

The Legal Protection for Instrumental Witnesses in Notarial Deeds

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Abstract. *Protection of Instrumental Witnesses in Notarial deeds has not been specifically regulated in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notaries. If it is related to the investigation process regarding a Notarial deed related to a legal case, the Instrumental Witness or witness in the notarial deed will be involved in the investigation process and will be summoned as a witness for questioning. The aim of this research is to find out and analyze the legal protection of witnesses in notarial deeds and also to find out and analyze the role of witnesses in notarial deeds. The method that will be used in this research is a normative juridical research method, which is a way to obtain data from library materials, especially those related to legal issues. This means that the research will discuss normative provisions relating to the protection of witnesses and the notarial sector using the legal and regulatory approach that applies in Indonesia. Protection of Instrumental Witnesses in Notarial deeds has not been specifically regulated in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notaries. However, in general, Law Number 13 of 2006 concerning Protection of Witnesses and Victims provides legal protection for witnesses, including instrumental witnesses. Especially protection in providing testimony at trials related to criminal cases, such as protection for providing information without pressure, the right to receive legal advice, and other general matters.*

Keywords: *Legal; Instrumental; Protection; Witness.*

1. Introduction

Indonesia is a rule of law country¹. The rule of law is a concept of state administration that is based on law. Every action of state officials must be based

¹Article 1 paragraph (3) of the 1945 Constitution

on applicable law. In other words, whatever is to be done in the context of state administration must be based on the rules of the game that are determined and determined together. The term rule of law was pioneered by AV Dicey, a famous British scholar. This term is used to describe the understanding that the law is what actually rules or leads a country, not humans or people.²

Certainty, order and legal protection require the existence of evidence that clearly determines a person's rights and obligations as a legal subject in the legal traffic of social life. In social life there are various activities to meet life's needs, such as buying and selling, renting, exchanging, borrowing and borrowing and so on. This community activity is a form of legal action which in its implementation requires guarantees of certainty, order and legal protection. Therefore, written evidence is needed that has authentic power regarding a situation, event or legal actions carried out by the community.³ Authentic deeds as written evidence that have perfect evidentiary power (the strongest and fullest), have a very important role in every legal relationship in social life. The demand for legal certainty in the field of social relations and the economic field, both at the national, regional and international levels, has resulted in an increasing need for authentic deeds as written evidence.

A notary is a public official who, according to Law no. 2 of 2014 concerning Amendments to Law no. 30 of 2004 concerning the Position of Notary (hereinafter referred to as UUJN), is given the authority² to make authentic deeds regarding all deeds, agreements and stipulations that are required by statutory regulations and/or that are desired by interested parties to be stated in authentic deeds, as long as they are made. The deed is also assigned or excluded to other officials or other people as determined by law, and several other authorities based on UUJN and other laws.

With the authority and obligations carried out by the Notary Position, the role and function of the notary position becomes increasingly important, especially in terms of making authentic deeds that are able to provide legal certainty for interested parties. So an authentic deed must be made properly and correctly and fulfill the requirements for the validity of an authentic deed, namely that it must contain formal and material requirements. These two conditions are cumulative, and not alternative. Furthermore, the formal requirements and material requirements must be related to each other. One of the formal requirements for making an Authentic Deed is the presence of two witnesses, who act to witness the correctness of the Deed being made in the presence of

²Jimly Asshiddiqie, *Constitution and Constitutionalism*, Constitutional Court of the Republic of Indonesia, p. 22.

³Article 1868 Civil Code (KUHPer)

the relevant official, in this case the person acting as a witness is a notary employee.

Within the scope of notarial institutions, there are two types of witnesses, namely Familiar Witnesses and Instrumental Witnesses. An acquaintance witness is an identifying witness who introduces the presenter to the notary, while an Instrumental witness is required by law to be present at the preparation of the Notarial deed and has the task of affixing a signature, providing testimony regarding the correctness of the contents of the deed and fulfilling the formalities required by law. So that when these conditions are completed, the notarial deed has perfect evidentiary power, and the position of the instrumental witness, which is one of the formal requirements in a notarial deed, can be legally accounted for. The importance of the role of witnesses in making authentic deeds is required by statutory regulations in the context of legal certainty, order and legal protection.

The importance of the presence of witnesses in authentic deeds is due to the law which later becomes evidence that has absolute evidentiary power. So a person who is a witness in a notarial deed must really understand and know about his or her testimony in the deed. Because the existence and function of witnesses is so important in notarial deeds, it is necessary to provide legal protection for witnesses, in order to achieve legal certainty. Legal protection in this case must be interpreted as protection by using legal means or protection provided by law. So it is very interesting to examine in this research, namely the legal protection of witnesses in notarial deeds.

