

Legal Protection of Instrumenter Witnesses if there is a Problem with a Notary Deed

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Abstract: *Instrumenter witnesses are witnesses who play an important role in the inauguration of a notarial deed so that if the existence of this deed witness is not fulfilled, then based on the law regarding the position of a notary, the deed only has the power of proof as an underhand deed. Instrumental witnesses who were present at the inauguration of the deed were included in the notarial field, but in the law regarding the position of a notary which is the only law regarding notarialty, it has not regulated the protection of the witness. This research is a normative legal research using a statute approach and case approach. The results showed the position of the instrumenter witness is only limited to qualifying the formality of the deed only. Regarding legal protection for instrumenter witnesses to date the arrangement has not been regulated in the notary office law even though there has been a law on the protection of witnesses and victims but in fact not enough to provide legal protection for instrumenter witnesses. Thus, a law that specifically protects the rights of instrumenter witnesses due to their function relating to notary deeds.*

Keywords: *legal protection; instrumenter witness; notarial deed.*

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INTRODUCTION

Community life creates relationships between legal subjects who have rights and obligations. Civil Law regulates two legal subjects, namely person (*natuurlijk persoon*) and legal entities (*rechts persoon*). a human being or legal entity may perform legal acts which are the exercise of their rights and obligations as subjects of law. One of the legal actions that can be done is to make a covenant. Indonesian Civil Law regulates the principle of

freedom of contract. Article 1338 of the Civil Code (KUHPerdata) explains that “*All treaties that it is legally made applicable as a law to those who make it.*”

Freedom of contract can be interpreted as the freedom for legal subjects to determine with whom they make the agreement and how the content and form of the agreement itself.

Agreements may be made before authorized public officials with the aim of providing certainty and protection as a valid means

of evidence. Notaries as general officials under the supervision of the Ministry of Law and Human Rights of the Republic of Indonesia are given confidence by the government to carry out some private (civil) legal functions for the benefit of public law.¹ The notary position is considered not an extension of the government but is a neutral and independent official. The position of notary itself is regulated in Law No. 30 of 2004 concerning Notary Position (UUJN) and Law No. 2 of 2014 on Amendments to Law No. 30 of 2004 concerning Notary Position (UUJN-P).

In accordance with the notary mahzab embraced in Indonesia, namely the Latin notary mahzab. In Latin notary mahzab, notaries have a pattern as a functional notary (*Notariat Fonctionnel*) with the following characteristics or characteristics:²

1. The delegation of authority (*gedelegered*) by the state;
2. Notary deed has formal evidentiary power;
3. Notary deed has power or execution power.

Based on article 1 number 1 UUJN-P, that notaries as general officials are authorized to make authentic deeds and other authorities in accordance with the law. Authentic deeds are made to create order, certainty and protection of the law in accordance with the laws and regulations. In addition, the creation of authentic deeds can also be made in accordance with the wishes of the parties who have interests for the guarantee of the rights and obliga-

tions of the parties.

Notary deed can be said to be perfect proof if the procedure in making the deed is fulfilled and does not violate the legal conditions of an agreement. The legal requirement of a notary deed can be said to be an authentic deed stipulated in article 38, article 39, article 40 and article 44 of UUJN-P.³

In making a notary deed the presence of witnesses is a condition of the deed can be said to be an authentic deed. Witnesses should be considered capable of seeing, hearing and witnessing the actions of the parties. Witnesses play a role in determining whether the conditions for the deed are in accordance with the laws and regulations. Therefore, usually the witnesses presented are notary employees themselves who understand the procedures for making a deed. Article 171 *Herzien Inlandsch Reglement* (HIR) explains that what the witness describes is what is seen, heard and felt by himself, in each testimony must be accompanied by the cause of which a witness can know what he describes.

In civil procedure law, it is not defined in detail as to who the witness is different than in the Criminal Procedure Law (KUHAP). The provisions in HIR and RBg related to witness statements only regulate what information a witness can give. In article 171 HIR/308 RBg stipulated that:⁴

1. Every testimony must contain all the causes of knowledge;
2. Special opinions or opinions arranged with the word reason not testimony.

From this provision, in giving his testimo-

¹ Habib Adjie, *Sanksi Perdata dan Administratif Terhadap Notaris Sebagai Pejabat Publik*, cet.2, (Bandung: PT.Refika Aditama, 2009), 163-164.

