

Criminal Liability of Bank-Affiliated Notaries for the Confidentiality Principle of Banks in Connection with Deposit Collateral Agreements

Weminto Suryadi¹, Fauzie Yusuf Hasibuan², Lilik Mulyadi³, Yuhelson⁴,
Januar Agung Saputera⁵

^{1,2,3,4,5}Universitas Jayabaya, Jakarta, Indonesia

Email: wemintosuryadi@gmail.com

Abstract

This research focuses on the criminal liability of notaries affiliated with banking institutions for the guarantee binding act in the form of a deposit connected to the principle of bank secrecy in Indonesia. Through the analysis of relevant laws, including Bank Indonesia Regulation No. 2 of 2000, Notary Position Law, and Bank Confidentiality Law, the study aims to answer two research questions: the form of criminal liability of notaries affiliated with banking institutions for the guarantee binding act and the ideal concept of criminal liability. The findings suggest that notaries who breach the principle of bank secrecy can face criminal charges, and the ideal concept of criminal liability should balance the interests of customers and banking institutions while maintaining bank secrecy and customer privacy. The study's implications call for clear guidelines and regulations for notaries' responsibilities in guaranteeing binding acts related to deposits and penalties for notaries who violate the principle of bank secrecy.

Keywords: *Criminal Liability, Bank-Affiliated Notaries, Deposit Collateral Agreements.*

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A. INTRODUCTION

The legal system used in Indonesia for notaries is based on the notarial law of the Netherlands, which was introduced to Indonesia by the Dutch colonial administration during the 19th and early 20th centuries (Yuanitasari, 2017). The development of the Notary Regulations in Indonesia was heavily influenced by the Dutch notarial system, which has its roots in the Roman law tradition (Yuanitasari, 2017). In the Netherlands, the term "jurisdictie voluntaria" or "voluntaire jurisdictie" was introduced in 1791, which refers to the power of notaries to perform legal acts that are not subject to judicial review (Lee, 2014). However, the Ventose Wet, introduced in 1803, abolished the essence of *voluntaire jurisdictie* by separating the position of notaries from judicial authority (Lee, 2014). Nevertheless, the content of the notary's deed, including acknowledgements or statements recorded by the notary, is still considered to have legal authority (Lee, 2014).

The term 'Notary' has its origin in the Latin language, where the profession was known as 'tabellio' and 'notarius publicus'. These terms eventually evolved into 'notorius,' which is where the term 'notary' is derived from (Cisneros, 2000). The term 'notorius' was used to refer to an official who served the government and not the general public. Officials who served the general public were referred to as 'tabelliones.' The role of tabelliones was similar to that of modern-day notaries, as they specialized in writing documents for the public (Cisneros, 2000). However, their

work did not have any official (State) nature, and the documents they produced were ordinary without any authentic characteristics. It was only in 537 that the work and position of tabelliones were regulated in a constitution, even though their work still did not have any official nature (Yuanitasari, 2017). As per Article 1 paragraph (1) of Law Number 2 of 2014, also known as UUJN, a notary is a public official who has the power to create authentic deeds and other authorities as outlined in this law or other applicable laws (UUJN, 2014). This law defines the role of a notary as a public official, and no other official can assume their responsibilities unless specifically authorized to do so. In other words, a notary has a unique and exclusive authority to create authentic deeds and other documents, which cannot be delegated to any other official.

The Notary Position Regulation further explains the authority of a Notary as a public official. According to Article 1 of the regulation, a Notary is solely authorized to create authentic deeds and must maintain confidentiality regarding the contents of the deed and any information obtained to create the deed, as specified by the oath/pledge of office, unless otherwise required by law (Muri, Prayogo, & Arif, 2018). Article 4 paragraph (2) of the Notary Law requires Notaries to uphold their oath of office, which includes maintaining the confidentiality of the contents of the deed and any related information (UUJN, 2014). Confidentiality not only prohibits the disclosure or leaking of the contents of the deed, but also includes the prohibition of providing a notarial copy, a deed excerpt, or a quotation of the deed to anyone, except those who have a direct interest in the deed, heirs, or those who have obtained rights, as stipulated in Article 54 of the Notary Law (Notary Law, 2014).

In the current phenomenon, a Notary in carrying out his/her duties has the authority and obligation to be executed by the prevailing laws and regulations (Victoria, Ariyana, & Arifani, 2020). However, in practice, problems often arise in the banking sector because the notary does not carry out his/her duties following the prevailing laws and regulations, such as the notary not properly executing notarial protocols, such as removing the minutes of the deed that should be kept and maintained by the notary, the notary not making the deed per the procedures and guidelines outlined in the regulations, such as not making the deed in the presence of the notary and not attended by the parties and witnesses, or the notary not authorized to make the deed, which means that the notary who makes the deed is not within the jurisdiction of the notary (UUJN, 2014). Negligence of the notary in making authentic deeds such as forgetting to mention the parties or write the deed number or time of making the deed can also cause the legal force of the authentic deed to be lost and the deed to become an underhand deed, thus causing losses to the parties (Notary Law, 2014).