2. Research Methods

The method that will be used in this research is a normative juridical research method, which is a way to obtain data from library materials, especially those related to legal issues.⁴This research uses a typology approach method, where this research uses a descriptive form of evaluative research. The data collection method in this research is literature study, carried out by reading and reviewing books, statutory regulations, documents, scientific articles, jurisprudence, and writings related to the problem that is the object of research. The data analysis method used in this research is a qualitative approach.

⁴Soerjono Soekanto and Sri Mamudji, 2004, Normative Legal Research, 8th Edition, PT. Raja Grafindo Persada, Jakarta, Pg. 14.

3. Results and Discussion

3.1. The provisions of the Notary Position Law regulate the legal protection of instrumental witnesses in notarial deeds

Article 1 number 7 of Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary Public states that "a Notarial deed, hereinafter referred to as a deed, is an authentic deed made by or in the presence of a Notary in accordance with the form and procedures stipulated in this Law." The authenticity of a Notary's deed is not in the paper but lies in the deed in question being made before a Notary as a Public Official with all the rights and authority or in other words that what is made by a Notary is authentic, this is not because the law stipulates that, but because the deed was made by or before a Public Official, as intended in Article 1868 of the Civil Code.

- a) The deed must be made (*door*) or in the presence (*ten overstaan*) of a Public Official;
- b) The deed is drawn up in the form determined by law;
- c) The Public Official by or before whom the deed is made must have the authority to make the deed, in the place where the deed is made.

Whether a deed is authentic or not is also not enough if the deed is made by or in the presence of a public employee, but also the method of making it must comply with the provisions contained in the statutory regulations. A deed made by an official who is not authorized and without the ability to make it or does not meet certain requirements, is not considered an authentic deed but has the force of a private deed, as well as a notarial deed as an authentic deed if it is made in accordance with or meets the cumulative requirements. as required in Article 1868 of the Civil Code. However, if one of them is not fulfilled then the notarial deed is degraded to a private deed.

Instrumental witnesses are attached to the position of notary, so their protection is the same as that of a notary, including their obligation to keep the contents of the deed confidential. Notaries have a body that protects them from all kinds of legal threats so that if a notary receives unfair treatment or is even criminalized by the party concerned with the deed he or she has made, the notary still has its own fortress, but this is different from an instrumental witness who, although basically attached to the position of notary, is not There are clear rules regarding legal protection if a witness is involved in a case.

When a dispute occurs involving a deed made by a Notary, the Notary who made the deed is often summoned as a witness in police, prosecutor's or trial

investigations, and by law summons the Notary as a witness as confirmed in Article 66 paragraph 1 of the Republic Law. Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary that the summons of a notary to attend an examination relating to a Notary's deed or protocol which is in storage for the purposes of the judicial process, investigator, public prosecutor or judge must be approved Honorary Council of Notaries. With the right to refuse,⁵Special provisions regarding the summons of a Notary by an Investigator, Public Prosecutor, or Judge, must require the approval of the Regional Supervisory Council because the Notary is the custodian and custodian of the Notary Protocol which is a state archive.

However, if a notary is not permitted to fulfill the summons of an investigator, public prosecutor or judge, especially investigators from the police will try to find other ways or loopholes, with the aim of obtaining material truth and what the investigator will do is summon deed witnesses or target witnesses. stated at the end of the deed with information obtained from witnesses to the deed.

When summoned to a trial, an instrumental witness is asked for information, no longer as a witness in a deed who only observes the formalities of inauguration of the deed, but has become a general witness whose information can be asked about cases or disputes involving a deed made by a notary. The witnesses presented at the trial regarding the notarial deed that are in dispute are deed witnesses who are employees or employees of the notary. Witnesses who came from notary employees who were presented at the trial, gave testimony limited to their responsibility in carrying out their obligations, namely in carrying out orders or tasks.

Legal action in the form of a summons is a series of investigative processes in order to obtain information at both the investigation, prosecution and judicial levels.⁶The Civil Procedure Code stipulates that there are three types of exceptions that free a person from their obligation to be a witness, namely: people who can resign, people who can ask to be released and people who are prohibited from being witnesses but whose statements can be heard in court without being sworn in. If you look at these three exceptions, Notary employees as instrumental witnesses or deed witnesses are not included in any group, so it is still mandatory for them to attend the trial and be witnesses. If a Notary employee who acts as a witness refuses to be a witness, then he can be punished

⁵Facts Andony, Anita Afriana, Indra Prayitno, 2020, "The Position of Notary Employees as Witnesses in Authentic Deeds in Investigation and Judicial Processes Reviewed by the Law on Notary Positions", Adhaper Civil Procedure Law Journal, No.2, Vol.6 Pg.69,<https://jhaper.org/index.php/JHAPER/article/view/133/114>, accessedspadaladder!Aug 27, 2023,07.00 WIB.