² Bachrudin, *Hukum Kenotariatan Perlindungan Hukum dan Jaminan Bagi Notaris sebagai Pejabat Umum dan Warga Negara*, (Yogyakarta: Thema Publishing, 2021), 25.

³ G.H.S Lumbang Tobing, *Peraturan Jabatan Notaris*, (Jakarta, Erlangga, 1983), 51.

⁴ Yahya Harahap, *Hukum Acara Perdata Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*, (Jakarta, Sinar Grafika, 2016), 661.

ny a witness must also give a reason for how he knows the things he explained. Witnesses are not allowed to give their opinions or opinions. Thus, it can be interpreted that a witness can only bear witness to things or events that he heard himself, he saw himself, or he experienced himself.

Other provisions regarding witnesses in civil cases are stipulated in Articles 145 and 146 HIR/Article 172 RBg, which describes which witnesses cannot be heard in absolute terms, and witnesses who can resign to testify. Against the provisions in Article 145 paragraph (1) HIR describes the witness who cannot be heard, namely:⁵

1. Blood family and family of one party in a straight lineage;
2. Husband or wife even though they are divorced;
3. The child is not yet old or not yet known with certainty that they are already 15 years old;
4. Crazy people even though they can use a healthy mind;

All provisions of the deed making procedure must be proven, if the deed is not in accordance with existing procedures then when the court process and the deed become evidence, it can be declared as a deed under the hand. If the notary deed position is under the hands then the evidentiary value will be submitted to the judge's judgment.⁶

According to Tan Thong Kie in notary known 2 (two) types of witnesses, namely instrumenter witnesses and identifying wit-

nesses.⁷ Deed witnesses who are usually notary employees are certainly only limited to participating in the making of the deed (*instrument*) and are only responsible for the formalities of the deed required in the UUJN, after which the witness signs the deed, then this is referred to as an instrumenter witness. An identifying witness can be defined as a witness who is tasked with introducing the impediments to a notary in the making of an authentic deed.⁸ The introduction referred to in this case is done factually and socially, in the process the notary must really see that the parties are the same person as the identity of the parties. The process of introduction by notaries in the creation of notary deeds is used in order to avoid "*error in persona*" in the creation and signing of notary deeds.

As mentioned above, witnesses play an important role. Other witnesses who are not in the making of a deed in the process of giving testimony to an event are sworn in first, but notary employees for their testimony are considered to be in unity with notaries as deed makers.

Notary as a general official who performs the duty of service to the public in the field of civil law, then against notary errors can be distinguished between personal faults and errors in carrying out their duties (*in service fault*). Notary is one of the professions that have the right to not attend the conference. In the event of a notary summoning to the trial must also be with the permission of the Notary Honorary Assembly. Article 18 paragraph 1 letter b

⁵ Gillang Pamungkas, "Saksi Dalam Perkara Perdata," last modified 2020, accessed February 17, 2022, <http://www.pn-ngabang.go.id/id/hubungi-kami/artikel-hukum/hukum-perdata/item/saksi-dalam-perkara-perdata.html>.

⁶ Habib adjie, *Memahami dan Menguasai Teori Akta Notaris*, (Semarang: Duta Nusindo, 2018), 8.

⁷ Tan Thong Kie, *Studi Notariat Serba Serbi Praktek Notaris*, (Jakarta: Ichtar Baru, 1994), 268.

⁸ Liza Dwi Nanda, "Perlindungan Hukum Terhadap Saksi Instrumenter Dalam Akta Notaris Yang Aktanya Menjadi Objek Perkara Pidana Di Pengadilan," *Premise Law Journal* 18 (2016), <https://jurnal.usu.ac.id/index.php/premise/article/view/16388>.

of the Regulation of the Minister of Law and Human Rights No. 7 of 2016 concerning the Notary Honorary Assembly states that one of the duties of the Honorary Assembly of The Notary of the Region is to give permission or refusal of notary summons to be present in the investigation, prosecution or trial process.

As a profession engaged in the field of services, of course notaries need the help of labor in this case notary employees. Notaries generally prioritize their employees to be instrumenter witnesses, considering that instrumenter witnesses must be known by notaries. Especially related to the trust, identity and credibility of notary employees, of course, it is difficult for notaries to get from others to be witnesses in their deeds.⁹ This can also be done if notary employees can be qualified to be witnesses as stipulated in Article 40 of UUJN-P.

