

The Position and Responsibilities of Instrumental Witnesses in Deeds Made by Notaries according to UUJN

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Abstract. *This study discusses the Notary as a public official who has the authority to make authentic deeds as stipulated in Act No. 30 of 2004 concerning the Position of Notary as amended by Act No. 2 of 2014. Notaries as regulated in the Law on Notary Position are obliged to keep confidential the contents of the deed he made. However, in the notarial deed there is also the role of 2 (two) witnesses, namely instrumentair witnesses, in this case, notary employees. The problem faced is what is the legal position of the instrumentair witness in relation to the notary's obligation to keep everything related to the deed made secret and the extent of the responsibility of the instrumentair witness notary deed. The results of this study indicate that the instrumentair witness in relation to the existence of a notary's obligation to keep secret everything related to the deed he made in Article 16 paragraph (1) letter f of the Amended UUJN, by law is not explicitly required for witnesses to keep the contents of the deed confidential so that if this instrumental witness leaks the contents of a deed, then the act is an unlawful act in Article 1365 of the Civil Code reads "every unlawful act, which brings harm to another person, obliges the person who because of the mistake of issuing the loss, compensates for the loss". The Law on Notary Office as well as the provisions in the Notary Code of Ethics, only regulates the Notary's obligation to keep the contents of the deed secret, so that if an instrumental witness discloses the confidentiality of the contents of the deed, then there are no sanctions that are legally binding. The act of an instrumental witness who leaks the contents of the deed is not may be prosecuted criminally.*

Keywords: Instrumentair; Responsibility; Witness.

1. Introduction

Notary is a Public Official who has the authority to make authentic deeds and other authorities as referred to in Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of Notary (hereinafter referred to as UUJN-P). Article 15 UUJN-P states that the Notary in this case is authorized to

carry out some of the duties and functions of the state within the scope of private law, namely by serving the needs of the community in producing authentic evidence. This article is a special elaboration of Article 1868 of the Civil Code which emphasizes that "An authentic deed is a deed made in the form determined by law by or before a public official who is authorized to do so at the place where the deed was made."¹

In carrying out his profession, a Notary provides legal services to the public which is regulated in Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Office of a Notary. Notaries in carrying out or carrying out their duties and positions are regulated in Article 17 of the Notary Act No. 30 of 2004 in conjunction with Act No. 2 of 2014 concerning the Position of Notary, namely regarding the prohibition of becoming a Notary. If the Notary violates the prohibition, the Notary will be subject to sanctions as stipulated in Article 85 of Act No. 30 of 2014 Number 2 of 2014 concerning the Position of Notary.² Article 1868 of the Civil Code (hereinafter referred to as the Civil Code), emphasizes that one of the requirements for the formation of an authentic deed is the form of the deed determined by law. Regarding the form of an authentic deed made by a Notary, it is regulated in Article 38 UUJN-P. One of the formal requirements that must exist in a notarial deed is the presence of 2 (two) witnesses whose identities are explicitly stated at the end of the deed, this is expressly stated in Article 40 paragraph (1) UUJN-P. As a whole, the notarial deed will be called a complete notarial deed if all the formal requirements are met so that it has perfect evidentiary power, so that the position of the deed witness, which is one of the formal requirements, has been legally accounted for.³ Instrumentair witness (Instrumentaire Getuigen) is a witness who knows all aspects of the formality of making a deed carried out in the office/before the parties facing the Notary, participating in making the deed (instrument). The witnesses to the deed affix their signatures to the deed, usually the instrumental witnesses are witnesses from the notary's own employees. The deed witness is obliged to sign the deed. Testify that the truth has been carried out and the required formalities have been fulfilled as stated in the Notary Office Law in the deed

As legal evidence, a witness is someone who gives testimony, either orally or in writing or by signature, that is, explaining what he himself witnessed (waarnemen), whether it be the actions or actions of another person or a situation or an event.⁴ One form of protection provided by law to a Notary in connection with making an authentic deed is the presence of witnesses as regulated in Article 40 of the Amended UUJN which reads:

¹R.Subekti and R.Tjitrosudibyo, 2008, Civil Code, Pradnya Paramita, Jakarta, p. 475.