⁶Ibid. pg 87

under articles 224 and 522 of the Criminal Code, namely a maximum fine of nine hundred rupiah and a maximum imprisonment of nine months.⁷

Instrumental witnesses or deed witnesses as one of the conditions for the authenticity of a deed, there are no regulations governing legal protection for deed witnesses or instrumental witnesses in Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary Even though the actions of Notary employees as instrumental witnesses in the inauguration of Notarial Deeds are included in the field of notarial matters, they are not protected by the Notary Honorary Council. It is not impossible for the parties involved in a case related to the deed made by the Notary, to know that the instrumental witnesses or witnesses the deed, know the ins and outs of the deed from the beginning to the end of the deed. This will cause parties who want to know the situation of the case to pressure instrumental witnesses or deed witnesses to provide testimony before the court.⁸

In this case, instrumental witnesses are indeed in a weak position, because there is not a single article in Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notaries which regulates the protection of instrumental witnesses or witness to this deed. Legal protection for deed witnesses or instrumental witnesses can only be found outside of Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notaries, namely in Law Number 31 of 2014 concerning Amendments to Laws. Law Number 13 of 2006 concerning Witness and Victim Protection.

Based on the explanation above, a clear point can be found that the protection of instrumental witnesses in notarial deeds has not been specifically regulated in Law Number 30 of 2004 concerning the Position of Notaries. If it is related to the investigation process regarding a Notarial deed related to a legal case, the Instrumental Witness or witness in the notarial deed will be involved in the investigation process and will be summoned as a witness for questioning. Notaries receive legal protection by exercising their right of objection provided by law as well as protection from the Notary Supervisory Board. Meanwhile, witnesses, because there is no article in the Law on the Position of Notaries which regulates their rights as instrumental witnesses, are required to provide information regarding the Notarial deed,

⁷Alifah Sarah Yunita, Herwinda Rena Damayanti and Nindya Putri P., 2020, "The Position of Notary Employees as Witnesses in Cases Involving Notaries in Trials", *Notaire*, No.1, Vol.3, Pg.18, <https://e-journal.unair.ac.id/NTR/article/view/17492/pdf>, accessed pada date 27 Aug 2023, at 08.08 WIB.

⁸Op. Cit. p. 289.

However, in general, Law Number 13 of 2006 concerning Protection of Witnesses and Victims provides legal protection for witnesses, including instrumental witnesses. Especially protection in providing testimony at trials related to criminal cases, such as protection for providing information without pressure, the right to receive legal advice, and other general matters. However, Law Number 13 of 2006 concerning the Protection of Witnesses and Victims is not sufficient to protect the rights of Instrumental Witnesses. Because the definition of a protected witness in the Law is a witness who hears, witnesses and/or experiences for himself a criminal case. Meanwhile, an Instrumental Witness is a witness who witnesses the formalities in making a Notarial deed. In other words,

1. The Role of Instrumental Witnesses in Notarial Deeds

The notary has the obligation to present 2 (two) witnesses, whose identification and authority of the witnesses are stated expressly in the deed. In addition, in Article 40 of Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notaries, the conditions for being able to become a witness have been determined as follows:

- 1) Every Deed read by a Notary is attended by at least 2 (two) witnesses, unless statutory regulations stipulate otherwise.
- 2) Witnesses as intended in paragraph (1) must meet the following requirements:
 - a. at least 18 (eighteen) years old or previously married;
 - b. Capable of carrying out legal actions;
 - c. Understand the language used in the deed;
 - d. Can add signature and initials; And
 - e. Do not have a marriage or blood relationship in a straight line upwards or downwards without limitation of degrees and lines to the side up to the third degree with the Notary or the parties.
- 3) The witness as intended in paragraph (1) must be known to the Notary or introduced to the Notary or explained about his identity and authority to the Notary by the person present.
- 4) An introduction or statement regarding the identity and authority of the witness is stated expressly in the deed.

The provisions of article 40 in Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of

Notaries must be fulfilled. And if there is a violation of Article 40 of Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions based on Article 41 of Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 Regarding the Notary's Position, the deed only has the power of proof as a private deed.

The characteristics of witnesses in notarial deeds are different from other witnesses, because instrumental witnesses are those who are attached to the position of notary so they are usually employees of the notary themselves or people the notary knows and has gained the trust of the notary to serve as instrumental witnesses, so they are different from witnesses outside that is presented to the notary, both of which have different roles.