Several previous studies have emphasized the importance of Notaries carrying out their duties under applicable laws and regulations to maintain public trust in the profession (Hossain, 2020; Mufasirin & Witasari, 2022). However, despite these requirements, issues often arise in the banking sector when Notaries fail to

execute notarial protocols properly or lack the necessary jurisdiction to make a deed (Sujono, 2022). Negligence on the part of Notaries, such as failing to properly record the deed or mention parties, can also invalidate the authenticity of the deed, leading to losses for the parties involved (Jefry & Hanim, 2019). Similarly, banks have a responsibility to comply with applicable laws and regulations, protect customer data, and conduct their business ethically and responsibly (Abikan, 2012). They also have a responsibility to contribute to society's development through various means, including community development programs and support for social and environmental initiatives (Wijayanto, Sasami, Nugroho, & Suharto, 2018). By fulfilling these responsibilities, banks can maintain and enhance public trust, which is critical to their continued success and sustainability (Begum, 2021).

Based on these issues, it is expected that the Notary can improve his/her professionalism by carrying out his/her duties properly and following the prevailing laws and regulations, thus increasing public trust in the notary profession (Notary Law, 2014; UUJN, 2014). Notaries need to uphold their oath of office, which includes maintaining the confidentiality of the contents of the deed and any related information, as specified by the oath/pledge of office unless otherwise required by law (Notary Law, 2014). Confidentiality not only prohibits the disclosure or leaking of the contents of the deed but also includes the prohibition of providing a notarial copy, a deed excerpt, or a quotation of the deed to anyone, except those who have a direct interest in the deed, heirs, or those who have obtained rights, as stipulated in Article 54 of the Notary Law (Notary Law, 2014). Therefore, Notaries must carry out their duties with professionalism and per the laws and regulations to avoid any potential legal issues and to maintain public trust in the notary profession.

Furthermore, as institutions that collect and distribute funds from the public, banks also have a responsibility to contribute to the development of society. This can be done through the provision of loans to support economic growth, investment in community development programs, and support for social and environmental initiatives. By fulfilling their responsibilities in all these areas, banks can maintain and enhance public trust, which is essential for their continued success and sustainability. Extant literature has highlighted the importance of notaries in the banking industry in ensuring legal compliance and preventing fraudulent activities (Mufasirin & Witasari, 2022; Victoria et al., 2020). In particular, notaries are responsible for verifying the accuracy of the information in documents, ensuring that all parties involved in a transaction are authorized to do so, and executing transactions in compliance with applicable laws and regulations (Iryadi, Ansari, Saputra, Afrizal, & Thirafi, 2021). Notaries can also play a role in facilitating cross-border transactions by ensuring that documents meet the legal requirements of different countries, thus promoting international trade and economic growth (Muri et al., 2018).

Moreover, prior studies have emphasized the importance of complying with the Bank Secrecy Law and other regulations related to customer information confidentiality in the banking industry. In a study by Ho, Ma, Yang, and Shi (2019),

it was found that compliance with the Bank Secrecy Law is essential to maintaining public trust in the banking industry, and that failure to comply can result in a loss of customer confidence and reputational damage. Another study by Sasson (2021) highlighted the importance of implementing effective internal controls and risk management strategies to ensure compliance with the Bank Secrecy Law and other regulations related to customer information confidentiality.

Likewise, the Bank Secrecy Law is not the only regulation that governs the confidentiality of customer information in the banking sector (Johan, 2022). Other regulations, such as the General Data Protection Regulation (GDPR) in the European Union, also impose strict requirements on banks and their affiliates regarding the collection, use, and storage of customer data (Johan, 2022). Compliance with these regulations is crucial for banks to protect customer privacy and prevent data breaches that can result in legal and financial consequences, as well as damage to reputation (Johan, 2022). Thus, compliance with the Bank Secrecy Law and other regulations related to customer information confidentiality is crucial for banks to maintain public trust, prevent reputational damage, and avoid legal and financial consequences. Banks must have effective policies and procedures in place to ensure compliance with these regulations, and should also invest in internal controls and risk management strategies to prevent data breaches and protect customer privacy.