²Ngadino, 2019, Duties and Responsibilities of Notary Office in Indonesia, UPT Publishing University PGRI Semarang Press, Semarang, p. 7

³<http://www.indonesianotarycommunity.com/saksi-akta-notaris-kedudukan-saksi-akta-notaris/>

⁴GHS, Lumban Tobing, 1999, Notary Office Regulations, Erlangga, Jakarta, p. 168

1. Every deed read by a Notary is attended by at least 2 (two) witnesses, unless the laws and regulations stipulate otherwise.
2. Witnesses as referred to in paragraph (1) must meet the following requirements;
 - a. At least 18 (eighteen) years old or married;
 - b. Capable of performing legal actions;
 - c. Understand the language used in the deed;
 - d. Can put signature and initials;
 - e. Do not have marital relations or blood relations in a straight line up or down without restrictions on degrees and sideways to the third degree with a Notary or the parties.
3. The witness as referred to in paragraph (1) must be known by the Notary or introduced to the Notary or explained about his identity and authority to the Notary by the appearer.
4. An introduction or statement regarding the identity and authority of the witness is expressly stated in the deed

Instrumental witnesses must be competent to act in law, understand the language of the deed, there may not be close family relationships in the sense of lines up and down without boundaries and sideways to the third degree either with the notary or with the appearers⁵.

According to the provisions of Article 16 paragraph 1 letter m UUJN of this Amendment, a deed must be read in front of the appearer in the presence of at least 2 (two) witnesses, so that in this case the presence of witnesses becomes important in making a notarial deed, the presence of witnesses is stated at the end of the deed. The provisions regarding the reading of the deed before witnesses are contrary to Article 16 paragraph (1) letter f of the Amended UUJN which reads: "Keep confidential everything regarding the deed made and all information obtained for making the deed in accordance with the oath/pledge of office, unless the law stipulates other."

According to this article, a notary must keep everything confidential regarding the deed he made and all the information obtained. The problem occurs because

⁵Sutrisno, 2007, Comments on the Law on the Position of Notary Book II, Medan, p. 37.

in this case the position of the witness knows the entire contents of the deed or is it only limited to knowing the appearers. Based on the things mentioned above, the author is interested in conducting research with the title "Position and Responsibilities of Instrumental Witnesses in Deeds Made by Notaries According to UUJN".

2. Research Methods

According to Maria SW Sumardjono, the type of legal research that is conducted using literature or secondary data is called normative legal research, while legal research that primarily examines primary data is called empirical legal research.⁶ Empirical legal research is a type of legal research that analyzes and examines its work in society. Primary data in question is data obtained directly from the main source, namely the behavior of community members through research, while secondary data is data obtained from library materials including official documents, research results in the form of reports, diaries and so on.⁷

3. Results and Discussion

Juridically, the definition of a notary is stated in Article 1 paragraph (1) UUJN: "Notary is a public official authorized to make authentic deeds and has other authorities as referred to in this Law or based on other laws".⁸

According to the legal dictionary, one of the meanings of *ambtbenaren* is an official, thus *openbare ambtbenaren* is an official who has duties related to the interests of the community, so *openbare ambtbenaren* is defined as an official entrusted with the task of the State to make an authentic deed that serves the interests of the community, and such qualifications given to the Notary. Public Officials are state organs that have the authority to provide services to the public in the field of Civil law, the authority of Public Officials is directly obtained from the highest authority, namely the state, not from the government or executive or State Administrative Officers. Public officials according to the Indonesian legal system are not under the influence of executive power and judicial or legislative power.

