

Notary's Evidentiary Position In Court Proceedings Without The Approval Of The Regional Honor Council

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Abstract

Every Notary who gets a summons from an Investigator or other legal apparatus cannot be summoned just like that, because Notaries are different from the general public. In terms of summoning a Notary to be a witness and provide information on the alleged criminal offense related to the deed he made is not easy. This research uses normative research methods. The evidentiary power of notary testimony examined without Notary Regional Honorary Council (MKNW) approval creates juridical dualism between formal and material validity. Although the Minutes of Examination (BAP) is still recognized as a letter of evidence based on Section 184 of the Criminal Procedure Code, its status drops to an underhand deed with free evidentiary power (vrij bewijs) which depends on the judge's assessment. In the event that a Notary provides testimony without Notary Regional Honorary Council (MKNW) approval in the judicial process, there are legal risks that can impact the validity of the evidence submitted. In criminal court, a Notary's statement given without MKNW's approval can be considered legally flawed, thus potentially cannot be used as valid evidence. In addition, Notaries who provide testimony without approval may face administrative sanctions from the MPN, including revocation of their license to practice or other disciplinary measures. Meanwhile, in civil court, notarial testimony given without approval can lead to legal disputes regarding the validity of the deed made, which in turn can harm interested parties in the legal transaction. MKNW's approval is crucial in the process of Notary examination by the Investigator because it serves as a mechanism for legal protection and ethics of the notary profession. This approval ensures that the examination is conducted in accordance with the provisions of Section 66 Verse (1) of Notary Law, which stipulates that the summoning and examination of Notaries must be authorized by MKNW in order to maintain the integrity of the deed and the confidentiality of the Notary profession as a Public Official. Thus, MKNW acts as a supervisory institution that ensures that the investigation process does not violate the rights and obligations of notaries and maintains that the deeds made still have legal validity.

Keywords: Notary, Evidence, Judicial Process, Notary Honor Council.

INTRODUCTION

With the enactment of the UUJN, the roles and responsibilities of Notary are further clarified and strengthened, making Notary a figure in maintaining integrity and having legal legitimacy in the community. To date, Notaries in Indonesia continue to play a vital role in social and economic life, providing legal guarantees for transactions, properties, and agreements, and contributing to national development through securing assets and ownership. Notary is one (1) component of the legal profession whose role is very large for the government, as a Public Official, Notary is authorized by the state to prepare authentic deeds and help ensure legal certainty in the community. In carrying out their duties, a Notary must comply with laws and regulations as well as obey the oath of office that was sworn in when they were inaugurated. Maintaining the confidentiality of the position, especially regarding the contents of deeds and information obtained during the performance of duties, is one of the main obligations that must be upheld. (Pengurus Pusat Ikatan Notaris Indonesia, 2020)

Notaries in Indonesia have status as Public Officials, which means they are authorized by the state to carry out certain tasks related to the making of authentic deeds and other documents that have legal force, as Public Officials Notaries have several important roles. Notaries have the authority to make authentic deeds that have perfect evidentiary power about what is recorded in them. (Habib Adjie, 2023) This authentic deed becomes strong evidence in court. Notaries ensure

that all agreements and transactions stated in the deed are in accordance with applicable legal provisions. Notaries are required to act neutrally and impartially, so as to safeguard the interests of all parties involved in the transaction. Notaries are required to document every important agreement such as the sale and purchase of property, company establishment, and wills.

The Authority and Responsibility of Notaries as Public Officials, Notaries must ensure that every deed made is in accordance with applicable law and does not violate statutory regulations. Notaries also play a role in providing legal consultation to their clients regarding agreements and transactions to be carried out. Notaries are responsible for keeping the original documents of the deeds made and providing certified copies to interested parties. With such roles and functions, Notaries as Public Officials contribute significantly in maintaining legal certainty and preventing disputes in the community.

Based on Indonesia Civil Code Section 1868, An authentic deed is a deed that is drawn up in the form specified by law or drawn up before a notary. An authentic deed has much greater probative value than a private deed. An authentic deed has external, formal, and material probative value. (R. Subekti, 1976) Notaries, through the authentic deeds they draw up, are able to provide legal protection to the parties who create these authentic deeds because authentic deeds have evidentiary value in court proceedings. Authentic deeds are considered to provide legal certainty and validity to the agreements they contain, so that the parties to the deed feel more secure legally.

