesses or suspects related to the deed they made. The significance of this investigation lies in the fact that the Notary Office Law authorizes the presence of a notary to aid and support individuals in obtaining reliable proof regarding specific situations, occurrences, or legal proceedings (Iryadi, 2018; Tan, 2020). If an individual seeks a notary's assistance in creating a certified document that accurately records their actions or deeds according to the notary's jurisdiction, and subsequently

the notary creates a document upon the request or preference of the involved parties, it indicates a lawful association between the notary and the parties (Gaol, 2018). It is the responsibility of the notary to ensure that the legal regulations are followed while creating the deed, in order to safeguard the interests of all parties involved (Budianto et al., 2020). If the deed has been made following statutory regulations, it becomes problematic when the notary is summoned as a witness or determined as a suspect in relation to the deed he/she made. In this context, notaries do not receive legal protection.

In addition, the notary's deed ensures the accuracy of the location, date, and parties involved in the deed (Victoria et al., 2020). When the notary is summoned by the investigator either as a witness or as a suspect or a deed that has been guaranteed the truth of the deed, this naturally has a psychological and social impact on the notary himself/herself. Psychologically, the summons interfered with the notary's performance. Socially, the summons has a negative impact on the notary in the eyes of the closest family, neighbors, clients, or even fellow members of the notary (Heriyanti, 2016). In this context, the summons clearly does not protect the notary regarding the deed he/she made.

In order to obtain a comprehensive picture of the legal protection for a notary who is examined as a witness or suspect for a deed drawn up by an investigator, this study aims to answer two main research questions:

*RQ1: What is the practice of examining a notary either as a witness or as a suspect during the investigation stage by the police on the deed he/she made?*

*RQ2: What is the examination procedure for a notary at the investigation stage as a witness or suspect in relation to the deed he/she made which provides legal protection?*

The rest of the paper is structured as follows. Section 2 reviews the related literature. Section 3 presents the research methodology. Section 4 provides the research results and discussion. Section 5 concludes the paper.

## 2. LITERATURE REVIEW

The notary profession plays a vital role in corporate criminal law in Indonesia. A notary is a legal professional authorized to perform acts in relation to corporate legal matters, including drafting, executing, and authenticating legal documents (Japar, 2022). In carrying out their duties, notaries face various risks, particularly in relation to corporate criminal acts. Notaries may be held liable for their involvement in criminal acts committed by the parties they represented, such as in cases of fraud, embezzlement, and corruption.

The criminal liability of notaries in Indonesia is governed by several laws, including Law No. 27 of 1999 concerning amendments to the Criminal Law Code relating to crimes against state security (Law No. 27 of 1999), Law No. 2 of 2014 about amendment to Law No. 30 of 2004 concerning the position of notary (Law No. 2 of 2014), and Law No. 8 of 1981 on criminal procedure (Law No. 8 of 1981). The Criminal Code provides general provisions on criminal liability, while Law No. 2 of 2014 specifically regulates the notary profession, including the liabilities of notaries in the event of criminal acts (Dewi, 2021; Puspitasari & Efendi, 2022).

Despite the legal provisions governing the notary profession in Indonesia, notaries still face challenges in carrying out their duties, particularly in the face of the increasingly complex and sophisticated criminal acts involving corporations. Notaries need to have sufficient legal knowledge and skills to identify and mitigate potential legal risks, as well as to comply with the legal requirements and ethical standards of their profession. Moreover, notaries need to have proper legal protection to

defend themselves against criminal charges and to ensure their legal rights are upheld (Erdi et al., 2020). To address these issues, it is essential to assess the legal framework governing the notary profession in Indonesia, particularly in relation to corporate criminal law.

Several studies have been conducted to examine the legal liability of notaries in Indonesia. For instance, Muyassar et al. (2019) examined the legal liability of notaries in relation to land transactions, while Fahrawi et al. (2022) analyzed the criminal liability of notaries in fraudulent acts. These studies highlight the need for notaries to have the necessary legal and ethical knowledge and skills to prevent and respond to criminal acts.

