



## The validity of the notary's self-safety clause in the notary deed

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### Abstract

The results of this study show that the self-security clauses listed by the notary in the deeds did not violate the provisions of laws and regulations, especially the UUJN. That is, the clause is validly stated on the condition that the notary lists the clause based on the statements of the complainants and that the statements or statements and supporting documents as a reference for making a notarial deed are valid, so if in the future it is known that there are wrong things, then the notary can use the clause as a form of effort to secure themselves or as a form of notarial resistance if the notary is used as a witness, the suspect/defendant, the defendant/co-defendant because of the deed he made. Juridically, the notary's self-protection clause does not have the legal force to bind third parties such as prosecutors, public prosecutors, or judges, so the clause cannot provide legal immunity for the notary if the notary can indeed be proven guilty in advance of the court. The clause only applies to notaries who have carried out the position's duties, especially in doing deeds by the provisions of the UUJN and laws and regulations.

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## **1. Introduction**

The Notary Institution is one of the social institutions in Indonesia that arises from human needs that require evidence regarding civil law relations between them. The role of a notary in providing services is as an official authorized by the state to serve the public in the civil field, especially making authentic deeds (Pertiwi, 2017). Notaries, as public officials, are entrusted by the state and society to make perfect evidence in the civil field. The evidence in question is an authentic deed containing the will of the parties who appear before the Notary. The authority of a notary does not necessarily exist. However, it has previously been regulated in the provisions of Law Number 30 of 2004 concerning the Office of a Notary as amended to become Law Number 2 of 2014 (after this, referred to as UUJN). In the provisions of Article 1 point, 1 UUJN provides a definition regarding a notary, namely: Notary is a public official who has the authority to make authentic deeds and other authorities based on UUJNP or other laws. The authority of a notary is regulated explicitly in Article 15, paragraph (1), paragraph (2) and paragraph (3) UUJN. Among the three paragraphs, the authority of a notary, in general, can be found in the provisions of article 15 paragraph (1) UUJN, which reads:

The notary has the authority to do authentic deeds regarding all actions, agreements and stipulations that are required by laws and regulations or that are desired by those concerned to be stated in authentic deeds, guarantee the certainty of the date of doing the deed, save the deed, provide Grosse, copy and excerpts of the deed, all of that as long as the making of the deeds is not also assigned or excluded to other officials or other people determined by law. The article mentioned above also confirms the Notary that as long as this authority is not the authority of another official,

then that authority becomes the authority of the Notary (Adjie, 2004). The authority that is so clear in the sound of the article above is that a notary can do an authentic deed. The term authentic deed can be observed in substance Article 1868 of the Civil Code (from now on referred to as KUHPerdata) that: An authentic deed is a deed made in a form determined by law by or before public officials who are authorized to that, in the place where the deed was done.

Viewed from the party who made it, the notarial deed can be divided into 2 (two) forms, namely the *relaas* deed, which is an authentic deed made by a notary and the *partij* deed, which is an authentic deed made before (ten overstaan) a notary (Lumban, 1983). Both of these deeds were made at the parties' request, but there are differences between the two. The *relaas* deed is a deed made by a Notary which contains all the events that the Notary himself saw and witnessed. In contrast, a *partij* deed, or a party deed, contains the will of the parties, where "the parties come before the Notary (Nisa, 2021).

Notaries as public officials who have the authority above, are required to act in their duties by complying with statutory regulations, especially UUJN, Article 1320 of the Civil Code relating to the legal terms of agreements, 1338 paragraph (1) of the Civil Code concerning freedom of contract, Article 1337 of the Civil Code relating to legal cause. In addition to these provisions, notaries must be based on the precautionary principle. The obligation to act carefully and scrupulously in carrying out the duties of a position is fundamental because not all appearers who appear before a notary act honestly and have good faith. Several cases of appearers coming to a notary to produce evidence but providing false statements and documents (Nisa, 2021).

Moving on from this incident, a few notaries have been affected and have dealings with law enforcers. This is detrimental to the Notary both materially and immaterially as a result of reports or claims of parties who feel disadvantaged due to the deed that the Notary made. Based on this incident, several notaries took the initiative to include a new clause which can be referred to as a notary security clause, which generally states that: "the appearers state that the statements and documents as the basis for doing this deed are true, and if there is an error or mistake in the statement and document which causes legal problems in the future, they will release the notary from all lawsuits, whether civil, penalize or administer the state administration. Furthermore, if there is a dispute or conflict related to the deed, it will be the full responsibility of the appearers."