The role of the instrumental witness is one of the absolute elements in making a notarial deed, and is a statutory order so that the notary must be careful in making every deed because it will have a big impact on the notary himself and the parties involved in the deed, one of which is the existence of the instrumenter's witness. The instrument witness has the obligation to put a signature and thumbprint when executing the deed. So it is necessary for the notary to work properly from the start in accordance with the applicable rules and regulations.

The presence of witnesses in a notarial deed is a task to fulfill the orders of the law, to strengthen the material being made and to strengthen the authenticity of the notarial deed so that they must be present in its preparation, while witnesses who are brought in from outside only have a role to strengthen the material in an agreement. But both of them still have to know the contents of the deed. So if the notary does not fulfill the order to present witnesses in making a deed then the deed cannot be said to be an authentic deed because its authenticity is damaged and degraded to a private deed, but by relegating the notarial deed to a private deed, compliance does not cause the agreement to be damaged or invalidated. .

Apart from that, the consequences of being an instrumental witness in carrying out their role have duties, namely, participating in researching the identities of the parties present, examining documents or data which are the basis for making the deed attached to the minutes of the deed, examining the substance of the deed and witnessing the reading of the deed carried out by the notary in front of the parties.

The position of a deed witness or instrument witness is an order from the Notary Position Law, so that an instrument witness must witness or know the process behind making the deed. With the order from the Notary Position Law, it can

strengthen the validity and authenticity of the deed.

Deed witnesses or often referred to as instrumental witnesses also have the responsibility to ensure that the formalities prescribed by law in making an authentic deed have been fulfilled, namely, that the presenters or parties have actually appeared before the notary and the identity of the presenters is in accordance with the description. which is read by a notary, that before being signed by the parties, the deed is first read by the notary to the parties present and if there are no errors in the contents of the deed read out, it is then signed by the parties concerned and thumbprints are attached by the parties, in which case All of this is done by the notary and the parties in front of witnesses.

Apart from playing a real role in ratifying the deed from the beginning of the reading until the deed is signed, the instrumental witnesses also continue to play a role in the continuity of the deed, so that if there is a problem with the deed in the future, the role of the instrumental witness will still be used if possible to be present in the investigation process until court proceedings.

Overall, a notarial deed will be called an authentic deed if all the formal requirements have perfect evidentiary power, so that the position of the instrumental witness, which is one of the formal requirements, is legally accountable. Instrumental witnesses who participate in making, reading and signing the authentic deed made by the notary will automatically be involved forever in the deed. The consequence is that if a deed that has been made and has been ratified by a notary is then signed by witnesses when a criminal complaint or an unlawful act occurs that goes to court, then the witness will automatically participate in the process of resolving the case starting from the investigation. carried out by the police until the time of giving testimony in the trial. This is done to provide evidence, because instrumental witnesses in this case can be included in the category of evidence.

The Criminal Procedure Code (KUHAP) imposes quite heavy obligations on witnesses, some of which are even accompanied by criminal threats, including:

- 1) Obligation to comply with investigator summons and court summons. If they refuse to comply with the summons, the witness can be confronted by force.⁹
- 2) The obligation to swear or promise before giving information. This obligation is accompanied by the threat of being held hostage in a state detention center for a maximum of fourteen days if the witness refuses.¹⁰

⁹Article 112 of the Criminal Procedure Code

¹⁰Ibid article 160 paragraph (3)

3) The witness's obligation to remain present at the trial after giving a statement.¹¹

Seeing the role and position of instrumental witnesses is very important in making a notarial deed because it is a formal requirement for the deed, but in reality so far they have never received adequate attention from law enforcers even though these witnesses have played a major role in disclosing a criminal act or in a civil lawsuit.

Furthermore, in its application, the notary also needs to provide understanding to the appointed instrumenter witness regarding the roles and responsibilities they carry out, so that the instrumenter witness has an idea of the impacts or legal risks they will face in the future.

4. Conclusion

The position of the instrumental witness in the inauguration of a notarial deed is a very helpful part of the Notary's performance in carrying out his duties and authority, especially in the case of the inauguration of the deed, because it is one of the requirements for an authentic deed, therefore if there is a legal problem in court regarding the deed then the instrumental witness participates are also affected by it, so it is appropriate for witnesses in notarial deeds to receive legal protection for their rights as witnesses. Furthermore, because this matter has entered into legal traffic in the notarial sector, it should also receive protection in the Notary Position Law, which until now has not been regulated therein.

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