

Functional Immunity and Mens Rea: Rethinking Criminal Liability of Notaries as Public Officials

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Abstract

The criminal prosecution of notaries for acts performed within their statutory duties raises a fundamental question regarding the proper boundary of criminal liability for public officials. In criminal law, liability is grounded in the principle of culpability, commonly expressed as *nullum delictum, nulla culpa* (no punishment without fault), which requires subjective fault as a prerequisite for punishment. This principle has long been emphasized by criminal law scholars such as Jan Remmelink and Moeljatno, who argue that criminal liability can arise only when fault is present and no exculpatory grounds exist. In the Indonesian context, this principle has been explicitly codified in Law No. 1 of 2023 on the Criminal Code, particularly under Articles 22 and 36–44, which emphasize fault-based criminal liability and the relevance of personal circumstances in determining culpability. Despite this normative clarity,



the application of criminal law to notaries often raises doctrinal tension, especially when formal notarial acts are linked to unlawful outcomes without clear proof of intention, knowledge, or negligence. This article examines the criminal liability of notaries as public officials through the lens of *mens rea* and functional immunity to reassess the legitimacy of penal intervention against notarial acts. Employing a doctrinal and comparative legal approach, this research analyzes criminal liability theory alongside legal frameworks in Indonesia, the Netherlands, and France. The study finds that criminal liability must be strictly grounded in subjective fault, and that notarial acts performed within statutory authority require careful differentiation between formal duties and personal misconduct. The article argues that, rather than assuming the absence of liability, the assessment of notarial responsibility must be based on a structured evaluation of *mens rea*, while recognizing the need for proportional legal protection for acts performed within official capacity. This approach aims to prevent overcriminalization while maintaining accountability, thereby aligning the enforcement of criminal law with the fundamental principle of culpability.

Keywords

Criminal Liability, Functional Immunity, *Mens Rea*, Notaries, Public Officials.

Introduction

The rise in criminal prosecutions against public officials has become a contemporary global concern, reflecting the expansion of criminal intervention into the administrative and professional realms. Criminal law, which ideally serves as a last resort (*ultimum remedies*), is increasingly being used as the primary instrument to sanction actions arising from administrative errors or disputes in legal documents. This global trend reflects the blurring of the boundaries between public duty and personal responsibility, raising fundamental questions about the proper boundaries of criminal responsibility. In this context, the position of notaries is a significant object of study, especially considering their dual

character as legal professionals and public officials acting under the mandate of the law.

Notaries are frequently subject to criminal suspicion when authentic deeds they prepare are later challenged, used to facilitate fraudulent conduct by the parties, or give rise to civil disputes. However, reducing the role of notaries to merely recording the parties' statements would be an oversimplification. Under Law No. 2 of 2014 on Notary Office, particularly Article 15 in conjunction with Article 16(1)(a), notaries are required to perform their duties with integrity, honesty, diligence, independence, and impartiality, as well as to safeguard the interests of the parties. In addition, the validity of agreements reflected in notarial deeds must comply with the requirement of lawful cause as stipulated in the Indonesian Civil Code, especially Article 1337, which prohibits causes that are contrary to law, public order, or morality.¹

In this context, notaries bear both formal and limited substantive responsibilities, particularly in ensuring that the deed does not embody an unlawful cause. Consequently, notaries cannot entirely evade legal responsibility on the basis that they merely record the parties' intentions. Nevertheless, the imposition of criminal liability requires a careful and rigorous assessment of subjective fault. In line with the fundamental principle of culpability, criminal sanctions should only be imposed where intention, knowledge, or negligence can be clearly established, as also reflected in judicial practice.

The core issue, therefore, does not lie in denying the notary's responsibility, but in determining the proper threshold at which a notary's professional conduct—performed within the scope of legal authority—transitions into criminally blameworthy behavior. This raises an important doctrinal question: to what extent can the performance of notarial duties, which combine formal obligations with certain substantive safeguards, be equated with *mens rea* in criminal law? Without clear proof of subjective fault, the attribution of criminal liability risks undermining the principle that punishment must be based

¹ V. S. Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?," *Harvard Law Review* 109, no. 7 (1996): 291, <https://doi.org/10.2307/1342023>.

on culpability rather than merely on the consequences of a legal act.²

Judicial practice in Indonesia demonstrates a fragmented approach in assessing the criminal liability of notaries, particularly concerning the element of fault. In several cases, courts have consistently required proof of intentional or negligent conduct before imposing criminal sanctions. For instance, in Supreme Court Decision No. 933 K/Pid/2015³ and Decision No. 439 K/Pid/2010⁴, notaries were held criminally liable for their active involvement and demonstrable intent in unlawful acts, reaffirming the centrality of mens rea in criminal responsibility.

However, contrasting reasoning is evident in other decisions. In Supreme Court Decision No. 20 PK/Pid/2020⁵, a notary who had previously been convicted was ultimately acquitted because the conduct constituted merely administrative negligence and lacked any element of intent or personal benefit. This decision explicitly distinguishes between administrative error and criminal wrongdoing, emphasizing the necessity of subjective fault.

At the same time, other cases reveal a grey area in judicial interpretation. In Decision No. 1461/Pid.B/2019/PN Tangerang⁶, the involvement of a notary in a criminal case raised questions regarding whether the conduct reflected active participation or merely formal execution of duties. Similarly, in Decision No. 54/Pdt.G/2020/PN Ungaran⁷, violations of procedural obligations by a notary resulted in civil consequences rather than criminal liability, indicating that not all professional misconduct meets the threshold of criminal culpability.

These divergent approaches reveal a significant legal gap. While some courts consistently apply the principle of culpability,⁸ others demonstrate ambiguity in distinguishing between administrative

² Satrio Abdillah, "Batasan Kewenangan Dan Tanggung Jawab Notaris-PPAT Dalam Edukasi Prosedur Pembuatan Akta Otentik Ditinjau Dari Pasal 51 KUHP," *Journal of Education Research* 4, no. 1 (2023): 433, <https://doi.org/10.37985/jer.v4i1.125>.

³ Supreme Court of the Republic of Indonesia, Supreme Court Decision No. 933 K/Pid/2015 (2015).

⁴ Supreme Court of the Republic of Indonesia, Supreme Court Decision No. 439 K/Pid/2010 (2010).

⁵ Supreme Court of the Republic of Indonesia, Supreme Court Decision No. 20 PK/Pid/2020 (2020).

⁶ District Court of Tangerang, District Court Decision No. 1461/Pid.B/2019/PN Tangerang (2019).

⁷ District Court of Ungaran, District Court Decision No. 54/Pdt.G/2020/PN Ungaran (2020).

⁸ Muhammad Azil Maskur et al., "Reimagining Criminal Liability in the Age of Artificial Intelligence: Toward a Comparative and Reform-Oriented Legal Framework," *Journal of Law and Legal Reform* 6, no. 4 (2025), <https://doi.org/10.15294/jllr.v6i4.35540>.

responsibility and criminal liability, thereby creating legal uncertainty in the application of criminal law to notaries.