In addition, some studies also emphasize the importance of legal protection for notaries facing criminal cases. Fauzia and Hamdani (2022) argue that notaries are often the first targets of prosecution in criminal cases involving corporations, even though their role is limited to providing legal assistance and executing legal documents. Therefore, notaries need to have proper legal protection, including access to legal representation and fair trial processes.

Another aspect to consider is the role of the notary association in providing support and guidance for notaries facing criminal charges. The notary association in Indonesia, the Indonesian Notary Association (*Ikatan Notaris Indonesia, INI*), has a crucial role in protecting the interests and rights of its members (Wiratmodja, 2022). The INI provides legal aid and support for notaries facing legal issues, including criminal cases.

Finally, the notary profession plays a significant role in corporate criminal law in Indonesia, and notaries face various legal risks in carrying out their duties. To ensure that notaries have adequate legal protection, there is a need to evaluate the legal framework governing the notary profession in Indonesia, particularly in relation to corporate criminal law. This includes identifying the legal and ethical knowledge and skills required for notaries, as well as the legal protection and support needed for notaries facing criminal charges. It is hoped that this review will provide valuable insights into the challenges faced by notaries in Indonesia and contribute to the ongoing efforts to strengthen legal protection for notaries and uphold their legal rights.

## 3. RESEARCH METHODOLOGY

This study uses empirical legal research and normative research. Empirical legal research is related to the practice of examining notaries by investigators who have not fully protected notaries. To answer this legal issue, researchers have conducted interviews with seven notaries who have been examined either as witnesses or suspects in a criminal case by investigators from the Indonesian National Police regarding the deeds they have made. The seven notaries agreed to be interviewed and explained their experience of being questioned by investigators regarding the deed they made as long as only their initials were mentioned. To answer the second legal issue, the researcher used secondary data in the form of books, journals, or laws and regulations related to notaries, deeds, the Notary Honorary Council, characteristics of

the notary-client relationship in making a deed, and the notary's right of refusal. The secondary data is important for formulating legal protection for a notary when dealing with a criminal case either as a witness or as a suspect regarding the deed he/she has made. The data is then analyzed qualitatively based on data reduction, data presentation, and drawing conclusions.

Apart from empirical legal research and normative research, other methods can be appropriate for conducting this investigation. One such method is the case study method, where the emphasis is on studying the experiences of notaries involved in criminal cases in greater depth. By selecting a few cases, the researcher can thoroughly explore the circumstances that triggered the investigation and its impact on the notary.

#### 4. RESULTS AND DISCUSSION: LEGAL PROTECTION FOR NOTARIES FACING CRIMINAL CASES

##### 4.1. Notary Honorary Council

Law No. 2 of 2014 concerning the Position of Notary includes a provision regarding the establishment of the Notary Honorary Council (*Majelis Kehormatan Notaris, MKN*), which is made up of representatives from the notary community, the Government, and academics. As per Article 66 paragraph (1), the MKN serves as a safeguarding institution for the notary's position in relation to documents created or executed by them. The MKN is responsible for providing notary training and has the responsibility of granting or denying approval for investigative and legal processes, photocopying minutes of the deed, and summoning notaries for exams relating to deeds or protocols within their storage (Arief et al., 2019).

Regulations for the Notary Honorary Council's duties, functions, requirements, procedures for appointment and dismissal, organizational structure, work procedures, and budget are outlined in Regulation of The Minister of Law and Human Rights of the Republic of Indonesia No. 7 of 2016 (Regulation No. 7 of 2016). This document was promulgated in the State Gazette on February 5, 2016. The Minister must follow this guidance and appoint an Honorary Council consisting of notaries, government members, and experts/academics. The Honorary Council operates as a legal protection institution and has the authority to benefit judicial proceedings, investigators, public prosecutors, or judges with the approval of the competent Honorary Notary Council, as stated in Article 66, paragraph (1) of Law No. 2 of 2014 concerning the Position of Notary:

- Make a copy of the minutes of the deed and any letters that are attached to them, as well as the notary protocol that is being kept in the notary's safe.
- Request the presence of the notary to participate in the investigation regarding the notary's document or record that is currently under the notary's supervision.

