



LEGAL PROTECTION FOR INSTRUMENTARY WITNESSES IN THE CRIMINAL INVESTIGATION OF NOTARIAL DEEDS

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ABSTRACT

*The examination of notary employees as instrumentary witnesses in criminal investigations often triggers conflicts between investigative authority and the obligation to maintain professional secrecy. Normatively, instrumentary witnesses only verify the formal execution of authentic deeds and are not privy to their legal substance. In practice, however, interrogations frequently exceed these formal limits. This study aims to analyze the discrepancy between norms and practices, while formulating a concrete legal protection model for these witnesses. Employing normative legal research with statutory and conceptual approaches, the study reveals that the current vulnerability arises from a distinct regulatory vacuum: neither the Indonesian Notary Act (UUJN) nor the Criminal Procedure Code (KUHAP) grants explicit procedural safeguards or a derivative right of refusal (*hak ingkar*) to notarial staff. To bridge this gap, this article establishes its academic novelty by proposing a “**Derivative Protection Model.**” This model advocates for extending the Notary Honor Council’s (MKN) protective mandate to instrumentary witnesses and institutionalizing a derivative *hak ingkar* within procedural law, ensuring a balanced synergy between criminal law enforcement and the sanctity of notarial confidentiality.*

Keywords: *legal protection; instrumentary witness; notary employee; notarial deed; investigation.*

I. INTRODUCTION

A Notary is a public official authorized to draw up authentic deeds and exercise other powers as stipulated under Law Number 2 of 2014 concerning the Amendment to Law Number 30 of 2004 concerning Notarial Profession (UUJN). As public officials, notaries play a pivotal role in establishing authentic evidence that possesses absolute evidentiary weight.¹ In the deed-making process, the presence of witnesses is an essential formal requirement to ensure the validity of certain deeds, particularly official deeds (*akta relaas*) and party deeds (*akta partij*). This is explicitly mandated by Article 16, paragraph (1), point m of the UUJN, which positions the witness as a pillar of the deed’s formal legitimacy.

¹ D. Pramono, “The Evidentiary Strength of Deeds Made by Notaries as Public Officials under Indonesian Civil Procedural Law,” *Lex Journalica* 12, no. 3 (2015): 253.

In practice, however, instrumentary witnesses who are predominantly notary employees often face legal entanglements when the deeds they witnessed become objects of criminal investigations, such as alleged forgery or fraud. Investigators frequently summon these witnesses to testify regarding the substance of the deed. Normatively, a legal problem arises because the standing of instrumentary witnesses is not explicitly regulated regarding immunity or procedural protection within criminal proceedings. In principle, their role is passive; they merely witness the reading and signing of the deed without direct involvement in the legal substance of the parties' agreement.²

Article 65 of the UUJN theoretically provides preventive protection by stating that notaries and deed witnesses cannot be held civilly or criminally liable for the content of the deed unless bad faith is proven. Nevertheless, this protection remains non-operational during the investigation stage. Unlike notaries, who receive procedural safeguards through the approval of the Notary Honorary Council (MKN) as per Article 66 of the UUJN, instrumentary witnesses lack similar legal protection. Consequently, there is a lack of legal certainty regarding the extent to which notary employees must uphold professional secrecy, as mandated by Article 16, paragraph (1), point f of the UUJN, when confronted with investigative powers.³ Based on this context, this study examines the urgency of strengthening legal protection for instrumentary witnesses to balance the interests of law enforcement with the principle of notarial professional secrecy.

Notaries also possess the right of refusal (*verschoningsplicht*), which is the legal right to decline providing information regarding the contents of a deed or matters disclosed to them in their professional capacity.⁴ This right is intended to safeguard the confidentiality of the deed as a form of state guarantee for data security and the privacy of transactions conducted by the parties.⁵ This principle of confidentiality aligns with classical views in notarial literature, such as those presented by Tan Tong Kie, who emphasized the principle of *tabelliones fideliter officium exerbo*. This principle underscores how a notary must work with simplicity and high integrity to maintain the sanctity of a deed's content, even amidst modern developments.⁶

The confidentiality of a deed cannot be breached arbitrarily, including within judicial processes. Article 66, paragraph (1) of the UUJN stipulates that for judicial purposes, investigators, public prosecutors, or judges may only obtain photocopies of

²Tauratiya and Rahmat Danni, "A Juridical Review of the Responsibility of Instrumentary Witnesses toward the Content of Notarial Deeds," *Refleksi Hukum: Jurnal Ilmu Hukum* 8, no. 1 (October 2023): 1-16.

³Law Number 2 of 2014 concerning the Amendment to Law Number 30 of 2004 concerning the Notarial Profession (UUJN).