This question leads to a more structural inquiry into whether criminal prosecution of notaries reflects a misalignment between functional duties and criminal responsibility. Public officials who act under legal authority carry out their functions on behalf of the state, not based on personal autonomy. In many jurisdictions, this principle gives rise to the doctrine of functional immunity. This legal shield protects officials from criminal prosecution when their actions are truly within the scope of public authority and without personal *mens rea*.⁹ Functional immunity has been developed and adopted in some civil law systems, such as the Netherlands¹⁰ and France, to prevent the criminalization of purely formal public acts.¹¹ However, Indonesian law has in fact recognized certain forms of legal protection for notaries who perform their duties in accordance with their statutory authority. Such protection is reflected in Law No. 2 of 2014 on Notary Office, particularly in Article 16(f) in conjunction with Article 66, which establishes mechanisms to safeguard notarial confidentiality and requires prior approval from the Notary Honorary Council before legal examination. This framework is further elaborated in Regulation of the Minister of Law and Human Rights No. 17 of 2021, which regulates the role of the Notary Honorary Council as an institutional filter in the law enforcement process. In addition, Law No. 1 of 2023 on the Criminal Code, particularly Article 443, protects against the unlawful disclosure of confidential information due to official position. Nevertheless, these forms of protection have not yet been systematically conceptualized within a coherent doctrine of functional immunity grounded in *mens rea*. As a result, the boundary between protected official conduct and criminally liable behavior remains subject to interpretative uncertainty in practice.

The existing literature primarily discusses notary responsibilities

⁹ Aziz Epik, "No Functional Immunity for Crimes under International Law before Foreign Domestic Courts An Unequivocal Message from the German Federal Court of Justice," *Journal of International Criminal Justice* 19, no. 5 (2021): 327, <https://doi.org/10.1093/jicj/mqab071>.

¹⁰ Royal Dutch Association Of and Civil-Law Notaries, "Olenz General Condition," 23 knb § (2025), <https://doi.org/10.52152/801841>.

¹¹ Chimène I. Keitner, "Functional Immunity of State Officials Before the International Law Commission: The 'Who' and the 'What,'" *Questions of International Law* 17 (2015): 656.

through an administrative or civil law perspective, often focusing on the validity of deeds, professional ethics, or procedural compliance. Few works address notaries in the context of criminal law, and even fewer analyze this problem through the lens of mens rea or functional immunity.¹² Furthermore, there is no substantive research comparing Indonesian regimes with jurisdictions that have implemented immunity-based protections for notaries. Therefore, there is a clear research gap in linking culpability theory with functional immunity¹³ as a basis for rethinking notaries' criminal responsibility.

Research on professional immunity has also developed in recent legal scholarship. A study by Ananta G. et al.¹⁴ concludes that criminal law enforcement against notaries must continue to prioritize the principle of legal protection as mandated by the Notary Position Act, while emphasizing the necessity of careful proof of the notary's fault before criminal liability is imposed. Afsila's¹⁵ research finds that notaries may be held criminally liable if it is proven that they relied on or used false information in the drafting of authentic deeds. Meanwhile, Hendriawan's (2022)¹⁶ study demonstrates that certain professions require functional immunity when performing official duties, a concept that can be analogously applied within the notarial context. However, studies on notarial criminal liability in Indonesia have largely concentrated on administrative and procedural aspects.

Studies on functional immunity and the criminal liability of public officials have been extensively explored in international legal scholarship, particularly in relation to state officials and the exercise of official

¹² A Epik and J Geneuss, "Without a Doubt: German Federal Court Rules No Functional Immunity for Crimes Under International Law," *Verfassungsblog From*, 2024, 652.

¹³ By Cedric Ryngaert, "Functional Immunity of Foreign State Officials in Respect of International Crimes before the Hague District Court : A Regressive Interpretation of Progressive International Law," *Blog of the European Journal of International Law* 9, no. c (2020): 342.

¹⁴ Gede Amatyana Ananta, I Made Arjaya, and Anak Agung Istri Agung, "Law Enforcement and Protection of Notaries in the Criminal Domain and Law of Notary Position (Case Study of Decision Number 196/Pid.B/2019/Pn Denpasar)," *NOTARIIL Jurnal Kenotariatan* 6, no. 1 (2021): 43, <https://doi.org/10.22225/jn.6.1.3612.38-45>.

¹⁵ Zalfa Kamelia Rona Afsila, "Kajian Pertanggungjawaban Pidana Seorang Notaris Dalam Pembuatan Akta Otentik Yang Didasarkan Pada Keterangan Palsu," *Sosial Simbiosis : Jurnal Integrasi Ilmu Sosial Dan Politik* 1, no. 2 (2024): 15, <https://doi.org/10.62383/sosial.v1i2.192>.

¹⁶ Muhammad Rizaldi Hendriawan, "Politics of Criminal Law Liability of Corporate Criminal in Indonesia," *Yuris (Journal of Court and Justice)* (journal.jfipublisher.com, 2022), 87.

functions. Pisillo Mazzeschi (2017)¹⁷ critically examines the doctrinal foundations of functional immunity, emphasizing that *immunity ratione materiae* is justified to protect acts performed on behalf of the state rather than the individual official. This view is reinforced by Akande and Shah (2010)¹⁸, who distinguish clearly between personal immunity and functional immunity, arguing that the latter may continue to apply even after an official has left office, provided that the acts were carried out in an official capacity. Similarly, the United Nations International Law Commission (2022)¹⁹ affirms that functional immunity attaches to official acts and safeguards the effective performance of state functions, while Zhong (2014)²⁰ highlights that such immunity is generally upheld except in cases involving core international crimes. Collectively, these studies establish functional immunity as a well-recognized doctrine aimed at preventing undue criminal prosecution of public officials for lawful official conduct.

Further scholarship explores the limits and implications of functional immunity in relation to criminal jurisdiction and accountability. Case analyses compiled in the Cambridge International Law Reports (2022)²¹ demonstrate that courts tend to preserve functional immunity when the alleged conduct remains within official duties, thereby requiring clear evidence of personal culpability before criminal liability may arise. The discussion is complemented by broader doctrinal reflections in the European Journal of International Law²², particularly

¹⁷ Riccardo Pisillo Mazzeschi, "The Functional Immunity of State Officials from Foreign Jurisdiction: A Critique of the Traditional Theories," *Leiden Studies on the Frontiers of International Law* 3, no. June 2014 (2017): 298, https://doi.org/10.1163/9789004269507_030.

¹⁸ Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," *European Journal of International Law* 21, no. 4 (2010): 37, <https://doi.org/10.1093/ejil/chq080>.

¹⁹ ILC, "Commentary Chapter VI Immunity of State Officials from Foreign Criminal Jurisdiction," 2016, 27.

²⁰ Zhong Yixuang, "Criminal Immunity of State Officials for Core International Crimes Now and in the Future," vol. 20, 2014, 273.

²¹ Cambridge University, "Functional Immunity of Foreign State Officials and Crimes under International Law Case," *International Law Reports*, 2023/01/10, vol. 200 (Cambridge University Press, 2022), 118, <https://doi.org/10.1017/ilr.2022.33>.

²² Claire E.M. Jervis, "Jurisdictional Immunities Revisited: An Analysis of the Procedure Substance Distinction in International Law," *European Journal of International Law* 30, no. 1 (2019): 78, <https://doi.org/10.1093/ejil/chz009>.

in debates on jurisdictional immunities, which stress that criminal responsibility must be grounded in individual fault rather than institutional role alone. While these studies²³ provide a robust theoretical and comparative foundation for understanding immunity and criminal liability of public officials, they largely focus on high-level state actors and international crimes. The application of these doctrines to notaries as public officials performing formal and administrative legal functions remains underexplored, particularly in relation to *mens rea*. This gap highlights the need for a focused analysis that connects functional immunity with the subjective elements of criminal liability in the context of notarial acts.

This article seeks to fill this gap by answering three core questions, namely, what *mens rea*²⁴ standards should be applied to determine criminal liability for public officials who commit acts mandated by law, especially notaries; whether the performance of the notary duties is in accordance with the rationale of functional immunity that should protect officials from criminal prosecution for formal actions; and how comparative jurisdictions regulate criminal immunity²⁵ and liability for notaries, and what insights can be drawn to reform Indonesia's approach. By approaching the subject through doctrinal analysis and comparative studies, this work positions notaries not only as legal practitioners but also as public officials whose criminal liability must be assessed through an error-based framework, rather than administrative outcomes.