Related to this authority, beforehand, the Regional Supervisory Council (*Majelis Pengawas Daerah, MPD*) had the power, as outlined in Article 66 of Law No. 2 of 2014 concerning the Position of Notary, to authorize investigators, public prosecutors, or judges to aid in the judicial process. The transfer of some of this authority from the MPD to the MKN does not imply that the MPD is

no longer operational because many other powers are still the authority of the MPD.

The purpose of establishing the MKN institution is to take over the function of the MPD in either approving or refusing a notary's summons, as well as obtaining a photocopy of the notary's protocol from investigators, public prosecutors, and judges. The MKN operates independently to provide direction and support to further strengthen the notary institution in implementing Law No. 2 of 2014 for all individuals occupying the position of a notary.

Notary Honorary Council consists of:

- The Central Notary Honorary Council was established by the Minister who lives in the capital of the State, DKI Jakarta;
- The Director General, representing the Minister, established the Regional Notary Honorary Council, which is based in the provincial capital.

In addition to the Central and Regional Notary Honorary Councils, there are still regional branch of MKN (work order), namely the Examination Council formed by the Head of the Regional MKN in the framework of examining a notary, which has as many as three members consisting of each member of the Regional MKN member. Based on Article 7 of Regulation No. 7 of 2016, central board of MKN has the task of carrying out coaching for the Regional Honorary Council related to its duties. He also has the function of supervising the Honorary Council of regional notaries. Meanwhile, the aim of MKN is to provide guidance and uphold the integrity and reputation of notaries in their professional role. They also aim to safeguard notaries regarding their duty to keep deeds confidential. In order to achieve this, the Regional Notary Honorary Council has specific responsibilities:

- Evaluate applications filed by investigators, public prosecutors, and judges for examinations.
- Authorize or deny approval of petitions to summon a Notary Public for investigations, prosecutions, and judicial proceedings.
- Determine whether to grant or reject requests to summon a notary for investigations, prosecutions, and judicial proceedings concerning notarial deeds or records under the notary's care.

The Notary Office Law not only governs MKN but also establishes guidelines for the Notary Supervisory Council (*Majelis Pengawas Notaris, MPN*) which has the responsibility to provide guidance and oversight for notaries. As a public official who has qualifications in the form of certain legal expertise, which other members of the public do not have, a notary can contribute to the progress and positive benefits of society. Even so, there is a possibility that the notary misuses his/her expertise so that it can cause harm to society. Therefore, in order to prepare for this, it is essential to establish thorough and detailed plans for the appointment, transfer, and termination of notaries, as well as for the guidance, supervision, and execution of their duties.

The Minister is responsible for overseeing notaries and establishes a Supervisory Board that includes individuals from the government, notary organizations, and academic experts, with each group represented by three people. According to Law No. 2 of 2014, Article 67 paragraph (3), the composition of the Notary Supervisory Board includes three members from the government, three from notary organizations, and three experts or academics. The MPN consists of the Central

Supervisory Council, the Regional Supervisory Council, and the Regional Supervisory Council.

Chapter IV from Article 20 to Article 35 of Regulation of The Minister of Law and Human Rights of the Republic of Indonesia No. 40 of 2015 about organizational structure, procedures for appointment of members, termination of members, and the work procedure of the Supervisory Assembly (Regulation No. 40 of 2015) outlines the procedures for inspecting the Notary Supervisory Board. Article 20 specifies that in the examination of a Notary Public, the Head of the Notary Supervisory Council will establish a Regional Examining Council and a Central Examining Council, each consisting of one chairman and two members of the Examining Council. The Regional and Central Examining Councils have the authority to examine and decide on reports. The formation of the Examining Council must be conducted within five working days after the report is received. The Examining Council cannot examine a notary who has a family relationship in a straight line up or down without limiting degrees or to the side up to the third degree with the notary. The chairman of the Notary Supervisory Council must establish the Regional and Central Examining Council according to the same format when conducting examinations.