⁴Laurensius Arliman, "Hak Ingkar Verschoningsplicht atau Kewajiban Verschoningsplicht Notaris dalam Undang-Undang Jabatan Notaris," *Jurnal Doktrinal*, Vol. 1, No. 1 (2016): 2.

⁵Z.P.F. Arisaputra, "Tanggungjawab Notaris dalam Merahasiakan Isi Akta Melalui Hak Ingkar," *Jurnal Notarius*, Vol. 12, No. 1 (2019).

⁶Tan Tong Kie, *Studi Notariat dan Serba-Serbi Praktek Notaris* (Jakarta: Ichtiar Baru Van Hoeve, 2007), 326.

the *minuta* (original) deed or summon a notary with the prior approval of the Notary Honorary Council (MKN). This provision reinforces that even high-ranking state officials do not have the direct authority to access a deed's contents without a valid legal mechanism.

To circumvent these hurdles, investigators frequently examine instrumentary witnesses notary employees who were present during the deed-making process. This examination creates a legal gap in the system, as these witnesses possess information that is essentially confidential. When an instrumentary witness provides testimony to investigators, the contents or circumstances surrounding the deed are indirectly exposed, thereby undermining the principle of notarial professional secrecy.

This phenomenon illustrates a normative and practical tension between the principle of notarial deed confidentiality and the investigative powers in criminal proceedings. On one hand, the law seeks transparency to uncover material truth; on the other, it demands protection for professional secrecy as a safeguard for parties performing legal acts. For instance, cases have arisen where, after the MKN denied a request to examine a notary, investigators summoned the notary's staff as instrumentary witnesses to testify about the signing process. In such instances, the witness disclosed details that should have been protected, allowing investigators to bypass official procedures. This situation highlights a regulatory vacuum or, at the very least, an ambiguity regarding the limits of an instrumentary witness's authority during an investigation.

Addressing this issue is crucial to providing legal clarity that protects the principle of confidentiality while ensuring that law enforcement is not hindered. Therefore, an in-depth analysis is required regarding the examination of notary employees as instrumentary witnesses concerning the principle of deed confidentiality in criminal investigations. Furthermore, the Indonesian Criminal Procedure Code (KUHAP) empowers investigators to summon and examine anyone who is presumed to have seen, heard, or experienced a criminal event, including deed witnesses.⁷ However, the lack of specific regulation distinguishing ordinary witnesses from formal witnesses in authentic deeds creates a risk of abuse of power or "over-acting" by investigators – such as pressuring witnesses who only played a passive role in the process.

Based on these issues, this research formulates two primary problems; to what extent do the normative regulations align with the actual practice of investigating notary employees as instrumentary witnesses in criminal cases involving notarial deeds and what form of legal protection should be provided to notary employees during the investigative process to uphold the principle of deed confidentiality.

⁷ See Articles 112 and 116 of the Indonesian Criminal Procedure Code (KUHAP).

II. RESEARCH METHOD

This study employs a normative-empirical legal research method, which examines written legal norms (doctrinal) while simultaneously investigating their practical implementation to identify existing legal disparities. To provide a comprehensive analysis, two main approaches are utilized: the statute approach and the conceptual approach. The statute approach is applied by identifying and analyzing the Indonesian Criminal Procedure Code (KUHAP), the Notarial Profession Law (UUJN), the Witness and Victim Protection Law, and relevant implementing regulations concerning investigative powers and the status of notarial deeds. Concurrently, the conceptual approach utilizes the theories of legal certainty and legal protection as analytical frameworks to evaluate the standing and protection of instrumentary witnesses facing criminal investigation.

Data collection involves a comprehensive literature review of primary, secondary, and tertiary legal materials, supplemented by field research to gather empirical data through semi-structured, in-depth interviews. Informants were selected using a purposive sampling technique to ensure that the chosen subjects possessed direct experience and relevant authority regarding the examined legal issue. The selected informants comprise four distinct key stakeholders: police investigators from the Directorates of General Criminal Investigation with experience in examining notarial deeds, notary employees who have been summoned as instrumentary witnesses, active practicing notaries, and members of the Notary Honor Council (*Majelis Kehormatan Notaris* - MKN) who provide institutional insights regarding approval mechanisms for notary-related examinations.

To maintain the validity, reliability, and credibility of the empirical data, this study applies the source triangulation method (*triangulasi sumber*). The insights obtained from the interviews with investigators were cross-examined and validated against the testimonies of notary employees and the institutional stances of the MKN, before being further cross-referenced with the normative statutory frameworks. The accumulated data is analyzed qualitatively by outlining relevant legal norms and providing textual and systematic interpretations. This analytical process aims to identify the empirical gap between "*das Sollen*" (the law as it should be) and "*das Sein*" (the law in practice), which is ultimately synthesized to formulate concrete recommendations for regulatory improvements and procedural harmonization.