The expected contribution of this study is twofold. Theoretically, the study offers a reconstruction of the limits of criminal liability for public officials who commit formal acts, grounded in *mens rea* analysis and supported by functional immunity reasoning.²⁶ In practical terms,

²³ Larissa Leite, "Immunity from Criminal Prosecution and Consular Assistance to the Foreign Detainee According the International Human Rights Law," *Immigration Detention, Risk and Human Rights: Studies on Immigration and Crime*, 2016, 47, https://doi.org/10.1007/978-3-319-24690-1_7.

²⁴ Roman Veresha, "Criminal and Legal Characteristics of Criminal Intent," *Journal of Financial Crime* 24, no. 1 (2017): 334, <https://doi.org/10.1108/JFC-02-2016-0013>.

²⁵ R I Ababei, "Functional Immunity in Relation to Crimes Pursuant to International Law," *Romanian J. Int'l L.*, 2024, 129.

²⁶ M La Manna, "Be Careful What You Wish for: The International Law Commission Recognizes a List of Instances in Which Functional Immunity Does Not Apply," ... *Internazionale: Rivista Trimestrale Della Società Italiana ...*, 2018, 86.

these findings can inform future legislative developments in Indonesia to prevent disproportionate criminalization and to ensure accountability and legal protection for notaries. Ultimately, this study aims to rebalance the relationship between state authority and individual error, reaffirming that criminal sanctions apply only when subjective errors actually exist.

Method

This study uses a doctrinal legal method²⁷, focusing on the analysis of criminal liability theory, mens rea standards, and the concept of functional immunity within the framework of public office. This study employs a doctrinal legal research method, focusing on the analysis of criminal liability theory, mens rea standards, and the concept of functional immunity within the framework of public office. Primary legal sources include statutory regulations governing the authority of notaries in Indonesia, particularly Law No. 2 of 2014 on Notary Office, provisions of criminal law related to fault and liability as regulated in Law No. 1 of 2023 on the Criminal Code, as well as jurisprudence in the form of court decisions concerning notarial criminal liability. In addition, selected international legal doctrines on functional immunity are examined to provide a comparative and conceptual framework. Secondary legal sources include scientific journals, doctrinal writings, and comparative legal studies that examine criminal responsibility, professional liability, and the distinction between official and personal acts, particularly in civil law systems. The approach used is normative-analytical, which examines legal principles and judicial reasoning to assess whether notarial actions, performed under statutory authority, fulfill the essential subjective elements of criminal liability, namely intention, knowledge, or negligence.²⁸

To strengthen this assessment, the study combines comparative legal methods by juxtaposing Indonesia's regulatory structure with immunity frameworks in other jurisdictions, including the Netherlands and France.

²⁷ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2016).

²⁸ Achmad Yulianto dan Fajar Mukti, "Dualisme Penelitian Hukum Normatif Dan Empiris, Pustaka Pelajar, Yogyakarta," *Yogyakarta: Pustaka Pelajar*, 2022, 87.

The comparative component allows the identification of systematic similarities and deviations, thereby facilitating the formulation of evaluative conclusions regarding whether functional immunity should be recognized to prevent the unfair criminalization of notaries. This analysis adopts a qualitative interpretive model, in which doctrinal arguments are synthesized to formulate the conceptual limits of mens rea in relation to public officials.

The comparative legal approach in this study is conducted using specific analytical parameters²⁹, namely: (i) the legal basis of notarial liability, (ii) the role of mens rea in determining criminal responsibility, (iii) the existence and scope of functional or procedural immunity, and (iv) institutional mechanisms that function as filters before criminal prosecution. These parameters are used to systematically compare Indonesia with the Netherlands and France to identify similarities, differences, and their implications for the development of a more coherent model of notarial criminal liability in Indonesia. The result of this method is a normative proposition that redefines the threshold of criminal liability against notaries and proposes a mens rea-based model of functional immunity.

Result and Discussion

A. Determining Mens Rea Standards in Criminal Liability of Public Officials

Criminal liability in criminal law essentially rests on the principle of culpability, or guilt. This principle emphasizes that a person can be punished only if they have an inner responsibility for an act at the time it is committed.³⁰ This principle is not only the basis in the civil law legal system, but it is also the universal foundation in modern criminal law. Mens rea is a psychological element that must be proven before a person

²⁹ Ratno Lukito, *Perbandingan Hukum: Perdebatan Teori Dan Metode*, vol. 1 (Gadjah Mada University Press, 2016).

³⁰ Asif Khan, Shaukat Hussain Bhatti, and Abid Shah, "An Overview on Individual Criminal Liability for Crime of Aggression," *Liberal Arts and Social Sciences International Journal (LASSIJ)* 5, no. 1 (2021): 432, <https://doi.org/10.47264/idea.lassij/5.1.28>.

is found guilty of a crime.³¹ Thus, it is not enough to build based on the occurrence of unlawful acts, but it must be accompanied by evidence about the inner state of the maker when the act is committed. Mens rea is the main filter to distinguish actions that are punishable from actions that occur in the administrative or professional realm without malicious intent.³²

According to Simons, under the theory of guilt, criminal liability can be imposed only if the perpetrator has made a mistake that is morally and legally accountable.³³ Guilt is not formed merely because a legal event occurs; it requires proof that the perpetrator committed the act with malicious intent or at least with negligence that can be attributed. This concept is in line with the thinking of Hans-Heinrich Jescheck, who emphasizes the subjective element in criminal offenses as the main determinant of whether an act deserves criminal sanctions. Jescheck separates the elements of external deeds and inner errors, where proof of mens rea is an absolute requirement before the state can impose criminal penalties on its citizens.³⁴ Punishment that is not based on inner guilt is seen as contrary to the principles of lawfulness and justice.

Moeljatno, in the conception of Indonesian criminal law, uses the phrase able to be responsible to describe the subjective foundation of criminal responsibility. Being able to take responsibility can mean that the perpetrator is aware of his actions, understands the consequences, and can control the action. In this perspective, intentionality or negligence is the criterion that constitutes mens rea and determines whether a person is criminally responsible.³⁵ Intentionality is related to the conscious will to perform an act and to cause its consequences, while negligence describes a

³¹ Dwi Rossulliaty, Yoyok Ucuk, and Wahyu Prawesthi, "Criminal Liability of Notary in Criminal Act Committed By Notary Signing Agent," *Journal of Court and Justice*, 2023, 376, <https://doi.org/10.56943/jcj.v2i1.258>.

³² Ahda Budiansyah, "Notary Responsibility Who Has Ended His Tenure on Notary 'S Protocol and Deed," *Tanggung Jawab Notaris Yang Telah Berakhir Masa Jabatannya Terhadap Akta Dan Protokol Notaris IV*, no. November 2011 (2016): 98.

³³ Paul H. Robinson, "Imputed Criminal Liability," *The Structure and Limits of Criminal Law*, 2018, 87, <https://doi.org/10.4324/9781315085159-2>.

³⁴ Budiansyah, "Notary Responsibility Who Has Ended His Tenure on Notary 'S Protocol and Deed."

³⁵ Arief Budiono, Dito Pratama Adi Sugiarto, and Syaifuddin Zuhdi, "Legal Protection for Notaries in Making Authentic Deeds in Indonesia," *Journal of Judicial Review* (academia.edu, 2023), 938, <https://doi.org/10.37253/jjr.v25i1.7612>.

careless attitude that can still be blamed. Therefore, the elements of intention, knowledge, and negligence are objective criteria for determining the existence of mens rea.³⁶ When these three elements are not met, the punishment loses its moral and juridical legitimacy.

