West Science Law and Human Rights
Vol. 3, No. 03, July 2025, pp. 274~280

Formulation of Notary's Right of Refusal In Criminal Case Examination Process

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Article Info

Article history:

Received July, 2025
Revised July, 2025
Accepted July, 2025

Keywords:

Right of Recusal, Notary, Law Enforcement

ABSTRACT

The notary is frequently a party to a dispute that occurs between the parties to the deed. For the parties, the notary drafts an official deed. Because of this requirement, the notary must have legal protection in the form of the right of renunciation. Law Number 30 of 2004 about the Notary Position (UUJN) and Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Notary Position (UUJN-P) (norm vacuum) do not, however, restrict the right of renunciation for notaries. This study employed normative legal research as its methodology. The findings of this dissertation research serve as the philosophical foundation for allowing a notary to decline to perform his duties in relation to notarial deed making as a public official, namely offering protection and assurances for the attainment of legal certainty. Adding guidelines for the legal protection of notaries in the UUJN is one way to standardize the notary's power of refusal in the course of law enforcement over notarial deeds pertaining to legal matters. Researchers provide a proposal with the formulation of norms that are made into additional paragraph (5) in Article 66 of the UUJN. According to the established norms, notaries who follow the law and ethical codes are protected from both civil and criminal prosecution while carrying out their official duties.

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1. INTRODUCTION

The Republic of Indonesia is a legal state, as explicitly articulated in the 1945 Constitution of the Republic of Indonesia (hence referred to as UUD NRI Tahun 1945) (Marwan Effendy, 2004). The rule of law premise, which is based on justice and truth, ensures legal protection, clarity, and order. Clarity, order, and legal protection are ensured by the equity and truth-based rule of law idea. The Republic of Indonesia's 1945 Constitution states in Article 28 (D) paragraph (1):

"Every person is entitled to recognition, guarantees, protection and certainty of a just law and equal treatment before the law".

All Indonesian citizens both in terms of male and female gender, in terms of old and young age, in terms of the work of entrepreneurs and laborers in the eyes of the law they are the same. Likewise, Notary as a profession recognized by the state should also

get the same portion of protection and legal certainty in the implementation of its duties.

A notary is a person who has received legal education and has been appointed and sworn in by the government, namely through the Ministry of Law and Human Rights, to carry out legal duties, including creating valid papers. As a public official, a notary's duties are not time-bound; they must always be accessible to offer legal services when the public requests them. This is due to the fact that notaries have several obligations to fulfill their roles in order to function effectively in society from various perspectives.

With so much investment coming into Indonesia, the demand for legal protection and services in the business sector is growing. As a rule of law, Indonesia must ensure the protection of its investors' and residents' rights by implementing requisite legislation. The objectives of the rule of law are to provide clarity, promote order, and provide legal protection for citizens. Article 1866 of the Civil Code stipulates the necessity of proof as a means to achieve legal objectives in cases of disputes and litigation between parties or between the community and the state. The Civil Code governs: "The means of evidence consist of: written evidence; evidence by witnesses; testimony; confession; oath...". Article 1868 of the Civil Code provides a definition of an authentic deed, which stipulates: "An authentic deed is a deed made in the form prescribed by law by or before a public official authorized to do so at the place where the deed is made". Article 1870 provides the evidentiary power of an authentic deed to the other parties, which stipulates: "An authentic deed provides between the parties and their heirs or those who get rights from them, a perfect proof of what is contained therein".

It is explicitly stated that a genuine deed must be performed by an authorized official in order for written proof to be considered valid. Thus, Law Number 2 of 2014 respecting Amendments to Law Number 30 of 2004 concerning Notary Offices (henceforth referred to as UUJN-P) states in Article 1 paragraph (1): "Notary is a public official authorized to make authentic deeds and has other authorities as referred to in this law or based on other laws".

Public authorities responsible for producing authentic documents for the benefit of the public may be regarded as notaries. Per Article 15, paragraph (1) of the UUJN-P, a notary's power is contingent upon their credentials as a public official. This authority is delineated as follows: "Notaries are empowered to create authentic Deeds pertaining to all deeds, agreements, and stipulations mandated by laws and regulations and/or requested by the parties involved to be recorded in an authentic Deed, ensure the veracity of the date of execution of the Deed, retain the Deed, and furnish a grosse, copy, and quotation of the Deed, provided that the execution of the Deed is not concurrently assigned or excluded to other officials or individuals specified by law."

