

Legal position of instrumental witnesses in making notarial deeds

Dara Sumayya¹, Darmawan², M Jafar²

¹ Faculty of Law, University Syiah Kuala, Banda Aceh, Indonesia

² Lecturers, Faculty of Law, University Syiah Kuala, Banda Aceh, Indonesia

Abstract

Notary Employees have the task of assisting Notaries in doing authentic deeds so that these tasks align with the requirements to become instrumental witnesses in Article 40 paragraph (2) of Law Number 30 of 2004 as amended by Law Number 2 of 2014 concerning Notary Positions. Instrumental witnesses are also needed to form deeds because their role can help Notaries carry out their duties more safely, especially in terms of proof when a deed that a Notary has legalized has a legal problem. However, Notary Employees as instrumental witnesses in making Notarial deeds are not given explicit legal protection in the UUJN.

This study aims to analyze the legal position of instrumental witnesses in notarial deeds, the responsibility of instrumental witnesses in doing notarial deeds, and the legal protection of instrumental witnesses in notarial deeds. The method used in this study is the normative legal method. The data sources used by the author are primary data in the form of interviews with notaries in Banda Aceh City, instrumental witnesses in Banda Aceh City, the Notary Regional Supervisory Board of Banda Aceh City, and other related parties. Secondary data is obtained from the primary legal materials by examining theories, concepts, legal principles, laws, and regulations related to this study.

The study results show that based on UUJN, instrumental witnesses are regulated in Article 16 paragraph (1), Article 38 and 40 paragraph (1), which mandate the presence of at least two witnesses in making a notarial deed. The primary role of instrumental witnesses is to ensure that the process of creating a notarial deed is carried out following legal provisions. Instrumental witnesses are responsible for fulfilling the formal requirements for the validity of the Deed made into an authentic deed. The formalities determined by law are that the person appearing has been present before the notary and the person appearing's identity follows the description read by the notary. Legal protection for witnesses is generally regulated in the Witness and Victim Protection Law. In providing information.

It is recommended to review the provisions in the UUJN regarding the position of instrumental witnesses summoned to court to provide information regarding the contents of the notarial Deed disputed by the parties. This should be included in the articles of the UUJN or by drafting special legislation that regulates the position, rights, and legal obligations of instrumental witnesses.

Keywords: Notary, instrumental witness, notarial deed

Introduction

Witnesses play an essential role in proving a case because the testimony can be one of the judge's considerations in deciding the case. In addition to written evidence, testimony from witnesses can also justify or strengthen the arguments presented in court. Some of these witnesses are deliberately asked to witness a legal act that is being carried out, and some happen to see and experience the event themselves. (Natshasya, 2016)^[8]

A witness as valid evidence is someone who gives testimony, either verbally or in writing or signed, explaining what he witnessed, whether in the form of an act or action of another person or a condition or an incident. In principle, the testimony of witnesses can be used for any purpose unless otherwise determined by law.

Evidence with witnesses is needed only if evidence with letters or writings is insufficient or not strong enough to explain the main problem. One example of a situation where witnesses are required is when an authentic deed made by a notary is denied by the party who feels aggrieved. Then, the authentic Deed becomes initial evidence and must be assisted by at least one other piece of evidence to reach the minimum limit of proof, namely witnesses who participated in making the Deed. (Manan, 2008)^[5] (Setyawati, 2009)^[12]

An identifying witness is a person at least 18 (eighteen) years old or married and competent to perform legal acts. An identifying witness only provides information following what is known about the person appearing and submits it to the notary. An instrumental witness (*instrumentere getuigen*) is a witness required by statutory regulations. The presence of 2 (two) instrumental witnesses is absolute but can be more if circumstances require. An instrumental witness witnesses the ratification of a deed by a Notary, namely whether it has been prepared and read by the notary and signed immediately by the persons appearing. In practice, the instrumental witness is the notary's employee himself. The notary's employee has the task of assisting the notary in making authentic deeds so that this task is in line with the requirements to become an instrumental witness in Article 40 paragraph (2) of Law Number 30 of 2004 as amended by Law Number 2 of 2014 concerning the Position of Notary (UUJN). The existence of an instrumental witness is also necessary for the formation of a deed because its role can help the notary carry out their duties more safely, especially in terms of providing evidence when a deed that the notary has legalized has a legal problem. (Nurjannah, 2018)^[9]