A public official is someone who is appointed and dismissed by the government and is given the authority and obligation to serve the public in certain matters

⁶Peter Mahmud Marzuki, 2005, *Legal Research*. First Print, Kencana, Jakarta, p. 17

⁷*Ibid.*, p. 11-12

⁸Article 1 point 1 of Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of Notary.

because he participates in carrying out a power that originates from his obligations from the government in his position. Public⁹

Regarding the responsibilities of a notary as a public official related to material truth, Nico distinguishes them into four points, namely:¹⁰

1. The responsibility of a notary in civil terms for the material truth of the deed he made;
2. The notary's criminal responsibility for material truth in the deed he made;
3. The responsibility of a notary based on the Notary's Position Regulations for the material truth in the deed he made;
4. The responsibilities of a notary in carrying out his position are based on the notary's code of ethics.

Notaries are officials who are appointed and dismissed by the Minister, but there are conditions set forth in UUJN that must be followed by everyone who wants to become a Notary. In order to be appointed as a Notary Public, one must meet the requirements specified in Article 3 UUJN, namely:

- a. Indonesian citizens.
- b. Have faith in God Almighty.
- c. Be at least 27 years old.
- d. Physically and mentally healthy as stated by a health certificate from a doctor and psychiatrist.
- e. Graduated with a law degree and graduated from the notary degree level.
- f. Has carried out an apprenticeship or actually worked as a notary's employee within 24 consecutive months at a notary's office on his own initiative or on the recommendation of a notary organization after graduating from notary level two.

⁹Sjaifurrachman and Habib Adjie, 2011, Responsibilities of internal notaries Create actions, p. 54

¹⁰Nico, Responsibilities of Notaries as Public Officials, Center for Documentation and Studies of Business Law, Yogyakarta, 2003, p. 83

g. Does not have the status of a civil servant, state official, advocate, or is not holding other positions which by law are prohibited from having concurrent positions as a notary.

h. Never been sentenced to imprisonment based on a court decision that has permanent legal force for committing a crime which is punishable by imprisonment of 5 years or more.

Based on Article 2 UUJN a notary is appointed and dismissed by the Minister. The Minister who will inaugurate the notary is the Minister of Law and Human Rights from each region in each regional office. Notary profession requires a responsibility both individually and socially. Therefore, before carrying out his position, a notary is obliged to take an oath/pledge according to his religion before the Minister or appointed official¹¹

Legal basis above the authority of a notary is specified in article 15 UUJN-P 2014 which can be classified into 3 (three) types of authority namely general authority of a notary, special authority of a notary and authority of a notary which will be determined later. The general authority of a Notary is specified in Article 15 paragraph (1) UUJN-P 2014, that:

The notary has the authority to make authentic deeds regarding all actions, agreements and stipulations that are required by laws and regulations and or that are desired by interested parties to be stated in authentic deeds, guarantee the certainty of the date of making the deed, save the deed, provide grosse, copies and quotations of the deed, all of this as long as the making of the deed is not also assigned or excluded to other officials or other people determined by law.

The Special Authority of a Notary is formulated in Article 15 paragraph (2) UUJN-P 2014 which stipulates that apart from the authority referred to in paragraph (1), a Notary also has the authority to:

1. legalize the signature and determine the certainty of the date of the letter under the hand by registering it in a special book;
2. record private letters by registering them in a special book;
3. make a copy of the original letter privately in the form of a copy containing the description as written and described in the letter concerned;

¹¹Article 4 paragraph (1) of Act No. 2 of 2014 concerning amendments to Act No. 30 of 2004 concerning the Position of Notary

4. verify the compatibility of the photocopy with the original letter;
5. provide legal counseling in connection with the making of the deed;
6. make deeds related to land; or make a deed of minutes of auction.