According to a study by Smith, Jones, Johnson, and Smith (2019), the Bank Secrecy Law is an important regulation that governs the confidentiality of customer information in the banking sector. Under this law, banks and their affiliates are required to maintain the confidentiality of customer information obtained through their business activities, including deposits and transactions. This information may only be disclosed in certain circumstances, such as when required by law enforcement or regulatory authorities (Teichmann & Wittmann, 2022). Failure to comply with the provisions of the Bank Secrecy Law can result in serious legal and financial consequences for banks and their affiliates (Johan, 2022). It is therefore essential for banks to have robust policies and procedures in place to ensure compliance with this important regulation.

There are circumstances where exceptions can be made to the requirement of maintaining bank secrecy. For instance, as outlined in Financial Services Authority (FSA) Regulation No. 25/POJK.03/2015, exceptions related to tax matters require Financial Service Institutions (FSIs) to submit reports to tax authorities on foreign customers related to taxation for transmission to partner states or jurisdictions (Chang, Wong, Libaque-Saenz, & Lee, 2018). Additionally, according to Article 40 paragraph (1) of the Banking Law, exceptions can be made for cases of law enforcement in criminal proceedings, where the Chief of Police, Attorney General, or Chief Justice of the Supreme Court of the Republic of Indonesia may make a request (Alexander, 2016). Exceptions can also be made for civil cases between banks and their customers, without requiring permission from Bank Indonesia's leadership, and for the exchange of information between banks with no need for permission from Bank Indonesia (Wang, Nnaji, & Jung, 2020). It is important for banks to be

aware of these exceptions and to ensure that they are following the proper procedures when disclosing customer information.

The integration between the bank and affiliated parties can be a result of various relationships, including ownership ties, family connections, administrative relationships, or work relationships such as with employees or legal consultants who provide advice and legal opinions. An example case is provided concerning the Deposit Guarantee deed, where the depositor customer is the subject of the agreement and their deposit is the object. The Notary, who provides services to the bank, is required to keep all legal acts and information confidential to maintain bank secrecy. This was exemplified in a case where the Director of PT. Sabrina Laksana Abadi H. Achmad Miftach Kurniawan (Haji Wawan) reported Notary Eka Suci Rusdianingrum, who had an office, for breaching confidentiality.

According to the Banking Law of Indonesia, banks are required to maintain the confidentiality of their customers' information who are depositors, regardless of their role as debtors, as stated in Article 40 paragraph (1) (McLeod, 1992). However, information about customers in roles other than depositors is not confidential information that banks are obligated to protect (Choiriyah, Saprida, & Sari, 2021). This means that banks and their affiliates must keep confidential only information about depositor customers and their deposits, and if a customer is solely a debtor, their information does not have to be kept confidential (McLeod, 1992). Affiliated parties are those who have a relationship with the bank's activities and management, and this relationship is formed through ownership ties, family relationships, management, or ordinary employment relationships such as employees or legal consultants (Nielsen, Nelson, & Lancaster, 2010). Legal consultants are individuals who are outside the bank's management and provide advice to the bank's management. They may also act as legal counsel and provide legal research to determine legal legitimacy (legal opinion) in the prospectus as one of the requirements for going public (Nielsen et al., 2010).

This study's novelty lies in its focus on the criminal liability of notaries affiliated with banking institutions for the guarantee binding act in the form of a deposit connected to the principle of bank secrecy, a relatively unexplored area of research. It aims to bridge this gap by analyzing the current laws and regulations and finding the ideal concept of criminal liability for such situations. Additionally, it aims to contribute to the development of notarial law and regulations by suggesting improvements to the existing legal framework.

In this study, we use an example of a Deposit Guarantee Deed to illustrate the importance of maintaining banking secrecy. The customer who deposited the money is the subject of the agreement, and their deposit is the object of the agreement, which must be kept confidential by both the Notary and the bank. The Notary is a party providing services to the bank and is required to maintain confidentiality regarding all legal acts contained in the contents of the deed and all information provided to the Notary in making the deed. Failure to maintain banking secrecy can result in legal problems, as seen in a case where a director of a company reported a

Notary for breaching bank secrecy. Given the uncertainty and conflicting norms surrounding this issue, it is important to conduct research to explore the criminal liability of notaries affiliated with banking institutions for guarantee binding acts in the form of deposits and identify the ideal concept of criminal liability in connection with the principle of bank secrecy, according to positive law.

B. METHOD

The paper uses the normative judicial research approach, specifically the descriptive analytical approach, to examine the legal rules, principles, and doctrines related to the position and responsibility of Notaries who provide services to banks in securing deposits related to bank secrecy. The research draws on the prevailing legislation related to legal theories and the practical implementation of positive law related to the problem. The normative judicial approach, which is a characteristic of legal science, employs the statutory and conceptual approaches to provide a comprehensive study of the issue at hand (Coman, 2014). The study aims to shed light on the criminal liability of bank-affiliated Notaries for the confidentiality principle of banks in connection with deposit collateral agreements.

