



Arrangement and Implementation of Notary Privileges after the Decision of the Constitutional Court Number 49/PUU-X/2012

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Abstract

The formulation of the research problems includes: 1) How is the notary privilege arrangement before and after the decision of Constitutional Court number 49/PUU-X/2012? 2) How is the notary privilege implementation after the decision of Constitutional Court number 49/PUU-X/2012? The main approach method used in this research is a normative juridical approach; i.e. research that emphasizes legal aspects, by studying the primary and secondary legal materials which will later be used as guidelines in understanding and analyzing the issues under discussion. In addition, the main approach is supported by an empirical juridical approach.

Discussion: 1) since the ratification of Law number 30 of 2004, notary privileges are regulated in Article 4, Article 16, Article 54 and Article 66 paragraph (1), following the decision of Constitutional Court number 49/PUU-X/2012 which grants the petition for judicial review of Article 66 paragraph (1). 2) After the establishment of the decision of Constitutional Court number 49/PUU-X/2012 related to the cancellation of the approval term of the Regional Supervisory Board in Article 66 paragraph (1) of the Law of Notary Position, there is no protection against privileges because investigators, public prosecutors and judges can call and take the copy of the original of the deed and documents in the storage directly without the approval of the Regional Supervisory Board.

Keywords: Notary; Privilege; Deed

Background of the Research

Initially, the existence of a notary in Indonesia was a necessity for the European nation or its equivalent in an effort to create an authentic deed especially in the field of trade.¹ Currently, notary institution is increasingly recognized by the public and is needed in making authentic written evidence from a legal act carried out by the society.² The need for notary institution in daily legal practice is

¹ Santiago, Faisal. "Implementation of The Role of Notary Through Capital Market In The Era of Asean Economic Community." *International Journal of Civil Engineering and Technology (IJCIET)* 8.8, 2017.

² Sucaya, IKG Ary, and Ketut Gede Ary. "Application and validation the land administration domain model in real life situation: a case study in Indonesia." ITC, 2009.

inseparable from the increasing level of the economy and public awareness of the law. An authentic deed made by a notary has very strong legal needs considering that it is a perfect proof. Thus, various laws and regulations often require a legal act to be realized in an authentic deed; for instance, business relations, the establishment of a company, a cooperative, a fiduciary deed in which the deed is made at the request of the parties. In carrying out duties and positions, a notary must adhere to the notary code of ethics.³

A notary is the only general official authorized to make authentic deeds regarding all deeds, agreements, and stipulations required by a general regulation—or in other words—that have an interest in being stated on an authentic deed, guarantee the date, keep the deed, provide *grosse*, copy, and duplicate of the deed; as long as the making of the deed by a general regulation is not also being assigned or excluded to other officials or other people.⁴

In carrying out his/her profession, a notary must be trustworthy, honest, thorough, independent, and impartial. Then, the main or core basis in making a notary deed is the desire and request of the parties. Without the wishes and requests of the parties, the notary will not make the intended deed.⁵ This notary position regulation is regulated in Law number 30 of 2004 as amended by Law number 2 of 2014 concerning Notary Position, notary position rules are included in the rubric of Laws and organic regulations because it regulates the notary position. The material stipulated in the Notary Position Regulations is included in public law; thus, the provisions contained therein are compelling regulations (*dwingen recht*).⁶

A Notary Position is a position of trust (*vertrouwens ambt*) that has special rights or privilege or “*verschoningrecht*”. Therefore, someone is willing to entrust something to him/her as a trustworthy person (*vertrouwens persoon*).⁷ Privilege is the right for someone who is tried to file an objection accompanied by a reason for the judge who is adjudicating his/her case. Since it is a right, this privilege can be used or not used⁸.

