

## LEGAL AND SOCIOLOGICAL IMPLICATIONS OF THE CONSTITUTIONAL COURT DECISION NUMBER 49/PUU-X/2012 ON THE POSITION OF NOTARY

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### Abstract

The Constitutional Court Decision Number 49/PUU-X/2012, which annulled Article 66, paragraph (1), of Law Number 30 of 2004 concerning the Position of Notary, was a turning point in the supervision and protection system for the notary profession in Indonesia. This study aims to determine and analyze the legal and sociological implications of Constitutional Court Decision Number 49/PUU-X/2012 regarding the position of notaries and the form of legal protection that should be provided to notaries after the decision. The research method used is socio-legal. The results of the study reveal two things: First, the Constitutional Court decision has legal and sociological implications. Juridically, the Constitutional Court's decision has implications for the possibility of notaries providing information that has implications for violating the principle of client confidentiality, changing the legal relationship between notaries and clients which was originally a private relationship into a public legal relationship, the notary's rights and obligations to disobey are void if the law orders the notary to reveal secrets and provide information to the requesting party such as investigators, prosecutors or judges, and the notary's rights to guarantee a fair examination process are likely to be violated by the Constitutional Court's decision. Sociologically, the decision means the public no longer trusts notaries if the contents of the deeds they make, which should be confidential, are revealed by the notary by law in the interests of investigation and/or examination in court, and the client will sue the notary for revealing their secrets. Second, the forms of legal protection provided to notaries following the Constitutional Court ruling include the obligation for law enforcement to request information from senior notaries who are members of the Notary Honorary Council (Majelis Kehormatan Notaris or MKN) for notarial examinations, both for investigative purposes and for court hearings. The client's right to privacy (the right to rebuttal) must remain protected throughout the examination process, and legal sanctions are imposed on law enforcement officials who violate the principle of client confidentiality inherent in notaries' roles and functions.

**Keywords:** *Constitutional Court Decision; Notaries; Regional Supervisory Council; Legal Protection*

### I. Introduction

Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia affirms that Indonesia is a state based on law. As a state based on law, Indonesia guarantees legal certainty, order, and protection for every citizen. According to General explanation of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, to guarantee this legal certainty, order, and protection, authentic written evidence is required regarding actions, agreements, decisions, and legal events made before or by authorized officials.

A notary is a public official authorized to draw up authentic deeds and has other powers. In carrying out their duties, notaries are required to maintain confidentiality regarding the deeds they draw up and all information obtained for the purpose of drawing up the deeds, in accordance with their oath/promise of office, unless otherwise stipulated by law. Therefore, notaries require protection and guarantees to ensure legal certainty.

Article 66 paragraph (1) of Law Number 30 of 2004 concerning the Position of Notary stipulates that for the judicial process, summoning a notary and taking photocopies of the minutes of the deed and/or letters attached to the minutes of the deed by law enforcement officers must have the approval of the Regional Supervisory Council (Majelis Pengawas Daerah or MPD).

During its development, Article 66, paragraph (1), of the law was subject to a judicial review lawsuit before the Constitutional Court (Mahkamah Konstitusi or MK) by Kant Kamal as the plaintiff. The lawsuit was filed because the plaintiff encountered obstacles during a dispute with his business partner. The dispute included, among other things, forged signatures and the provision of false information (Partner Media Notaris, 2013).

The panel of judges of the Constitutional Court in Decision Number 49/PUU-X/2012 dated May 28 2013 has granted the request for a judicial review of Article 66 paragraph (1) of Law Number 30 of 2004 concerning the Position of Notary in the form of cancellation of the phrase "with the approval of the Regional Supervisory Council (Majelis Pengawas Daerah or MPD)" in the article being tested, with the ratio decidendi that according to the court the need for the approval of the Regional Supervisory Council regarding the judicial process is included in the group of regulations that should not contain different treatment, because it is contrary to the principle of equal protection, as guaranteed in Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia: equality or equal rights before the law and government.

With the issuance of Constitutional Court Decision No. 49/PUU-X/2012, the Constitutional Court has revoked the function and authority of the Regional Supervisory Council to provide legal protection to notaries, including document retrieval and summoning them for examinations. According to Hasbi (2012), this allows police investigators to directly summon and question notaries without the permission of the Regional Supervisory Council.

The Constitutional Court's decision is considered to uphold and apply the principle of equality before the law to all citizens without exception. However, the decision also has legal and sociological implications, particularly regarding the status of notaries as public officials.

Based on these issues, this research can be identified as follows: What are the legal and sociological implications of Constitutional Court Decision No. 49/PUU-X/2012 for the existence of notaries, and what form of legal protection should notaries be provided following the Constitutional Court's decision?

