

The Notary's Right of Refusal in Examination: Study of Judicial Consideration of Decision Number 1003 K/PID/2015

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Submission Track:	ABSTRACT
Received: March 28, 2023	Objective: This research was conducted to present considerations to the judge regarding the notary's right of refusal in the case of an examination (Study on Case Decision Number 1003 K/PID/2015) and the consequences related to the notary's right utilization according to the law on the notary's office and code of ethics in Indonesia.
Final Revision: June 16, 2023	Methodology: This research adopted normative juridical law research, employing statute and case approaches. The materials obtained from the research findings were systematically collected and classified according to the subject matter and then qualitatively analyzed.
Available online: June 19, 2023	Results: This research emphasized that the right of refusal in the position of a notary is contained in the notary oath of office, which prohibits disseminating the contents of the data. Regarding the consequences of the notary refusal, the notary will be discharged from witness obligations or a general testimony for the release of the notary from various demands related to all parties' interests. Applications of this study: The study provides a reference conceptualized into norms that can be accepted and implemented in society and become a moral guideline regarding the notary's right of refusal in the case of an examination. Novelty/Originality: This research concerns the notary's right of refusal in the examination context and its consequences. This study focuses on the judge's consideration investigation and its relation to the law on notary office and the notary code of ethics, which are relatively uncommon in Indonesia.

Keywords: Notary, Right of Refusal, Law on Notary Office, Code of Ethics

ABSTRAK

Tujuan: Penelitian ini dilakukan untuk memberikan pertimbangan kepada hakim mengenai hak ingkar notaris dalam perkara pemeriksaan (Studi Putusan Perkara Nomor 1003 K/PID/2015) dan akibat yang terkait dengan penggunaan hak notaris menurut hukum tentang jabatan notaris dan kode etik di Indonesia.

Metodologi: Penelitian ini menggunakan penelitian hukum yuridis normatif, dengan pendekatan undang-undang dan kasus. Bahan-bahan yang diperoleh dari temuan penelitian dikumpulkan secara sistematis dan diklasifikasikan menurut pokok bahasan kemudian dianalisis secara kualitatif.

Hasil: Penelitian ini menegaskan bahwa hak ingkar jabatan notaris tertuang dalam sumpah jabatan notaris yang melarang penyebarluasan isi data. Mengenai akibat penolakan notaris tersebut, notaris akan dibebaskan dari kewajiban saksi atau keterangan umum untuk pembebasan notaris dari berbagai tuntutan yang berkaitan dengan kepentingan semua pihak.

Aplikasi penelitian: Kajian ini memberikan acuan yang dikonseptualisasikan ke dalam norma-norma yang dapat diterima dan dilaksanakan di masyarakat serta menjadi pedoman moral mengenai hak ingkar notaris dalam hal pemeriksaan.

Kebaruan/Orisinalitas: Penelitian ini menyangkut hak ingkar notaris dalam konteks pemeriksaan dan akibatnya. Kajian ini berfokus pada pemeriksaan pertimbangan hakim dan kaitannya dengan undang-undang jabatan notaris dan kode etik notaris yang relatif jarang ditemui di Indonesia.

Kata kunci: Notaris, Hak Menolak, UU Jabatan Notaris, Kode Etik

INTRODUCTION

Engaging in the legal profession certainly offers significant privileges because this profession is very noble and greatly influences the structures and elements of the state (Tardjono, 2021). As one of the noble professions, the state apparatus certainly has values in upholding noble duties, including honesty, responsibility, courage, and independence, both ethically and morally. As one of the vital components of law enforcement, besides performing the duties according to the law, a notary must also uphold the moral values of the profession (Salsabilah, Subroto, & Pratiwi, 2022). It occurs because the profession of a notary has a significant interconnection with social and humanitarian life (Yazid, 2020). Furthermore, the public in common still considers the state neutral and stands above all groups. However, in fact, the public still considers that the public interest is more identical to state politics or

interests. In addition, the state has the authority in this case and has a vital responsibility to ensure the safety and harmony of its citizens (Newton & Deth, 2019).