According to Article 21, any party that has been wronged can submit a written report in Indonesian and provide evidence to the Regional Supervisory Council, alleging a breach of the Notary Code of Ethics or misconduct in the notary's duties. Article 22 also provides additional information:

- The Examining Council's Chairman called for a meeting with both the Reporting and Reported parties.
- The summons, sent via letter by the secretary, must be received no later than five working days prior to the hearing.
- If there is a pressing matter, a facsimile can be used for the summons if it is followed up immediately with a formal summons.
- If the Reported Party is legally summoned but fails to appear, a second summons will be sent out.
- If the Reported Party cannot attend the examination after being legally summoned a second time, the Examining Council will proceed without them and make a decision.
- If the Reporting Party is absent after being legally summoned, a second summons will be sent out. If the Reporting Party still fails to appear, the report will be declared invalid and cannot be submitted again.

#### 4.2. Notary refusal right

The term "right of refusal" is equivalent to *verschoningsrecht*, which allows a person to decline the obligation of testifying as a witness in either civil or criminal cases (Saepudin & Khisni, 2019). It is a special circumstance that deviates from Article 1909 of the Law No. 27 of 1999, which mandates that all summoned witnesses must provide testimony. According to Tobing (1993), the right of denial is the right to refuse to give testimony or the right to ask to withdraw from testimony (*verchoningsrecht*). The right of refusal by the notary contains the obligation not to speak (*verschoningsplicht*) so that the notary not only has the right not to speak (*verchoningsrecht*) but also has the obligation not to speak (Tobing, 1993).

The right to refuse as a notary is not just a privilege, but also a responsibility since any violation of it may result in legal penalties. The notary not only has the right not to speak but also has the obligation not to speak (Adjie & Agustini, 2021). Juridically, the right to refuse a notary is Article 1909 paragraph (3) of the Civil Code and refers to Article 146 paragraph (1) number 3 of Updated Indonesian Reglement (*Reglemen Indonesia Yang Diperbaharui, RIB*). Meanwhile, the obligation to disobey a notary comes from the provisions of Article 4 paragraph (2) and Article 16 paragraph (1) letter e. of Law No. 2 of 2014 (Maria, 2011). In carrying out his/her position, a notary not only needs to keep secret what is listed and stated in the deed drawn up before him/her but also what is known and notified in the framework of making the deed.

The philosophical basis of the right of refusal for trusted positions lies in the public interest so that if someone is in a difficult situation, he/she can contact someone he/she trusts to get the help he/she needs in the juridical, medical or spiritual fields with the confidence that he/she will receive advice, without being so it will be detrimental for him. The statement complies with the interpretation of Article 16, as stated in the Law No. 2 of 2014 concerning the Position of Notary, that the duty to maintain the confidentiality of all details connected to the document and any accompanying correspondence aims to safeguard the interests of all parties involved in the matter (Tobing, 1993).

In carrying out his duties as a public official, it is not uncommon for a notary to deal with the legal process, both at the investigation, investigation, and trial stages. During this legal proceeding, the notary will be required to share details and give evidence about the deed they created. This may appear to contradict the notary's sworn duty to keep the contents of the deed confidential. However, legal provisions allow for certain positions to decline or be excused from being a witness (Lisdiyono et al., 2018).

One of the characteristics of the notary profession is the position of trust (*vertouwens ambt*). With such a character, a person is willing to entrust something to a notary as a confidant (*vertouwens person*). The notary is obligated to maintain the confidentiality of all information shared with them, even if it is not included in the official deed. It is not permissible for a notary to reveal any information that has been disclosed to them during the preparation of the deed. This obligation to maintain confidentiality is not only a legal requirement but also a personal commitment for the notary. If a notary fails to respect this obligation, they may face negative repercussions such as losing the trust of the public and no longer being viewed as a trusted person (Sjaifurrachman, 2011).

The notary's obligation to keep the matter aforesaid will end if there is a legal obligation to speak, that is if a person is summoned to testify before the court both in the process of a case and in the process of a criminal case. Even so, the notary still has the obligation to keep it confidential by using the rights granted by Article 1909 paragraph (2) letter 3e of the Civil Code, Article 170 of Law No. 8 of 1981, and Article 322 of Law No. 27 of 1999. Article 1909 of the Civil Code determines all individuals who are potential witnesses are obliged to give testimony before a judge, but they

have the option to request exemption from this duty: 1e. Who is related by blood on the side line in the second degree or second degree with one of the parties: 2e. Who is related by blood in an unlimited straight line in a lateral line in the second degree with the husband or wife of one of the parties: 3e. Individuals are required to maintain confidentiality of information that has been entrusted to them due to their job title, position, or legal obligations. This obligation is limited to matters specifically assigned to them.