It is fair to understand Openbare Ambtenaren as a public official since the phrase "public official" is a translation of the term "openbare ambtenaren," which refers to an official with responsibilities pertaining to the public interest. Notaries are given the responsibility of creating genuine deeds that serve the public interest, which is specifically tied to Openbare Ambtenaren, which is translated as "public officials" (G.H.S. Lumban Tobing, 1999). Before exercising his or her office as a Notary, he or she takes an oath or promise to safeguard the interests of the parties with regard to the contents of their deeds. Thus, in exercising his/her authority, including the right of rescission, a Notary must maintain one of the axiological aspects of the Pancasila philosophy of law, namely justice and certainty. This means that a Notary must be able to hold and guarantee the secret of office which is closely related to the provisions in Article 54 paragraph (1) of UUJN-P, which basically states that: "A Notary may only give, show, or disclose the contents of a Deed, Deed Grosse, Deed Copy, or Deed Excerpt, to a person with a direct interest in the Deed, heirs, or persons acquiring rights, unless otherwise provided by laws and regulations". Furthermore,

Article 16 Paragraph (1) letter (f) of UUJN-P states: "In carrying out his/her position, a Notary is obliged to keep confidential everything regarding the Deed he/she makes and all information obtained for the purpose of making the Deed in accordance with the oath/pledge of office, unless the law determines otherwise".

The Notary's right of refusal is pointless, though, as they are now required to divulge the secrecy of their deeds without a court's request. Additionally, they are in violation of Article 4 Paragraph (2) of the UUJN. In this instance, certainty includes what are known as foundational facts, or fundamental truths. A "basic certainty that reveals the existence of the subject" is the first principle (AB. Syah, 1986). It is important to regulate the norms relating the right of renunciation for notaries in UUJN and UUJN-P (norm vacuum) since, as a result of the issues mentioned above, there is no legislation on this topic. The notary may refuse to offer information during the examination as long as the deed's substance satisfies his or her duties as a notary.

2. METHODS

This study employed normative legal research as its methodology. According to this legal research, law is either understood as what is stated in laws and regulations (law in books) or as standards or guidelines that serve as standards for acceptable human behavior (Amiruddin and Zainal Asikin, 2013).

The problem approach used in this research is as follows: Statute approach, conceptual approach, and comparative approach.

Analysis is carried out by linking several elements that are the purpose of this research discussion, namely legal comparison. The analysis is carried out to find out in detail the problems that exist in this study by describing (describing) what is the problem, explaining the problem (explanation), examining the problem from related legal materials (evaluation) and providing arguments from the evaluation results.

3. RESULTS AND DISCUSSION

3.1 Regulation of Notary's Right of Recusal in the Process of Law Enforcement of Notarial Deeds Involved in Legal Problems

The goal of law enforcement is to bring the concepts of justice, legal certainty, and social benefit to life. Thus, in essence, law enforcement is an idea-realization process. Since the core of legal certainty is protection from arbitrariness, law enforcement's realization of this objective is not just tied to the state. The government and the courts play a crucial role in establishing and preserving legal certainty. According to I Nyoman Putu Budiartha (2016), the government should refrain from issuing implementing rules that are either unregulated by law or in conflict with it.

The right of recusal, also known as verschoningrecht, is the ability to be excused from testifying as a witness in court when someone tries to protest to the judge who will hear the case and provides justification. This privilege constitutes an exception to the basic principle that all competent individuals are mandated to serve as witnesses and provide testimony in court. The Notary may use the power of rejection for all executed deeds. If the Notary becomes a witness or defendant, he/she can defend himself/herself that the criminal offense charged to him/her was not committed by the Notary but by the Notary based on the information and documents provided by him/her.

Regarding the application of the right of refuse, it is said that the broad consensus is that the right of refusal is not only applied to the entirety of the testimony but also to specific issues, and it may even be applied to each question separately. According to the aforementioned opinion, it is known that the right to remain silent is not always applied to the entire deed; rather, it is only used in specific situations, such as those pertaining to the deed's substance or content, including both the written deed's contents and matters

outside the deed that the notary is aware of due to his position (Bagus Gede Ardi Artha Prabawa, 2017).