The law regarding notary responses, as stipulated in Law No. 30 of 2004, elucidates that a notary is a public official endowed with the privilege to create authentic deeds, make tools, and collect perfect and balanced evidence for the involved parties (Setiadi, 2017). Evidence holds significant importance in legal actions, which is minimally helpful as a tool of reassurance and will not be impartial in a trial. Regarding the third party's involvement to act on the case, the third party has the right to formulate, and it can be employed as evidence, while the rest is entrusted to the state (Baihaqi, 2020). In performing his duties, a notary must maintain his position confidential. This obligation has been conferred upon him even before performing his duties and positions, namely in the oath of office per Article 4 Paragraph 2 of Law No. 30 of 2004. In its implementation, the notary possesses the right not to assume this obligation according to an order from the Judge (Zagoto, 2020).

In the judicial process, deeds can serve as evidence, such as in civil cases (Palit, 2015). Fundamentally, a notary will maintain his position confidential and will refuse to answer as requested to provide an explanation regarding the formed deed, especially in terms of the contents, except for the former of the deed (Burns, 2005). Even though the notary's final product can be admitted as evidence, it will still require the services of the former with an alibi of office confidentiality (Sukisno, 2008). Thus, it is common in civil cases that the notary has an equal position to the suspect, even though this situation is unreasonable because a notary is prohibited from being involved in a legal action. The involvement of a notary as a suspect aims to reveal the results of the deed formed by a notary, which can serve as evidence (Busrizal, Yuslim, & Khairani, 2019). This particular case is recognized as one of the approaches to undermine the obligation to maintain the position confidential.

In accordance with UUJN (the Law on Notary Office), confidentiality is no longer an urgent matter. Furthermore, in this law on judicial processes, a notary not only is able to be requested for an explanation regarding the formed deed but also is also able to request a soft file or hard file from the notary (Difah, Wisnaeni, & Sukma, 2021). It is regulated in Article 66 UUJN that: Firstly, for judicial process purposes, investigators, public prosecutors, or judges, with the approval of the Regional Supervisory Council, are authorized to obtain a photocopy of the Minutes of the Deed and/or the letters attached to the Minutes of the Deed or

Notary Protocol in the repository of a notary, and summon the notary to attend the examination relating to the formed deed or the Notary Protocol in the notary's repository. Secondly, by obtaining a photocopy of Minutes of Deeds or letters referred to in paragraph 1, letter a, the minutes of submission are accomplished.

Regarding this article, notaries can be requested for information or statements as witnesses, especially in criminal cases (Krismen, 2019). Thus, law enforcement officials can present a notary in criminal law as a witness for the formed deed. However, according to the notary, the mentioned article is regarded as diminishing the obligation to maintain the notary position confidential (Fadila, Sugiri, & Wisnuwardhani., 2020). Furthermore, it can be noticed that there is no longer any obligation to maintain the position confidential. In fulfilling duties as a public official, a notary is considered to have the potential to conceal or obfuscate the proceeds of a crime (Elnizar, 2017). Thus, the possibility of a notary committing fraud and attempting to conceal fraudulent activities under the guise of confidentiality may occur. As in the case described in Supreme Court Decision Number 206/PDT/2015/PTMDN, concerning the notary sided with Defendant II and committed a crime of fraud against Plaintiff I, Notary (Defendant I) and Defendant II indeed committed a crime of fraud together (Chyntia Djabu & Latumenten, 2022).

Thus, this article intends to achieve clarity from the authentic deed that a notary has formed—more than extracting the truth of material data. On the one hand, as a legal instrument, a notary has the right of refusal as a public official while concurrently upholding his oath of office not to divulge the results of the formed deed. On the other hand, a notary must align with the state's interests to correspond to the public interest in obtaining a fair law (Aulia, Yuliandri, & Fendri, 2019). The boundary of the notary's authority to potentially reveal/expose the confidentiality of deed contents and everything obtained for the deed formation is exclusively due to the demands of concerned parties, heirs, or people who desire the parties to be allowed to comprehend the contents of the deed, as stipulated in UUJN Article 16 paragraph 1 point f, which states that the notary has the right to provide or reveal a statement regarding the deed to parties who have no interest in the trial as long as statutory regulations support it. In addition, the summons of a notary for the benefit of the judicial process, investigators, public prosecutors, or judges must also be approved by the Notary Honorary Council, as stipulated in Article 66 of Law Number 2 of 2014 concerning the position of a notary regarding the procedure for summoning a notary as a witness. Regarding

the problems described, this research initially aimed to examine the judge's considerations strategy regarding the notary's right of refusal in case decision number 1003K/PID/2015. Secondly, this research aimed to examine the legal consequences of using a notary's right of refusal in case number 1003/K/PID/2015 and its relation to the Law on Notary Office and the Notary Code of Ethics.