3. DISCUSSION

3.1. Alignment Between Normative Regulations and the Practice of Examining Notary Employees as Instrumentary Witnesses in Criminal Investigations

The background of this research is rooted in the evident discrepancy between normative regulations and the actual practice of examining notary employees as instrumentary witnesses during criminal investigations involving notarial deeds. Normatively, the function of an instrumentary witness is strictly limited; they serve only to witness the fulfillment of formal requirements in the execution of an authentic deed. This includes the presence of the parties, the reading of the deed by the notary, and the signing of the document in the notary's presence. This role does not encompass knowledge of, or liability for, the legal substance of the acts contained within the deed.

The provisions regarding this formal function can be implicitly traced to Law Number 2 of 2014 concerning the Amendment to Law Number 30 of 2004 concerning the Notarial Profession (UUJN). This law positions the instrumentary witness as a formal requirement for the authenticity of a deed. The UUJN affirms that the notary is solely responsible for the content and validity of the deed, while the instrumentary witness acts only to ensure that the formal process of creation has been conducted in accordance with the law.

a. Investigative Authority within the Criminal Procedure System

Conversely, the Indonesian Criminal Procedure Code (KUHAP) grants broad authority to investigators to examine witnesses for the purpose of an investigation. This authority is part of the investigative function to seek and collect evidence to clarify a criminal act. Nevertheless, KUHAP imposes limitations on this power through provisions that recognize the right to refuse to provide testimony if such testimony pertains to the obligation to maintain professional secrecy, as stipulated in Article 170 of KUHAP. This provision reflects the criminal procedure law's recognition of protecting certain broader legal interests, including the protection of notarial professional secrecy.⁸

However, Article 170 of KUHAP is systematically placed within the context of court examinations; thus, textually, the norm does not explicitly govern the investigation stage.⁹ This creates an interpretative problem regarding the extent to which the right to refuse testimony can be applied during the investigation. From the perspective of modern criminal procedure law, a purely textual approach is insufficient, as the protection of legal subjects' rights must be understood holistically throughout every stage of the criminal justice process.

⁸Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Yogyakarta: Liberty, 2009), 15.

⁹Andi Hamzah, *Hukum Acara Pidana Indonesia* (Jakarta: Sinar Grafika, 2014), 145.

Under the framework of the principle of **due process of law**, the protection of witness rights including the right to withhold professional secrets must be consistently applied from the investigation stage through to the trial. Therefore, Article 170 of KUHAP should not be interpreted narrowly as applicable only during trial; rather, it should be understood as a manifestation of the general principle of protecting professional secrecy within the criminal justice system. Consequently, from a doctrinal standpoint, the right to refuse testimony regarding professional secrets is relevant at the investigative stage, even if not explicitly regulated.

In the evolution of national criminal law, Indonesia has enacted Law Number 1 of 2023 (the New Criminal Code) as a reform of substantive criminal law. However, this has not yet been followed by a reform of criminal procedure law; thus, investigative procedures still rely on the 1981 KUHAP. This situation indicates a lack of synchronization between substantive and procedural criminal law. While the Draft Criminal Procedure Code (RKUHAP) aims to strengthen the protection of witness rights, it does not yet explicitly address instrumentary witnesses. Thus, a legal gap persists in the regulation of examinations of instrumentary witnesses by investigators.

b. Limitation of Investigative Authority Based on the Principle of Due Process of Law

Furthermore, the examination of instrumentary witnesses by investigators must be situated within the framework of the due process of law. This fundamental principle of a constitutional state is reflected in Article 1, paragraph (3) of the 1945 Constitution of the Republic of Indonesia and is further strengthened by human rights provisions in the International Covenant on Civil and Political Rights (ICCPR), which Indonesia has ratified. This principle demands that every investigative action be conducted based on law, valid procedures, and with profound respect for the rights of the individuals being examined.

Based on this normative foundation, a legal question arises: has the practice of examining notary employees as instrumentary witnesses aligned with prevailing laws, or does it indicate an expansion of investigative authority that exceeds the formal function of such witnesses? Therefore, the first problem in this study focuses on analyzing the alignment between normative regulations and the practice of examining notary staff. This analysis utilizes the Notarial Profession Law (UUJN), KUHAP, Minister of Law and Human Rights Regulation (Permenkumham) No. 17 of 2021, and the principle of due process of law as its primary analytical basis.