The formation of mens rea cannot be separated from the fundamental distinction between actions performed in the capacity of office and personal acts. In the criminal law system, personal liability arises when a person acts of their own will and with awareness of the consequences of their actions. On the other hand, official acts are generally carried out based on a predetermined normative mandate, so the space for personal will is relatively limited. This is where the significance of mens rea differentiation lies in the context of public officials, because not every action that appears to intersect with a criminal event reflects a subjective error on the part in the officials who carry it out.³⁷ Actions taken solely to fulfill formal obligations do not necessarily indicate the perpetrator's psychological involvement in criminal acts that may occur beyond the scope of his duties.

The distinction between official capacity and personal capacity is essential not only to prevent the overexpansion of criminalization but also to ensure that criminal liability is imposed in accordance with the principle of individualized culpability. In this regard, Law No. 1 of 2023 on the Criminal Code explicitly recognizes the importance of assessing the offender's personal circumstances. Article 22, in conjunction with Articles 36–44, affirms that criminal liability cannot be imposed mechanically based solely on the fulfillment of the objective elements of an offense, but must take into account the subjective condition, role, and capacity of the perpetrator.

This framework reflects the principle of individualization of criminal liability, whereby the law views the offender as a legal subject with specific professional roles, responsibilities, and limitations. In the context of notaries, their position as public officials exercising legally mandated

³⁶ Dwikarunia Setiawan Guntik and Dewa Gede Pradnya Yustiawan, "Corporations As Whistleblowers in the Crime of Defamation Based on the Electronic and Transaction Information Act," *Policy, Law, Notary and Regulatory Issues (Polri)* (download.garuda.kemdikbud.go.id, 2022), 982, <https://doi.org/10.55047/polri.v1i1.43>.

³⁷ Adelyn L.M. Wilson, "Notaries and Advocates in Early Modern Aberdeen," *Cultures of Law in Urban Northern Europe*, 2020, 329, <https://doi.org/10.4324/9780429262869-20>.

duties constitutes a relevant personal circumstance that must be carefully evaluated in determining culpability. Actions performed within official authority, particularly those of a formal and procedural nature, cannot automatically be equated with personal intent or negligence without a thorough examination of the notary's mental state.

Furthermore, personal circumstances may function to exclude, reduce, or aggravate criminal liability. Where a notary acts strictly within the bounds of statutory authority and without intention or negligence, the absence of culpability may negate criminal responsibility altogether. Conversely, where there is clear abuse of authority or intentional participation in unlawful conduct, criminal liability remains fully applicable. This approach ensures that punishment is grounded in culpability, reflecting the principles of proportionality and substantive justice in modern criminal law.³⁸

When public officials carry out their law-mandated duties, they work within a normative framework that limits the space of will. Thus, proof of *mens rea* must be carried out more strictly, because officials may act only as administrative executors without knowledge of or intent to commit the crime that occurred.³⁹ This principle is in line with Simons's thinking on guilt, which places moral responsibility and subjective guilt as prerequisites for punishment. If an act is carried out in the capacity of an office, the question arises whether the official intends an or merely exercises the authority inherent in his position.

In this perspective, the criminalization of public officials must be carefully distinguished between legitimate acts performed within official authority and personal actions that exceed or abuse such authority. Rather than assuming that officials are criminalized despite acting properly, the issue lies in how courts interpret and assess the boundary between lawful professional conduct and behavior that is criminally relevant.

As reflected in judicial practice, inconsistencies may arise not from the absence of the fault requirement but from differing interpretations of

³⁸ Anis Widyawati et al., "Crafting an Ideal Penitentiary Law: A Global Comparative Framework for Indonesia's Correctional System," *Legality: Jurnal Ilmiah Hukum* 33, no. 2 (2025): p.425, <https://doi.org/10.22219/ljih.v33i2.40358>.

³⁹ Simon Nahak, "The Liability of Criminal Law towards a Notary Official in the Crime of Embezzlement at the Denpasar District Court," *NOTARIL Jurnal Kenotariatan*, 2020, 118, <https://doi.org/10.22225/jn.v5i2.2572>.

whether the official's conduct demonstrates intention, knowledge, or negligence. This highlights the importance of a rigorous, case-by-case evaluation of *mens rea*, particularly where public officials—such as notaries—perform duties that are both formal and legally regulated. Without such careful assessment, there is a risk that criminal liability may be inferred from the consequences of an act rather than from the proven existence of subjective fault.

Actions generally have objective-formal characteristics, while personal actions indicate a stronger subjective will. If public officials act beyond their authority or abuse it for personal purposes, then *mens rea* can be inferred, and criminalization becomes relevant. However, when the action is carried out in the formal space of the position without any indication of intent or serious negligence, the attribution of fault cannot be justified. This distinction will be key in assessing whether the notary has *mens rea* when making an authentic deed, or whether he records the parties' statements in accordance with his authority.⁴⁰

In making a deed, a notary is responsible not only for verifying the identity and legal capacity of the parties and ensuring formal compliance with statutory requirements, but also for upholding professional obligations of integrity, diligence, independence, and impartiality as mandated under Law No. 2 of 2014 on Notary Office, particularly Article 15 in conjunction with Article 16(1)(a). In this respect, the notary's role extends beyond purely formal aspects to include a limited substantive responsibility, especially in ensuring that the deed does not embody an unlawful cause.

This requirement is closely linked to the validity of agreements under the Indonesian Civil Code, particularly Article 1320 on lawful cause, and Article 1337, which prohibits agreements that are contrary to law, public order, or morality. Therefore, while notaries are not expected to investigate the parties' underlying motives comprehensively, they cannot disregard indications of illegality that are apparent from the transaction.

Accordingly, the role of the notary may be understood as occupying a hybrid position: combining formal verification with a duty to ensure that

⁴⁰ Mauliawati Alifah, "Notary Investigation in Making Copies of CV's Deed Establishment Which Different Numbers in Minuta," *Sultan Agung Notary Law Review* (download.garuda.kemdikbud.go.id, 2021), 653, <https://doi.org/10.30659/sanlar.3.3.833-846>.

the legal act being formalized does not clearly violate the law. This nuanced position becomes essential in assessing criminal liability, as the presence or absence of *mens rea* must be evaluated in light of both the notary's formal duties and their limited substantive obligations.

This condition places notarial acts within the sphere of official conduct, which must be assessed in light of the principle of culpability rather than presumed to be devoid of *mens rea*.⁴¹ In Indonesian criminal law, the imposition of criminal liability is fundamentally based on subjective fault, requiring proof of intention, knowledge, or negligence. Accordingly, criminal sanctions against notaries are not, in principle, imposed solely based on the legal consequences of a deed, but must be grounded in the existence of culpable conduct.

However, the critical issue lies in how such a subjective fault is interpreted and demonstrated in practice. In cases where notaries perform their duties within the framework of their legal authority, distinguishing between formal participation and culpable involvement becomes essential. Therefore, the assessment of criminal liability should not merely rely on the existence of an unlawful outcome, but must involve a careful evaluation of whether the notary possessed the requisite *mens rea*, taking into account both the nature of the act and the professional context in which it was performed.

From a *mens rea* perspective, the involvement of a notary can only be qualified as a criminal offense if there is an element of *intent* (intentionality to assist or participate in a crime), *knowledge* (knowledge of the purpose of breaking the law), or *negligence* (serious negligence that causes loss or criminal act to occur).⁴² If these elements are not proven, then the deed made by the notary remains a product of a position protected by the principles of legality and the authority of the law. Thus, the penal approach must be carried out proportionately, namely, distinguishing between *criminal participation based on mens rea* and *mere*

⁴¹ Fenny Octavia et al., "The Use of Exoneration Clausules as a Legal Protection for Notary," *Journal of Environmental Treatment Techniques* (scholar.archive.org, 2020), 238, [https://doi.org/10.47277/JETT/8\(4\)1455](https://doi.org/10.47277/JETT/8(4)1455).