The obligation for witnesses to be present in doing an authentic deed is stipulated in Article 16 paragraph (1) letter

m in conjunction with Article 40 UUJN. Provisions regarding the requirements for instrumental witnesses are regulated in Article 40 paragraph (2) UUJN, namely:

1. Unless statutory regulations specify otherwise, every Deed read by a Notary must be attended by at least 2 (two) witnesses.
2. Witnesses, as referred to in paragraph (1), must fulfil the following requirements:
 - a. Minimum age of 18 years or previously married.
 - b. Capable of performing legal acts;
 - c. Understand the language used in the Deed;
 - d. Can sign and initial; and
 - e. It does not have a marital relationship or blood relationship in a straight line upwards or downwards without limitation of degree, and it sideways lines up to the third degree with the notary or the parties.
3. As referred to in paragraph (1), witnesses must be known to the notary, introduced to the notary, or have their identity and authority explained to the notary by the person appearing.
4. The introduction or statement regarding the identity and authority of the witness is stated explicitly in the Deed.

UUJN has no definition of an instrumental witness, so the definition of a witness, according to UUJN, is considered the same as the definition of a witness in general. Still, if we look deeper, there is a difference between the position of an instrumental witness and a witness in general. The difference is that a witness, in general, is a person who is present to provide testimony regarding a legal act. In contrast, the presence of an instrumental witness is a formal requirement in doing an authentic deed whose duty is to give testimony to the truth of what was done and fulfil the formalities required by law. (Lumban, 1999)^[4]

In practice, a deed as a Notary product can be disputed by the parties facing the notary or other third parties who feel aggrieved. Notary employees as instrumental witnesses automatically know the process of making the Deed and even the confidential matters in the Deed. Notary employees as instrumental witnesses are not legally regulated regarding the obligation to keep the contents of the notary deed confidential. If a problem related to the notary deed occurs, an instrumental witness can also be held accountable. There are no regulations regarding the legal standing and protection of Notary employees as instrumental witnesses in the UUJN. The legal actions of notary employees as instrumental witnesses related to the ratification of notary deeds are the domain of notary law, so regulation is needed in the UUJN to provide legal security for instrumental witnesses.

Notary employees as instrumental witnesses in the making of notarial deeds are not given explicit legal protection in the UUJN. Instrumental witnesses should also receive special legal protection that is different from ordinary witnesses, and their safety must be guaranteed in the event of a case in court. Due to the absence of special regulations for instrumental witnesses of notarial deeds, the legal protection provided is the same as ordinary witnesses who are not bound by their position/profession in Law Number 13 of 2006 concerning Protection of Witnesses and Victims as amended by Law Number 31 of 2014 (from now on abbreviated as the Law on Protection of Witnesses and Victims). Based on this background, I am interested in

studying the legal position of instrumental witnesses in the making of notarial deeds.

Materials and Methods

Based on this research, the normative legal research method is doctrinal legal research, also known as library research or document study. It is called doctrinal legal research because this research is conducted or aimed only at written regulations or other legal materials. It is called library research or document study because this research is conducted more on secondary data in the library. The research approach to be used in this research is the normative legal approach, which is an approach carried out based on the primary legal material by examining theories, concepts, legal principles, laws, and regulations related to this research. This approach is also known as the library approach, which involves studying books, rules and regulations, and other documents related to this research. Research materials obtained from library research and field research. Data analysis uses a qualitative approach, namely a study that groups data according to the problems studied. The data is taken as a conclusion and implemented so that it can be used for scientific research analysis. (Marzuk, 2014)^[7]

Results and Discussion

The law protects Notaries in making authentic deeds by requiring the presence of witnesses, known as Instrumental Witnesses. The presence of these instrumental witnesses is regulated by Article 40, paragraph (1) UUJN. Instrumental witnesses listed in the Notarial Deed are witnesses who statutory regulations have required. Absolutely, there must be at least 2 (two) instrumental witnesses, but the number of witnesses can be more if necessary. More than 2 (two) witnesses are required if the Deed made is a deed of inheritance, which generally uses 4 (four) witnesses. In making a notarial deed, instrumental witnesses have an essential role that is required by law to be present when the notarial Deed is made.