Notaries play a role in creating transparency and public trust in the legal process. The presence of a Notary as a neutral and independent party provides confidence to the public that the legal transaction process is conducted honestly, fairly, and in accordance with applicable laws. This contributes to increased public trust in the legal system as a whole. Notaries can also play a role in dispute resolution and mediation. In some cases, they can act as mediators who help the parties involved in a dispute reach an amicable agreement and avoid a longer and costly judicial process. The existence of a Notary as a neutral party.

Section 16 Verse (1) letter f, Act Number 2 Year 2014 on the Amendment to Act Number 30 Year 2004 about Notary states that “In exercising their authority, notaries have an obligation to keep confidential all matters relating to deeds in accordance with their oath and pledge of office, unless otherwise specified by law”. As otherwise specified by the Anti-Money Laundering Law, exceptions to this confidentiality are made so that notaries do not become a refuge for perpetrators of money laundering.

Therefore, the Notary is obliged to maintain the confidentiality of all contents of the deed for which he is responsible, as well as all information he receives related to the deed based on his oath or promise of office, unless there are other provisions regulated by law. On the one hand, information from a Notary is needed for the clarity of a criminal case. But on the other hand, the Notary must maintain the confidentiality of the deeds he makes. If a Notary divulges the secret of his/her office, he/she may be subject to criminal sanctions, in accordance with KUHAP Section 322 Verse (1): “Any person who with deliberate intent discloses a secret, which by virtue of his office or profession, present or former, he is obliged to keep, shall be punished by a maximum imprisonment of nine months or a maximum fine of six hundred rupiahs.”

It can be concluded that the contribution of Notaries in the legal system is very important. They play a role in protecting the interests of the public and the parties involved in legal transactions. By ensuring the creation of accurate and valid authentic deeds, verifying documents and identities, and providing legal protection, Notaries create vital legal certainty for society.

Every Notary who gets a summons from an Investigator or other legal apparatus cannot be summoned just like that, because Notaries are different from the general public. In terms of summoning a Notary to be a witness and provide information on the alleged criminal acts related to the deed he made, it is not easy, as stated above that Notaries are Public Officials who are protected by law in carrying out their positions, in this case the UUJN where Notaries have an

organization of the Notary Honor Council (MKN) which has the authority to reject requests from law enforcement to take protocols from Notaries and summon Notaries for the benefit of investigations and judicial proceedings.

Regarding the many legal events that make Notaries summoned by Law Enforcement Officers to serve as witnesses and provide information to the authorities related to the deed they made, Notaries as Public Officials need to obtain prior approval from the authorized agency in the event that they will disclose the secrets of the deed they made, according to Indonesia Procedure of Criminal Code Section 43 stipulated that: *With regard to letters that are required by law to be kept confidential, as long as they do not relate to state secrets, the seizure of such documents may be carried out with the approval of the Chief Justice, unless otherwise specified by law.*”

Delfit's research (2024) explains that the regulation of the authority of police investigators to summon notaries as witnesses in criminal cases stipulates that the summoning of notaries to provide information or submit notarial protocols in criminal cases must obtain approval from the Regional Supervisory Council (MPD) or the Head of the District Court. The presence of a notary as a witness is important, especially if the MKN has given approval for the examination of the notary because even though a copy of the notarial deed is a representation/proxy of the notary who made it, meaning that the investigator who has a copy of the deed is sufficient without the presence of the notary as a witness, the presence of the notary can make everything clear. The legal significance of the presence of a notary as a witness at trial is, first, to fulfill their obligations as citizens both professionally and personally because, in principle, everyone must obey the law without exception; no one is immune from the law or has immunity, including notaries.

Legal certainty in the authority of police investigators to summon notaries as witnesses in criminal cases should be able to meet the needs of effective law enforcement without neglecting the protection of notaries. This can be achieved through several improvements. First, better synergy is needed between the UUJN and the Criminal Procedure Code (KUHAP) to ensure faster and simpler procedures without reducing accountability. Second, the MPD, as the institution authorized to give approval, should have clear operational guidelines and strict deadlines for making decisions so as not to hinder the investigation process.