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In practice, the position of the instrumenter witness is considered the same as the witness who saw and heard a witness directly. Law

enforcement officials in reality often call witnesses to search for material truth. Law enforcement officials often call witness deeds in the hope that they provide information that can later be used to be the basis of notary summons.

The summoning of instrumenter witnesses is a practice that is considered deviant because it is seen as an attempt to dismantle the secret of the notary position through the testimony of the instrumenter witness. This is considered not in accordance with Article 16 paragraph 1 letter f UUJN-P in which the notary in carrying out his office duties must keep everything about the deed he made and all information obtained for the making of the deed in accordance with the oath of office notary, unless the law determines otherwise.¹⁰

UUJN and UUJN-P do not regulate the obligations and also legal protection against the summoning of instrumenter witnesses in the trial process when there is a legal problem with the notary deed. UUJN only regulates the terms of being a witness and does not explain its legal protections. This is where there is a legal vacuum in the protection of instrumenter witnesses who should be given clear legal protection. Given the position of the instrumenter witness is important in the validity of a notary deed. Do not let a notary deed which is an authentic deed with perfect proof become a deed under the hand that can harm the parties.

This is something interesting to put forward in this article. The actions of notary employees as witnesses of this instrumenter or others who are present as witness deeds are included in the scope of notary, but it turns out that the Notary Department Act which is the only legal pay for notaries has not clearly

⁹ Hatta Isnaini Wahyu Utomo and Imam Safi'i, "Tanggung Jawab Mantan Karyawan Notaris Sebagai Saksi Aktaterhadap Kerahasiaan Akta," *Res Judicata* 2, no. 1 (2019): 216, <http://openjurnal.unmuhpnk.ac.id/index.php/RJ/article/view/1444>.

¹⁰ Habib adjie, *Op.Cit.*, 45.

regulated it.

METHOD

The type of research used is normative legal research. This research is conducted based on the main legal materials by examining theories, concepts, legal principles and laws and regulations, views, and legal doctrines related to this research, namely instrumenter witnesses.¹¹ To get information from various aspects of legal issues that is being examined in this study using the statute approach and case approach.¹²

The legal resources used consist of primary legal materials in the form of laws and regulations, secondary legal materials in the form of books, articles and scientific journals and tertiary legal materials in the form of dictionaries related to the problems in this research.¹³ Then the analytical technique used in this study is with the Prescriptive method, which is an analysis that is intended to provide arguments for the results of research that the author has done. The argument here is made by the author to provide a prescription or assessment of right or wrong or what should be legal to the facts or legal events of the results of this study.

ANALYSIS AND DISCUSSION

Position of Instrumenter Witness in Notary Deed

The existence of instrumenter witnesses in notary deeds is a requirement required by the law of the notary office. The instrumenter witness is not a party to the deed, but because

of the legal obligation of the notary position that in each deed must present the witness as a condition of the formality of the deed.¹⁴

Article 40 paragraph 3 of UUJN-P states that instrumenter witnesses must be known or introduced to notaries. Understanding is not meant that one must know familiar like a friend. Known in the juridical sense means the appointment of a person in a notary deed must be in accordance with the proof of identity of himself. Those whose identities are mentioned in notary deeds must conform as they are known in society. Known or introduced is not limited only to the identity of witnesses but also to the authority of a person to be an instrumenter witness in accordance with the conditions specified by UUJN-P.

The provisions regarding notary deed witnesses are not only limited to UUJN-P, prospective notaries who are interns are also required to be witnesses in the notary deed where they intern. In article 10 paragraph 1 of the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 25 of 2017 concerning the Notary Appointment Examination, it is stipulated that every prospective notary who interns is obliged to participate and be named as a witness at least on 20 (twenty) deeds. Prospective notary before taking the appointment exam by the Ministry of Law and Human Rights must be qualified that he has been a witness in the notary deed, it is stated through an affidavit issued by a notary at the prospective internship notary candidate.

Notaries in carrying out their job duties require the help of labor, namely notary em-

¹¹ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2011), 35.

¹² Ibid, 133.

¹³ Bahder Johan Nasution, *Metode Penelitian Ilmu Hukum* (Bandung: Mandar Maju, 2008), 87.