The provisions in Article 38 paragraph (4) letter UUJN state that the final or closing part of the Deed must contain the full name, place and date of birth, job, position, position and place of residence of each witness to the Deed. Violation of Article 38 UUJN based on Article 41 UUJN results in the Deed only having the power of proof as a private deed. (Romadhoni, 2018)^[10]

The role of an instrumental witness is to provide evidence and help protect the notary's position in situations where the Deed made by the notary becomes a dispute between the parties involved. An instrumental witness can provide information that the notary has carried out the specified procedure, for example, by reading the contents of the Deed to the parties involved and ensuring their understanding before signing. Witnesses in a notarial deed function as one of the aspects that support the making of the Deed as valid.

Thus, instrumental witnesses have a legal standing that is regulated and recognized in the context of notarial deeds. Their existence in a notarial deed is a formal requirement that must be met to make the Deed valid and have perfect evidentiary value (authentic). For instrumental witnesses in notarial deeds, several provisions must be adhered to, namely as follows:

- a. presence in the Deed
- b. clear and accurate identity

- c. witnessing the act or reality
- d. reading and signing the Deed

The existence of an instrumental witness is regulated in Article 38, paragraph (4) letter c UUJN, Article 40, paragraph (1) UUJN, and Article 1868 of the Civil Code. The obligations of an instrumental witness in doing a notarial deed include several essential things. The instrumental witness is also obligated to pay attention to the fact that at the end of the closing section of the Deed, a stamp will be signed. This is an integral part of the deed formalization process. In the process of signing a notarial deed, the instrumental witness has a vital role and participates in signing the Deed. They actively witness the process from the beginning to the signing of the Deed by the parties involved.

By signing the Deed, the instrument witness confirms that the deed-making process has been carried out correctly and in accordance with legal provisions. The instrument witness must also see that the parties or parties have affixed their signatures and ensure the existence of the stamp so that the signing process is valid and the Deed can become an authentic deed.

Instrumental witnesses are not responsible for the contents of the Deed; instrumentary witnesses, who are generally taken from Notary employees, are not required to understand the entire contents of the Deed and cannot be held accountable for the contents of the Deed but only have responsibility at the time the Deed is formalized and the formalities of the Deed given to them. Notary duties, for example, preparing a draft of the Deed, adjusting personal data by going through data verification, preparing letters that have relations with several parties, participating in directly seeing it read, signing the Deed, and signing the Deed relating to his function as an instrumentary witness. His main task is to witness the process of making the Deed directly and to provide testimony about it. The presence of an instrumentary witness can provide testimony that the formal procedures in making the Deed, as determined by law, have been fulfilled.

The accountability of instrumental witnesses includes two things that must be present in a norm that reflects the aspect of legal certainty: the law can be defined in certain concrete circumstances, and legal security with a value of legal renewal that is appropriate to the progress of the times. One form of emptiness related to the accountability of instrumental witnesses is associated with the responsibility of instrumental witnesses in maintaining confidentiality; instrumental witnesses who are also notary employees have all matters pertaining to the work of a notary; instrumental witnesses must not leak this information to unauthorized third parties.

Instrumental witnesses must maintain the confidentiality of all information related to the notary's work. This responsibility arises due to the professional ethics of witnesses as notary employees. Explicit regulations regarding the duties of instrumental witnesses regarding the confidentiality of deeds are not directly stated in the UUJN. Instrumental witnesses also act as evidence and provide information before the judge when examining cases related to the value of the Deed.¹¹⁰ If the Deed faces legal problems, one of the things that can be used as evidence other than the Deed is the testimony of the instrumental witness.

The legal consequences received by an instrumental witness who opens or leaks the confidentiality of the contents of a deed can be seen from the scope of civil and criminal law. In the scope of civil law, the actions of an instrumental witness who leaks the contents of a deed cannot be prosecuted criminally. Such actions of an instrumental witness are unlawful acts (*onrechtmatig daad*). Illegal acts are regulated in Articles 1365 to 1380 of the Civil Code. Article 1365 of the Civil Code states that every unlawful act which causes loss to another person requires the person who, through his fault, issues the loss to compensate for the loss.