⁴² Stella Stella, "Perlindungan Hukum Bagi Notaris Dalam Menghadapi Pengguna Jasa Nakal Di Era Teknologi Modern," *Reformasi Hukum* 27, no. 1 (2023): 48, <https://doi.org/10.46257/jrh.v27i1.593>.

administrative involvement without inner error.⁴³ This is relevant to prevent excessive criminalization that focuses solely on consequences, without considering the actor's intent.

B. Functional Immunity and Its Justification for Notaries as Public Officials

Functional immunity is generally understood as a form of legal protection afforded to public officials for acts performed in their official capacity. The underlying rationale is that actions carried out as part of state functions (*acta jure imperii*) are attributed to the state rather than to the individual, and therefore cannot automatically give rise to personal criminal liability in the absence of subjective fault. In this sense, criminal liability may only arise where there is clear evidence of intention, knowledge, or negligence accompanying the exercise of authority. Functional immunity is not intended to create impunity, but to ensure that public officials are not exposed to criminal sanctions merely for performing law-mandated duties.

However, this concept must be distinguished from the provisions contained in Law No. 1 of 2023 on the Criminal Code, particularly Article 31, which regulates the execution of a lawful official order as a ground for justification in criminal law. While Article 31 operates as a doctrinal basis for excluding criminal liability in specific cases where an act is carried out under a valid order of authority, functional immunity functions at a broader conceptual level as a principle that limits the attribution of criminal responsibility for acts performed within official capacity. Therefore, functional immunity is not identical to statutory justifications, but rather complements them by emphasizing the necessity of assessing culpability and the nature of the official act before criminal liability is imposed.⁴⁴

As a doctrine, functional immunity departs from the assumption that the state requires an executive organ to carry out the administrative

⁴³ Muhammad Alfatahri, Azhari Yahya, and Muazzin, "The Responsibility of the Notary Regarding the Fulfillment of the Elements of Article 41 of the Notary Office Law," *Beijing Law Review* 13, no. 01 (2022): 29, <https://doi.org/10.4236/blr.2022.131005>.

⁴⁴ R. Nigro, "The Arbitral Award in the Enrica Lexie Case and Its Questionable Recognition of Functional Immunity to the Italian Marines Under Customary International Law," *The Italian Yearbook of International Law Online*, 2021, 76.

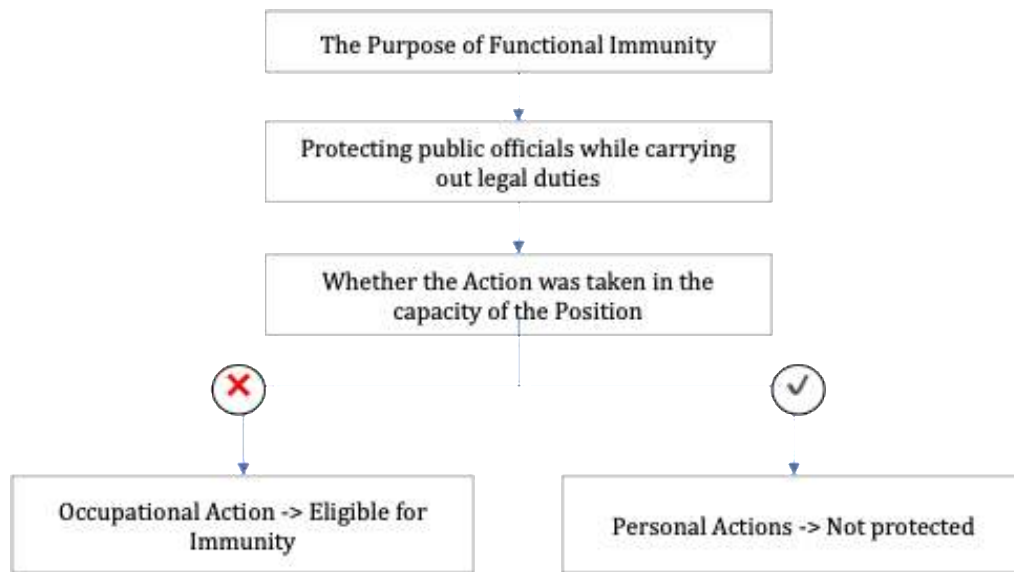
functions and ensure the legality of public life.⁴⁵ If every action in a prone position becomes grounds for criminalization, officials will act with fear and reluctance, thereby hampering public services. Therefore, immunity is instrumental: it keeps the state's authority functioning effectively without paralysis from the threat of criminal proceedings. It is at this point that this concept meets the theory of criminal liability: immunity does not negate accountability; it applies only when there is no *mens rea*.⁴⁶ This means that functional immunity works as a filter that separates the act of office (which must be protected) and the act of personal deviation (which must be punished).⁴⁷

This concept is important to apply to notaries because notaries are not just a private profession but public officials who perform the functions of legalization and state proof. In this position, the notary acts only on the parties' statements and lacks the authority to examine the agreement substantively. This model is identical to the doctrine of *official capacity* in public law, where the actions of officials represent the will of the law, not the will of the individual. Therefore, functional immunity imposes a strict limit: if the notarial action is carried out within the corridor of authority (formal competence, presence of the parties, administrative correctness), then the punishment cannot stand without evidence of internal error. Immunity in this context is not absolute liberation, but rather normative protection against the actions of a legitimate department.

⁴⁵ Nigro, "The Arbitral Award in the Enrica Lexie Case and Its Questionable Recognition of Functional Immunity to the Italian Marines Under Customary International Law."

⁴⁶ I. V. Pantyukhina and V. E. Yuzhanin, "Problem of Forms of Implementation of Criminal Liability," *Juridical Journal of Samara University* 10, no. 2 (2024): 460, <https://doi.org/10.18287/2542-047x-2024-10-2-56-63>.

⁴⁷ E Winther, "Universal Jurisdiction: Methodology, Universal Jurisdiction and Functional Immunity before National Courts in International Law.," 2023, 95.



This chart emphasizes that the basis of immunity is not to eliminate criminal liability, but to ensure that criminalization occurs only when officials deviate from their official functions and have internal faults.⁴⁸

To determine whether a notary action deserves functional immunity, the first thing that must be ascertained is the notary's status as a public official and the nature of the action he performs. In Indonesian positive law, a notary is a public official authorized to execute authentic deeds and to perform the state's evidentiary function. The deed produced is not a private product of the parties, but a public document that obtains legal legitimacy through the authority of the notary's office. Because this authority is delegated from the state, the act of making a deed must be seen as an official *function*, not a personal act. Thus, when the notary carries out his duties according to formal procedures, he is theoretically in the domain of *functional acts* that meet the philosophical basis for the enforcement of functional immunity.⁴⁹

Furthermore, to assess the feasibility of immunity, it is necessary to distinguish between notarial acts performed within the scope of official

⁴⁸ A Elezi, "Criminal Liability of Legal Entities," *Balkan Journal Of* (sciendo.com, 2024), 578, <https://doi.org/10.2478/bjir-2024-0027>.

⁴⁹ M Frulli, "For All or for Some? Functional Immunity of State Officials before the International Law Commission-Introduction to the Symposium," *QUESTIONS OF INTERNATIONAL LAW* (flore.unifi.it, 2015), 328; Carissa Amanda Siswanto et al., "Legal Recognition of Electronic Notarial Acts: A Comparative Study of Indonesia and Rwanda," *Indonesia Private Law Review* 6, no. 2 (2026), <https://doi.org/10.25041/iplr.v6i2.4686>.

authority and those carried out personally or beyond such authority. Deeds made based on the presence of the parties, proper identity verification, conformity between the expressed will of the parties and the formal structure of the deed, as well as compliance with procedural requirements, constitute acts of office protected under Law No. 2 of 2014 on Notary Office.