Those who are obliged by law to keep it confidential according to this Section can be interpreted as one of them is Notary and with their approval referred to in this Section can be interpreted as approval from MKN, while according to the law referred to in this Section is interpreted as UUJN. In the event that there is an invitation to a Notary made by a Legal Apparatus requesting the Notary to be present as a witness to provide information or submit a copy of the deed made by the Notary, then for this purpose based on Section 66 Verse (1) of UUJN, the party authorized to give approval to the Notary to be questioned and provide a copy of the deed he has made is MKN, in this case MKNW, which has the task of examining requests submitted by Investigating Legal Apparatus, Public Prosecutors, or Judges. They are also responsible for approving or rejecting requests for photocopying the Minute of Deed and summoning Notaries to appear in the investigation and judicial process.

However, in practice there are still cases where Investigators invite Notaries without first obtaining approval from MKNW. This raises a number of issues, such as the possible violation of the Notary's rights, disruption to the Investigation process, and legal uncertainty regarding the status of the Notary's examination. The dilemma between the obligation of confidentiality and the interests of the judiciary is something that must be faced by the Notary when he is asked to be a witness or provide deeds/documents that he has made.

RESEARCH METHODS

This study will focus on research that explores the objectives, values, and legal compliance based on the concepts and legal norms applicable in Indonesia. This study uses the normative legal research method, which aims to identify legal events from the perspective of legislation in order to answer questions about the legal phenomena being studied. (Peter M. Marzuki, 2023)

The normative approach is used to examine law as a system of norms, making it particularly appropriate for assessing the legality and procedures governing the summoning of notaries in judicial proceedings. In this study, the data collection technique used was library research, which is the collection of data sourced from secondary legal materials such as legislation, legal literature, court decisions, scientific journals, and other legal documents relevant to the issues under study

RESULT AND DISCUSSION

In the Indonesian criminal procedure system, every piece of evidence presented in the judicial process must meet both material and formal legal requirements. (Andy Sofyan, 2014) A Notary's statement requested in capacity as a civil servant has distinctive characteristics because the Notary is bound by the obligation to keep the secrets of the office. When investigators summon a Notary to provide testimony without going through the approval mechanism from MKNW, questions arise regarding the formal validity of the testimony, as well as its impact on the strength of evidence in the criminal process and in criminal trials.

Notarial statements obtained without going through the procedures specified in Section 66 of the UUJN, normatively contain procedural defects. The provision explicitly states that Notaries can only be summoned by law enforcement officials after obtaining approval from MKNW. This provision is not only administrative in nature, but is a form of constitutional protection for the Notary profession that performs a public function. Thus, if the statement is given without this mechanism, the strength of the evidence can be considered formally weak. (Irfan Iryadi, 2020)

Theoretically, the reading of the validity of a legal norm must be placed in a hierarchical legal structure. Hans Kelsen, in his *Stufenbau des Recht* (hierarchical structure of law) This theory explains that every legal norm derives its legitimacy from a higher norm, until it reaches the basic norm or *Grundnorm*, which forms the foundation of a country's legal system. (Anders Wedberg, 1945) In the Indonesian legal system, the hierarchy of laws has been explicitly regulated in Act Number 12 Year 2011 about Enactment of Laws. (Karisna Mega Pasha, 2023) Therefore, Notary Law is on the same level as KUHAP in the hierarchy of legislation, having the same binding force. (Jimly Asshiddiqie, 2010)

The application of Hans Kelsen's *Stufenbau* theory shows that KUHAP and UUJN are not 2 (two) conflicting legal instruments, but instead must be understood as 1 (one) normative system that is tiered and complementary. In this framework, KUHAP provides general authority to investigators, (Yahya Harahap, 2015) while the UUJN establishes a special exception for the Notary profession. The principle of *lex specialis derogat lex generali* operates in parallel with Kelsen's theory of hierarchy of norms, where the special norms in the UUJN apply to specific cases without negating the applicability of the general norms in the KUHAP. (Anders Wedberg, 1945)

When a Notary is summoned without the approval of MKNW, the action undermines the hierarchical system of legal norms that should be upheld. Consequently, the testimony given

under these conditions can be categorized as evidence obtained by unlawful procedures (unlawful evidence), which has implications for invalidity in the judicial process. In judicial practice, this can be used as a basis for objection by the defendant's legal counsel, because it violates formal procedures that are binding. This is in line with the exclusionary rule doctrine in evidentiary law, namely that evidence obtained illegally cannot be used in court. (Marfuatul Latifah, 2021)

In criminal procedure law, the validity of evidence is not only seen from its content, but also from the way it is obtained. Summoning a Notary without following the procedures in the UUJN has the potential to harm the principle of fair trial as recognized in the constitution and human rights principles. Notaries are not just ordinary witnesses, but public officials who have a constitutional mandate to provide reliable legal services. If they are summoned arbitrarily, public trust in the legal system could be eroded. (Sudikno Mertokusumo, 2013)

On the other hand, even if the Notary provides information voluntarily without MKNW approval, it still does not remove the formal obligation of the investigator to follow the applicable legal procedures. In Stufenbau theory, procedure is an integral part of the validity of norms. Non-compliance with the norms in the UUJN makes the summoning action incompatible with the legal structure. Therefore, the existence of MKNW as a formal prerequisite is not a barrier, but rather a complement to the legitimacy of legal actions against Notaries.