RESEARCH METHOD

This research employed normative juridical law research (Marzuki, 2014) to study the related legal products and the judge's consideration (Wiryani, Sugiharto, Nasser, & Najih, 2021). Specifically, Decision Number 1003 K/PID/2015 and Law No. 2 of 2014 are amendments to Law No. 30 of 2004 based on the Law on the Notary's Office and Code of Ethics. Furthermore, this technique is employed to identify and analyze rules, laws, and doctrines to answer the issues (Bhat, 2019). Juridical-normative or normative legal research is referred to as library research (Sumitro, 1990, p. 11). This legal research utilized statute and case approaches (Banakar & Travers, 2005). This research aimed to assess whether an event was right or wrong and the relevance of the event according to the law (Prastyanti, Rahayu, Yafi, Wardiono, & Budiono, 2022). The materials obtained from the research findings were systematically collected and classified according to the subject matter, then qualitatively analyzed according to the truth quality.

RESULTS AND DISCUSSION

The Judge's Considerations Regarding the Notary's Right of Refusal in Case Decision Number 1003K/PID/2015

As a civil servant and occupying a position of trust (*vertronwens ambts*), a notary must protect the contents of the formed deed and submitted, followed by all information provided by the parties, the presenter, and the notary. Thus, the notary must remain confidential because a notary is bound by an oath/confidential office in Article 4 UUJN. However, if the deed previously formed or achieved by a notary indicates a criminal act, the notary must discharge or neglect the confidentiality obligation regarding the contents of the deed because it includes the public or state interest, which serves the administration of justice. Procedures, Article 16 (1) (f), and confidentiality of office Article 54 UUJN can be neglected if a higher

interest requires testimony or information from a notary, discharging the notary from his oath of office according to applicable laws and regulations.

Concerning case decision number 1003K/PID/2015, which refers to the forgery of letters and causes disputes between the parties who form the deed, the case begins with a dispute between DFS (initials) as the Director of PT Bonita Indah and BS (initials) in court because of the deed formed by the defendant NS. There is a discrepancy between the copy of Notarial Deed No. 149 dated March 30, 2011, from BS and MH with the minute draft of Deed No. 149 belonging to DFS, namely Articles 4, 6, and 9. After DFS realized the discrepancies in Articles 4, 6, and 9, he visited the defendant to review the minute of Authentic Deed Number 149, dated March 30, 2011. Several articles have changed in the form of cross-out and sentence omission by suppressing the texts and then retyping them with a manual typewriter. Furthermore, some articles were discarded without the consent of DFS as the first party.

The judge's decision in case number 1003K/PID/2015 stipulates restrictions on utilizing the right of refusal to maintain the confidentiality of the notary's office, which was formed by the defendant NS in the expert's testimony, according to UUJN. He stated that if the changes made after the signing of the deed are invalid, compensation can be requested from the notary. Criminal disqualification causes harm to the other party. The notary must make changes in the presence of both parties following their agreement or the procedure (Isnaini & Utomo, 2019b). Therefore, the original document expires or can no longer be used as a binding document. Additionally, if defendant NS has deleted, abolished, and replaced Articles 4, 6, 7, and 9 of Deed Number 149 dated March 30, 2011, the defendant is declared to have violated Article 48 Paragraph (1) of Law No. 30 of 2004.