However, the expression of the parties' intentions in a deed is not merely a formal exercise, but must also comply with substantive legal requirements. In particular, the validity of the underlying agreement must satisfy the requirement of lawful cause as stipulated in the Indonesian Civil Code, particularly Article 1320 in conjunction with Article 1337, which prohibit causes that are contrary to law, public order, or morality. Accordingly, a notary cannot disregard indications of unlawfulness that are apparent from the transaction, even when acting within a formal procedural framework.

Conversely, if the notary acts with intent, engages in document falsification, or knowingly cooperates with parties in unlawful conduct, the act shifts from official function to personal misconduct. In such circumstances, the protection associated with official capacity is no longer applicable. Therefore, the relevance of functional immunity depends not only on whether the act falls within formal authority, but also on whether the notary has fulfilled both formal and substantive obligations without the presence of mens rea that would justify criminal liability.⁵⁰

To clarify this distinction, the following is presented: a table of evaluation of notary actions based on the nature of functionality and their relevance to immunity:

⁵⁰ J Kwik, "Obstacles to Criminal Liability: A Systemic Analysis," *Lawfully Using Autonomous Weapon Technologies*, 2024, 90, https://doi.org/10.1007/978-94-6265-631-4_12.

Table 1: Evaluation of Notary Acts and Their Relevance to Immunity

Types of Notary Actions	Legal Character	Status Mens Rea	Is Functional Immunity Worth It?
Make deeds according to procedures.	Actions of formal positions	No intent/knowledge/negligence	Yes (eligible)
Recording of the parties' statements as they are	Implementation of administrative tasks	Not controlling the material of the statement	Yes (eligible)
Neglect to check the identity of the party	Position, but with negligence	<i>Proven negligence</i>	Can It Not
Making deeds without the presence of a party	Violation of office authority	Gross negligence/intent may be present	Not eligible
Conspiring to falsify the contents of the act	Personal action – criminal intent	Mens rea is clear	not eligible
Make deeds according to procedures.	Actions of formal positions	No intent/knowledge/negligence	Yes (eligible)

Table 1 confirms that immunity is not absolute, but selective and conditional. Notaries have the right to obtain functional immunity only when the actions taken are the exercise of their positions and do not have inner errors. Thus, criminal liability against a notary should be based not on the mere existence of the deed, but on proof of subjective fault, namely,

whether the notary acted with intention, knowledge, or negligence in relation to a potentially criminal act.⁵¹ This formulation strengthens the argument that an authentic deed as a product of office is insufficient to form a criminal basis without demonstrating the existence of *mens rea* that can be accounted for.⁵²

The discussion of the limits of criminal liability for notaries must ultimately lead to an integrative model that unites two main foundations: *mens rea*, as a subjective condition for criminal prosecution, and functional immunity, as a protection mechanism for the office's actions.⁵³ If *mens rea* is the main touchstone of criminal liability⁵⁴, then functional immunity is a normative fence that prevents public officials from being criminalized simply for carrying out their duties. The two are not contradictory concepts but legal instruments that must be brought in harmony. Criminalization is only possible when there is an inner error, whereas immunity applies when the action is administrative-formal without an element of intentionality or gross negligence.

This integrative model demands a systematic assessment of the notary act in two stages. The first stage is *culpability assessment*, which is an examination of whether there is a will to commit a mistake (intention), knowledge of unlawful acts (knowledge), or serious professional negligence (negligence). If this element is not proven, all actions taken in implementing the position must automatically fall within the scope of functional immunity. The second stage is *functional classification*, in which actions are assessed to determine whether they are acts of office in accordance with procedures (competent official act) or personal acts that deviate (*ultra vires* misconduct). Thus, criminalization not only examines

⁵¹ Suteki Florencia Magnis, Butar-butur, "Exemptions from Liability in Indonesian Criminal Law Reform," *Annals of R.S.C.B.*, 2021, 321.

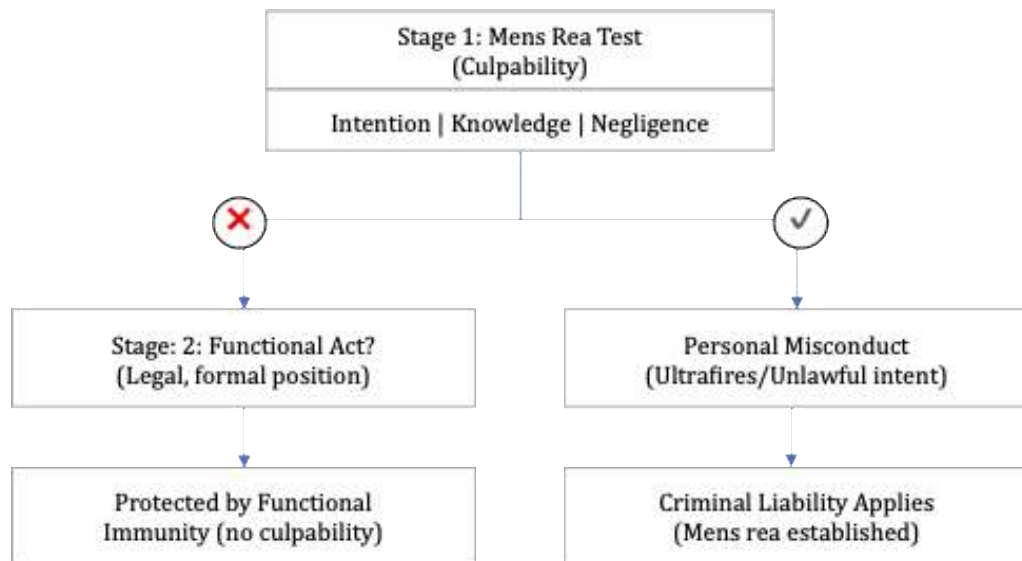
⁵² Alfatahri, Yahya, and , "The Responsibility of the Notary Regarding the Fulfillment of the Elements of Article 41 of the Notary Office Law."

⁵³ Adi Akbar et al., "Proliferation of Policies on Notarial Supervisory Institutions Based on Justice," *Journal of Human Rights, Culture and Legal System* 5, no. 3 (2025): 26, <https://doi.org/10.53955/jhcls.v5i3.789>.

⁵⁴ Александр Вячеславович Федоров, "Criminal Liability of Legal Entities in Estonia," *Расследование Преступлений: Проблемы И Пути Их Решения* 35, no. 1(35) (2022): 69, <https://doi.org/10.54217/2411-1627.2022.35.1.002>.

the consequences of the act but also the mental process and the nature of the actions of the officials who gave birth to the act.⁵⁵

For this mechanism to be understood operationally, the following is a construction diagram of a mens rea-based functional immunity model:



This model emphasizes that immunity does not remove criminal liability; it prevents criminal imposition when there is no internal fault.⁵⁶ Thus, functional immunity is not an instrument of impunity but an instrument of criminal justice that maintains a balance between protecting public officials and ensuring legal accountability.

C. Comparative Study: Criminal Liability and Notarial Immunity Models in Other Jurisdictions

Before engaging in a comparative analysis with other jurisdictions, it is important to acknowledge that Indonesian law has already established mechanisms to protect notaries in the exercise of their duties. These

⁵⁵ Mahfud Baihaqi, "Analysis of Notary Immunity Laws That Open Confidentiality in Trial Based on Act No. 2 of 2014 on Amendment to Act No. 30 Of 2004 on Notary Office (Case Study Decision Number 83 / PID.B / 2011 / PN. SKA)," *Sultan Agung Notary Law Review* (academia.edu, 2020), 322, <https://doi.org/10.30659/sanlar.2.4.570-591>.