The notary is obliged to keep everything informed to him/her. Despite of being a notary, there is some information that is not included in the deed, the notary is not free to tell what the parties told him/her when the discussion for preparing the deed takes place. In this case, not all information in the discussion is included in the deed.⁹ Since notary position is independent and impartial, the deed that he/she made is a definite and legal guarantee. A notary cannot be interrupted by the willingness of one party to ignore one of the other parties. Thus, a notary may not tarnish the trust that has been given by the Law. Keeping the contents of the deed made by a notary is an obligation of a public official.¹⁰ Therefore, before executing a position legally, a notary must first take an oath. As long as this has not been carried out, the position may not and cannot be carried out legally. A notary is obliged to keep everything about the deed he/she made and all the information he/she obtained in making deeds in accordance with the

³ Supriadi, *Ethics and Legal Professional Responsibility in Indonesia*, Sinar Grafika, Jakarta, 2006, page 51.

⁴ Habib Adjie, *Indonesian Notary Law (Thematic Interpretation of Law number 30 of 2004 concerning Notary Position)*, Refika Aditama, Bandung, 2008, page 13.

⁵ Daeng Naja, *Contract Making Techniques (Notary Mandatory Book)*, Pustaka Yustisia, Jakarta, 2012, page 16.

⁶ G.H.S Lumban Tobing, *Regulations of Notary Position*, Erlangga, Jakarta, 1992, page 44

⁷ *Ibid*

⁸ Hartono, Sunaryati. "The Law of Contract in Indonesia." *Malaya L. Rev.* 20 (1978): 142.

⁹ Sjaifurrachman, and Habib Adjie, *Notary Accountability Aspect in Making Deed*, CV Mandar Maju, Bandung, 2011, page 251-252.

¹⁰ Hartanto, J. Andy. "Legal Aspects of Land Purchase/Sale Disputes in Indonesia." *Environmental Policy and Law* 48.1 (2018): 79-82.

oath/ promise of office; unless, the law stipulates otherwise as stated in Article 16 paragraph (1) letter f of the Law of Notary Position.¹¹

The oath of office stipulated in Law of Notary Position Article 4 paragraph (2) of the Law of Notary Position concerning the oath/ promise of a notary affirms that the notary will keep the contents of the deed confidential and the information he/she obtained in conducting his/her position. Thus, a notary must keep the contents of the deed confidential and the information he/she obtained in making the deed; unless the Law instructs that the notary is not obliged to keep confidential and provide information which is needed and related to the deed. Thus, the boundary is clear that only the Law can order a notary to disclose the contents of the deed and the information/ statements he/she knows that are related to making the intended deed.¹²

Regarding allegations of legal cases carried out by a notary, Article 66 paragraph (1) of the Law of Notary Position states that investigators, public prosecutors, or judges must go through the approval of the Regional Supervisory Board in retrieving original of the deed and calling a notary.¹³ Then, in addition to the existence of notary privileges, there is no single article that regulates legal protection against a notary in the notary office. The legal protection is only implied in Article 66 of the Law on Notary Position concerning supervision of a notary that aims to provide legal protection for notaries in carrying out their duties and positions as public officials.

The form of legal protection is regulated in Article 66 paragraph (1) of Law number 30 of 2004 concerning Notary Position, which states: "For the benefit of judicial processes, investigators, public prosecutors, or judges, with the approval of the Regional Supervisory Board, are authorized to:¹⁴

- a. Take copies of the original of the deed and/or letters attached to the original of the deed or notarial protocol, and
- b. Call a notary to be present in the inspection pertaining to the notarial deed or protocol he/she made which is kept in the storage of the notary."

Research Method

Research is an effort or work to look back on a particular method carefully, systematically and perfectly to the problem so that the results can be used to solve or answer the problem. Legal research is a scientific activity, which is based on certain methods, systems and thoughts, which aim to study one or several symptoms of a particular law by analyzing it. The examination is carried out in depth against the legal facts, in which a solution is later sought on the problems that arise in the symptoms concerned. The research method is an absolute system and process that must be carried out in a research and development activity in science. As a scientific research, a series of research activities are assessed from data collection to data analysis which is carried out by observing the scientific rules as follows:

This study uses a perspective analysis approach. An analyst perspective means that this study studies the purpose of the law, the values of justice, and the validation of the rule of law.¹⁵ The analysis is

¹¹ <http://ilmukenotariatan.blogspot.co.id/2013/12/hak-ingkar-notaris-sbg-pejabat-umum.html#.VIKzNV4bHIU>, accessed on March 26, 2018.