The elements that must be fulfilled so that someone can be said to have committed an unlawful act relating to the responsibility of an instrumental witness are:

- a. The act must be against the law (*unrechtmatig*)
- b. The act must cause harm
- c. The act must be done with error (negligence)
- d. There must be a causal relationship between the act and the resulting loss

In the scope of criminal law, the act of a witness who reveals the contents of a notarial deed can cause losses for one party or several parties listed in the notarial Deed. According to the provisions of Article 322 paragraph (1) and paragraph (2) of the Criminal Code, it states that anyone who intentionally reveals a secret that must be kept because of his position or work, whether current or former, is threatened with a maximum prison sentence of nine months or a maximum fine of nine thousand rupiahs and if the crime is committed against a particular person, then the act can only be prosecuted on the complaint of another person.

When related to the elements found in Article 322 of the Criminal Code, the responsibility of criminal instrumental witnesses in the case of revealing confidentiality in a notary deed is as follows:

- a. The obligation to keep the secret as a result of a current job or position, or one that they previously held
- b. The disclosure of the secret was done intentionally;
- c. There is a demand for a complaint from another person who feels their secret has been disclosed.

The elements in Article 322 of the Criminal Code are cumulative elements, meaning that if one of the elements is not met, the article cannot be applied to the act. It is important to note that the sanctions applied depend on the type of violation committed by the instrumental witness and the provisions stipulated in the applicable laws and regulations. Therefore, instrumental witnesses need to comply with the obligation to maintain confidentiality and comply with applicable regulations to preserve the integrity of the notary profession.

Legal protection has a vital role in guaranteeing and providing certainty for individuals to obtain rights and obligations and protect their interests. This is closely related to the rules and norms that apply in society. According to Setiono, legal protection is an effort to protect individuals from arbitrary actions by authorities that are not in accordance with the law, to create peace and provide opportunities for humans to obtain dignity as humans. (Avivah, 2022)^[1]

In the context of legal protection for witnesses, the most important thing is to ensure that witnesses feel safe and are not influenced by external pressure that could intimidate

them regarding their testimony, both in civil and criminal cases. When these conditions are met, witnesses can testify honestly and without fear. Being a witness in a trial is a legal obligation for every citizen, and by carrying it out, a person is considered a good citizen and obeys the law.

Instrumental witnesses are witnesses involved in the making of notarial deeds because they have a special role in the process of forming the Deed. In civil law, instrumental witnesses are regulated in Article 171 HIR. This provision explains that instrumental witnesses have knowledge of a notarial deed and can be witnesses following these rules.

For Notary employees as instrumental witnesses in giving their testimony in court related to the Deed, they are only limited to the formalities of the Deed's inauguration and what is ordered or assigned by the notary in preparing it. This condition provides an opportunity for the parties to the case to ask further questions regarding the contents of the Deed; it is even possible that the opposing party will pressure or coerce the witness to provide testimony regarding the contents of the Deed, which is not the witness' responsibility. On the other hand, the instrumental witness cannot offer such testimony because even though the witnesses can memorize the substance of the Deed if the contents of the Deed are opened, Article 1365 of the Civil Code can be imposed, namely, an unlawful act (*onrechtmatige daad*).

In such conditions, the position of the instrumental witness is clearly weak, so legal protection is needed, but in the UUJN, there is not a single article that regulates protection for him as a witness in the ratification of the Deed. The rules regarding witness protection in general can be seen in the Witness and Victim Protection Law. Article 1 number (3) explains that witness protection is provided through the Witness and Victim Protection Agency (from now on, abbreviated as LPSK), where LPSK has the duty and authority to provide safety and rights to witnesses.

There are no explicit and concrete regulations that protect them legally or within the scope of a particular profession/position. Although the duties of an instrumental witness are included in the core of the notary's business, the absence of this legal protection has resulted in a vacuum of legal protection for notary employees who are instrumental witnesses in providing information in the process of examining cases.

The regulation of the position of the instrument witness, in this case, is not yet precise, whether the instrument witness in their position is called to trial, whether their position is the same as an ordinary witness or not, keeping the contents of the Deed and the information obtained confidential aims to protect the interests of the community, especially for the parties whose legal actions are contained in the authentic Deed, with explicit provisions regarding the obligation of witnesses to notarial deeds in terms of maintaining the confidentiality of the contents of notarial deeds and sanctions for witnesses to notarial deeds who leak the confidentiality of the contents of notarial deeds.

The regulation regarding the position of instrumental witnesses in UUJN and other rules still needs to be considered more comprehensively. The revision of UUJN is expected to include more comprehensive regulation regarding the position of instrumental witnesses so that the rights, roles and responsibilities of witnesses in their position when called in court to provide their statements regarding the Deed made by a notary being sued by the

parties can be adequately implemented. There still needs to be more legal norms in UUJN regarding the position of instrumental witnesses. Lawmakers should clarify responsibilities, rights and obligations, and protection for instrumental witnesses.

