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Responsibility of Notary for Registered Private Deed in the Perspective of Law of Evidence

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ABSTRAK

In public life, there is a relationship between one party and another which will involve rights and obligations, which will lead to many violations, one of which is a legal event. Notary is a public official who is appointed by the government to assist the community in terms of an agreement, the only one with an authentic deed. The task of the notary is not only to make an authentic deed but also to register and validate the letter under the hand or called waarmeken. In the aspect of proof in court, the letter under hand that has been guarded does not have perfect evidentiary power because it lies in a signature which, if acknowledged, then the deed will become perfect evidence such as

1. Introduction

The existence of a Notary as a Public Official is a public need for legal certainty for every contract that has been carried out by the community, this is clearly related to life. The position of Notary as a functionary in society that considered by the public as a place to obtain reliable advice in the preparation and validation of perfect documents in a legal process.[1]

The public needs someone whose policies can be accounted for, trusted and whose signature has a guarantee to be used as perfect evidence. In carrying out his position, a Notary must not take sides and become an consultant who has no defects, must keep his mouth shut and make an contract that can be used to protect in the future.[2]

Notary as a public official has the authority of attribution which is given directly by the law, and is appointed by delegation by Ministry of Law and Human Rights to carry out his position. This authority is a legal action that is regulated and given to someone who has a position based on applicable laws and regulations.[3]

According to UUJN, the authority of Notary can be divided into three as follows:

1. On Article 15 paragraph (1), Notary has the authority to draw up authentic deeds.
2. On Article 15 paragraph (2), Notary has the authority to do certain legal actions.
3. On Article 15 paragraph (3), Notary has other authorities which are regulated in laws and regulations. Therefore with this limitation, the laws and regulations that have been referred to must be in the form of laws and not under laws. [4]

The presence of the Notary position is desired by law with the intention to helping and serving public who need authentic written evidences regarding situations, events or legal actions. Apart from the authentic deed drawn up by a Notary, there is another deed called a private deed, which is a deed intentionally drawn up by the parties for evidence without the support of a deed official. In other words, the meaning of private deed is a deed that is drawn up as evidence but is not made before a public official.

The written contract made before the Notary is called as a Deed. It is intended that the deed can be used as perfect evidence in the event of dispute between the parties or a lawsuit from another party. So based on this, it is known that the importance of the function of the deed is very important, therefore, Law Number 2 of 2014 on Amendment of Law Number 30 of 2004 on Notary Position (hereinafter referred to as UUJN) are considered stronger than Notary Position Regulations (hereinafter referred to as PJN).[5]

Indonesia as a legal state is guided by Pancasila and the 1945 Constitution of the Republic of Indonesia, so the Indonesian people are obligated to implement law enforcement that reflects justice, certainty and expediency as the law protection, order and people's welfare. Therefore, for legal realization, authentic evidence is needed regarding circumstances, events or legal actions carried out through a Notary.[6]

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[1] Kohar A, Notaris Dalam Praktek Hukum, Bandung: Alumi, 1983, Hlm. 24.

[2] Tang Thong Kie, *Studi Notariat & Serba Serbi Praktek Notaris*, Jakarta, Ichtiar Baru Van Hoave, 2007, Hlm. 162.

[3] Habib Adjie, Hukum Notaris Indonesia Tafsir Tematik Terhadap Uujn, Bandung: Refika Aditama, 2008, Hlm, 77

[4] Muhammad Tiantanik Citra Mido, 2018, Tanggung Jawab Perdata Notaris Terhadap Akta Yang Dibacakan Oleh Staf Notaris Di Hadapan Penghadap, Jurnal Lentera Hukum, Vol. 5, No. 1, Hlm. 8, 2008.

[5] Viktor M. *Situmorang*, *Groose Akta Dalam Pembuktian Dan Eksekusi*, Jakarta: Rineka Cipta, 1993, Hlm. 36.