¹² <http://yoanbudyanto.blogspot.co.id/2012/07/kewajiban-ingkar-notaris.html>, accessed on March 26, 2018.

¹³ Habib Adjie, *Compilation of Legislation Regulations for Notary Position*, Pustaka Zaman, Semarang, 2011, page 22.

¹⁴ Explanation of Law Number 30 of 2004 concerning Notary Position.

¹⁵ Peter Mahmud Marzuki, *Legal Research*, Kencana, Jakarta, 2010, page 35.

based on the description that facts obtained carefully about how to answer research problems. The design of the research is adjusted to the problems raised.

Normative legal research is intended to approach the problem by looking at the terms of legislation and the prevailing doctrines. The approach of this research is carried out using a normative juridical or legislative approach. It aims to approach the problem by looking at the prevailing laws and regulations regarding notary privilege arrangements and their implementation after the decision of Constitutional Court number 49/PUU-X/2012.

This study uses data sources: library research or library research is taking data from books, literature, and other reading related to this research. In addition, the places to conduct library research include:

- a. Library of the Faculty of Law, Post Graduate of Andalas University, Padang;
- b. Books and legal literature that the authors have relating to this research;
- c. Legal websites, or notarial materials from the internet related to the research problems.

Research Findings and Discussion

1. Arrangement of Notary Privileges Before and After the Decision of Constitutional Court number 49/PUU-X/2012

Notaries are an extension of the government in the field of civil law. The position of a notary is a position of trust (*vertrouwens ambt*) and therefore someone is willing to entrust something to him/her as a person who can be trusted (*vertrouws wens person*). Notary profession is an honorable position. Compliance with laws and regulations concerning notaries and notary codes of conduct is a necessity in order to maintain the honor and dignity of the notary's profession. Legal certainty is a characteristic that cannot be separated from the law, especially for written legal norms. Laws that have no certainty will lose their meaning because they can no longer be used as guidelines for everyone.¹⁶

As a trusted officer (*vertrouwens ambt*) that is appointed under the Law, the notary is given *versconingraech* privileges. Notary privilege is a statutory obligation which states that the notary is not obliged to provide testimony concerning the contents of the deed and information obtained in the execution of the position.¹⁷ Notary privilege is an oath or notary promise to God, State, society and him/herself to keep the deed and other information confidential or information obtained from the parties relating to the deed he/she made and the implementation of the notary duties since he/she appoints an oath as a notary, even when he/she retired as a notary. The authority of a notary determines that an act carried out by a notary must be based on a definite basis and regulated by a provision of legislation; i.e. a notary is authorized to carry out his/her duties if he/she has taken an oath based on his/her religion and belief before an official who is given the authority to do so. The notary is obliged to keep all data and information confidential by the parties before him/her during the making of the deed, as the notary oath which turns out to be stated in the Law of Notary Position Article 4 and Article 16 paragraph (1) letter f which explains the obligation to keep the contents of the deed confidential.

Furthermore, in the Law of Notary Position, notary privilege related to the interests of the judicial process is also affirmed in Article 54 and Article 66. Article 4 of the Law of Notary Position basically

¹⁶ Salim HS, *Theory Development in Law*, PT Rajagrafindo Persada, Jakarta, 2010, page 82.

¹⁷ Sjaifurrachman and Habib Adjie, *Notary Responsibility Aspect*, Mandar Maju, Bandung, 2011, page 254.

stipulates that “before carrying out his/her position, a notary is obliged to take oath or promise according to the appointed minister or official”. One of the contents of the oath and promise is in Article 4 paragraph (2) letter D states “that I will keep the contents of the deed confidential and the information that I obtain in carrying out my position”.