When investigators ignore the approval provisions of the MKNW, they also indirectly ignore the validity of norms that have equal status with the Criminal Procedure Code. This is not only an ethical and administrative issue, but can also create a bad precedent for the integrity of the national criminal law system. Information generated from procedurally flawed actions has the potential to cause legal uncertainty, both for the judicial process and for the Notary concerned.

By considering Kelsen's theory of legal hierarchy and the principle of due process of law, the evidentiary power of Notary testimony in criminal proceedings is highly dependent on compliance with the summoning procedure. Formal legality is an absolute requirement for material validity. Therefore, every investigator is obliged to comply with the procedure of requesting approval from MKNW before summoning a Notary, in order to maintain the legal force of the testimony provided and ensure validity in the judicial process.

Thus, the analysis of the strength of evidence of Notary testimony in summoning without MKNW approval cannot be separated from a hierarchical and logical legal framework. Hans Kelsen's Stufenbau theory is the basis for the argument that the norm on the protection of Notaries is not an additional or complementary norm, but a legitimate part of the national legal system that has a structural function in maintaining the attachment and justice of Indonesian criminal procedure law.

Providing information by a Notary whose summons is made without obtaining approval from MKNW may result in sanctions for the Notary and may pose a legal risk. The responsibility of a Notary includes aspects of civil (compensation), criminal (legal sanctions), administrative (license revocation), and compliance with the professional code of ethics. If a Notary violates the code of ethics by committing unlawful acts, the juridical consequences include non-compliance with UUJN standards, resulting in the practice of the profession being considered deviant. The risk of material/non-material loss for both the Notary himself and the parties who entrust legal matters to him.

Examining a Notary without MKNW's permission violates the procedural provisions that must be fulfilled. Examination without MKNW's permission can raise doubts about the validity of the examination process and its results, although it does not automatically cancel the entire ongoing legal process but has the potential to cause legal problems with the validity of the examination and BAP, as well as open the possibility of administrative sanctions from the Notary Supervisory Council. However, there are no specific criminal sanctions for this offense, so legal protection and administrative dispute resolution mechanisms are very important. Evidence must be legally valid in order to form the basis for a strong decision, namely witness testimony,

experts, letters, instructions, and testimony of the defendant in accordance with Section 184 of the Criminal Procedure Code.

However, in practice, evidence obtained illegally (for example through unlawful procedures) is not automatically invalidated or cannot be presented at trial, it can still be used but its evidentiary strength is weakened. Judges have the freedom to assess the strength of evidence (free and relative proof system). This means that evidence obtained illegally can still be considered if it supports the main facts and is supported by other valid evidence. However, usually the evidentiary strength of unauthorized evidence is lower and can be the object of a pretrial objection or lawsuit. In the criminal evidence system, the principle of *unus testis nullus testis* applies, which states that the testimony of one witness is not enough to be used as valid evidence. Therefore, a defendant can only be sentenced if his/her guilt has been proven conclusively through a minimum of two valid and mutually supporting pieces of evidence. This principle aims to ensure accuracy and fairness in the criminal justice process, and prevent verdicts based on a single piece of unverified evidence. (M. Yahya Harahap, 2001)

According to Section 184 Verse (1) of KUHAP, the evidentiary system in criminal cases in Indonesia recognizes five types of valid evidence, namely: a) witness testimony; b) expert testimony; c) letters; d) clues; and e) testimony of the defendant. These five pieces of evidence are the basis for the judge to build confidence in the occurrence of a criminal offense and the defendant's involvement in the incident.