¹⁴ Baihaqy Prianto Adi, "Perlindungan Hukum Terhadap Saksi Instrumenter Dalam Pembuatan Akta Notaris" (Universitas Islam Indonesia, 2020), <https://dspace.uui.ac.id/handle/123456789/28278>.

ployees. There is no law that states that instrumenter witnesses must be notary employees, but in practice notaries more often use their employees as instrumenter witnesses. In the event that a notary uses its employees as instrumenter witnesses, it is based on a notary's orders as the employer assigns its employees. Notary employees can become instrumenter witnesses if they are eligible for article 40 paragraph 2 of UUJN-P. These conditions are cumulative which means that all conditions must be met so that the witness in the notary deed can be declared capable and the notary deed becomes valid as an authentic deed.

The task of notary employees is typing and planning deeds and matching the identity of the interceptors who will be mentioned in the deed before the deed is made. This is the responsibility of notary employees regarding their performance to notaries, but this is inseparable from the supervision and direction of notaries.

Based on the above description it is known that in terms of using notary employees as instrumenter witnesses is actually not the right thing. Not that it should not only be related to the independent nature or independence of a witness, the instrumenter witness is not a party to the notary deed, but a person who is considered neutral in the process of inauguration of the deed. Instrumenter witnesses who come from notary employees have a working relationship with a notary. An instrumenter witness who has a working relationship with a notary in carrying out his duties is certainly based on the will of a notary.

The position of the instrumenter witness is different from the witness in general. Witnesses are generally those who hear, see and experience for themselves an event that occurred. While the instrumenter witness is a

witness who is deliberately asked to witness a legal act committed by the parties. Examples of cases where deed witnesses are present for questioning or testimony as in civil case number 13/Pdt.G/2020/PN.Pindan civil case number 140/Pdt.G/2020/PN.BDG. In civil case Number 140/Pdt.G/2020/PN.BDG, Bandung District Court regarding the default on the sale and purchase agreement made between Hanny Untar as a buyer with Rachmat Affandi Hatadji, Tien Kartini Rachmat and Olih Darmawan Hatadji as sellers. In this case, there were two witnesses. First witness Rosmaniar Rajagukguk, SH, the witness can be judged as a witness in general where he witnessed that the buyer had transferred some money on the payment of the land price to the seller and knew the object was in dispute. While the second witness, Ati Haryati, did not know anything about the handover of money and the object of the dispute. Based on the case it can be seen that what the instrumenter witness knows is different from what the witness in general knows. Ati haryati is an instrumenter witness in PPJB deed No. 1 dated September 05, 2014 made notary Euis Komala, S.H. only domiciled as a person who witnessed the inauguration of the deed made before notary Euis Komala. In his testimony Ati Haryati only knew things related to the deed. Factually Ati haryati is not aware of the occurrence of achievements and counter-achievements of a legal act within the framework of a contractual relationship between the parties. The fulfillment of the rights and obligations of the parties is reciprocally carried out before or after the parties concerned come to the notary.

Instrumenter witnesses do not need to understand or understand the legal actions of the parties facing as contained in the contents

of the deed. Thus the instrumenter witness is not obliged to keep matters relating to the contents of the deed in his memory. But the instrumenter witness must know the formalities of the deeds that he witnessed both in the reading of the deed and the signing of the deed and the paraf carried out in case the deed is not read by a notary.

As is known that the notary deed is divided into 2 types, namely deeds made by notaries (*deeds of relaas*) and deeds made in the presence of notaries (*deeds of partij*). According to G.H.S Lumban Tobing the task of instrumenter witnesses is as long as related to the partij deed they must be present in the inauguration of the deed in the sense of reading and signing the deed.¹⁵ With their presence in the inauguration of the deed they can testify that the true formalities have been fulfilled as determined by the law, before the deed is signed by the parties, the deed is first read by a notary to the court of the court. All things in the inauguration of the deed are done by notaries and parties before witnesses.

Instrumenter witnesses in the formality of the inauguration of the deed of relaas are only limited to witnessing that the notary is present in a state that is seen or witnessed by the notary himself. For example, in a General Meeting of Shareholders (RUPS) of a limited liability company, instrumenter witnesses must ensure that a notary is present at the meeting. The instrumenter witness must witness that it is true that the deed was made by a notary and read to the witness and himself as a witness. Unlike the partij deed that must be affixed to the signature of the parties to be referred to as an authentic deed, on the deed of relaas is not a problem if the deed is signed or not by the parties, provided that the notary mentions

the basis or the reason the interceptor does not sign the deed. Notaries and instrumenter witnesses must still apply the deed of willingness, even if the parties do not sign the deed.