Moreover, Article 16 paragraph (1) letter e and Article 54 of the Law of Notary Position require the notary to not speak anything which means that the notary is not allowed to give testimony about what is contained in the deed which he/she made; including *partij deed* and *official deed/ ambtelijke deed*. Based on these provisions, the notary is not only entitled to not speak, but has an obligation not to speak. The obligation to not speak is not based on Article 1909 paragraph (2) number 3e of the Civil Code which only gives the right to speak by demanding the use of *verschoningrecht*'s privileges; however, it is based on the secret oath of office, Article 4 paragraph (2), 16 paragraph (1) letter e and Article 54 the Law of Notary Position. The obligation to keep the contents of the deeds confidential and all information obtained in the making of deeds that are expressly determined in these articles excludes the general obligation to give testimony as referred to in Article 1909 paragraph (1) of the Civil Code.¹⁸ Provisions in the Law of Notary Position along with other similar legislation require the notary not to disclose the secret of office and can be freed from the obligation to provide information as a witness in the judicial process.

Article 54 of the Law of Notary Position reaffirms the privilege of a notary in carrying out his/her position which states: provide *grosse*, copy, and duplicate of the deed. Notaries can only provide, show, or notify the contents of the Deed, Grosse, Copy or Duplicate of the Deed, to related persons, including the heirs or persons who obtain rights upon the Deed, unless the statutory regulations specify otherwise. Regarding allegations of legal cases carried out by a notary, it has been regulated in Article 66 paragraph (1) of the Law of Notary Position which states that investigators, public prosecutors, or judges, in the case of taking the original of the deeds and calling notaries, must go through the approval of the Regional Supervisory Board.¹⁹

Then on May 28, 2013, the Constitutional Court granted a judicial review of Article 66 paragraph (1) of the Law of Notary Position submitted by Kant Kamal and canceled the phrase “with the approval of the Regional Supervisory Board” within that Article. After the termination of the decision of Constitutional Court number 49/PUU-X/2012 on 28 May 2013, the examination of legal proceedings involving notaries no longer requires the approval of the Regional Supervisory Board again and the phrase is deemed contradictory to the 1945 Constitution of the Republic of Indonesia and has no binding legal force. In the trial and procedural law of the Constitutional Court of the Republic of Indonesia, it is certainly decided that this decision is final and binding.²⁰

The basis of the legal consideration of the Constitutional Court in deciding this case is the equality in law related to the provisions of article 66 paragraph (1) of the Law of Notary Position as long as the phrase / sentence with paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution; thus, it has no binding legal force. So, the investigator will be able to conduct an examination of the notary who made an authentic deed in which it is alleged that false information is included. Meanwhile, the investigator must make a police report in determining the authentic deed so that the inspection process can proceed so as to create equality in law for every citizen and legal protection and certainty that is fair to the Indonesian people, notary not as stipulated in Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution.

¹⁸ *Ibid*

¹⁹ Habib Adjie, *Compilation of Legislation for Notary Position*, Pustaka Zaman, Semarang, 2011, page 22.

²⁰ Decision of the Constitutional Court number 49/PUU-X/2012, *concerning Review of Law number 30 of 2004 concerning Notary Position against the 1945 Constitution of the Republic of Indonesia*.

Elimination of authority over the approval of police actions against a notary by the Constitutional Court Decision number 49/PUU-X/2012 dated 28 May 2013, which removes the phrase “with the approval of the Regional Supervisory Board” in Article 66 Paragraph (1) Law number 30 of 2004 concerning Notary Position does not mean much and does not affect the supervision of the notary because it turns out that in Law number 2 of 2014 concerning Amendment to Law number 30 of 2004 concerning the Notary Position is re-stated in article 66 by the Law makers. So, the authority that was once owned by the Regional Supervisory Board was transferred to the Honorary Board of Notaries. The presence of the Honorary Board of Notaries can be seen in the provisions of Article 66 paragraph (1) of Law number 2 of 2004 concerning changes to Law number 30 of 2004 concerning Notary Position, as follows:

- a. For the benefit of judicial processes, investigators, public prosecutors, or judges, with the approval of the Regional Supervisory Board, are authorized to:
 - b.
 - 1) Take copies of the original of the deed and/or letters attached to the original of the deed or notarial protocol, and
 - 2) Call a notary to be present in the inspection pertaining to the notarial deed or protocol he/she made which is kept in the storage of the notary.
 - c. Taking photocopy of the original deed or letters as referred to in paragraph (1) letter a, must make a submission report.
 - d. The Honorary Board of Notaries, within a maximum period of 30 (thirty) working days as of the receipt of the request for approval as referred to in paragraph (1), must provide answers about accepting or rejecting requests for approval.
 - e. If the Honorary Board of Notaries does not provide an answer within the period referred to in paragraph (3), the Honorary Board of Notaries is deemed to have accepted the request for approval.

Then, related to the position of the Honorary Board of Notaries, it has just been regulated in the Decree of the Minister of Law and Human Rights of the Republic of Indonesia number 7 of 2016. Therefore, this has led to the implementation of Law Article 66 paragraph (1) of the Notary Position as if it had not function well. We can say that there is a legal vacuum (for more or less two years) in the application of Law Article 66 paragraph (1) of the of Notary Position because there are no regulations explaining the position of the Honorary Board of Notaries. During these two years of vacant position, the implementation of Article 66 was the entrance for police investigators to call and examine the notary. The Honorary Board of Notaries consists of 7 people consisting of 1 chairman, 1 vice chairman, and 5 members. The Honorary Board of Notaries is elected for a term of 3 (three) years and then they can be re-appointed. The element of the Honorary Board of Notaries consists of the government, notary, and experts/ academics.

The Regional Honorary Board of Notaries is formed to carry out the function of conducting guidance in order to maintain the dignity and honor of the notary in carrying out his/her profession and provide protection to the notary public regarding the obligation to keep the contents of the deed confidential. For this reason, the Regional Honorary Board of Notaries has the following tasks:²¹

- a. conducting an examination of the application submitted by investigators, public prosecutors and judges; and

²¹ Article 18 Minister of Law and Human Rights Regulation number 7 of 2016 concerning the Honorary Board of Notaries.

- b. giving approval or rejection of requests for approval to call a notary to attend the investigation, prosecution and judicial process.

The authority of the Regional Honorary Board of Notaries based on the decision of the Regional Honorary Board of Notaries meeting includes:

- a. examining the notary for approval from the Regional Honorary Board of Notaries by investigators, public prosecutors or judges;
- b. giving approval or rejection of the request for approval of copying the original deeds and/or letters attached to the original deed or notary protocol that is in the notary's storage; and
- c. give approval or rejection of the request to call a notary to be present in the investigation, prosecution and judicial process relating to the notary deed or protocol that is in the notary's storage.

The Central Honorary Board of Notaries is formed by the Minister and is domiciled in the National Capital of the Republic of Indonesia, while the Regional Honorary Board of Notaries is formed by the Director General on behalf of the Minister and is domiciled in the Capital of the Province. In terms of different formation and positions, duties and authorities are certainly also different. However, in terms of elements of representation in the Honorary Board of Notaries, membership, election of chairman and deputy chairperson do not impose a difference between the Central and Regional Honorary Board of Notaries. As it turns out, it is stated in Article 3 and Article 4 of the Ministerial Regulation.

2. Implementation of Notary Privileges After Decision of Constitutional Court number 49/PUU-X/2012.

Generally, when a dispute between the related parties takes place, the notary is involved as a witness in the case process where one or more parties use a notary deed as evidence, or are even involved as two, three or four defendants in a case before the court. Commonly, notaries are involved as defendants only because it is the notary who made the deed and has nothing to do with what constitutes the subject matter of the agreement which is the subject matter.²²

Regarding the case of a notary being a witness or taking an original copy of a deed during a summons from an investigator, public prosecutor, or judge, based on the Act of Notary Position, a notary has privileges, in accordance with applicable laws and regulations as stated in Article 66 paragraph (1) Law number 30 of 2004 as follows: "for the benefit of judicial processes, investigators, public prosecutors, or judges, with the approval of the Regional Supervisory Board, are authorized to."²³

- a. Take copies of the original of the deed and/or letters attached to the original of the deed or notarial protocol, and
- b. Call a notary to be present in the inspection pertaining to the notarial deed or protocol he/she made which is kept in the storage of the notary."