The Legal Consequences of Using the Notary's Right of Refusal (Case Number 1003/K/PID/2015)

A notary is a public official, not a civil servant (Closen, 1997). This term originated from the Latin "Notarius," which can be interpreted as a person authorized to make notes. The person also has a sign to convey words (Arisaputra, 2012). In performing their duties, the notary has obligations that cannot be neglected, as stated in Article 16, paragraph 1 UUJN. As a public official, a notary must be honest, act carefully, and act independently. In addition, the most important thing is to protect the interests of parties related to the law (Djunaedi, 2021),

make a deed or minutes of the deed, which are saved as a notary protocol (Putra, Sudini, & Puspadma, 2020), issue a copy or duplicate of the deed following the minute of the deed (Adigita, Ma'ruf, & Witasari., 2019), provide services under the law (Hulu, 2020), maintain everything related to the confidentiality of the deed following the oath of office (Styawati, Sumardika, & Ujianti., 2023).

In the case of an examination, the notary's right of refusal is a right to freely provide information as a witness in a civil and criminal case. This privilege is an exception because everyone summoned as a witness is obliged to testify (Syahyu, 2022). It is an exception for a notary (Wibowo, 2019), as one of the public officials endowed with legal protection in providing testimony (Vaughn, 1975). However, limited notaries practically utilize this right because the right of refusal can fundamentally be a valid or invalid reason for a notary to be discharged from providing testimony. Regarding the right of refusal, if the deed formed by or for a notary is indicated with a criminal act and the notary must be relieved from or neglect the obligation to maintain confidential everything related to the contents of the deed, the confidentiality of office can be set aside (Permanasari & Khisni, 2018). A notary can be discharged from his oath of office by relieving or neglecting the obligation to keep secrets regarding the contents of the deed to become a witness in court in the public or state interest and assist in the legal process (Rasta, 2015). The exception from the obligation not to provide the deed's contents also justifies utilizing the right of refusal arbitrarily. It occurs because the right of refusal is not only for personal gain but also for the public interest; consequently, it cannot be merely dismissed (Arliman, 2015). In addition, Law Number 2 of 2014 is an amendment to Law Number 30 of 2004 concerning the position of a notary prohibited from concurrently holding a position as a state official. Furthermore, a notary is not allowed to serve as a state official.

The legal consequence of employing the right of refusal by a notary in event No. 1003/K/PID/2015 is a forged Notarial Deed. Thus, it served as the foundation for conducting witness interviews and obtaining official warrants—the authority of Notary Sanctions for notaries. In contrast, this limitation is demanded or utilized to punish a notary because the notary falsifies the authentic deed (Nur, 2022), which is classified as a notary delict. The notary is legally responsible for the act, the forgery of original documents, and the notary is liable for sanctions related to tort. Veegens Oppenheim P. stated that a deed is written

evidence or a piece of writing that can be employed as legal evidence (Sari, Pamuncak, & Kurnianingsih, 2021). An authentic deed has a minimum of three types of evidence: 1). Formal Evidence: This type of evidence focuses on providing evidence that the notary has explained what has been stated in the deed. 2). Material Evidence: This type of evidence focuses on proving that what is in the deed is an event that indeed happened, not fictitious. 3). External Evidence: It serves as proof that there is also a third party who, according to the time in the deed, has visited the person in charge to explain this matter (Aswin, 2006).

Quoting from Law No. 2 of 2014, the legal protection provided to notaries is exclusively for notary professionalism. Specifically, to protect against all interests of the validity of the data contained in the authentic deeds of all parties concerned, the deeds will become protected state archives. In the process of protecting a notary from the threat of being summoned in a judicial mechanism until taking minutes of the deed or notary protocol, it is regulated in Article 66 Paragraph 1 Chapter IV, initially, for judicial process purposes, investigators, public prosecutors or judges with the approval of the regional supervisory council are authorized, namely taking a photocopy of the minutes of the deed and/or the letters attached to the minutes of deed or notary protocol in the notary's repository, and summons the notary to present in the examination relating to the deed formed or the Notary Protocol in the notary's safekeeping. Secondly, a copy of Minutes of Deeds or letters referred to in paragraph 1, letter a, minutes of submission can be taken.