Article 170 paragraph (1) and paragraph (2) of Law No. 27 of 1999 confirms individuals who are obligated to maintain confidentiality due to their job, honor, or status may request to be excused from testifying as witnesses, specifically regarding the topics they were entrusted with. The validity of the request is determined by the judge after examining all the reasons provided.

Article 322 of Law No. 27 of 1999 determines anyone who deliberately reveals a confidential matter that they are required to keep due to their present or past employment or position shall face imprisonment for up to 9 months or a fine of not more than 9,000 rupiahs.

Based on the legal provisions above, it is known that the right of refusal is an obligation because it is an exception to the general provisions which state that every person who is capable of giving testimony as a witness is obliged to testify before the court, both in civil proceedings and in criminal proceedings. In other words, there is no obligation for a notary to provide testimony as long as it concerns the contents of the deed and information obtained in the exercise of office. The duty of a notary's oath is to prevent the notary from disclosing any information contained in the deed they have created, regardless of whether it is a private document or an official one.

In this context, if it is understood that the contents of the deed drawn up by a notary are based on the requests and wishes of the parties, then investigators, public prosecutors, and judges do not need to ask the notary to provide information regarding the deed made. The contents of the deed are complete there so that confirmation is sufficient for the parties to appear before the notary who requests a deed to be drawn up.

The right of refusal by a notary in this context can be interpreted in several ways as a form of legal protection for a notary. First, the notary may not be present before the investigator or judge to provide information regarding the contents of the deed. The notary can decline to answer questions asked by investigators, public prosecutors, and judges regarding the deed as long as they have the right to do so. It is sufficient for the investigators, public prosecutors, and judges to refer to the contents of the deed without requiring confirmation from the notary (Prasstumi, 2022). Second, this right of

refusal is related to the substance/content in a complete deed, both in terms of formal, material, and principles in making a deed. Because the deed made by a notary is based on the requests and wishes of the parties in such a complete way, the focus on finding and finding evidence related to a case is sufficient to refer to the deed (Runisari & Tanaya, 2022).

Third, the notary's right of refusal must also be linked to the prohibition for a notary to disclose client secrets. The deed made by a notary is confidential and is only used and opened by parties who have a direct interest in the deed. If the notary is asked for information to explain the secret deed, it means that the notary has violated the prohibition on disclosing client secrets. Fourth, the notary's right of refusal should also be linked to the notary's obligation to always uphold the notary's oath of office in all aspects including in making a deed and explaining it to other than the parties whose names are explicitly stated in a deed. If the notary is asked for information to explain the contents of the deed made, it means that the notary has violated the notary's oath of office where one of the contents of the notary is not allowed to disclose client secrets (Aziza et al., 2020).

## 5. CONCLUSION

The Notary Honorary Council in Indonesia acts as an independent institution to protect notaries and their clients. The Council has the power to regulate notary training, investigate judicial purposes, and summon notaries for examination related to deeds or protocols. These councils ensure accountability and transparency in the notary profession, and they play a critical role in maintaining trust between clients and the legal system. Additionally, this study highlights the importance of notaries' right of refusal to give testimony in protecting client confidentiality, emphasizing its legal basis and the penalties for intentional disclosure. Ultimately, this study underscores the vital role notaries play in upholding legal standards and maintaining the public's trust in the legal system. In the future, in order for notaries to truly receive legal protection, the existence of the Notary Honor Council must be empowered. Without the approval of this panel, investigators are prohibited from examining a notary either as a witness or as a suspect regarding the deed he made. In addition, the notary's right of refusal also needs to be used as a means of legal protection. This research is limited to examinations for notaries at the investigation stage. Therefore, further research on how the process of examining a notary either as a witness or a defendant regarding the deed made at the trial stage of a criminal case needs to be carried out.

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