In the Indonesian criminal justice system, investigation is a crucial stage that determines the direction of law enforcement. It serves as the gateway to identifying criminal events, perpetrators, and legally valid evidence. KUHAP positions investigators as state organs granted broad authority to carry out a series of legal actions to achieve these objectives. Article 1, point 2 of KUHAP affirms that an

investigation is a series of actions by investigators, conducted in circumstances and according to methods regulated by law, to seek and collect evidence that clarifies the crime and identifies the suspect. This definition demonstrates that investigation is not merely technical but is inherently laden with human rights protections, including the rights of witnesses.

The limitation of investigative authority is a concrete manifestation of the checks and balances principle within the criminal justice system. Without such limitations, investigative power could potentially transform into an instrument of oppression that violates individual rights. Thus, criminal procedure law serves as a “guardrail” to prevent the abuse of investigative authority.¹⁰ In the context of witness examination, these limitations mean that investigators may only request testimony that is relevant, necessary, and within the scope of the witness’s knowledge. Examinations that are excessive, coercive, or deviate from the investigative purpose constitute a violation of the due process of law.

The due process of law requires witness examinations to be conducted humanely, objectively, and free from any form of coercion. KUHAP implicitly prohibits the use of physical or psychological violence, intimidation, or pressure. This principle aligns with international human rights standards asserting that everyone is entitled to humane and dignified treatment in the criminal justice process. Testimonies obtained through threats or pressure not only violate human rights but also diminish the evidentiary value of the testimony itself.¹¹

Regarding notary employees as instrumentary witnesses, the application of due process becomes even more critical given their normatively passive and formal standing. Compelling an instrumentary witness to provide testimony beyond their function and knowledge is a deviation from the principle of a fair examination. The due process of law also necessitates that investigators respect legal provisions providing specific protection to witnesses with certain statuses. Indonesian criminal procedure recognizes witnesses bound by professional secrecy (*verschoningsplicht*), such as notaries, advocates, and doctors.

The protection of witnesses with special status is based on the consideration that the legal interests protected by professional secrecy hold broader value than mere evidentiary interests in a criminal case. Without such protection, public trust in these professions would erode. In the notarial context, the obligation to maintain professional secrecy is a cornerstone of the profession. Therefore, any investigative effort directly or indirectly aimed at uncovering notarial secrets must be conducted with extreme caution and through strict legal procedures.

¹⁰ Satjipto Rahardjo, *Hukum dan Masyarakat* (Bandung: Angkasa, 2008), 72.

¹¹ *International Covenant on Civil and Political Rights (ICCPR)*, Article 14.

The explicit limitation of investigative authority is reflected in Article 170 of KUHAP, which grants certain parties the right to refuse to testify if the information pertains to professional secrecy. This provision is a clear manifestation of the due process of law in Indonesia. It demonstrates that the criminal procedure system is not solely oriented toward law enforcement but also provides space for the protection of other fundamental legal interests. Although instrumentary witnesses are not the primary holders of professional secrecy, their testimony is often inextricably linked to the notary's duties. Consequently, Article 170 of KUHAP serves as a relevant argumentative basis to limit the examination of instrumentary witnesses, ensuring it does not become a backdoor for bypassing notarial confidentiality.

c. Tension Between Investigative Efficiency and the Protection of Witness Rights

In practice, tension often arises between the demands for investigative efficiency and the application of the *due process of law*. Investigators frequently argue that extensive and in-depth examinations are necessary to uncover the "material truth" (*materiële waarheid*). However, such reasoning cannot serve as a justification for disregarding individual rights. The principle of *due process of law* asserts that investigative efficiency must be achieved through lawful and fair means. Law enforcement that sacrifices human rights will ultimately erode the legitimacy of the criminal justice system itself.

In the context of examining instrumentary witnesses, limiting investigative authority is not an obstacle to law enforcement; rather, it is a control mechanism to ensure that investigations remain within the corridors of a constitutional state (*rechtstaat*). These limitations have significant normative and practical implications. Normatively, they reinforce that Indonesian criminal procedure is grounded in the protection of human rights. Practically, they provide tangible protection for instrumentary witnesses against the risks of undue pressure and criminalization. Therefore, the *due process of law* must be the primary foundation in every witness examination, including those of notary employees, to enhance the overall quality and legitimacy of criminal justice.

d. The Interrelation of Justice, Legal Certainty, and Utility in Investigations

The theory of justice proposed by Gustav Radbruch places law within three inseparable core values: justice (*Gerechtigkeit*), legal certainty (*Rechtssicherheit*), and utility (*Zweckmäßigkeit*).¹² These three values must exist in balance within every legal application. When a conflict occurs, the law must not be enforced solely in a formalistic manner but must remain oriented toward substantive justice.