The Regional Supervisory Board, as stipulated in Article 66 paragraph (1), has actually given hope about how an institution that understands and knows the notaries judge them. In conducting notary examinations at the request of investigators, public prosecutors or judges for the benefit of the judicial process, the Regional Supervisory Board will certainly hold a hearing and assess the actions of the notary based on the Law of Notary Position, Notary Code of Ethics and Indonesian notary law. Moreover, since

²² Sjaifurrachman and Habib Adjie, *Loc. Cit.*

²³ Explanation of *Law Number 30 of 2004 concerning Notary Position.*

the stipulation of the Constitutional Court number 49/PUU-X/2012, it is decided to grant the petition for judicial review of Article 66 paragraph (1) and declare in the ruling the verdict to cancel the phrase “with the approval of the Regional Supervisory Board” in the article. It was then declared not to have binding legal force, so that the process of calling a notary by investigators, public prosecutors and judges can be directly carried out; in other words, taking the copy of the notary’s original deed can be executed without the approval of the Regional Supervisory Board.

Normative legal certainty is when a rule is made and promulgated with certainty because it regulates clearly and logically. Clearly it means that it does not cause doubts (multi-interpretations) and logically means that it becomes a norm system with other norms so that it does not clash or cause norm conflicts. The norm conflict caused by rule uncertainty can be in the form of norm contestation, norm reduction or norm distortion.²⁴

Then, after the ratification of Law number 2 of 2014 by the President of the Republic of Indonesia concerning amendments to Law number 30 of 2004 concerning Notary Position, several provisions have been amended from Law number 30 of 2004 including the Formation of the Honorary Board of Notaries. The Honorary Board of Notaries has the authority as stipulated by the Act.

The presence of the Honorary Board of Notaries can be seen in the provisions of Article 66 paragraph (1) of Law number 2 of 2004 concerning changes to Law number 30 of 2004 concerning Notary Position as follows:

For the benefit of judicial processes, investigators, public prosecutors, or judges, with the approval of the Regional Supervisory Board, are authorized to:

- a. Take copies of the original of the deed and/or letters attached to the original of the deed or notarial protocol, and
- b. Call a notary to be present in the inspection pertaining to the notarial deed or protocol he/she made which is kept in the storage of the notary.²⁵

Then the rules regarding Article 66 cannot be implemented because there are no specific regulations regarding the formation of the Honorary Board of Notaries. In other words, the implementation of the provisions of Article 66 paragraph (1) seems as if it is not functioning. Any notary who is reported to the authorities as a witness or suspect will be summoned directly by the investigator, public prosecutor and judge for the court process.²⁶

Legal certainty requires an effort to regulate law in legislation which is made by authorized and authoritative parties, so that the rules are owned by a juridical aspect that can guarantee the certainty that the law functions as a rule that must be obeyed. The Presence of the Honorary Board of Notaries strongly supports the notary who wants to obtain legal certainty for all acts and authorities that he/she has done while carrying out his/her position which should be the object of complaints for the parties and report the notary to the authorities. Thus, the investigator must first submit a request for inspection and retrieval of copies of the original deed and letters in the notary’s storage.

²⁴ Yance Arizona, *What Is Legal Certainty, see in: What Is Legal Certainty?*<http://yancearizona.net/2008/04/13/apa-itu-kepastian-hukum/>, accessed on July 25, 2018.

²⁵ Provisions of Article 66 paragraph (1) of Law number 2 of 2014 concerning Amendments to Law number 30 of 2004 concerning Notary Position.