Basically, when the notary deed has been signed by the parties, instrumenter witnesses and notaries of the deed are not allowed for any more changes. When the notary learns that there is a typing error in the signed deed, the notary on his own initiative can make a deed of news of the correcting event in accordance with the provisions stipulated in article 51 of UJN-P. Correction to typos in the deed of agreement is kasuistic which means that a correction attempt is not always applicable. The making of the deed of news of the correction event must be done in front of the parties and witnesses of the instrumenter.

The witness in the deed of the correcting event does not have to be the same as the witness at the beginning of the deed, but it would be nice if the witness is the same person. This is so that when in the future the correction turns out to be unacceptable by one of the parties, the instrumenter witness can corroborate the notary's statement that the correction has been in accordance with what should be. The function of the instrumenter witness on the making of the deed of news of the correction event is only as a formality of the terms of article 51 paragraph 2 UJN-P has been fulfilled. Regarding the truth of the content of the correction in the deed is the responsibility of the notary.¹⁶ One of the points of thought in the law-making of notary positions is about certainty, order, and legal protection of authentic written evidence of deeds, agreements, determinations, and legal events made before or by a notary. The point of thought through the theory of legal certainty analyzes that the

¹⁵ G.H.S Lumban Tobing, *Op.Cit.*, 169.

¹⁶ Habib Adjie II, *Op.Cit.*, 113.

position of the instrumenter witness required to be on the notary deed serves to maintain the validity and authenticity of the notary deed. Considering that based on article 41 UUJN-P if the condition of the instrumenter witness is violated will have legal consequences, what happens is the degradation of the proof of the deed. Notary deeds are required to be able to guarantee legal certainty about a legal act that can basically be recognized as true and has been in accordance with the terms of formality and form specified by law.

Against notary deeds the position of instrumenter witnesses is only limited to the formalities of the deed only. The content of the notary deed is the responsibility of the notary and the parties to the deed. Notaries must understand the contents and clauses in the deed and must be known by the parties. When there is a dispute against the notary deed, the instrumenter witness only gives a statement to the extent of the formality of the deed.

Confidentiality to notary deeds because there are personal rights of a person, personal rights related to the position of a person in conducting affairs that should not be interfered with by others who have no interest. Notary deeds must be kept confidential because in addition to the State an archive in the deed contains personal data, wishes and statements of the parties. Information of a personal nature is very important to keep confidential because the confidentiality of personal information concerns the honor and dignity of a person recognized as a human right.¹⁷ In article 17 letter g of Law No. 14 of 2008

on Public Information Disclosure passed on April 30, 2008 stipulated that one of the information that is excluded to be opened is “*Public information that if the information is opened can reveal the contents of authentic deeds of a personal nature and the last will of a person or one’s will.*” Furthermore, in article 54 paragraph 1 of the Law on the disclosure of public information they deliberately without the right to provide information that is excluded as stipulated in article 17 letter g, the person can be punished with a maximum prison term of 2 (two) years and a maximum fine of Rp. 10,000,000,- (ten million rupiah).

Based on these provisions, notary employees who are witnesses in a deed are also obliged to participate in confidentializing the contents of the notary deed which is an authentic deed. Notary employees should not divulge the contents or information obtained in the process of making a deed because it violates the provisions of article 54 paragraphs 1 of the Public Information Disclosure Act. Notary employees do not have the right to provide such information to anyone relating to a person’s personal data.

Based on this, the position of the instrumenter witness in terms of the obligation to keep the contents of the deed secret is seen as a legal uncertainty. Instrumenter witnesses who are present at the inauguration of the deed certainly know the contents of the deed and the identity of the parties, although the instrumenter witness is not required to understand and understand the contents of the deed. Instrumenter witnesses who have an important role in the process of making deeds should also have an obligation to keep the deeds they signed secret. UUJN-P does not expressly stipulate that instrumenter witnesses also have an obligation to keep the con-

¹⁷ Liva Irawan, Zainul Daulay, and Beatrix Benni, “The Legal Position of the Instrumenter Witness in Relation to the Confidentiality of a Notarial Deed,” *International Journal of Multicultural and Multireligious Understanding* 6 (2019): 165, <https://ijmmu.com/index.php/ijmmu/article/view/938>.

tents of the deed secret. On the other hand, it is stipulated in article 16A paragraph 2 of UUJN-P that prospective notaries who are instrumenting are required to keep the contents of the deed and all information obtained.