[6] Whenahyu Teguh Puspa, 2016, Tanggungjawab Notaris Terhadap Kebenaran Akta Dibawah Tangan

The basic idea of the rule of law both in the concept of *rechtsstaat* and *the rule of law* which explains that the protection of basic human rights is realized through the principle of legality. The principle of legality means that the law must be formed consciously and set forth in an official form.[7] Notary according to UUJN is a public official who is authorized to draw up authentic deeds and has other authorities as referred to in this law.[8] The UUJN paradigm emphasizes legal certainty, which means that the norms in authentic deeds are made in such a way as to guarantee perfect evidence.[9]

Notary is a public official appointed by the government to assist the public in making contract that exist and arise in society. The need for this contract to be drawn up before a Notary is to guarantee legal certainty for the parties entering into the contract. The meaning of authentic deed according to Article 1868 Indonesian Civil Law (hereinafter referred to as the Civil Code) is a deed made in the form specified in the law by or before the authorized public official for whom the deed was made. So, as explained in Article 1 number 7 of the UUJN which has a relationship with Notaries, it defines a Notarial Deed as an authentic deed made by or before a Notary in the form and procedures stipulated by law. Apart from authentic deeds, there are also private deeds, namely deeds that have been made by each party concerned, where the form and procedures for drawing the deed do not have to be in accordance with the law, as long as the private deed meets the terms of the contract.

Notary is authorized to draw up deeds concerning all acts of contract and provision which are required by law or which the parties concerned wish to be stated in an authentic deed.[10] Article 1 of UUJN does not provide a complete description of the duties and work of a Notary. This is because in addition to making authentic deeds, Notaries are also assigned to register and certify deeds under hand (legalization and *waarmeking*).[11]

The emergence of the need to validate a document was the beginning of legalization and *waarmeking*. Legalizing a document is a way to strengthen the position of the document as written evidence. When the parties who want the document to be corroborated by a Notary in the event that the document is not made by a Notary, then the interested parties can request the document to be *waarmeking* or legalized.

In relation to the legal force of proof of a private deed that has been registered (*waarmeking*) by a Notary, it does not affect the *waarmeking* itself, which can be interpreted as the law of evidence will apply perfectly if both parties acknowledge it because the Notary only records it in a special book. Apart from that, the Notary does not have any responsibility for the legality of the private deed that has been registered because every private deed that is registered by the Notary only provides a Register Number and is recorded in a special book, without being

Yang Dilegalisasi Oleh Notaris, *Jurnal Repertorium*, Vol. 3, No. 2 Juli-Desember 2016, Hlm. 155

[7] Febri Rahmadhani, Kekuatan Pembuktian Akta Di Bawah Tangan Waarmerking Dalam Perspektif Peraturan Perundang-Undangan Di Indonesia, *Jurnal Recital Review*, Vol. 2 No.2, Hlm. 2 2020.

[8] Misbah Imam Subari & Justicia Firdaus Kurniawan, Penggunaan Klausula Proteksi Diri Bagi Notaris Dalam Akta Partij Ditinjau Dari Undang-Undang Jabatan Notaris, *Jurnal Ilmu Kenotariatan*, Vol. 4, No. 2, hlm. 144, 2023.

[9] Muhammad Farid Alwadji, 2020, Urgensi Pengaturan Cyber Notary Dalam Mendukung Kemudahan Berusaha Di Indonesia, *Jurnal Rechtvinding*, Vol 2, No. 3,2020.

[10] Elok Sunaringtyas Mahanani & Iswi Hariyani. The Urgency of The Indonesian Notary Association (INI) In Development And Supervision Of Notary, *Jurnal Ilmu Kenotariatan*, Vol. 4, No. 1, h. 11. 2023

[11] G.H.S Lumban Tobing, *Peraturan Jabatan Notaris*, Jakarta: Erlangga, 2019,Hlm. 37.

read first by the Notary, in other words, the purpose of registering the deed is so that the state knows about the existence of the deed.[12]

Sudikno Mertokusumo explained his opinion that proof is juridical proof and nothing but historical proof. This historical evidence tries to establish what has happened concretely, both juridically and scientifically. In essence this means considering logically why certain events are considered true. [13]

Registration of private deed or *waarmeking* has not been specifically regulated, but regarding legalization it can be found in Article 15 paragraph (2) of UUJN which states that a Notary in his position has the authority to ratify signatures and determine the certainty of the date of private deed by registering them in a special book. . However, in the implementation of private deeds registered by a notary, many people misunderstand them. Private deed does not have a clear legal basis, it is only regulated in UUJN. In UUJN, the content of the article is only written, but the legal force of the private deed that has been registered by the Notary is not implemented.[14]