In the context of investigative authority, Radbruch's theory provides a vital evaluative framework. While investigative powers derived from statutes embody legal certainty, such certainty cannot be detached from justice and utility. Law enforcement that focuses only on procedural certainty while ignoring the protection of the legal

¹²Gustav Radbruch, *Legal Philosophy*, trans. Kurt Wilk (Cambridge: Harvard University Press, 1950), 107-109.

subjects' rights risks creating "extreme injustice." Radbruch famously asserted that highly unjust positive law is no longer worthy of being called "law," a principle known as the *Radbruchsche Formel* (Radbruch Formula).¹³ From this perspective, investigative actions that are formally valid under KUHAP but substantially violate human rights or nullify legal protections may be deemed contrary to the value of justice.

The application of Radbruch's theory demands that investigative authority not be interpreted as absolute power. It must be constrained by substantive justice – justice that prioritizes human dignity and the balance of legal interests over mere procedural compliance. Legal certainty in investigations is reflected in the investigator's adherence to the prevailing criminal procedure code (KUHAP), which provides the legal basis for summonses, examinations, arrests, and seizures, thereby preventing arbitrary actions.¹⁴

As Van Apeldoorn explained, legal certainty serves as a protection for individuals against arbitrary exercises of power. It provides predictability, allowing legal subjects to understand the legal consequences of their actions and the state's actions. In an investigation, legal certainty means that anyone summoned as a witness or suspect understands the legal basis of the summons, their rights and obligations, and the limits of the investigator's authority.

This situation highlights the lack of synchronization between the recent reforms in substantive criminal law and the outdated procedural law. In this study, the regulation of investigative authority over instrumentary witnesses remains entirely dependent on the current KUHAP. Although the Draft Criminal Procedure Code (RKUHAP) shows a trend toward strengthening witness rights, there is still no explicit regulation concerning the standing and limits of examining instrumentary witnesses in a notarial context. Consequently, the legal gap regarding the boundaries of investigative authority remains a relevant issue, necessitating systematic legal interpretation and regulatory reinforcement to guarantee legal certainty and protection for instrumentary witnesses.

3.2. Forms of Legal Protection for Notary Employees in the Investigative Process Concerning the Principle of Deed Confidentiality in the Examination of Instrumentary Witnesses

a. The Position and Function of Instrumentary Witnesses in the Notarial System

The instrumentary witness is an essential element in the formation of an authentic deed by a notary. Their presence is not merely an administrative supplement but a formal requirement for the validity of an authentic deed, as explicitly regulated

¹³Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law," *Oxford Journal of Legal Studies* 26, no. 1 (2006): 6.

¹⁴M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP: Penyidikan dan Penuntutan* (Jakarta: Sinar Grafika, 2017), 109–111.

under Law Number 2 of 2014 concerning the Amendment to Law Number 30 of 2004 concerning the Notarial Profession (hereinafter referred to as the UUJN). Article 40 of the UUJN strictly mandates that the reading and signing of a deed must be conducted in the presence of at least two witnesses who meet the qualifications of instrumentary witnesses.

Conceptually, an instrumentary witness is not a party involved in the legal relationship established within the deed. They hold no contractual relationship with the parties and are not responsible for the material truth of the deed's content. Their primary role is to attest to the formal execution of the instrument, ensuring that the procedural requirements of the law are satisfied.

In the perspective of criminal procedure law, the definition of a witness, as formulated in Article 1, point 26 of the Indonesian Criminal Procedure Code (KUHAP), emphasizes that a witness is someone who can provide testimony about a criminal case based on what they personally heard, saw, and experienced. This definition highlights a direct link between the witness and the criminal event under investigation. Therefore, a witness in criminal procedure law is essentially a witness of fact (*testis de visu*) who possesses direct knowledge of the commission of a crime.

When this definition is applied to the standing of an instrumentary witness, it becomes clear that they generally do not meet the qualifications of a witness of fact regarding criminal cases involving the substance of a deed. The knowledge of an instrumentary witness is limited to the fact that a deed was read and signed according to procedure, not to the material truth of the parties' statements or the existence of criminal elements behind the legal act. Consequently, the examination of instrumentary witnesses during the investigative process should be restricted to the formal aspects of the deed's creation and should not be expanded to touch upon the legal substance, which lies beyond their authority.

Such limitations are vital to maintain consistency between the notarial system and criminal procedure law, and to prevent the abuse of investigative authority that could harm the instrumentary witness or the notary. Furthermore, positioning the instrumentary witness proportionally is part of upholding the principles of legal certainty and **due process of law**, ensuring that law enforcement remains fair, measured, and within the corridors of prevailing regulations.