The non-regulation of the obligation of instrumenter witnesses to keep the contents of the deed secret both in UUJN-P and in the notary code of ethics causes harm to notaries and instrumenter witnesses themselves. Instrumenter witnesses who do not have an obligation to keep the contents of the deed confidential are easier to be questioned in relation to the notary deed either by third parties or by the authorities. The summoning of instrumenter witnesses by any party resulted in the opening of information related to the deed, this is because there is no legal certainty about it.

Habib Adjie argued that the position of the instrumenter witness who participated in the inauguration of the notary deed, then against the instrumenter witness must still carry out the obligation to keep the contents and all information obtained in the inauguration of the deed. This obligation is attached until the last breath or breath.¹⁸

The role of instrumenter witnesses in any notary deed making is still necessary because the existence of instrumenter witnesses in addition to serving as evidence can also help the position of a notary become safe in the event that the deed made by a notary is contested by one of the parties to the deed or a third party.¹⁹

According to Satjipto Raharjo to regulate all the desires that exist in society towards an interest, can only be done by limiting the interests of others. So notaries and instrumenter

witnesses are obliged to keep the contents of the deed secret in order to protect the interests of the parties in the otaris deed.²⁰

Legal Protection of Instrumental Witnesses If There Is a Problem with Notary Deed

According to Soetiono, legal protection is an act or action to provide protection to individuals in society as legal subjects of arbitrary members of other communities and/or the State to realize order and tranquility so as to allow humans to enjoy their dignity.²¹

The protection of instrumenter witnesses is inseparable from the important role of notaries. According to philipus M Hadjon's theory of legal protection, the means of protection are divided into two, which are preventive and repressive. The role of notaries in terms of preventive legal protection is to always be careful in carrying out their duties in order to prevent disputes both civilly and criminally. Repressive legal protection includes understanding that must be had in the legal settlement in court, as well as providing direction to instrumenter witnesses when dealing with the process of investigation or trial on cases involving notary deeds. Notaries are required to have the principle of prudence and understanding of all legal settlement processes because their duties are in the interests of many communities.

The witnesses presented related to the issue of notary deeds are inseparable from notaries

¹⁸ Habib Adjie II, *Op.Cit.*, 185.

¹⁹ G.H.S Lumbang Tobing, *Peraturan Jabatan Notaris* (Jakarta, Erlangga, 1983), 170.

²⁰ Puteri Chintami Oktavianti, "Kedudukan Saksi Instrumenter Dalam Merahasiakan Akta Otentik Dan Perlindungan Hukum Bagi Saksi Instrumenter," *Syntax Literate: Jurnal Ilmiah Indonesia* 6, no. 5 (2021): 2413, <https://jurnal.syntaxliterate.co.id/index.php/syntax-literate/article/view/2720>.

²¹ Soetiono, "Rule of Law (Supremasi Hukum)" (Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret, 2004),3

and instrumenter witnesses. Legal protection is given to the notary in carrying out his duties as a general official which by law is given and entrusted to him. Notaries are protected by the Honorary Assembly of Notary Territories (MKNW) when subject to discrimination treatment by certain parties in relation to the deeds it makes. This is in accordance with the sound of article 66 of UUJN-P, namely:

- (1) For the benefit of judicial proceedings, investigators, public prosecutors, or judges with the approval of the honorary notary assembly authorized:
 - a. Take photocopies of minuta deeds and/or letters attached to minuta deeds or notary protocols in notary storage; and
 - b. Call a notary to be present in an examination relating to a deed or notary protocol that is in the custody of a notary.
- (2) Taking photocopies of minuta deeds or letters as referred to in paragraph (1) letter a, then made news of the submission event.
- (3) The Honorary Assembly of the Notary within a maximum of 30 (thirty) working days from the receipt of the letter of approval as referred to in paragraph (1) shall provide an answer accepting or rejecting the request for approval.
- (4) In the event that the honorary assembly of the Notary does not provide an answer within the time frame referred to in paragraph (3), the honorary assembly of the Notary shall be deemed to receive a request for approval..

Examination of notaries or deeds made at the request of investigators, public prosecutors or judges in the judicial process requires an assessment from the MKNW. The

MKNW's decision does not allow a notary to be examined based on the assessment that the notary concerned in making the deed is in accordance with the correct procedures under the notary office law. It is interpreted that the deed made by or before a notary has fulfilled the power of external, formil and material proof.