Waarrmeking does not state the validity of the date, signing, and the validity of the contents of the private deed as well as legalization or endorsement. Authentic or legalized deeds are clearly implemented in line with the Civil Code and proof has also been explained, however private deeds cannot be associated with authentic or legalized deeds. In fact, a private deed that has been *waarmeking* can also be used as a evidence process because *waarmeking* is also made for certain reasons or *waarmeking* is finish just for registration which has no benefit.[15]

In fact, what happens in public is that some of them are less aware of how important a document is as evidence, so that a contract between the parties only be done with a sense of trust and made verbally, but there are also people who well understand the importance of making a document as evidence so the contract can be made. – the agreement is made in written form which is very necessary as evidence.[16] The development of information technology is the result of globalization. The development of information technology has an important role in developed countries and in developing countries. Therefore, until now many rulers spur the development of information technology in their countries.

2. Results and Discussion

Tanggung Jawab Notaris Dalam Kekuatan Pembuktian Akta Dibawah Tangan Yang Telah Di Waarmeking

According to Huala Adolf, responsibility arises from the existence of a contract which gives rise to rights and obligations that must be fulfilled by the parties. So the consequence of an exchange of rights and obligations will give rise to the responsibilities of the parties. Responsibility for actions that cause harm to other parties and responsibility that is guided by applicable laws.[17] Notaries have a strategic position in the field of civil law, because notaries involve the most basic and fundamental matters in every

[12] Redaksi, 2020, *Problemtika Waarmeking Dan Legalisasi Serta Solusinya* Diakses Dari Https://Notarymagazine.Com/Problemtika-Waarmeking-Dan-Legalisasi-Serta-Solusinya/ Pada Tanggal 21 November 2020 Jam 16.21 Wib.

[13] R Subekti, *Hukum Pembuktian*, Pradnya Paramita: Jakarta, 2001, Hlm.1.

[14] Febri Rahmadhani, *Ibid*, Hlm. 5.

[15] Meitinah, 2006, Kekuatan Pembuktian Akta Di Bawah Tangan Yang Telah Memperoleh Legalisasi Dari Notaris, *Jurnal Hukum Pembangunan*, No.4, Hlm. 457-458.

[16] Soegondo Notodirejo, *Hukum Notariat Di Indonesia, Rajawali*: Jakarta, 1982, Hlm. 4.

[17] Huala Adolf, *Aspek – Aspek Negara Dalam Hukum Internasional*, Jakarta: Rajawali Pers, 2002, Hlm.87.

legal act. It is clear that people who are both subjects and objects of legal actions will always need a Notaries in legal administration matters.[18]

Notary is a public official who has the duties and obligations to provide legal services and consultations to the public. Notary is expected to have an objective profession, so it is expected that Notary can provide legal advice and legal actions carried out at the request of the parties who need it.[19]

Notary has responsibility for the deed he has made. If the deed made by the Notary contains a dispute then this is worth asking, whether the making of the deed was the fault of the parties who did not want to be open in providing information or whether it was the Notary's fault. There is a contract by a Notary with one of the parties which makes the other party feel at a loss. If there is a formal defect in the deed made by the Notary either due to negligence or intentionally, then the Notary can be liable.

A deed that only has the power of proof is a private deed or is void by law which can be a reason for the party who suffers a loss to demand loss costs from the Notary who made the deed.[20]

Legal assistance that can be provided by a Notary in the form of an authentic deed, then ratifying and registering a deed privately or other things. Deeds are divided into two, namely authentic deeds and private deeds. The form of this private deed is due to the agreement of the two parties who have made an contract. Authentic deeds are made before a Notary, while private deeds are made by the parties and not before a Notary, then made on any date.[21]

Private deed is made without standard and only adapted to the needs of the parties. If the deed has been signed by the parties before coming to the Notary, then the deed is only registered in the book provided by the Notary and then each page will be signed with the Notary's stamp.[22]

Waarmeking or what is called *veklaring van visum* is explained in Article 15 paragraph (2) letter b UUJN which states, "validate the signature and determine the certainty of the date of privately-made letter by listing it in a special book." It is concluded that *waarmeking* is one of the important authorities carried out by a Notary. This authority can also be called the 'Register' of the private deed. Making *waarmeking* is carried out if there is a document that is signed first by the parties and then submitted to the Notary.