⁵⁶ A G Wibisana, M G Faure, and R Majory, "Error in Personam: Confusion in Indonesia's Environmental Corporate Criminal Liability," *Criminal Law Forum*, 2021, 65, <https://doi.org/10.1007/s10609-021-09412-6>.

protections are primarily reflected in Law No. 2 of 2014 on Notary Office, particularly Article 66, which requires prior approval from the Notary Honorary Council before a notary may be examined in criminal proceedings. This framework is further elaborated in the Regulation of the Minister of Law and Human Rights No. 17 of 2021, which institutionalizes the Notary Honorary Council's role as a gatekeeping mechanism in law enforcement processes.

However, while these provisions provide important procedural safeguards, they do not yet constitute a fully developed doctrinal framework comparable to the concept of functional immunity recognized in jurisdictions such as the Netherlands and France. In these systems, the limitation of criminal liability is not only procedural but also substantively grounded in the requirement of culpability, particularly the existence of *mens rea*.

This distinction becomes crucial in understanding the comparative landscape. While Indonesia emphasizes institutional protection through procedural mechanisms, the Netherlands and France integrate both procedural safeguards and substantive limitations on criminal liability. Therefore, this section examines how these approaches operate and assesses whether the Indonesian framework can be further developed toward a more coherent, *mens rea*-based model of notarial liability.

The Netherlands is one of the legal systems with a strong foundation in the protection of the notary profession as a public body that performs state functions in civil evidence. In the Dutch notary system, notaries work on the basis of the principles of independence, impartiality, and legal duty.⁵⁷ The deed made is not seen as a representation of the notary's personal will, but as a product of state authority that is institutionalized through the notary position. Therefore, the imposition of a criminal penalty against a notary cannot be carried out solely because there is a legal dispute after the deed is made. Criminalization must be based on the existence of intention or knowledge of the criminal act that occurred, namely, when the notary knowingly authorizes the document used for the purpose of violating the law. This mechanism shows that the element of *mens rea* is the main basis for notary criminalization in the Netherlands.

⁵⁷ knb, "Notarial Acts - The Royal Dutch Association of Civil-Law Notaries (KNB)," n.d.

The protection provided by the state to notaries in the Netherlands is not absolute, but proportional through the principle of functional immunity.⁵⁸ Notary actions carried out in the capacity of office are considered to be within the scope of an official act so that they do not become the basis for criminal liability.⁵⁹ Criminal proceedings can only be initiated through a preliminary examination mechanism by a professional supervisory authority such as *the Koninklijke Notariële Beroepsorganisatie*. This initial filter aims to ensure that every criminal charge filed against the notary is genuinely well-founded. Thus, the Dutch legal system treats notaries as public officials, protecting them from excessive criminalization so long as their actions lack an element of intent.⁶⁰

To clarify the construction of notary responsibilities in the Netherlands, the following is a brief table of the liability system and functional immunity in the notary profession.

Table 2 Notary Liability Scheme in the Netherlands

Action Categories	Legal Qualifications	Mens Rea Required for Criminalization	Functional Immunity Applies
The creation of the deed follows legal procedures	Official Capacity Act	No mens rea	Yes
Not checking the administrative formalities.	Lapse of duty, but still in office	Negligence must be proven	Immunity may not be granted
Forging documents or participating in crimes	Personal misconduct	Proven Intention and Knowledge	Not valid

⁵⁸ Shidqi Noer Salsa, *Hukum Pengawasan Notaris Di Indonesia Dan Belanda* (Prenada Media, 2020), 43.

⁵⁹ M Wantoła, "Criminal Liability for Attempt. An Attempt at a New Perspective," *Czasopismo Prawa Karnego i Nauk Penalnych*, 2021, 118.

⁶⁰ R Larasati, "Critical Legal Studies Approach to the Governance and Effectiveness of Regional Notary Supervisory Boards in Indonesia," *Pena Justisia: Media Komunikasi Dan Kajian Hukum* (jurnal.unikal.ac.id, 2025), 218.

Drafting the deed according to the statements of the parties	Neutral recording duty	No intention to be involved in a criminal offense	Yes
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From the table, it can be concluded that immunity is not granted to every action but rather serves as a legal protection against actions in office carried out without inner error. Thus, the Dutch system can be a conceptual reference in formulating the limits of notary criminal liability in Indonesia, especially in emphasizing that formal administrative actions are not the basis for criminalization if mens rea cannot be proven.⁶¹

France has a notary system similar to that of the Netherlands, but with a criminal liability approach that emphasizes the requirements of culpabilité personnelle, or personal fault.⁶² In French law, a notary deed is included in the category of a public instrument and is not the result of a notary's private will.⁶³ Consequently, notaries are not automatically convicted when there is a criminal act related to the actions of the parties outlined in the deed. Criminalization is only relevant if the notary has the desire or knowledge of the crime. This mechanism makes mens rea a determining element, so that notaries cannot be convicted simply because another party uses the deed for an improper purpose.⁶⁴

Furthermore, France established an internal control system through the Conseil Supérieur du Notariat to conduct an initial assessment in the event of allegations of irregularities. This model is similar to that of the Netherlands in that criminal investigations can proceed only after the supervisory organs assess the potential for misconduct. This shows that the

⁶¹ Agnes Nova Randomis, "Regulation of Legal Protection for Notaries in Performing Official Duties to Ensure Legal Certainty and Justice," *International Journal of Social Service and Research* 5, no. 10 (2025): 368, <https://doi.org/10.46799/ijssr.v5i10.1333>.

⁶² Maghfira Humaira and Pieter Everhardus Latumeten, "Policy of Notary Deed in Indonesia, Netherland, and Belgium during the Covid-19 Pandemic," *JPPI (Jurnal Penelitian Pendidikan Indonesia)* 8, no. 2 (2022): 56, <https://doi.org/10.29210/020221374>.

⁶³ French-property, "The Notaire and His Role in France, the French Notary | French-Property.Com," n.d.

⁶⁴ Roni Joyo Santoso and Adnan Hamid, "Discrepancies Between Legal Norms and Practices in the Protection of Notaries," *Jurnal Ilmu Hukum Kyadiren* 7, no. 1 (2025): 119.

French system implicitly applies the principle of functional immunity.⁶⁵ Immunity is not stated as a single norm, but is present through a procedural screening mechanism that effectively prevents excessive criminalization. Criminalization is only carried out when there is evidence that the notary is not only negligent, but also makes a mental contribution in the form of intention or approval to the criminal act.

Table 3 Notary Liability in the French System

Elements of Assessment	Legal Weight	Consequences for Criminal Liability
The deed is made according to formal procedures	Official act and legally valid	Cannot be punished
Notaries fail to check administrative requirements.	Lapse of duty, but still in position	Can only be subject to ethical or administrative sanctions
Notaries know the use of deeds for crimes	Legally proven knowledge	Criminal liability applies
Notaries also initiate unlawful acts.	Strong and measurable intention	Full criminal liability

From this model, it can be seen that the French system does not criminalize notaries easily because the main priority is to ensure the existence of culpability before the sentence is imposed.⁶⁶ Notaries can still be held ethically and administratively accountable, but criminalization is only the last option after proof of *mens rea*.⁶⁷ This framework is in line with the idea that functional immunity is not the elimination of

⁶⁵ “Décret N° 2023-1297 Du 28 Décembre 2023 Relatif Au Code de Déontologie Des Notaires - Légifrance,” n.d.