Several previous studies on Constitutional Court Decision No. 49/PUU-X/2012 have discussed the legal implications of the Constitutional Court's decision for the existence of the Regional Supervisory Council, which continues to exist in accordance with Law No. 30 of 2004. However, the Regional Supervisory Council's authority to grant approval for the issuance of summonses to notaries is no longer valid and has no legally binding force (Siregar, 2014). The concept of the right of refusal in the performance of notary duties can be excluded if it is related to due process of law, which implies the summons of notaries without the Regional Supervisory Council's approval (Fidhira et al., 2021). Dwiwana (2013) discusses the legal protection of notaries in maintaining the confidentiality of deeds after the decision, which no longer receives protection from the Regional Supervisory Council.

In this article, not only the legal implications but also the sociological implications of the Constitutional Court's decision Number 49/PUU-X/2012 on the existence of notaries, as well as seeking the appropriate format/form of protection to maintain the dignity and honor of notaries in carrying out their duties, so as not to cause unrest, in the economic, social and political fields at this time which can be the basis for renewing regulations related to the position of notaries.

## II. Finding and Discussion

### A. Implications of the Issuance of Constitutional Court Decision Number 49/PUU-X/2012 on the Position of Notary

Following the Constitutional Court's decision Number 49/PUU-X/2012, dated May 28, 2013, which annulled Article 66 paragraph (1) of Law Number 30 of 2012 concerning the Position of Notary. Legally, this has implications for the police's authority to directly summon and/or examine notaries without obtaining approval from the Regional Supervisory Council. If previously, this authority was limited by the existence of the Regional Supervisory Council, then after the decision, the police's authority to summon and/or examine every citizen was also extended to notaries. The decision contains clear and firm legal norms, especially for law enforcement to summon and/or examine notaries for investigation and/or examination in court (Meagher, 2014).

Although the Constitutional Court's ruling is considered to uphold and apply the principle of equality before the law to all citizens without exception, the ruling also has legal and sociological implications, particularly for the existence of notaries. Furthermore, the Constitutional Court's ruling also eliminates notaries' rights to legal protection against alleged criminal acts.

While the legal protection currently provided to notaries is through the Regional Supervisory Council, the Constitutional Court's ruling effectively deprives notaries of legal protection in the exercise of their profession. Without notaries, government administration and the daily lives of the public, particularly those related to the preparation of deeds and similar services, face challenges.

Several notaries interviewed stated that the principle of client confidentiality is violated when notaries provide testimony to investigators, even as witnesses, regarding deeds they have prepared. The questions investigators ask notaries actually reveal client secrets that notaries are obligated to safeguard. Furthermore, the notary's right to recuse is violated by investigators' questioning. Even if a notary is unwilling or even refuses to testify as a witness in a criminal case related to a deed they have prepared, investigators still ask them to answer questions about the deed, a direct violation of the notary's right of recusal.

Based on these interviews, it is clear that the summons and/or examination of notaries by investigators actually has implications for: First, there is a possibility that a notary might provide information that could violate the principle of client confidentiality. On the one hand, a notary is legally obligated to provide accurate information in accordance with the alleged article, thereby obtaining two valid pieces of evidence. On the other hand, the information provided by the notary could potentially violate their own obligation to safeguard the contents of the deed they drafted (Law Number 2 of 2014 concerning the Position of Notary).

Second, the Constitutional Court's ruling changed the legal relationship between notaries and clients from a private one to a public one. This means that the contents of deeds drawn up by notaries, which were supposed to be for the client's benefit, become public if the police request information from the notary about the deed's contents (Adjie, 2008).

Third, a notary can be found guilty of an unlawful act if they disclose the contents of a deed to a third party without the client's knowledge and permission. The Constitutional Court's ruling revokes a notary's right and obligation to disregard a deed when the law requires them to disclose confidential information and to provide it to a requesting party, such as an investigator, prosecutor, or judge (Adjie, 2008).

Fourth, the Constitutional Court's ruling may violate the notary's right to a fair examination process. Problems arise when the police name a notary as a suspect without prior approval from the Regional Supervisory Council for an alleged crime related to the drafting of a deed whose contents intersect with three legal areas: civil law, criminal law, and state administrative law (Adjie, 2008). Moreover, the police did not seek information from a senior notary or contract law expert before naming the notary as a suspect. The notary's right to a fair trial was violated in this context.

The Constitutional Court's ruling also has sociological implications. The public will lose trust in notaries if the contents of their supposedly confidential deeds are disclosed by the notary for investigation and/or examination in court. This public distrust is dangerous, given notaries' strategic role and function. Furthermore, if notaries refuse to issue deeds requested by the public because investigators could summon them at any time without prior approval from the Regional Supervisory Council, government and business operations will be disrupted, as financial transactions and other matters inevitably require the presence of a notary.