The Notary's responsibility is only limited to confirming that the parties have made a contract on the date stated in the document and it has been registered in the Private Deed Registration Book.[23] It means the date of the private deed may not be the same as the date of registration of the private deed or document in a special book by the Notary. When a Notary gives *waarmeking*, affixes a signature and a statement at the bottom of the private deed.

The responsibilities of a Notary are in accordance with the definition of a Notary itself contained in article 1 UUJN which states that public officials are authorized to make authentic deeds and other authorities as

[18] Rasaid, *Hukum Acara Perdata*, Jakarta: Sinar Grafika, 1999, Hlm. 26

[19] Satjipto Rahardjo, *Ilmu Hukum*, Bandung: Ptcitra Aditya Bakti, 1996, Hlm 25.

[20] Bernadette M. Waluyo, Hukum Perlindungan Konsumen, Jakarta: Rajawali Pers, 1997, Hlm, 15,

[21] Nurlina, Tinjauan Yuridis Tentang Tanggung Jawab Notaris Dalam Mendaftarkan Akta Dibawah Tangan (Waarmeking), *Jurnal Artikel Ilmiah*, Hlm. 5. 2013

[22] Fuady, *Konsep Hukum Perdata*, Cetakan Kedua, Jakarta: Pt. Raja Grafindo, 2015, Hlm 12.

[23] A Pitlo, 1986, *Pembuktian Dan Daluarsa Menurut Kitab Undang – Undang Hukum Perdata*, Intermasa: Jakarta, Hlm. 34

referred to in this Law. This responsibility is referred to as a mandatory situation where a Notary is obliged to carry everything, responsibility is also human awareness of behavior or actions that are intentional or unintentional.[24]

Article 1 UUJN does not provide a complete explanation of the authority of a Notary, because apart from the Notary making the deed, the Notary is also authorized to registering and ratifying private deed. In *waarmeking*, the Notary has the right to provide justification testimony that the contract has occurred. However, the Notary is not responsible for the contents of the contract because the party concerned made it themselves. So if there is a dispute on the contents of the contract, it is not acceptable if the Notary is the guilty party. It is justified if the Notary is the party at fault because of the authority to register.[25]

The Notary provides a written statement, in other words to make an authentic deed, to confirm that an act has] before him.[26] This is not an explanation that is included in the action that the Notary is asked to confirm by the Notary, it is just what happened at the meeting. The legal implications of *waarmeking* for the Notary are not immense because the Notary only records the date.

This is different from legalization where even though the Notary does not take part in making the deed, the Notary is obliged to know the party who signs it, so the Notary has a greater responsibility. From a legal perspective, this is the authority of the Notary in his position, as if the two are inherent and cannot be separated. There is no authority without position and otherwise, authority without position is impossible.[27]

Notary in an authentic deed can be asked to be liable for the deed because it consequences in it being null and void based on the distribution of responsibilities which can burden a Notary, this is personal responsibility. It means is a Notary can be liable for violations that have been committed himself, apart from that responsibility based on mistakes, a Notary is also responsible for violations that are committed intentionally and with the aim of causing harm to the person involved.[28]

There is an explanation in the narrow sense which emphasizes that the Notary is only an exception in constituting an act which is not a legal act, namely if there is a law which expressly or secretly gives authority to the Notary as explained in Article 1 UUJN where the words meant by legal acts in a special sense are acts with the aim of the will contained therein creating a right for someone or changing an existing right or terminating it.

Article 1, if further linked to article 29 UUJN, in reality does not provide a difference in the Notary's authority to regulate legal acts and acts which are not legal acts, where the existence of this article does not contain a specific purpose in expanding the authority of the Notary to make deeds and formalize other deeds. rather than those containing deeds, agreements and decrees.[29]

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[24] Shidarta, *Moralitas Profesi Hukum Suatu Tawaran Kerangka Berpiki*r, Bandung: Refika Aditama, 2006, Hlm. 11.