In Article 15 paragraph (3) UUJN-P 2014 determines that "Apart from the authority referred to in paragraph (1) and paragraph (2), the Notary has other authorities regulated in laws and regulations". This provision as a whole is the authority of the Notary which will be determined later based on other legal regulations that will come (*ius constituendum*).¹²

Authentic deed is a deed in the form determined by law is drawn up by or before public officials who have the power to do so at the place where the deed is made.¹³ in the provisions of article 1868 of the Civil Code (KUHPerdata) is the source of the authenticity of an authentic deed in the provisions of the article is the legal basis for a Notary to make an authentic deed with the provision that the deed must be made by (door) or before (ten) overstaan) of a Public Official and the form of the authentic deed is made based on the provisions contained in UUJN and the authentic deed must be made before a public official who has the authority to make the authentic deed¹⁴

Deeds drawn up before or by a notary domiciled as authentic deed according to the form and procedure stipulated in UUJN, this is in line with the opinion of Philipus M. Hadjon, that the requirements for an authentic deed are:¹⁵

1. In the form determined by law (standard form); and
2. Made by and in the presence of a Public Official.

Irawan Soerodjo also stated that there are 3 (three) elements *essencelia* in order to fulfill the formal requirements of an authentic deed, namely:¹⁶

1. In the form determined by law;
2. Made by and before a public official; and

¹²Habib Adjie, Op. Cit., p. 83.

¹³M. Marwan & Jimmy P, 2009, Dictionary of Law (Dictionary of Law Complete Edition), Cet. I, Reality Publisher, Surabaya, p. 31.

¹⁴Ibid, p.127

¹⁵Philipus M. Hadjon, Land Registration Form Not Authentic Deed, Surabaya Post, Surabaya, 2001, p. 3

¹⁶Irawan Soerodjo, Legal Certainty over Land in Indonesia, Arkola, Surabaya, 2003, p. 148

3. A deed drawn up by or in the presence of a public official authorized for that purpose and at the place where the deed was made.

Article 1868 of the Civil Code is a source for the authenticity of notarial deeds is also the basis for the legality of the existence of a notarial deed, with the following conditions:¹⁷

- a. The deed must be made by (door) or before (ten overstaan) a Public Official;
- b. The deed must be made in the form determined by law; and
- c. The public official by or before whom the deed was made must have the authority to make the deed.

An authentic deed is made at the request of the parties facing the agreement to put it into a deed. As an authentic deed agreement, it must fulfill the elements of the validity of the agreement contained in the provisions of Article 1320 of the Civil Code (hereinafter referred to as the Civil Code), namely: the agreement of the parties, competent in acting, contains certain things, and something that is promised may not against the law.

Regarding the procedure for the form of an authentic deed that must be made by a notary, it has been determined based on the provisions of Article 38 to Article 65 UUJN-P. The authenticity of a notarial deed originates from Article 1 paragraph (1) and Article 15 paragraph (1) UUJN-P juncto Article 1868 of the Civil Code which determines that an authentic deed fulfills its authenticity as an authentic deed if it fulfills:

1. The deed is drawn up by an official authorized by law. The deed must clearly describe the circumstances or wishes of the parties.
2. The form of an authentic deed must be adjusted to Article 38 UUJN-P, which in that article has determined the form of the deed that must be made

The process of making an authentic deed is not only the parties and the notary, but there must also be witnesses who also put signatures in making an authentic deed because it is required by law.¹⁸ In criminal procedural law as well as procedural law, witnesses can be categorized as evidence. It can be said as a witness if the person is a person who directly saw or knows the events of an

¹⁷Habib Adjie, *Cancellation and Cancellation of Notary Deed*, (Habib Adjie III), Refika Aditama, Bandung, 2015, p. 9.

¹⁸. Kusumaningrum, IAK, Wairocana, IGN, & Suartha, IDM *The Obligation of Instrumental Witnesses to Keep the Contents of the Deed Confidential Under the Notary Office Law*. Acta Comitas, 237-246.

event, can provide information about an event that he saw, a person who can provide information before a judge for the benefit of the trial about what he saw.¹⁹

As a legal means of evidence, a witness is someone who gives testimony, either orally or in writing or by signature, that is, explaining what he himself witnessed, whether in the form of actions or actions of another person or a situation or an event.²⁰

Protection of witnesses and victims aims to provide a sense of security to witnesses and/or victims in providing information in every criminal justice process²¹. Protection of witnesses and victims is based on²²:

1. Respect for human dignity;
2. A sense of security;
3. Justice;
4. Not discriminatory; and
5. Legal certainty.

Within the scope of notarization there are 2 (two) types of witnesses, namely familiar witnesses (*attesterend*) and instrumentair witnesses. Known witness (*attesterend*) is a witness who introduces the appearer to the Notary. The legal basis regarding instrumentair witnesses is regulated in the provisions of Article 40 UUJN

Known Witnesses in the notary world are known as (*attesterend*). A familiar witness is a witness who introduces the appearer to the notary. In the provisions of Article 39 paragraph (2) UUJN 43 it is explained that the requirements to become an identifying witness are that a person must be at least 18 (eighteen) years old or married and capable of carrying out legal actions. The identity and statement of the identifying witness are clearly stated in the notarial deed as stipulated in Article 39 paragraph (3) UUJN.

Instrumentair witness has a very important role in a notarial deed, because without his presence the deed made by a notary does not have perfect

¹⁹HUTAPEA, HNR (2016). Position of Instrumental Witness in Making Notary Deeds in National Law. *Premise Law Journal*, 11.

²⁰GHS Lumban Tobing, *Notary Office Regulations*, Erlangga, Jakarta, 1983, p. 168

²¹Article 4 of Act No. 13 of 2006 Concerning the Protection of Witnesses and Victims.

²²Article 3 Act No. 13 of 2006 Concerning the Protection of Witnesses and Victims

evidentiary power and only becomes a private deed. In the provisions of Article 40 paragraph (1) UUJN stipulates that each deed read by a notary is attended by at least 2 (two) witnesses, unless the laws and regulations stipulate otherwise. From these provisions it can be concluded that the role of the instrumental witness is very important in making a notarial deed. As a whole a notarial deed will be called a complete and authentic notarial deed if all the formal conditions specified in UUJN are met and thus the notary deed has perfect evidentiary power. Article 40 paragraph (2) stipulates that the requirements to become an instrumentair witness, namely

1. Each deed read by a notary is attended by at least 2 (two) witnesses, unless the laws and regulations stipulate otherwise.
2. Witnesses as referred to in paragraph (1) must meet the following requirements:
 - a. At least 18 (eighteen) years old or married;
 - b. Capable of performing legal actions;
 - c. Understand the language used in the deed;
 - d. May affix signature and initials, and
 - e. Do not have marital relations or blood relations in a straight line up or down without restrictions on degrees and sideways to the third degree with a notary or the parties.
3. Witnesses as referred to in paragraph (1) must be known by a notary or introduced to a notary or explained about their identity and authority to a notary by the appearer.
4. An introduction or statement regarding the identity and authority of the witness is expressly stated in the deed.

The task of this instrumentary witness is to sign, testify about the truth of the contents of the deed and what is required by law, in current practice the instrumentary witness is the notary's own employee

3.1 Position and Legal Responsibilities of Instrumentair Witnesses for the Authenticity of Notary Deeds

The position of a Notary deed witness is of course different from the position of a witness in general who is a witness who hears and/or sees an event that occurred.

The position of an instrument witness as one of the formal requirements for a notarial deed is stated in Article 38 paragraph (4) letter c of Law No. 30 of 2004 concerning the Position of a Notary Public that at the end or closing the deed must contain the full name, place and date of birth, occupation, position, position, and place of residence of each witness. When these formal requirements are not met, the deed is degraded from its position to the strength of proof as a deed under the hand. In relation to the Notary's obligation to keep the contents of the deed confidential as stipulated in the provisions of Article 16 paragraph (1) letter l of the UUJN, a change in the position of an instrumentair witness which is a legal requirement for a deed to be called an authentic deed is not a violation. The position of the instrumentair witness is one - unit in a Notary deed, Instrumental witnesses who come from Notary employees in practice in the field are not always employees who type the deed of the parties. Not infrequently the employees who witnessed the signing and reading of the deed knew only when the incident took place. So that the notary employee in his position as an instrumentair witness is not obliged to remember the contents of the deed in his memory. As long as the instrumentair witness does not commit an unlawful act in his duties as a notary's employee to type the parties' deed, then his presence in a notary deed is not contrary to the provisions of the notary's obligation to keep the contents of the deed secret.