Clients whose supposedly confidential deeds are disclosed by the notary upon being named a suspect are also potentially liable for civil lawsuits alleging unlawful conduct by the notary. A notary is considered to have committed an unlawful act or breach of contract if they issue a deed whose contents are confidential and only known and disclosed with the knowledge and consent of the client.

If this is the case, the Constitutional Court's decision is actually sociologically problematic because it does not take into account the side effects that will arise from the cancellation of Article 66, paragraph (1), of Law Number 30 of 2004 concerning the Position of Notary.

## **B. Forms of Notary Protection Following the Issuance of Constitutional Court Decision Number 49/PUU-X/2012**

The issuance of Constitutional Court Decision Number 49/PUU-X/2012 had implications for the vacuum of legal protection for notaries. The Central Board of the Indonesian Notaries Association (Ikatan Notaris Indonesia or INI) submitted a National Legislation Program (Program Legislasi Nasional or Prolegnas), and Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary was issued, which was ratified and promulgated in Jakarta on January 15, 2014 (Arliman, 2016). Article 66 paragraph (1) of Law Number 2 of 2014

again includes legal protection for notaries by reviving a similar function through the establishment of the Notary Honorary Council (Majelis Kehormatan Notaris or MKN).

The Notary Honorary Council (Majelis Kehormatan Notaris or MKN) is a breath of fresh air for notaries. Law enforcement officers can no longer directly take photocopies of minutes of deeds or notarial protocols, or summon notaries, without obtaining approval from the regional Notary Honorary Council for investigation and judicial purposes. The existence of the Notary Honorary Council is expected not to hinder the law enforcement process, but rather to help smooth the handling of cases while still upholding the principle of equality before the law, including for notaries (NNP, 2016).

In legal science, the term legal protection can mean protection given to the law so that it is not misinterpreted and is not harmed by law enforcement officials, or protection given by the law to something (Irianto, 2013).

Hadjon (1987) defines legal protection as the protection of dignity and honor, as well as the recognition of human rights held by legal subjects, based on legal provisions that protect against arbitrariness, or as a collection of regulations or rules that protect one thing from another. Legal protection in this discussion refers to the protection of notaries as legal subjects in the performance of their official duties.

Notaries and their deeds can be interpreted as the state's efforts to create legal certainty and protection for society's members. Given that, in the private/civil legal domain, the state positions notaries as public officials authorized to issue authentic deeds as evidence (Pengurus Pusat Ikatan Notaris Indonesia, 2013).

Based on the provisions of Article 15 paragraph (1) of Law Number 2 of 2014, a notary is authorized to draw up a deed as long as the parties desire it or it is legally required to be drawn up in the form of an authentic deed. However, when carrying out their duties and responsibilities, errors in drawing up an authentic deed, whether intentional, unintentional, or due to negligence, are possible. If this occurs, it will give rise to legal issues related to the drawing up of the deed, both civil and criminal.

In civil law, the validity of an authentic deed as strong evidence can be questioned. Meanwhile, in criminal law, in addition to the questionable validity of a notarial deed, a notary may also be suspected of committing an unlawful act, particularly for preparing or providing false information in the deed.

The creation of authentic deeds by a notary public, as a public official, is limited and restricted by the standards or requirements for notarial deeds as referred to in Articles 38 to 65 of Law Number 2 of 2014. If a notary public complies with the provisions of laws and regulations when creating an authentic deed, the notary will be free from legal issues related to the deed.

A notary public is also a citizen with equal rights and obligations before the law. Legal protection for notaries as private citizens is the same as that enjoyed by citizens in general. In addition to being private citizens, notaries as public officials also enjoy legal protection.

The notary's right of recusal is an inherent right due to the notary's obligation to maintain confidentiality regarding the deeds they create and the information obtained from the parties involved in the creation of the deeds. The notary's right and obligation to recuse lapse if the law requires them to disclose confidential information and provide information to requesting parties, such as investigators, prosecutors, or judges.

The application of a notary's right of recusal is in line with the notary's obligation to maintain confidentiality of the contents of the deeds they draft. Article 4 paragraph (2) of the Notary Law concerning the notary's oath/pledge and Article 16 number (1) letter f of the Notary Law concerning the notary's obligation to maintain confidentiality of all matters concerning the deeds they draft, unless otherwise stipulated by law.

In criminal proceedings, the application of the right of recusal is in accordance with Article 220 of Law Number 20 of 2025 (the new Criminal Procedure Code), which states that: (1) A person who, due to their dignity, occupation, or position, is required to maintain confidentiality may request to be exempted from the obligation to testify as a witness regarding matters entrusted to them. (2) The judge shall determine the validity of all reasons for the request as referred to in paragraph (1).