The existence of a clause insert in the notarial deed raises questions about the validity and authenticity of the deed, because juridically in Article 38 paragraph (3) UUJN, that the body of the deed only contains the will of the parties and not the notary. In addition, considering the provisions of Article 53, UUJN explains that: "Notarial Deeds may not contain stipulations or provisions that confer rights or benefits for the notary...". It is undeniable that this clause is indirectly a form of notary interest. Therefore, the author wants to analyze the validity of this clause further and whether it can eliminate the authenticity of a notarial deed.

## 2. Methods

The method used to study this problem is normative juridical. The approach used is the statutory approach and the conceptual approach. This research uses primary data obtained through statutory regulations, especially UUJN and the Civil

Code, along with doctrinal data and opinions of scholars and secondary data collected through literature searches. In addition, the data were analyzed qualitatively and then presented in a descriptive method.

## 3. Result and Discussion

A notary is a public official authorized to do authentic deeds and has other authorities as referred to in this Law or based on other laws. Notary deed (Notariel Acta) as described in UUJN Article 1 paragraph (7) is: "notarial deed, from now on referred to as deed is an authentic deed drawn up by or before a notary in the form and procedure stipulated by this Law" and has authentic characteristics (Wijaya, 2018). Notaries, in carrying out their positions, are required to be honest, impartial and always careful as stipulated in Article 16 paragraphs (1), (2) and (3) UUJN; Notaries expect these characteristics to carry out their positions as well as possible (Safira, 2022).

The Notary Deed is an authentic proof tool that has perfect evidentiary power. This is in line with Subekti's opinion, which states that the value of the power of proof (*bewijskracht*) attached to authentic certificates is regulated in Article 1870 of the Civil Code jo. Article 285i RBG is: perfect (*volledigi bewijskracht*) and binding (*bindendei bewijskracht*). Perfect (*volledig bewijskracht*) here means that the deed can stand alone without the need for the help of other evidence because it has met the minimum requirements for proof. While binding (*bindende bewijskracht*) here is by the provisions of Article 1338 of the Civil Code, an authentic deed made by a notary is the wish of the appearers as outlined in an agreement which is then binding on the parties concerned as binding by law."

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An authentic deed contains formal truths by which the parties notify the Notary. However, the Notary must include that what is contained in the Notary's deed has genuinely been understood and is by the parties' wishes (Sasauw, 2015). In this case, all information and statements submitted to the notary contained in the deed and contained in the minutes must be considered valid. Then, it will be loaded into the deed as correct for each party facing the notary (Septianingsih, 2020).

A notary deed as an authentic deed is a deed drawn up before a Public Servant or a Party appointed by law, and a notary is one of them. A notarial deed made in the presence of a public employee is usually referred to as a deed of the parties; here, a public employee, one of whom is a notary, is passive in the sense of waiting until he is needed by another party to draw up a deed. So, the notary does not automatically do a deed without being summoned. The deed of the parties also does not mean that it only contains information from the parties solely, but also the notary himself (Siahaan, 2019).

The strength of an authentic or notarial deed is a direct result of the duties of a notary official granted by statutory provisions. That is a legal relationship; there must be authentic statements that are useful as proof for the parties providing information outlined in a Notary deed so that it becomes an authentic deed (Boty, 2017).

It is further explained in the elucidation of Law no. 30 of 2004 that authentic deeds, as the most robust and complete evidence, have an essential role in every legal relationship in people's lives. In various business relationships, activities in the fields of banking, land, social activities, and others, the need for written evidence in the form of authentic deeds is increasing in line with the growing demand for legal certainty in various eco-

nomie and social relations, both at the national, regional and global levels (Pramono, 2015).

The authority of a notary in doing authentic deeds must be based on requests from the appearers. The notary is obliged to listen to the statement or statement of the parties without taking sides with one of the parties. Then the statement or statement is poured into a notarial deed which is the parties' wish (Tjukup, 2016).

A notarized deed as an authentic deed has perfect evidentiary power if the deed is drawn up by or before a notary by the form stipulated by UUJN (Adjie, 2021). When examined further, a notary deed is said to be authentic if it fulfils the elements stipulated in Article 1868 of the Civil Code, namely: a) a. The deed must be made by (door) or before (ten overstaan) a Public Official; b) The deed must be drawn up in the form determined by law; c) The public official by or before whom the deed was done must have the authority to draw up the deed.