Notary in carrying out the duties of his office has an obligation to keep matters confidential related to the deed, for his obligations the notary has the right to disbeliement. The right of denial is an exception to the legal provision that states that those who are able to testify are obliged to testify before the court, both in civil and criminal proceedings.²² The existence of such disbeliement rights becomes legal protection for notaries if called to be witnesses in the trial.

In practice when a notary exercised his or her disbelial rights or a notary was not allowed by the MKNW to testify, in an attempt to obtain information usually the one called was an instrumenter witness simply because his name was listed at the end of the deed. In practice, there is often information obtained from instrumenter witnesses as a basis to be able to examine notaries.

For example the case in case Number 13/Pdt.G/2020/PN.Pinrang, District Court Class II Pinrang. This case is an act of default that the defendants take to the plaintiff, in the event that the defendants have not completed their obligations for revenue-sharing payments and capital returns. In that case Muhammad Sappedan Nawahida was an employee of notary Muhammad Tahir, SH. In the case, the plaintiff presented Muhammad

²² Sjaifurrachman dan Habib Adjie, *Aspek Tanggung Jawab Notaris Dalam Pembuatan Akta*. (Bandung: Mandar Maju, 2011),253.

Sapped and Nawahida to be witnesses at the trial. Muhammad Tahir, SH clearly received protection not to be a witness in the case. While the two employees who are instrumenter witnesses become witnesses in the trial because they do not have the same protection as the notary in carrying out his position. Muhammad Sapped and Nawahida's position is as an instrumenter witness in the Deed of Cooperation Agreement No. 32 dated August 16, 2016. With these conditions, instrumenter witnesses who are only limited to the formality of the deed feel pressured because they give testimony that is not their responsibility.

With the instrumenter witness certainly benefits the notary if there is a legal problem with the deed he made. Instrumenter witnesses in the trial can always explain about the process of inauguration of notary deeds that have been signed by the court, while in providing information about the material of the deed of the instrumenter witness is usually unable to explain on the basis of not knowing or not understanding. This is certainly in addition to because there is no responsibility of the instrumenter witness to understand the contents of the deed, but also because of the obligation of the instrumenter witness to keep the contents of the deed secret. According to article 1908 of the Civil Code, judges in considering a value of testimony are required to pay attention to the similarities between the testimony of witnesses with other witnesses, similarities about the testimony with what is known from other sources about the case, the reasons that encourage witnesses to give their testimony on the way of life, decency and position of witnesses and all something that can affect the trust in witnesses.

In civil courts in Indonesia the truth that is to be achieved and realized by the judge is the

truth formiil (*formeel waarheid*). Basically it is not forbidden for judges to seek and find material truth, but if material truth is not found then the judge is allowed by law to make a decision based on the truth formil.²³ The summoning of witnesses is one of the judge's efforts to find the truth formilya that the truth is based on the tools of evidence, considering that a witness is a person who witnessed an event himself, someone who will give an explanation in the trial for the benefit of all parties involved in the case.

In article 140 HIR it is explained that a person who is called to the trial is then obliged to testify, against which will be sanctioned to pay the costs that have been incurred if they do not fulfill the call. On the other hand in article 142 HIR explains that "*if the witness who does not come to fulfill the call makes it clear that he cannot fulfill the call for legitimate reasons, then after explaining this, the district court is obliged to remove the sentence imposed on him*". Furthermore, in article 143 of HIR it is stated that anyone should not be forced to testify before the trial in a civil case, if the witness is domiciled or residing outside the area of the examined district court.

Yahya Harahap argues in his book that against witnesses domiciled outside the territory of the district court that examines then the legal obligation is not imperative, meaning that being a witness in a civil case is a legal obligation but it is not imperative related to everything when the witness cannot confirm the proposition or objection then there is no obligation to testify. Whereas when witnesses reside outside the district court area that examines them can not be sanctioned for

²³ M. Yahya Harahap, *Hukum Acara Perdata: Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan*, (Jakarta: Sinar Grafika), 499.

their death or examination of his testimony can be devolved to the court of the country where he lives.²⁴

Legal obligations are assigned to every capable person to testify before the trial. When called in court for his testimony, the position of the instrumenter witness is no longer a witness in the deed which only confirms the formality of the inauguration of the deed, but has become a witness in general giving testimony about a dispute involving a notary deed. In these conditions the instrumenter witness in the trial only gives testimony to the extent of his responsibility in carrying out his duties ordered by the notary.