The provisions of the Criminal Procedure Code are materially regulated in Article 443 point (1) of Law Number 1 of 2023 (the new Criminal Code), which states that "any person who reveals a secret that he or she is required to keep because of his or her position, profession, or duties assigned by a government agency, whether currently or previously, shall be punished by a maximum of 1 (one) year's imprisonment or a maximum fine of category III."

Furthermore, a notary's right of recusal can be used to refuse to be a witness in a criminal case as referred to in Article 218 of the new Criminal Procedure Code, which states that unless otherwise stipulated in this law, "a person cannot be heard and may withdraw as a witness if: he or she is related by blood or marriage in a straight line up or down to the third degree to the accused; or who is also a suspect or defendant even though the cases are separate; is related by blood to the accused or is related by mother or father, as well as those who are related by marriage to the children of the accused's siblings up to the third degree; and/or is the husband or wife of the accused or was previously the husband or wife of the accused."

Article 54 point (1) of the Notary Law states that "a notary may only provide, show, or disclose the contents of a deed, the grosse deed, a copy of the deed, or an extract of the deed, to persons directly interested in the deed, heirs, or persons who acquire rights, unless otherwise stipulated by statutory regulations."

The notary's obligation to breach the notary's obligation carries with it sanctions for notaries who violate it. The provisions regarding sanctions for notaries who breach the obligation are related to Article 443, point (1), of Law Number 1 of 2023 (the new Criminal Code), which provides that the term "every person" also includes substitute notaries and acting notaries. This is as referred to in Article 33 paragraph (2) of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, which states that the provisions applicable to Notaries as referred to in Article 4, Article 15, Article 16, and Article 17 apply to Substitute Notaries, Acting Notaries, emeritus notaries, and retired notaries unless otherwise stipulated by law.

Provisions regarding the scope of notaries who receive protection from the Rights and Obligations of Refusal should also be included in the provisions of Article 66 paragraph (1) of Law Number 2 of 2014, so that they receive protection from the Notary Honorary Council in relation to summoning notaries in judicial proceedings. So the article reads as follows: "For the benefit of the judicial process, investigators, public prosecutors, or judges, with the approval of the Notary Honorary Council (Majelis Kehormatan Notaris or MKN), are authorized to summon notaries, substitute notaries, temporary notary officials, emeritus notaries, and werda notaries to attend examinations related to notarial deeds or protocols held by the notary." This is to ensure that notaries, both during and after their tenure, are protected from the arbitrariness of investigators in the criminal justice process related to the making of the said deeds or information regarding their creation. This is solely so that the nobility and dignity of the notary institution at the legal level can be maintained..

### III. Conclusion and Suggestions

The issuance of Constitutional Court Decision No. 49/PUU-X/2012, dated May 28, 2013, regarding the existence of notaries has legal and sociological implications. Legally, the Constitutional Court's decision removed the Regional Supervisory Council's (Majelis Pengawas Daerah, or MPD) authority to issue summonses to notaries for law enforcement purposes. Summonses and/or examinations related to notaries' presence as witnesses or suspects in deeds they have drawn up raise several implications, including the possibility that notaries may provide information that could violate the principle of client confidentiality. Second, the legal relationship between notaries and clients changes from a private relationship to a public one. Third, notaries can be found guilty of an unlawful act if they disclose the contents of a deed to a third party without the client's knowledge and permission. Fourth, the notary's rights to a fair examination process may be violated.

The Constitutional Court's decision also has sociological implications. Sociologically, the public will lose trust in notaries if the contents of their supposedly confidential deeds are disclosed by the notary for investigation and/or examination in court. This would then deem the notary to have committed an unlawful act or breach of contract.

If this occurs, the Constitutional Court's decision is sociologically problematic because it fails to consider the potential side effects of amending Article 66 paragraph (1) of Law Number 30 of 2004 concerning the Office of Notaries.

The provisions of Article 31 of Law Number 1 of 2023 (the new Criminal Code) can be applied to notaries in carrying out their duties. As long as the performance of these duties complies with the procedures stipulated in Law Number 2 of 2014, this provides legal protection for notaries in carrying out their duties or constitutes a form of immunity for notaries in carrying out their duties in accordance with applicable law. There is an obligation for law enforcers to request information from senior notaries who are members of the Notary Honorary Council (Majelis Kehormatan Notaris or MKN) for the notary examination process, both for investigative purposes and examination in court hearings; the right to client privacy (right of recusal) must still be protected during the examination process. There are legal sanctions for law enforcers who violate the principle of client confidentiality inherent in the role and function of a notary.

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