In addition to the size or limitations regarding the authenticity of a deed as referred to in Article 1868 of the Civil Code, there are also civil sanctions that affect the deed if the notary commits an act of violation of specific articles, namely the notary's deed will have the power of proof as a deed under the hand (Setiadewi, 2020).

According to the conditions for a notarial deed to be an authentic deed that has the power of proof, it must also pay attention to 3 (three) aspects (Adjie, 2021): a) Manufacturing Procedure, notary deeds must be done systematically by UUJN provisions, which generally must include the following: get to know the appearers by looking at identities such as Identity Cards (KTP) or passports or other valid identification to a notary, doing questions and answers regarding the wishes of the parties facing the notary, carry out inspec-

tions related to documents as the basis for doing a deed according to the wishes of the parties, provide advice and draw up a deed for the appearers, fulfill all administrative techniques for doing deeds, make copies and complete files for minuta deed, carry out other obligations related to the implementation of the duties of a notary;

If any of these steps are missed, then the validity of the notary's actions in doing the deed may be questioned because it is not by UUJN procedures. b) Authority, Notaries "in carrying out their duties must comply with Article 15 UUJN and are not allowed to do deeds outside their Authority. This will have an impact on the strength of evidence of the deed. If the Notary acts outside his Authority, then the loss incurred will be the responsibility of the Notary as the maker of the deed. c) Substance, the contents of the deed represent the substance of Article 38 paragraph (3) letter c which explains that the body of the deed or the contents of the deed contains the wishes or wishes of the parties while still observing the provisions of Article 1337 of the KUHPerdata (Nisa, 2021).

The three conditions mentioned above are cumulative, meaning that if one element is not fulfilled, then the deed is invalidated as authentic evidence with the consequence that the notary deed does not have perfect legal force before the court. The basis for making a notary deed is the will of the appeared, whether it is a deed drawn up by or before a notary. The notarial deed will not be drawn up if there is no request from the appearers. The Notary confirms the will of the Notary in the form of an authentic deed whose preparation must be by UUJN. The form of a notarial deed is regulated based on the provisions of Article 38 UUJN, namely as follows: 1) Each Deed consists of the following: a) start Deed or head Deed; b) body Deed; c) terminate or close

the deed. 2) Start the Deed or start the deed containing: a) Title Deed; b) deed number; c) hour, day, date, month, and year; and d) name complete and occupy the position of Notary. 3) Body of the Deed contains: a) full name, place and date of birth, nationality, occupation, position, position residence of the addressees or the person they represent; b) information regarding the position of acting as a appeared; c) the contents of the deed, which are the wishes and desires of interested parties; and d) full name, place and date of birth, including occupation, position, position and place of residence of each identifying witness. 4) End or close the deed contains: a) description of the reading of the deed as referred to in Article 16 paragraph (1) letter m or Article 16 paragraph (7); b) description of the signing and place of signing or translation of the deed, if any; c) full name, place and date of birth, occupation, position, position and place of residence of each witness in the deed; and d) description of the absence of changes that occurred in the making of the deed or the existence of changes that may be in the form of additions, deletions or replacements, including the number of changes. 5) Deed of Notary Substitute and Temporary Officer of Notary Public, in addition to containing the provisions referred to in paragraphs (2), paragraphs (3), and paragraphs (4), also contains the number and date of the determination of the appointment, as well as the officials who appointed them.

Let us take a closer look at the provisions of Article 38i paragraph (3) letter c UUJN. It provides information that the contents of the deed are the wishes and desires of interested parties, and it is not permissible for the interests of other parties, including notaries. This can be seen in the provisions of Article 53 UUJN: The notarized deed may not contain stipulations or provisions that give rights or benefits too: a) Notary, wife or husband

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of a notary; b) Witness, wife or husband witness; or c) A person with a kinship relationship with a notary or witness, whether blood-related, in a straight line to the top or bottom line without restrictions on degree or marriage relationship up to the third degree.

Based on these provisions, it is essential to analyze related to the additional clause of self-protection included by the Notary in the body of the deed regarding its validity. Quoting Habib Adjie's Opinion, this clause is new in notary practice (Adjie, 2021). The Notary in the deed contains the self-safety clause as a form of protection for the Notary from the bad faith of the appearers from lies either about documents or information submitted to the Notary, which can result in dragging the Notary into legal problems caused by the parties themselves. Another reason is that the Notary includes this clause, namely (Adjie, 2021): a) Form prudential and careful actions for notaries; b) Form legal protection that the Notary himself can carry out; c) For information to other parties, do not be too easy to label a notary from the party who must be fully responsible if there is no strong evidence; d) As a way of educating appearers, they must be held responsible if they lie.