Legal protection for instrumentary witnesses who are notary employees is a logical consequence of the application of the rule of law (*rechtsstaat*) and respect for human rights within the criminal justice system. In a constitutional state, every action by law enforcement officials must be grounded in law, limited by clear authority, and guarantee the protection of citizens' rights including instrumentary witnesses performing formal functions in the creation of authentic deeds.

b. Concept of Legal Protection for Instrumentary Witnesses

Conceptually, legal protection for instrumentary witnesses can be classified into two primary forms: preventive legal protection and repressive legal protection. This classification aligns with the general theory of legal protection, which distinguishes between safeguards implemented prior to a potential violation and remedies provided after a rights infringement has occurred.

c. Preventive Legal Protection in the Examination of Instrumentary Witnesses

Preventive legal protection aims to prevent the violation of the rights of instrumentary witnesses during criminal investigations involving notarial deeds. This protection is manifested through the limitation of investigative authority to ensure that investigators do not act arbitrarily or exceed the formal functions of instrumentary witnesses as defined within the notarial system.¹⁵

One of the most fundamental forms of preventive protection is the limitation of the **scope of examination**. Investigative inquiries should be focused solely on the formal aspects of the deed's execution, such as the presence of the parties before the notary, the reading of the deed, the signing process, and the fulfillment of other formal requirements stipulated in the UUJN. Examinations that delve into the legal substance of the acts, the motives of the parties, or the material truth of the deed's content constitute a deviation from the function of an instrumentary witness and potentially violate the principle of legal certainty.

Furthermore, preventive protection is reflected in the investigator's obligation to respect the principle of notarial professional secrecy. Although instrumentary witnesses are not public officials, the information they possess is inextricably linked to the notarial deed, which is legally protected by the obligation to maintain confidentiality regarding the deed's contents and information obtained during official duties. Consequently, the testimony of an instrumentary witness must not be used as an indirect means to bypass notarial secrecy without a valid legal procedure.¹⁶ This principle is consistent with Article 16, paragraph (1), point f of the UUJN.

d. Repressive Legal Protection Against Rights Violations of Instrumentary Witnesses

Repressive legal protection is granted once a violation of an instrumentary witness's rights has occurred during the investigative process. This form of protection aims to restore the infringed rights and provide a corrective mechanism for law enforcement actions that deviate from criminal procedure law.

One available repressive mechanism is the pre-trial hearing (*praperadilan*), as regulated in the Indonesian Criminal Procedure Code (KUHAP). Through a pre-trial

¹⁵Nishfi Miiftahurrahmah dan Salim HS, "PERLINDUNGAN HUKUM TERHADAP NOTARIS PENGGANTI TERKAIT KERUSAKAN PROTOKOL NOTARIS DALAM PELAKSANAAN TUGAS JABATAN". 2021. *Private Law* 1 (3): 490-501. <https://doi.org/10.29303/prlw.v1i3.424>.

¹⁶Edmon Makarim, "Perlindungan Hukum terhadap Rahasia Jabatan Notaris," *Jurnal Hukum & Pembangunan* 41, no. 2 (2011): 215.

hearing, the legality of investigative actions—including the validity of summons or examinations deemed unlawful or beyond the investigator’s authority—can be judicially tested. Additionally, instrumentary witnesses may file complaints with law enforcement oversight bodies, such as the Police’s Division of Profession and Security (Propam) or external oversight institutions. These mechanisms serve as institutional controls to ensure that law enforcement officials uphold the principles of professionalism, proportionality, and accountability.¹⁷

e. The Role of the Notary Honorary Council (MKN) in Protecting Instrumentary Witnesses

The Notary Honorary Council (MKN) is an institution established to protect the dignity, honor, and independence of the notarial profession. The MKN’s existence is normatively regulated in Article 66 of the UUJN, which requires its prior approval before investigators, public prosecutors, or judges may summon a notary or seize *minuta* deeds.¹⁸

However, shifting the investigative focus to instrumentary witnesses (the notary’s staff) can create a loophole that undermines the MKN’s protective function. While such actions may not formally violate Article 66 of the UUJN, they substantially weaken the protection intended by the law by providing an indirect path to confidential information. In this context, the MKN’s role is strategic in filling the normative vacuum. The MKN should not only serve as an approving body for notary examinations but also act as a moral and institutional guardian to ensure that all parties involved in the notarial process are examined proportionately. Therefore, it is imperative for the MKN to promote the establishment of official guidelines or recommendations regarding the limits of examining instrumentary witnesses in criminal investigations.¹⁹

f. The Role of Professional Organizations (Indonesian Notaries Association) in Protecting Instrumentary Witnesses

In addition to the MKN, the notarial professional organization—specifically the Indonesian Notaries Association (Ikatan Notaris Indonesia - INI) plays a pivotal role in providing legal protection to instrumentary witnesses. Although instrumentary witnesses are not structurally members of the association, they are functionally an inseparable part of the notarial ecosystem. Consequently, the moral and professional responsibility of the organization cannot be confined solely to the notaries themselves.²⁰

The role of the professional organization can be manifested through legal education for both notaries and their staff. Such education is crucial to ensure that instrumentary witnesses understand the boundaries of the testimony they may provide, and are able to distinguish between their duty as a witness and their right

¹⁷ Satjipto Rahardjo, *Penegakan Hukum: Suatu Tinjauan Sosiologis* (Yogyakarta: Genta Publishing, 2009), 134.