Conclusion

Based on UUJN, instrumental witnesses are regulated in Article 16 paragraph (1), Article 38, and Article 40 paragraph (1), which mandate the presence of at least two witnesses in doing a notarial deed. The primary role of instrumental witnesses is to ensure that the process of doing a notarial deed is carried out following legal provisions. Instrumental witnesses are required to be physically present when the Deed is made, read the contents of the Deed, sign at the end of the Deed, and witness the events or facts recorded in the Deed. This action provides testimony that the specified procedures have been adequately fulfilled, thus strengthening the validity and evidentiary power of the notarial Deed. Instrumental witnesses are responsible for fulfilling the formal requirements for the validity of the Deed made into an authentic deed. Formalities stipulated by law, namely that the person appearing before the notary is present and the person appearing's identity is by the description read by the notary, that the Deed, before being signed by the parties, is first read by the notary to the persons appearing, and then signed by the parties concerned, all of which are carried out by the notary and the parties in the presence of witnesses. Legal consequences for witnesses in providing information in a Notarial deed occur if the witness commits an unlawful act by giving false information while in court. Legal protection for witnesses is generally regulated in the Witness and Victim Protection Law. In providing information, up to protection from threats from other parties that may make a witness reluctant to provide information in court, witnesses can be protected by the Witness and Victim Protection Agency (LPSK) at their request. However, special provisions for witnesses of notarial deed instruments have yet to be regulated in the UUJN.

Suggestion

Revision of the material contained in UUJN regarding the legal standing of instrumental witnesses who are summoned to the trial to provide information related to the contents of the notarial Deed contested by the parties, which should be included in the articles contained in UUJN or by making a special regulation to regulate the position, rights and legal obligations of instrumental witnesses. So if the witness gives testimony in court, his position can be guaranteed, and things that can cause the contents of the Deed to be disclosed through instrumental witnesses can be avoided.

Reference

1. Avivah LN. Pentingnya Pendaftaran Tanah Untuk Pertama Kali Dalam Rangka Perlindungan Hukum Kepemilikan Sertifikat Tanah. *Jurnal Tunas Agraria*, 2022.
2. Eudea Adeli Arsyah HN. Jawab Notaris Terhadap Akta Yang Cacat Hukum Dan Tidak Sesuai Dengan Ketentuan Pembuatan Akta Dalam Undang-Undang Jabatan Notaris. *Jurnal Bina Mulia Hukum*, 2021, 5.
3. Kartikosari H. Pembatasan Jumlah Pembuatan Akta Notaris Oleh Dewan Kehormatan Pusat Ikatan Notaris Indonesia. *Jurnal Panorama Hukum*, 2017, 180.

4. Lumban TG. Peraturan Jabatan Notaris. Jakarta: Erlangga, 1999.
5. Manan A. Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama. Jakarta: Kencana, 2008.
6. Mardiyah SI. Sanksi Hukum Terhadap Notaris Yang Melanggar Kewajiban Dan Larangan Undang-Undang Jabatan Notaris. Acta Comitatus, 2017.
7. Marzuk PM. Penelitian Hukum. Jakarta: Kencana Media Group, 2014.
8. Natshasya HH. Kedudukan Saksi Instrumenter Dalam Hukum Nasional. Medan: Jurnal Unimed, 2016.
9. Nurjannah MF. Introducer Witness On Notary's Deed Establishment: Forgotten Role in Indonesia Notarial Law. Jurnal Rechtsidee, 2018.
10. Romadhoni AA. Peranan Saksi Instrumenter Dan Akibat Hukumnya Terhadap Kerahasiaan Dalam Pembuatan Akta Notariil. Yogyakarta: Magister Kenotariatan Universitas Islam Indonesia, 2018.
11. Sasauw C. Tinjauan Yuridis Tentang Kekuatan Mengikat Suatu Akta Notaris. Jurnal Lex Privatum, 2015, 100.
12. Setyawati SI. Kedudukan Saksi Instrumenter Pada Akta Notaris. Surabaya: Program Studi Magister Kenotariatan, Fakultas Hukum, Universitas Airlangga, 2009.