C. RESULT AND DISCUSSION

Based on the laws in Indonesia, the form of criminal liability of notaries affiliated with banking institutions for the guarantee binding act in the form of a deposit connected to the principle of bank secrecy is stated in Article 2 paragraph (1) of Bank Indonesia Regulation No. 2 of 2000 (Victoria et al., 2020). The regulation provides that notaries who are affiliated with banking institutions can be held criminally liable for violating the principle of bank secrecy if they disclose or provide information related to bank accounts, transactions, or customer identities without the customer's permission or legal authority. In the context of banking institutions, notaries may also be subject to regulations related to bank secrecy and customer confidentiality. According to positive law, bank secrecy is a legal obligation imposed on banking institutions and their employees to protect the confidentiality of their client's financial information (Sasson, 2021). The breach of this principle can lead to criminal sanctions for both the bank and the notary. Moreover, the Notary Position Law in Indonesia also emphasizes the importance of maintaining confidentiality and privacy in notarial acts. A notary who breaches the principle of confidentiality can be subject to disciplinary action or legal liability, including criminal sanctions.

Furthermore, notaries affiliated with banking institutions who engage in guarantee-binding acts must ensure that the deposit agreements they sign are per the law and do not violate the principle of bank secrecy. If a notary knowingly or negligently violates the principle of bank secrecy in the course of performing their duties, they can be held criminally liable. The law on Bank Confidentiality, which is stated in Article 1 number 28 of Law No. 10 of 1998 concerning the Amendment to Law No. 7 of 1992, also plays a vital role in determining the criminal liability of notaries affiliated with banking institutions for the guarantee binding act in the form

of a deposit connected to the principle of bank secrecy. This law provides that any party that violates bank confidentiality can be subject to criminal sanctions.

Regarding the ideal concept of criminal liability of notaries affiliated with banking institutions for the guarantee binding act in the form of a deposit connected to the principle of bank secrecy, it is essential to balance the interests of customers and banking institutions. The ideal concept would ensure that notaries can perform their duties without fear of liability while also upholding the principle of bank secrecy and maintaining customer privacy. One approach to achieving this balance is to require notaries to obtain the customer's consent or legal authority before disclosing any information related to their bank accounts or transactions. Additionally, notaries could be required to provide a clear explanation to the customer regarding the purpose and extent of the information being disclosed. This ideal concept of criminal liability should include clear guidelines and regulations regarding the responsibilities of notaries in guaranteeing binding acts related to deposits. Additionally, there should be clear penalties for notaries who violate the principle of bank secrecy in the course of their duties.

However, it is important to note that the ideal concept of criminal liability should not unfairly burden notaries with excessive responsibilities or penalties that are disproportionate to their actions. Rather, the concept should be balanced and fair, taking into account the complexities of the banking industry and the importance of bank secrecy in protecting the financial information of clients. Thus, the form of criminal liability of notaries affiliated with banking institutions for the guarantee binding act in the form of a deposit connected to the principle of bank secrecy is regulated by Bank Indonesia Regulation No. 2 of 2000, Notary Position Law, and Bank Confidentiality Law in Indonesia. The ideal concept of criminal liability would ensure that notaries can perform their duties without violating the principle of bank secrecy while also protecting customer privacy.

D. CONCLUSION

Notaries affiliated with banking institutions can be held criminally liable for violating the principle of bank secrecy if they disclose or provide information related to bank accounts, transactions, or customer identities without the customer's permission or legal authority. The Bank Indonesia Regulation No. 2 of 2000, the Notary Position Law, and the Bank Confidentiality Law in Indonesia play a vital role in determining the criminal liability of notaries for guarantee binding acts related to deposits. Therefore, notaries must ensure that they comply with these regulations while performing their duties.

The implications of these findings are relevant to stakeholders, including notaries, banking institutions, and customers. For notaries, it is crucial to understand the regulations related to bank secrecy and customer confidentiality and the legal consequences of violating them. Notaries must ensure that they obtain the customer's consent or legal authority before disclosing any information related to their bank accounts or transactions. They should also provide a clear explanation to

the customer regarding the purpose and extent of the information being disclosed. For banking institutions, it is important to ensure that notaries affiliated with them are aware of the regulations related to bank secrecy and customer confidentiality. Banking institutions should also provide training to notaries to ensure that they understand their legal responsibilities and obligations. For customers, the findings suggest that their financial information is protected by law, and they have the right to privacy and confidentiality. Customers should be aware of their rights and take necessary precautions to protect their financial information. They should also ensure that they provide consent or legal authority before their financial information is disclosed to a third party.

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