The legal requirements for a person to be categorized as a witness are explained in Section 1 point 27 of the Criminal Procedure Code, which states that witness testimony is evidence in the form of a statement regarding a criminal event that he himself heard, saw, and experienced, accompanied by the reasons underlying his knowledge. This provision emphasizes that testimony must be direct and based on personal experience, not just opinions or information from other parties (*testimonium de auditu*). (Suryono Sutarto, 2004)

Meanwhile, the definition of expert testimony is regulated in Section 1 point 28 of KUHAP, which states that expert testimony is a statement given by a person who has special expertise in a particular field, which is needed to clarify a criminal case in the context of examination. This statement can be given both in the investigation stage and in court, and must be based on professional competence and an oath of office.

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Thus, both witness testimony and expert testimony have an important role in the criminal evidentiary process, but each is subject to different formal and substantial requirements. Witness testimony focuses on direct experience of criminal events, while expert testimony focuses on analysis and interpretation based on technical or scientific expertise.

In the criminal evidence system according to KUHAP, evidence in the form of letters is regulated in detail in Section 187, as an elaboration of Section 184 Verse (1) letter c. Letters as evidence must be made under oath or reinforced by oath in order to have valid evidentiary power. The types of letters referred to include: a) Minutes and other official letters made by or in the presence of an authorized official, which contain information about events or circumstances experienced, seen, or heard directly by the official, accompanied by clear and firm reasons for the information; b) Letters made based on statutory provisions, or letters prepared by public officials regarding matters included in the procedures for which they are responsible, and are intended as a means of proving a legal situation or event; c) A letter from an expert, which contains an opinion based on special expertise that is officially requested, regarding a matter or situation that is relevant to the criminal case being examined; d) Other letters, which can only be

used as evidence if they have a substantial relationship with the contents of other evidence that has been legally recognized in the judicial process. (Suryono Sutarto, 2004)

The evidentiary power of Notary testimony examined without MKNW approval creates juridical dualism between formal and material validity. Although the Minutes of Examination (BAP) is still recognized as a letter evidence based on Indonesia Procedure of Criminal Code Section 184, its status drops to a Private Covenant with weaker evidentiary weight (*vrij bewijs*) which depends on the judge's assessment. In the event that a Notary provides testimony without MKNW approval in the judicial process, there are legal risks that can impact the validity of the evidence submitted. In criminal court, notarial testimony given without MKNW approval can be considered legally flawed, so it potentially cannot be used as valid evidence. In addition, notaries who provide statements without approval may face administrative sanctions from the MPN, including revocation of their license to practice or other disciplinary measures. Meanwhile, in civil court, notarial statements given without approval can lead to legal disputes regarding the validity of the deed made, which in turn can harm interested parties in the legal transaction.

MKNW approval is crucial in the process of Notary examination by Investigators because it serves as a mechanism for legal protection and ethics of the notary profession. This approval ensures that the examination is conducted in accordance with the provisions of Section 66 Verse (1) of UUJN, which stipulates that the summoning and examination of Notaries must be authorized by MKNW in order to maintain the integrity of the deed and the confidentiality of the Notary profession as a Public Official. Thus, MKNW acts as a supervisory institution that ensures that the investigation process does not violate the rights and obligations of notaries and maintains that the deeds made still have legal validity.

CONCLUSION

The strength of proof of Notarial statements examined without the approval of the Notary Regional Honorary Council (MKNW) creates a juridical dualism between formal and material validity. Although the minutes of examination (BAP) are still recognized as evidence of the letter under Section 184 of the Criminal Procedure Code, its status has decreased to a deed under the hand with the power of free proof (*Vrij bewijs*) which depends on the judge's assessment. In the event that the notary provides information without the approval of the MKNW in the judicial process, there are legal risks that can have an impact on the validity of the evidence submitted. In criminal justice, notarial testimony provided without the consent of the MKNW can be considered legally flawed, making it potentially unusable as valid evidence. In addition, notaries who provide information without consent may face administrative sanctions from the MPN, including revocation of a license to practice or other disciplinary action.

Meanwhile, in civil justice, notarial information provided without consent can lead to legal disputes related to the validity of the deed, which in turn can harm the interested parties in the legal transaction. MKNW approval is very crucial in the process of Notary examination by investigators because it serves as a mechanism for legal protection and professional ethics of notaries. This agreement ensures that the examination is carried out in accordance with the provisions of Section 66 Verse (1) UUJN, which regulates that the summons and examination of Notaries must go through mknw permission in order to maintain the integrity of the deed and the confidentiality of the notary profession as a public official. Thus, MKNW acts as a supervisory institution that ensures that the investigation process does not violate the rights and obligations of notaries and keeps the deed drawn up in legal force.

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