In the process of providing testimony in court, the notary also has the right to remain silent or the notary does not testify in court as long as it does not conflict with other laws and regulations (Kusuma, 2019). It means that a notary has the right not to provide an explanation for the formed deed, either partially or in whole. Because the notary is a trusted person, the notary has the right to maintain everything that is notified to him by the concerned party (Isnaini & Utomo, 2019a). The legal consequences of a notary in employing the right to remain silent in court are as follows: Initially, if a notary utilizes his right of refusal, he must be discharged as a witness or provide testimony in the trial for violating the oath of office and violating the confidentiality of office (Pratiwi & Djaja, 2021). However, after the issuance of Constitutional Court Decision Number 49/PUU.X/2012, the Law on Notary Office Number 30 of 2004 concerning the right of refusal can be discharged if it is related to the process of law. Article 27 of the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 7 of 2016 concerning the Notary Honorary Council states that the Notary

Honorary Council provides approval to investigators, public prosecutors, and judges for the benefit of the judicial process in summoning a notary on the condition that: 1) there is an allegation of a criminal act relating to the minutes of deed and/or notarial letters in the notary's safekeeping; 2) The right to sue is not expired under the provisions of the expiration in 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 is an allegation that the notary has postponed the date. Concerning case number 1003/K/PID/2015, the defendant NS was proven to have deleted, replaced, and changed Articles 4, 6, 7, and 9 of Deed Number 149 dated March 30, 2011. Thus, the defendant was declared to have violated Article 48 Paragraph 1 of Law No. 30 of 2004. As a result, NS, as a notary, must discharge or neglect the obligation to maintain confidentiality regarding the contents of the deed because it is in the public interest or the state's interest and helps the legal process. Article 16 paragraph (1) letter f and Article 54 UUJN related to confidential positions can be neglected and require the defendant to provide testimony or information in court examination.

Furthermore, the notary can be exempted from all lawsuits filed by interested parties if the right of refusal is rejected by the judge or court or according to legal provisions that require the notary to testify before the court (Erliyani & Ratomi, 2018). If the notary utilizes his right of refusal, he must attend and fulfill the summon and must submit a request that the notary will utilize his right of refusal to the judge who hears or examines the case (Faerber, 1997). The judge examining the concerned case 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. However, if the judge rejects the notary's request, the notary must testify. Regarding case number 1003/K/PID/2015, the notary was proven to have falsified an authentic deed, including deleting, replacing, and changing the deed, which was utilized as a fundamental for the judge to sanction NS in a trial in the form of administrative sanctions.

Notary negligence and acts violating provisions in statutory regulations are not regulated in the Law on Notary Office, but it does not imply that a notary cannot be subject to criminal sanctions for his actions (Ananta, Arjaya, & Agung, 2021). A notary can still be subject to criminal sanctions if the notary complies with the formulation of violations stipulated in the Criminal Code. A notary can be requested responsibility in civil, code of

ethics, and administrative terms on the condition that, in performing his authority, it is proven that he has abused his authority, which has caused losses to parties who have an interest (Chyntia Djabu & Latumenten, 2022). Criminal sanctions are the most severe sanctions for unlawful acts committed by a notary, and criminal sanctions are the *ultimum remedium*, which refers to the final sanction if civil and administrative sanctions or code of ethics sanctions are insufficient in deterring the notary or PPAT (Rusyd & Astuti, n.d.). It was also utilized as the foundation for convicting the defendant NS because a notary had falsified authentic documents, including criminal activity that NS committed. Furthermore, NS was legally responsible for an act of falsification of authentic documents, and he assumed responsibility for a sanction in acts that were contrary to the law.

CONCLUSION

Fundamentally, a notary must carefully protect the contents of the deed provided to investigators or public prosecutors. A notary confirmed to have divulged client deed data will impact divulging client confidentiality and create the impression that the notary is unprofessional and impartial. However, if circumstances compel the notary to act as a witness because the deed formed by or before him indicates a criminal act, the notary must discharge or neglect the obligation to maintain the contents of the deed confidential because it is in the public or state interest and assists the legal process. The confidentiality of office, as stipulated in Article 16 paragraph (1) letter f and Article 54 UUJN, can be set aside, and a notary can be discharged from his oath of office following the applicable laws and regulations to serve as a witness at the examination. Forgery of original documents with the qualifications of a crime committed by a notary public can be utilized as a foundation for imposing sanctions in the form of administrative sanctions, and the notary is legally responsible for his actions and is responsible for a sanction in the event of an act contrary to the law.

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