¹⁸ Sulam Suci Fatiha dan Diangsa Wagian, Pengaturan Hukum Cyber Notary Dalam Hukum Kenotariatan Indonesia”. 2024. *Private Law* 4 (1): 63-72. <https://doi.org/10.29303/prlw.v4i1.3917>.

¹⁹ Habib Adjie, “Majelis Kehormatan Notaris dan Perlindungan Jabatan Notaris,” *Jurnal Notariat* 6, no. 1 (2014): 25.

²⁰ Jimly Asshiddiqie, *Etika Jabatan dan Profesionalisme Penegak Hukum* (Jakarta: Sinar Grafika, 2006), 89.

to refuse testimony that exceeds their knowledge or potentially violates professional secrecy. Furthermore, the organization can provide legal assistance to staff members summoned for examination. This assistance is necessary to ensure that the investigation complies with criminal procedure law and to protect witnesses from intimidation, undue pressure, or “entrapment” questions (*pertanyaan menjerat*), thereby upholding human rights within the criminal justice process.

g. Philosophical Analysis of Legal Protection Based on Gustav Radbruch’s Theory

The legal protection of notary employees as instrumental witnesses is intrinsically linked to the fundamental objectives of law. From a legal philosophy perspective, law is not merely a collection of binding positive norms but a means to realize the core values that serve as the soul of the legal system. One of the most relevant frameworks for this analysis is Gustav Radbruch’s Theory of Justice, which situates law within a balanced triad of justice (*Gerechtigkeit*), legal certainty (*Rechtssicherheit*), and utility (*Zweckmäßigkeit*).

Radbruch asserted that a sound legal system must proportionately accommodate these three values. They cannot be separated or placed in extreme opposition, as the excessive dominance of one value would negate the essence of law as an instrument of justice.²¹ Therefore, an analysis of the legal protection afforded to instrumental witnesses must examine the extent to which existing norms and practices reflect a balance between these three pillars.

Legal certainty, a fundamental value in Radbruch’s theory, emphasizes the importance of clear, written, and predictable rules. For instrumental witnesses, legal certainty is reflected in the existence of explicit normative regulations regarding their standing, function, and the limits of their liability. Based on Radbruch’s framework, legal protection for these witnesses is not an attempt to hinder law enforcement; rather, it is an absolute requirement to ensure that enforcement aligns with the principles of the rule of law (*rechtstaat*) and human rights.

Proportional protection for instrumental witnesses also has positive implications for public trust in both the notarial profession and the criminal justice system. When staff feel legally secure, the notarial function as an instrument of legal certainty in society can operate optimally. Thus, the legal protection of instrumental witnesses must be understood as an integral part of realizing a legal system that is just, certain, and beneficial, as envisioned by Gustav Radbruch.

²¹Gustav Radbruch, “Statutory Lawlessness and Supra-Statutory Law,” *Oxford Journal of Legal Studies* 26, no. 1 (2006): 7.

4. CLOSING

4.1. Conclusion

Normative and Practical Discrepancy: There is a significant disparity between the normative role of the instrumentary witness as a formal-passive figure under the UUJN and the actual practice of investigators who tend to probe into the legal substance of deeds. The regulatory vacuum regarding the limits of examining instrumentary witnesses in both the KUHAP and UUJN creates a legal loophole, allowing investigators to bypass professional secrecy safeguards by examining notary employees. **The Urgency of Legal Protection under Due Process of Law:** Legal protection for instrumentary witnesses is a manifestation of the due process of law and Gustav Radbruch's theory of justice. Criminal law enforcement must not sacrifice legal certainty or professional protection. Preventive protection (through limiting the scope of examination) and repressive protection (via pre-trial mechanisms and institutional oversight) are essential to maintain the balance between investigative efficiency and notarial professional secrecy. **Strengthening Institutional Roles:** The protection of instrumentary witnesses requires active involvement from the Notary Honorary Council (MKN) and professional organizations (INI). The MKN must expand its moral and procedural roles by establishing examination guidelines, while professional organizations are responsible for providing legal education and assistance to prevent the criminalization of notary employees who perform formal functions in the execution of authentic deeds.