⁶⁶ “Le Notariat et Notre Modèle de Droit Écrit | Conseil Supérieur Du Notariat,” n.d.

⁶⁷ Fifi Ayu Lestari, “Criminal Liability for Notaries Those Involved in Document Forgery,” *JILPR Journal Indonesia Law and Policy Review* 7, no. 1 (2025): 238, <https://doi.org/10.56371/jirpl.v7i1.514>.

responsibility, but rather a barrier to criminalization that is not based on inner error.

A comparison of the Dutch⁶⁸ and French⁶⁹ systems show a consistent pattern: the criminalization of notaries is only possible if there is evidence of internal error in the form of intention, knowledge, or negligence that can be accounted for. The two countries do not consider notaries a profession exempt from criminal law, but defer criminal intervention until it is proven that there is subjective culpability. This shows that the principle of functional immunity applied is not absolute immunity, but conditional immunity that has just expired if the notary behaves defiantly from the function of the position. If this system is applied in Indonesia, then the punishment will no longer rely on the legal consequences of the deed but on proving whether the notary had *mens rea* at the time the deed was made.

Indonesia has established a regulatory framework governing the liability and legal protection of notaries, particularly through Law No. 2 of 2014 on Notary Office, including Article 66, which requires prior approval from the Notary Honorary Council before a notary may be examined in criminal proceedings. This mechanism is further elaborated in the Regulation of the Minister of Law and Human Rights No. 17 of 2021, which institutionalizes the Notary Honorary Council's role as a procedural safeguard in the law enforcement process.

However, despite this framework, Indonesian law does not yet provide a sufficiently clear and systematic doctrinal formulation that distinguishes between acts performed within the scope of notarial authority and personal misconduct that gives rise to criminal liability. The current approach tends to emphasize procedural protection rather than offering a substantive framework for assessing culpability, particularly in relation to *mens rea*.

As a result, the boundary between protected official conduct and punishable personal acts may still be subject to interpretative variation in practice. This condition highlights the need for a more coherent model

⁶⁸ Of and Notaries, Olenz General Condition.

⁶⁹ notaire.fr, "Responsibilities and Obligations of a Notary | Notaires de France," n.d.

that integrates procedural safeguards with a clear mens rea-based standard in determining notarial criminal liability.

As a result, many criminal proceedings run simply because the deed is associated with an unlawful act by the parties, without investigating whether the notary knew or wanted the criminal act. Unlike the Netherlands and France, which use professional supervision mechanisms as an initial filter, Indonesia often enters the criminal investigation process directly. This has the potential to produce criminal overreach that is not in line with modern criminal accountability principles. The implementation of mens rea as a basic condition for punishment must be the starting point for reform, so that punishment is not carried out in cases where subjective guilt is not proven.

For this reason, a regulatory model is needed that establishes the limits of notary criminal liability and, at the same time, ensures protection of legitimate office actions.⁷⁰ Indonesia needs to adopt a mens rea approach, as practiced by the Netherlands and France, under which punishment can be imposed only if there is evidence of intent or knowledge of the crime. Furthermore, the pre-prosecution screening mechanism should be placed on the Supervisory Board as a filter to determine whether a criminal report has a valid subjective basis for error. Thus, Indonesia can avoid excessive criminalization while still providing a criminal avenue for notaries who deliberately abuse their authority.

⁷⁰ Michał Peno and Olgierd Bogucki, "Principles of Criminal Liability from the Semiotic Point of View," *International Journal for the Semiotics of Law* 34, no. 2 (2021): 87, <https://doi.org/10.1007/s11196-020-09691-z>.

Table 4 Comparative Notary Liability System of Three Countries

Country	Basic Principles	Mens Rea as a Criminal Condition	Functional Immunity	Filter Mechanism
Netherlands	Public officer liability	Must be proven before sentencing	Applies to departmental actions	Applies to departmental actions
France	Culpabilité personnelle	Must be proven first	Not absolute but effective through ethical procedures	Conseil Supérieur du Notariat as a filter
Indonesia	It does not have a firm limit yet	It is not always proven at the beginning of the process	Not explicitly formulated	Investigations can be started immediately without strong filters

A structured comparison based on the above parameters reveals both similarities and fundamental differences among the three jurisdictions. In terms of similarity, Indonesia, the Netherlands, and France all recognize that notaries are public officials whose actions are subject to legal accountability. However, significant differences arise in how criminal liability is constructed and limited.

In the Netherlands and France, criminal liability is consistently grounded in the mens rea requirement and supported by both doctrinal and institutional safeguards that prevent premature criminalization. In contrast, Indonesia emphasizes procedural protection through the Notary Honorary Council, but lacks a fully developed doctrinal framework that explicitly links notarial duties with the assessment of culpability. As a

result, the determination of criminal liability may vary depending on interpretation, particularly in distinguishing between administrative error and criminal conduct.

This comparison implies that Indonesia does not require the creation of entirely new legal mechanisms, but rather the strengthening of its existing framework through a clearer integration of mens rea as the primary threshold of criminal liability. By aligning procedural safeguards with a more explicit culpability-based standard, Indonesia can achieve a more consistent and proportionate approach to the criminalization of notaries.

Table 5. Comparative Parameters of Notarial Criminal Liability

Parameter	Indonesia	Netherlands	France
Legal basis	Law No. 2 of 2014 on Notary Office and Penal Code	Civil law system	Civil law system
Mens rea	Recognized but not always explicit in practice	Central requirement	Central requirement
Protection mechanism	Notary Honorary Council (procedural)	Professional + doctrinal	Ethical + institutional
Nature of immunity	Procedural safeguard	Functional (implicit)	Functional (implicit)
Threshold for criminal liability	Varies in practice	Strict mens rea	Strict mens rea

Through this comparison, it can be understood that Indonesia needs doctrinal adjustments so that the criminalization of notaries is only carried out in conditions where the inner error is objectively proven. This legal reformulation not only provides justice for notaries who act within their authority but also strengthens the dimension of public accountability, ensuring that criminality remains the last resort when mens rea is proven.

Conclusion

Notarial acts cannot be reduced to purely formal functions, as notaries are bound by both formal and limited substantive obligations under Law No. 2 of 2014 on Notary Office, particularly Article 15 in conjunction with Article 16(1)(a), as well as the requirement of lawful cause under Indonesian Civil Code, especially Article 1320 in conjunction with Article 1337. From a criminal law perspective, liability must be grounded in the principle of culpability, as reflected in Law No. 1 of 2023 on the Criminal Code, particularly Articles 22 and 36–44, which emphasize subjective fault and personal circumstances, and in Article 443 on the protection of confidential information. Accordingly, criminal sanctions against notaries cannot be imposed solely based on the consequences of a deed, but must be based on proven intent, knowledge, or negligence. Although Indonesian law already provides procedural safeguards through Article 66 of the Notary Office Act and Regulation of the Minister of Law and Human Rights No. 17 of 2021, judicial practice still demonstrates inconsistencies in assessing the element of fault, particularly in distinguishing between administrative error and criminal liability.

Comparative analysis with the Netherlands and France shows that criminal liability of notaries is consistently limited by the requirement of culpability and supported by both procedural safeguards and substantive constraints on criminalization. In contrast, the Indonesian framework, while normatively established, has not yet developed a sufficiently coherent doctrinal model linking notarial duties with *mens rea* assessment. Therefore, legal development in Indonesia should focus on strengthening a proportional model that integrates *mens rea* as the primary threshold of criminal liability with existing institutional safeguards. Such an approach would ensure that notaries are protected when acting within their lawful authority, while still allowing criminal sanctions in cases of proven abuse of authority, thereby aligning law enforcement with the principles of culpability, proportionality, and legal certainty.

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