Instrumenter witnesses in legal matters related to notary deeds are often used as witnesses in both civil and criminal cases. Seeing the legal protection of instrumenter witnesses is certainly not only encouraged to UUJN-P alone because there is no article in the law that explains the protection of instrumenter witnesses. To provide protection to instrumenter witnesses who become witnesses in the judiciary, other laws such as Law No. 31 of 2014 on Amendments to Law No. 13 of 2006 on Protection of Witnesses and Victims were passed in Jakarta on October 17, 2014.

In article 1 number 5 of the Witness and Victim Protection Act states that this protection is provided through the Witness and Victim Protection Agency (LPSK). Article 5 of the Protection of Witnesses and Victims Act describes the rights of witnesses, namely:

- a. Obtain protection for the security of his personal, family, and property, and be free from threats relating to the testimony which he will, is, or has given; This protection is the main protection, even if needed witnesses can be placed in an un-

disclosed location;

- b. Participate in the process of selecting and determining the form of security protection and support;
- c. Provide information without pressure;
- d. Get a translator;
- e. Free from questions that ensnare;
- f. Get information about the development of the case;
- g. Get information about the court's decision;
- h. Get information in the event that the convict is released;
- i. Kept his identity secret, etc.

Furthermore, in article 10 paragraph 1 of the Witness and Victim Protection Act it is mentioned that witnesses who testify at trial cannot be prosecuted against the testimony or reports given either criminally or civilly, unless the testimony submitted has bad faith such as giving false testimony and perjury.

Legal protection will be provided to witnesses if LPSK approves the application in writing given by the witness, along with a signed affidavit to follow the terms and conditions in providing protection to witnesses. Witnesses must be willing to obey the rules relating to their safety to testify in the judicial process.

In article 12A paragraph 1 of the Law on the Protection of Witnesses and Victims in carrying out their duties LPSK is authorized to:

1. Requesting oral and/or written information from the applicant and other parties related to the application, the other party intended is law enforcement or the witness family;
2. Review the relevant information, letters, and/or documents to obtain the truth of the request;
3. Request a copy or photocopy of the letter

²⁴ *Ibid*, 625.

and/or related documents needed from any agency to examine the applicant's report in accordance with the provisions of the laws and regulations;

4. Request information on case developments from law enforcement;
5. Change the identity of witnesses in accordance with the provisions of the laws and regulations, and so on.

The protection of witnesses according to this law applies also to the interests of instrumenter witnesses or deed witnesses who are called to be witnesses in the trial related to deeds made by notaries although instrumenter witnesses who in their understanding are witnesses who witness the inauguration of a notary deed, not witnesses who witness themselves or experience a criminal incident themselves.

So actually in this case what needs to be regulated in a provision or law is the rules regarding the protection of witnesses instrumenter. Because it relates to the creation and reading of notary deeds, it is appropriate that the protection of instrumenter witnesses, the majority of whom are notary employees, is regulated in the law of the notary office which is explained the need or absence of an instrumenter witness to testify about a criminal act on a notary deed, even though their function is only as a witness who witnessed the inauguration of a deed.²⁵

CONCLUSION

The position of the instrumenter witness in a notary deed is a requirement required by the

law of the notary department. There is no law that states that instrumenter witnesses must be notary employees, nor is there a prohibition on using people who have a working relationship with notaries such as employees. So that legally there is no harm if in practice the notary more often uses his employees as instrumenter witnesses when making a notary deed to meet the formality requirements of a deed as in the case that has been outlined earlier, namely in civil case number 13/Pdt.G/2020/PN. Pinrang civil case Number 140/Pdt.G/2020/PN.BDG. However, instrumenter witnesses are still required to carry out the obligation to keep the contents and all information obtained in the inauguration of the deed.

The protection of instrumenter witnesses is inseparable from the important role of notaries. In general, the law on the protection of witnesses and victims has provided legal protection for witnesses including instrumenter witnesses, but the law is not sufficient and provides legal protection for instrumenter witnesses because of its different nature to witnesses in general. Thus in the future a law (*ius constituendum*) is needed with a philosophical foundation that protects specifically the rights and obligations and positions and limitations of the responsibilities of instrumenter witnesses who are mostly currently notary employees in the event of later legal problems on notary deeds, both civil and criminal law issues.

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²⁵ Hendra Jonathan Sibuea, "Instrumenter Witness In Making Notarial Deeds," *South East Asia Journal of Contemporary Business, Economics and Law* 19, no. 4 (2019): 17, https://seajbel.com/wp-content/uploads/2019/10/LAW_250.pdf.

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