[25] Sudarsono, *Sekilas Tentang Wewenang Dan Penyalahgunaan Wewenang (Dalam Perspektif Hukum Administrasi Negara*, Malang: Unidha Pres, 2013, Hlm. 95-96.

[26] Milinia Mutiara Yusshinta Dewi & Bayu Indra Permana. Keabsahan Akta Yang Dibuat Oleh Calon Notaris Yang Sedang Magang Di Kantor Notaris, *Jurnal Ilmu Kenotariatan*, Vol. 3, No. 2, h. 76-83, 2022.

[27] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, Jogjakarta: Liberty, 2006, Hlm, 26.

[28] Supriadi, *Etika Dan Tanggung Jawab Profesi Hukum Di Indonesia*, Jakarta, Sinar Grafika, 2010, Hlm. 19.

[29] G.H.S Lumban Tobing, *Ibid*, Hlm. 37.

In *waarmeking*, the Notary only registers and is not responsible for the following things:

a. Contents are permitted by law.
b. Those who sign are the parties concerned.
c. the date stated on the deed.

From the three things above, it is very clear that in *waarmerking* means confirmation of the date, that the deed has been *waarmeked* on that date.

Legal Consequences of the Power of Private Deed Waarmerking by a Notary

Basically, the issue of evidence is the most important part of the case examination process in court. Thus, if there is a dispute regarding what has been agreed upon in a Notarial deed which the parties have desired to act on, then the Notary is not involved in carrying out an obligation or in claiming a right, because a Notary is outside the legal actions of the parties. [30] A deed must have the content of the information contained in the deed act as true, where the content must have actual certainty, be legally proven between the parties with the meaning:

a. The deed, if used before the court, is sufficient and that the judge is not permitted to ask for other signatures besides that;
b. That proof to the contrary is always permitted with ordinary means of proof, which are permitted for this purpose according to law.

From this information, it is clear that an authentic deed, if used in court, is sufficient and the judge is not permitted to ask for other evidence besides what is usually called evidence. Evidence is material used as evidence in a trial.[31] Although it is generally adopted by what is called "*vrijebewijstheorie*", which means that the testimony of witnesses, for example, does not bind the judge to the evidence, this is different with authentic deeds where the law binds the judge to the evidence. Because if this is not the case, the law which appoints a Notary to make an authentic deed as evidence will be useless if the judge can overrule it.[32]

A private deed is made without the intermediary of a public official, where the binding force of the parties under the private deed is the same as an authentic deed, clearly this agreement must not conflict with the laws which are stated in Article 1338 of the Civil Code, the contract will apply to those who made it so that the contract can be withdrawn but this applies if the contract of both parties or based on reasons stipulated by law.[33]

The written nature of an agreement in the form of a deed does not make the agreement valid but is only used as evidence at one time. A *waarmeking* deed is also one that has the power of proof because of the external power of the private deed, where there is a party who confirms or denies the signing. The most important thing about a deed is that it is used as evidence and that there is evidentiary power in it. If the signature is acknowledged, then the judge must admit that it is correct and must be examined, then the private deed cannot be denied and will also have evidentiary power and become perfect evidence. However, if the private deed whose signature has been disguised is not recognized

[30] Lusy K.F.R Gerungan, Kekuatan Pembuktian Akta Dibawah Tangan Yang Telah Dilegalisasi Oleh Notaris, *Jurnal Review*, Vol. 20, No.1, Hlm. 6. 2012.

[31] Bachtiar Effendie, *Surat Gugat Dan Hukum Pembuktian Dalam Perkara Perdata*, Bandung: Pt.Citra Aditya Bakti, 1991, Hlm. 49.

[32] G.H.S Lumban Tobing, *Ibid*, 61.

[33] Salim Hs, *Perancangan Kontrak & Memorandum Of Understanding (Mou)*, Jakarta: Sinar Grafika, 2011, Hlm. 5.

by one of the parties then the signed deed has no legal force.[34]

Regarding private agreement deeds registered by a Notary, the public generally understands that by registering a private deed by a Notary, the deed has legal force and is legally binding. In Article 1338 of the Civil Code, the phrase "Made legally" is used. This means that what has been agreed between the parties is valid by law as long as what is agreed is said to be valid. This means that this does not conflict with the law, public order and decency. If the contract conflicts, the contract will be null and void by law.