²⁶ Based on the results of interviews with Mr. Alexander, SH, SP 1, a notary in Padang City and Member of the Regional Honorary Board of Notaries of West Sumatra, on 12 July 2018 at 10:30 West Indonesia Time.

Based on the Amendments of the Law of Notary Position Article 66A, the Notary Honorary Assembly consists of 7 people consisting of 3 elements which include the government, notaries and academics or experts. The reason for presenting an element of the police is that the Honorary Board of Notaries considers that the element of the police is very important to provide an understanding to the investigator, whether or not a case is worthy or unworthy of being recommended. Therefore, it is decided that the elements of the police needed to be included in the Regional Honorary Board of Notaries in the West Sumatra Province. Representatives from the police elements are certainly figures who can protect each member of the investigator in terms of rank.

Honorary Board of Notaries obtains authority by attribution; namely the authority obtained based on legislation. This authority is intended so that the notary gets legal certainty and justice in the process of examining the requests submitted by the investigator to examine the notary and retrieve the copies of original deed and documents that are in the notary's storage. Legal certainty given by the Honorary Board of Notaries will provide justice to the notary being examined. Notary rights in the examination of the Honorary Board of Notaries must be recognized and considered as determined by the Law of Notary Position. Justice given to a notary is justice that has legal norms with a sense of justice; thus, the presence of the Honorary Board of Notaries can protect the notary. The existence of the Honorary Board of Notaries will guarantee the notary's rights in carrying out his/her position. In addition, it also applies when the investigator asks the Honorary Board of Notaries to examine the notary and retrieve the original deed and the documents in the notary's storage in accordance with the rules in the Law of Notary Position.

Based on the results of interviews with one of the staff members of the Regional Honorary Board of Notaries Secretariat, he explained that investigators, public prosecutors or judges conducting examination against the notary must obtain approval from the Honorary Board of Notaries as stipulated in Article 66 of the Amendments of the Law of Notary Position. The he also explained that before the Honorary Board of Notaries gave an approval or rejection of the request of investigators, public prosecutors or judges, they have to conduct an examination first. Examination will be carried out by establishing an Examination Board based on the submitted application.²⁷

The establishment of the Examination Board is conducted within 5 (five) working days starting from the request for a notary examination received by the Regional Honorary Board of Notaries Secretariat. After that, the notary will be called through a summons signed by the Chair of the Regional Honorary Board of Notaries. The summon is made within 5 (five) working days before the inspection is carried out. In this case, the notary must be present to fulfill the inspectorate's call which it cannot be represented. If the notary is not present after the valid and proper summons twice, then the examining panel has the right to make a decision on the request of the investigator, public prosecutor and judge. After the inspection is carried out, the Examination Board has two benchmarks, i.e. giving approval or rejecting the inquiry request, within a maximum of 30 (thirty) working days starting from the date of receipt of the application. If the 30 (thirty) days are exceeded and there is no answer from the Honorary Board of Notaries, the Regional Honorary Board of Notaries is deemed to have approved the request for the approval.²⁸

According to Mr. Alexander, SH, SP 1, if the notary is summoned by the investigator then based on the results of the examination by the Examining Board he/she is indicated to have committed a

²⁷ Results of interviews with Mr. Farhan, S. Sos, a staff at the Regional Office of the Ministry of Rights and Human Rights of West Sumatra Province, who are also assigned as Secretary staff of the Regional Honorary Board of Notaries in West Sumatra.

²⁸ Results of interviews with Mr. Farhan, S. Sos, a staff at the Regional Office of the Ministry of Rights and Human Rights of West Sumatra Province, who are also assigned as Secretary staff of the Regional Honorary Board of Notaries in West Sumatra.

criminal act, the Board will give approval to the investigator to examine and/or retrieve the copies of original deed and letters which is in the storage.²⁹ The criminal case of a notary deed is always problematic from the formal aspect especially regarding to:³⁰

- a. Certainty of days, dates, months, years and hours of attendance.
- b. Party (who) meets the notary.
- c. Signatures of the present parties.
- d. The copy of the deed is not in accordance with the original of the deed.
- e. The copy of the deed is available without the making of an original of the deed.
- f. The original of the deed is not completely signed but it has been issued.