4.2 Recommendation

To effectively address the normative-practical discrepancies and safeguard the principle of deed confidentiality, this study proposes three integrated actions. First, the House of Representatives and the Government must initiate legislative reform by amending the Notarial Profession Law (UUJN) to explicitly incorporate derivative legal protection for notary employees, while simultaneously formulating the Draft Criminal Procedure Code (RKUHAP) to extend the right of refusal under Article 170 KUHAP unequivocally to the criminal investigation stage. Second, the Notary Honor Council (MKN), the Ministry of Law and Human Rights, and the Indonesian National Police should institutionalize a Joint Memorandum of Understanding (MoU) that mandates formal MKN notification prior to summoning notary staff and strictly restricts the investigative matrix to the formal mechanics of a deed's execution—such as reading and signing—rather than its material substance. Third, the Indonesian Notaries Association (INI) must actively provide structured legal advocacy and standardized literacy programs for notary employees to equip them with a clear understanding of their formal-passive standing, thereby shielding the

notarial ecosystem from arbitrary over-activation by investigators and ensuring a balanced synergy between law enforcement and professional secrecy.

BIBLIOGRAPHY

- Adjie, Habib. *Majelis Kehormatan Notaris dan Perlindungan Jabatan Notaris*. Jurnal Notariat 6, no. 1 (2014): 25.
- Ashiddiqie, Jimly. *Etika Jabatan dan Profesionalisme Penegak Hukum*. Jakarta: Sinar Grafika, 2006.
- Arisaputra, Z.P.F. "Tanggungjawab Notaris dalam Merahasiakan Isi Akta Melalui Hak Ingkar." *Jurnal Notarius* 12, no. 1 (2019).
- Arliman, Laurensius. "Hak Ingkar Verschoningsplicht atau Kewajiban Verschoningsplicht Notaris dalam Undang-Undang Jabatan Notaris." *Jurnal Doktrinal* 1, no. 1 (2016): 2.
- Hamzah, Andi. *Hukum Acara Pidana Indonesia*. Jakarta: Sinar Grafika, 2014.
- Harahap, M. Yahya. *Pembahasan Permasalahan dan Penerapan KUHAP: Penyidikan dan Penuntutan*. Jakarta: Sinar Grafika, 2017.
- International Covenant on Civil and Political Rights (ICCPR)*, Article 14.
- Indonesian Criminal Procedure Code (KUHP)*, Articles 112 and 116.
- Mertokusumo, Sudikno. *Hukum Acara Perdata Indonesia*. Yogyakarta: Liberty, 2009.
- Makarim, Edmon. "Perlindungan Hukum terhadap Rahasia Jabatan Notaris." *Jurnal Hukum & Pembangunan* 41, no. 2 (2011): 215.
- Nishfi Miftahurrahmah dan Salim HS, "PERLINDUNGAN HUKUM TERHADAP NOTARIS PENGGANTI TERKAIT KERUSAKAN PROTOKOL NOTARIS DALAM PELAKSANAAN TUGAS JABATAN". 2021. *Private Law* 1 (3): 490-501. <https://doi.org/10.29303/prlw.v1i3.424>.
- Pramono, D. "The Evidentiary Strength of Deeds Made by Notaries as Public Officials under Indonesian Civil Procedural Law." *Lex Journalica* 12, no. 3 (2015): 253.
- Radbruch, Gustav. "Statutory Lawlessness and Supra-Statutory Law." *Oxford Journal of Legal Studies* 26, no. 1 (2006): 6-7.
- Radbruch, Gustav. *Legal Philosophy*. Translated by Kurt Wilk. Cambridge: Harvard University Press, 1950.
- Rahardjo, Satjipto. *Hukum dan Masyarakat*. Bandung: Angkasa, 2008.
- Rahardjo, Satjipto. *Penegakan Hukum: Suatu Tinjauan Sosiologis*. Yogyakarta: Genta Publishing, 2009.
- Sulam Suci Fatihah dan Diangsa Wagian, "Pengaturan Hukum Cyber Notary Dalam Hukum Kenotariatan Indonesia". 2024. *Private Law* 4 (1): 63-72. <https://doi.org/10.29303/prlw.v4i1.3917>.
- Tan Tong Kie. *Studi Notariat dan Serba-Serbi Praktek Notaris*. Jakarta: Ichtiar Baru Van Hoeve, 2007.
- Tauratiya and Rahmat Danni. "A Juridical Review of the Responsibility of Instrumentary Witnesses toward the Content of Notarial Deeds." *Refleksi Hukum: Jurnal Ilmu*

Hukum 8, no. 1 (October 2023): 1-16.

Law Number 2 of 2014 concerning the Amendment to Law Number 30 of 2004 concerning the Notarial Profession (UUJN).