According to the principle of freedom of contract as stated in Article 1338 letter a, there are 5 elements that provide freedom to the parties, namely:

a. making or not making an agreement
b. enter into an agreement with anyone
c. determine the contents of the agreement, implementation and requirements.
d. determine the form of agreement (written or unwritten).
e. determine legal options.

A private deed has formal evidentiary power if the signature has been acknowledged, which means that the signature is a symbol for the party who has signed the private deed. So if there is a party who has signed the deed without reading it first, then that party states that he or she was deceived, then the statement is not declared valid.[35] The certainty of a deed in a proof can be used as valid proof against the parties who made the deed or obtained the rights and is generally valid unless there is proof to the contrary.

The legal power of a private deed that has been validated by a Notary is confirmed by its proof which only includes the fact that the information was given, if the signature is acknowledged by the person signing or is recognized according to law for a private document, the power of the proof will depend on the truth of the parties' denial of the contents. deed of each signature. If the contents and signature of a private deed are acknowledged by each party, the strength of the proof is almost the same as an authentic deed.[36]

For the judge, a private deed is "free evidence" because a private deed only has the power of material evidence if its formal strength has been proven. Meanwhile, its formal strength occurs if the parties concerned know the truth of the contents and procedures for making the deed. So, a private deed is different from an authentic deed, because if the private deed is declared fake then the party using the deed must be able to prove that the deed is not fake.[37]

A private deed that has been underwritten cannot yet help the judge in providing evidence at trial, because in a underhand deed that has been underwritten there is no guarantee that the date, signature and contents are known to the Notary. Letters that have been submitted to the Notary for making warmeking will be legally recorded. So, if a dispute occurs, it can be used as evidence, but this does not guarantee that the contents are permitted by law. Waarmeking

[34] Cita Astungkara, Dkk, Kekuatan Pembuktian Legalisasi Dan *Waarmeking* Akta Dibawah Tangan Oleh Notaris, *Jurnal Artikel Ilmiah Hasil Penelitian Mahasiswa*, Hlm. 7, 2014.

[35] M. Yahya Harahap, Hukum Acara Perdata Gugatan Persidangan, Penyitaan, Pembuktian, Dan Putusan Pengadilan, Jakarta: Sinar Grafika, 2013, Hlm. 597.

[36] Avina Rismadewi, Kekuatan Hukum Dari Sebuah Akta Dibawah Tangan, *Jurnal Artikel Bisnis* Vol.1, No.1, Hlm. 5, 2020.

[37] Kiagus Yusrizal, 2008, Tinjauan Hukum Terhadap Kekuatan Pembuktian Akta Di Bawah Tangan Dihubungkan Dengan Kewenangan Notaris Dalam Pasal 15 Ayat (2) Uu Nomor 30 Tahun 2004 Tentang Jabatan Notaris, Tesis, Magister Kenotariatan Universitas Diponegoro, Hlm. 29.

only confirms the date the letter has been registered.[38]

3. Conclusion

The Notary's responsibility for a private deed is only limited to the validity of the signatures of the parties listed in the deed. Then the Notary is also not responsible for private deeds that have been legalized because the Notary only records the date. This is different from legalization where even though the Notary does not take part in making the deed, the Notary is obliged to know the party who signs it, so the Notary has a greater responsibility.

A private deed cannot yet help the judge in providing evidence at trial, because in a underhand deed that has been underwritten there is no guarantee that the date, signature and contents are known to the Notary. Private deed that have been submitted to the Notary for making *waarmeking* will be legally recorded. So, if a dispute occurs, it can be used as evidence, but this does not guarantee that the contents are permitted by law. *Waarmeking* only confirms the date the letter has been registered.

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[38] Bahder Johan Nasution, Penerapan Sanksi Administrasi Sebagai Sarana Pengendali Pembatasan Terhadap Kebebasan Bertindak Bagi Notaris, *Jurnal Recital Review*, Vol.2, No. 1, Hlm.12, 2020.

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