Regarding this matter, the author has also conducted an interview with one of the staffs on duty at the Padang Regional Police Office. He explained that the police always followed the applicable rules. In addition, since the enactment of Law number 2 of 2014 concerning Notary Position, investigators are no longer referring to the decision of Constitutional Court number 49/PUU-X/2012. The obstacle is that the Honorary Board of Notaries itself has not been formed by a special legislation regulation.³¹

For legal proceedings at the trial, if the court has received approval from the Examination Board, the notary must be present as a witness and at the time of his/her presence the notary will determine whether or not he/she will use his/her privileges. Notaries as holders of positions can use their privileges for the whole testimony and can also use it against certain questions; they can even use it for each question asked to them. It depends on the notary concerned whether the question is general or concerns the material contents of the deed that he/she made even though the final decision is in the hands of the judge. Therefore, that privilege does not mean that the notary can immediately reject it to give testimony without examining whether the secret is confidential to his/her client.³²

Regarding this notary privileges, it is necessary to know that the notary's obligation is to keep the contents of the statement confidential and the information he/she knows about his/her position which are not included in the deed but are related to the contents of the deed. It does not mean that the party in the deed places the notary in such situation but the Law does. Thus, even if the parties give approval to the notary to divulge or notify the contents of the deed that they have made, the notary can use his/her privileges.

Conclusions

1. The arrangement of notary privilege, before and after the decision of the Constitutional Court number 49/ PUU-X/2012 since the establishment and enactment of Law number 30 of 2004, are listed in:

²⁹ Based on the results of interviews with Mr. Alexander, SH, SP 1, a notary in Padang City and Member of the Regional Honorary Board of Notaries of West Sumatra, on 12 July 2018 at 10:30 West Indonesia Time.

³⁰ <http://www.indonesianotarycommunity.com/menilai-pembuktian-akta-otentik/>, Habib Adjie, accessed on 10 August 2018.

³¹ Interview with Mr. Aipda Mendra Kenis, one of the investigators in the West Sumatra Regional Police, June 25, 2018, at 10.00 West Indonesia Time.

³² Sjaifurrachman and Habib Adjie, *Loc. Cit*

- Article 4 paragraph (2) in the fourth paragraph which contains the Oath of Notary Position regarding the obligation of the Notary to keep the contents of the deed confidential.
- Article 16 paragraph (1) letter e of the Law of Notary Position which regulates the obligations of a Notary in carrying out his/her position.
- Article 54 of the Law of Notary Position which regulates grosse, copy and duplicate of the deeds.
- Article 66 paragraph (1) which regulates the summon and retrieval of copy of original deeds and letters attached to the original deed for judicial proceedings by investigators, public prosecutors and judges.
- Article 322 paragraph (1) of the Criminal Code which regulates criminal sanctions against people who are obliged to keep something confidential but then they disclose it.

Moreover, after the decision of the Constitutional Court number 49/PUU-X/2012 applies, it grants the petition for judicial review of Article 66 paragraph (1) so that the Regional Supervisory Board does not have any authority. In addition, the 2014 Amendment to the Law of Notary Position number 2 of 2014 was re-established along with Article 66 concerning the Honorary Board of Notaries which has the same function as the Regional Supervisory Board.

2. The implementation of notary privileges after the enactment of the Constitutional Court number 49/PUU-X/2012 has been related to the cancellation of the approval terms of the Regional Supervisory Board in Article 66 paragraph (1) of the Law of Notary Position, there is no protection against notary privileges because investigators, prosecutors and judges can summon and retrieve copies of original deeds and letters in the notary's storage directly without the approval of the Regional Supervisory Board. At the end, after the stipulation of the Amendment to the Law of Notary Position, the implementation of Article 66 seemed to not function because the special rules regarding the Honorary Board of Notaries themselves are only regulated in the Regulation of the Minister of Law and Human Rights number 7 of 2016.

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