The Notary's right of refusal can be exercised with restrictions on the Notary being examined by any agency that wants to request information or statements from the Notary that have a relationship with the Notary's authority in making deeds. When a Notary is called upon by a judge to testify in court regarding a deed that was made by or before him, or regarding the execution of the Notary's office duties based on UUJN and UUJN-P, the Notary may exercise the right of refusal when being questioned as a witness in a civil or criminal case. In such cases, the Notary is required to comply with the summons. The obligation to fulfill the Judge's summons does not mean that the Notary is directly obliged to provide information regarding the contents of the deed he made, the use of the right of refusal when the Notary is a witness in the trial in Court is not absolute, immediately applicable, if the Notary wants to use it the Notary can make a request letter to the Judge who hears or examines the case to request the Judge that the Notary will use his right of refusal. Therefore, the Judge will determine whether to grant or reject the request from the Notary.

According to the researcher, the Judge should accept the request if indeed the Notary is indeed due to his work, dignity or position to keep the secret of the information, this right is stated in Article 170 of the Criminal Procedure Code, which stipulates: "Those who, because of their work, dignity or position, are obliged to keep secrets, may be asked to be released from their obligation to provide information as witnesses, namely about matters that are trusted to them".

The judge decides whether or not to grant the notary's right of refusal. If the judge rejects the request, the notary must testify and provide information in court. If the notary has harmed an individual by his evidence, he cannot be charged under Article 322 Paragraph (1) of the Criminal Code, since the notary operates under the directives of the judge.

The examiner is no longer required to investigate the rationale behind the Notary's use of the right of refusal; the justification is evident: to comply with legal mandates prohibiting the disclosure of confidential information pertaining to the Notary's office. Consequently, the examiner need not ascertain the acceptability of the Notary's invocation of the right of refusal. The researcher asserts that in matters pertaining to the Notary's responsibilities, the Notary must exercise the right of renunciation as mandated by the UUJN and UUJN-P, in accordance with Article 50 of the Criminal Code, which stipulates that individual executing legal provisions are exempt from punishment. However, the Notary himself must decide whether to use the Notary's right of renunciation or not by considering the circumstances and circumstances.

3.2 Norming of the Notary's Right of Recusal in the Process of Law Enforcement of Notarial Deeds Related to Legal Issues

Two legal steles are recognized by the notarial institution: the Anglo-Saxon or Anglo-American steles with the Common Law system and the Continental (Latin) steles with the Civil Law system. Time, location, legal politics, and legal consciousness have all influenced the development of notarization and the laws governing notary practice in each nation. The nature, purpose, quality of the evidence, and application of notarial deeds in notarial practice in the two legal systems differ and are comparable (Herlien Budiono, 2017).

The difference between the Notary profession in these two legal systems includes the term used in the Latin notarial environment or Civil Law is notary, while in the Common Law system the term notary public is used. A jurist performs the duties of a notary as a public official in the Latin notariat, and there are further requirements that include particular schooling, exams, and internships. However, more specific education or an apprenticeship are not necessarily necessary to work as a notary public. There are also differences in the method of appointment and authority for

both notary and notary public (M.J.A. van Mourik, 1992).

Indonesia as a country that adheres to the Civil Law legal system, like other countries in the world that also adhere to the Civil Law legal system, has an affiliation with The International Union of Notaries (hereinafter UINL). UINL members are grouped by continent, namely Europe, the United States, Africa and Asia. UINL member countries are represented by representatives from National Councils or Institutions or Organizations of Notaries recognized in their respective countries. In this instance, Indonesia is represented by the Indonesian Notary Association (INI), the sole notarial organization in the country.

The notary, as a professional public officer, possesses the legal right of refusal. He is required to take an oath of office to maintain the confidentiality of his actions, while also acting in the state's interest, which pertains to the public interest, to complete the legal proceedings in court and provide a verdict that is rational, pragmatic, and guarantees legal certainty. In addition, laws and regulations can protect the interests and trust of the parties given to the Notary, if they are in accordance with the objectives of the law, namely legal certainty, justice and order. In addition, laws and regulations can be said to fulfill the ideal construction if they provide justice, legal certainty and order. The non-implementation of Article 66 of the UUJN-P properly has resulted in the absence of legal protection of the Notary's right of refusal, because there is no legal protection of the Notary's right of refusal, the trust of the Notary as an office of trust is not appropriate. Because the Notary's office frequently clashes and clashes with law enforcement, the UUJN and the Notary Code of Ethics must serve as the foundation for the Notary's duties and responsibilities in order to avoid regulatory disputes. The presumption of validity, also known as vermoeden van rechmatigheid, states that notary deeds will always be regarded as legitimate and possess complete and perfect evidentiary value, until any party can demonstrate otherwise in court. This principle serves as a safeguard against crimes that could put notaries in legal hot water.