According to the author, the instrument witness is also indirectly obliged to keep the contents of the deed confidential in order to protect the interests of the parties to the deed in question. As previously explained that with regard to the contents of the notary deed, it remains the responsibility of the notary if it is disputed in court cases relating to the notary deed, because the notary communicates directly with the appearer, so that the notary's employees cannot be held accountable if they are used as a witness in the trial. relating to the contents of the notary deed, because the responsibility of the notary employee is only limited to preparing the deed which he is accountable to the notary, The existence of Instrumental Witnesses besides being intended as evidence can also help a Notary's position to be secure in the event that a deed made by a Notary is sued by one of the parties to the deed or a third party. However, in reality, notaries can still be prosecuted both criminally and civilly even though the making of an authentic deed has been witnessed by an Instrumental Witness.

In practice, many notaries make their employees as instrumental witnesses, if they meet the requirements set by law, as in accordance with Article 40 UUJN. It is these notary employees who prepare everything that is needed in terms of drawing up a deed. Starting from preparing for the signing of the deed, namely asking for the necessary documents as well as checking whether they are in accordance with the parties involved in the deed. Until witnessing the officialization of the deed, namely the reading and signing of the deed before a

notary, also up to giving a copy of the deed to interested parties is one of the duties of the notary's employees, and in this case it will result in a loss suffered by one or several parties. Regarding the existence of a loss caused by the actions of other people, then there should be a party who is responsible for this matter. . In the realm of civil law, Roscoe Pound stated that the law saw that there were three responsibilities for the delict, namely

- a. Liability for intentional loss;
- b. Liability for loss due to negligence and unintentional;
- c. Liability in certain cases for losses incurred due to negligence and unintentional.

So, accountability arises because of mistakes made that cause losses, required if the unlawful act can be accounted for. Someone who is legally responsible for certain actions that he can be subject to a sanction in cases where his actions are contrary to law. Sanctions are imposed deliquet, because of his own actions that make the person responsible²³.

3.2. Legal Consequences for Instrumental Witnesses Related to the leaking of the Confidentiality of the contents of the Notary Deed

Legal consequences are all consequences that occur from all legal actions carried out by legal subjects against legal objects or other consequences caused by certain events by the law concerned that have been determined or considered as legal consequences.

The obligation for an instrumentary witness to keep the contents of the deed confidential is not regulated explicitly in the Notary's Office Act or the provisions in the Notary's Code of Ethics, in the Notary's Office Act and the provisions in the Notary's Code of Ethics, only regulates the Notary's obligation to keep the contents of the deed confidential, so that if Instrumental witness discloses the confidentiality of the contents of the deed, so there are no binding sanctions by law and regulation. The act of an instrumental witness who leaks the contents of the deed cannot be prosecuted criminally. The act of such an instrumental witness is an unlawful act (onrechtmatig daad). Unlawful acts are regulated in Article 1365 to Article 1380 of the Civil Code. Article 1365 of the Civil Code reads "any unlawful act that brings harm to other people.

²³Jimly Asshiddiqie and Ali Safa'at, Hans Kelsen's Theory on Law, (Jakarta: Press Constitution, 2006), p. 61

4. Conclusion

The position of the instrumentary witness formally remains as a witness only. In contrast to the Notary as the party that ratifies the deed. Here, the instrumental witness has the role of witnessing 2 important stages of making the deed, namely the process of reading and signing (approval) of the deed. By signing the deed, the parties have expressly agreed to the contents of the deed so that it cannot be denied anymore, while the responsibility of the instrumental witness is only limited to the formal truth given by the parties for the purpose of making a Notarial deed, and if an error occurs related to the formal truth, then the one who is obliged to be responsible is the Notary as a public official.

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