This presumption of validity is related to the General Explanation of the UUJN which states: "...as the strongest and fullest written evidence, what is stated in a notarial deed must be accepted, unless the interested party can prove the opposite satisfactorily before a court trial." According to Habib Adjie, this presumption of validity is related to a deed that can be canceled, which is an act containing a defect. Specifically, the notary's inability to create a deed that is not in compliance with the legal requirements for notarial deeds and that is formal, substantial, and externally (Habib Adjie, 2017).

Based on the results of the researcher's research, that the existence of the presumption of validity of the deed made by the Notary has not guaranteed the Notary from legal traps, because there are still Notaries who are caught in the law in making deeds from fake documents brought by the confronter which makes the deed legally defective. According to the researcher, the UUJN needs to be changed in order to protect notaries' immunity rights. This is because notaries have a lot of responsibilities and duties in the legal field, and their immunity rights are necessary for their comfort and security while performing their jobs.

Based on the description above, the Researcher provides a proposal related to the right of immunity to Notary, because this is very much needed for the future, with the formulation of norms made as an additional paragraph (5) in Article 66 of the UUJN, as follows: "Notaries cannot be prosecuted either civilly or criminally in carrying out their professional duties in good faith to carry out their duties as regulated in this law".

In the formulation of the norm above, it can be added in the Explanation Chapter, regarding "good faith means that the Notary performs his duties in accordance with the provisions of the applicable laws and regulations and there is no negligence in the process or procedure of making and/or the content of the deed he makes".

According to the aforementioned standards, notaries who perform their professional duties without breaking any of the laws or codes of ethics are immune from both civil and criminal prosecution. In addition to offering the Notary total protection, the assumed right of immunity shields the Notary from criminal and civil liability resulting from the client's incomplete or inaccurate information.

4. CONCLUSION

The form of norming the notary's right of refusal in the process of law enforcement of notarial deeds related to legal issues by adding norms regarding the legal protection of Notaries in the UUJN and UUJN-P. Based on the results of the researcher's research, that regarding authentic deeds made by Notaries in the Netherlands and Indonesia, which adhere to the civil law system, have perfect evidentiary power, while deeds made by public notaries in America do not. In Indonesia, the provision of the notary's obligation to seek material truth from the confronter has not guaranteed the notary from legal traps, because there are still notaries who are caught in the law in making deeds from fake documents brought by the confronter. According to researchers, the UUJN needs to be changed regarding notaries' immunity rights because notaries have a lot of responsibilities and duties in the legal field. These rights are necessary for the notaries' comfort and safety while performing their jobs. Before any party can demonstrate differently in court, the Notary deed will always be regarded as legitimate and having complete and perfect evidential value due to the presumption of validity, also known as vermoeden van rechmatigheid. A deed that can be canceled is an act that has a flaw, namely the notary's lack of power to make a deed publicly, legally, materially, and not in compliance with the legal regulations for the making of notarial deeds. This is connected to the legal presumption concept. Based on the description above, the Researcher provides a proposal related to the immunity rights of Notary, because this is very much needed for the future, with the formulation of norms made as an additional paragraph (5) in Article 66 of the UUJN, as follows: "Notaries cannot be prosecuted either civilly or criminally in carrying out their professional duties in good faith to carry out their duties as regulated in this law". In the formulation of the norm above, it can be added in the Explanation Chapter, regarding "good faith means that the Notary performs his duties in accordance with the provisions of the applicable laws and regulations and there is no negligence in the process or procedure of making and/or the content of the deed he makes". According to the established standards, Notaries are immune from civil and criminal prosecution while performing their professional responsibilities, provided they adhere to the legal rules and ethical codes. The expected right of immunity is not merely to provide absolute immunity to the Notary, but in the form of protecting the Notary from civil and criminal liability due to client errors in providing information and data completeness.

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