An example of a notary's self-protection clause, which is usually included in a deed, especially in a party deed (partij), is as follows: "Furthermore, the appearers explained that they had understood, understood and accepted and agreed to all the contents of this deed so that if in the future there are objections or disputes by the parties themselves or from other parties regarding the making of this deed, then it becomes the personal responsibility of the parties, and free me, the Notary and the witnesses who co-signed this deed from all lawsuits (Kosuma, 2021)".

The inclusion of a notary's self-protection clause, when viewed from a juridical perspective,

may be included as long as it is not prohibited because the existence of this clause in a notary deed does not provide the advantage of legal immunity and does not bind third parties such as law enforcers. If the Notary is carrying out his duties by the authority and UUJN, then the Notary will be free from problems caused by the parties to the deed if there is a dispute. In the Decision of the Supreme Court of the Republic of Indonesia Number 702 K/Sip/1973, the Supreme Court thinks, "The function of a notary is only to record and write down whatever is desired and stated by the parties who are facing the Notary. If during the making of the authentic deed, the parties show supporting documents, then the Notary is not obliged to investigate materially the documents and matters found by the appearers." This is in line with the Supreme Court Decision Number 385K/Pid/2006; the Supreme Court is also of the opinion that "The defendant as a notary is not authorized to review the legality of the authorization letter under the signature filed by the witness Yapii Kusuma at the time he entered into a binding sale and purchase of land including the house with witness Kurniawati.

The signature in the Power of Attorney under signature is fake, criminal liability cannot be imposed on the accused (Notary), so the charges should not be proven, and the accused (Notary) is not released from criminal charges but is acquitted of charges." The main point of the two decisions is that the Notary is not responsible for errors or mistakes that the parties purely cause to the deed; as long as the Notary exercises the authority as stipulated in the law, the Notary has done his job properly and correctly. Because the Notary, as a public official, only functions to record what the parties want, the Notary has no obligation to trace the material truth of the documents given to the Notary.

Vice versa, if the Notary is proven to have violated statutory regulations, especially UUJN, then the Notary must be held responsible according to the degree of the violation even though the deed he made contained a notary's self-safety clause. This can be seen in the provisions of Article 65 UUJN which explains that: "Notary, Substitute Notary, Special Substitute Notary, and Provisional Notary Officials are responsible for each deed they make, even though the notary protocols have been submitted or transferred to the party keeping the notary protocols."

If it is reviewed further, the Notary will include this clause but must obtain approval from the appearers. Returning to the provisions of Article 38 paragraph (3) letter c, the contents of the deed are the wishes and wishes of the parties only. This approval can be seen from the objections or not of the appearers at the time the deed was read. If the objectors object to the inclusion of this clause, the Notary must review the contents of the clause (Nisa, 2021). However, the Notary can also request information from the appearers who are presented before the Notary that the statements and evidence presented are accurate. Based on the parties' statements, the Notary can then include it in the form of a clause, which is fine.

The notary's security clause is not regulated in UUJN, so this clause does not have legal force in providing legal protection for the notary (Leoprayoga, Vanessa and Hoesin, 2019). as long as the notary carries out his position by applicable legal regulations (Nisa, 2021). Including the notary's security clause in the deed, whether made by or before a notary, does not have legal force or does not have a significant impact on the notary. However, if the notary wishes but includes these clauses in the deed, it is also not wrong and does not reduce or does not reduce the notary is being weak (Nisa, 2021). The binding power of this clause

only binds the parties to the deed as stipulated in Article 1338 paragraph (1) BW and does not bind third parties such as investigators, public prosecutors, or judges (Naily, 2021). In carrying out their duties, judges are not bound, nor do they rely on this clause in seeking the truth during trials because judges have independence and judgments during the judicial process (Nisa, 2021).

#### 4. Conclusion

Based on the explanation above, including a self-safety clause in a notarial deed is not prohibited. This means that the inclusion of this clause is permissible even though the provisions are not explicitly regulated either in UUJN or other laws because this clause is only in the form of an affirmation and does not give a notary the right of legal immunity, and does not remove the notary's responsibility regarding the formal correctness of the deed he made. Juridically, the notary's self-protection clause does not have the force of law to bind third parties such as prosecutors, public prosecutors or judges, so this clause cannot provide legal immunity for a notary if the notary can indeed be proven guilty before a court of law. This clause only applies to notaries who have carried out their duties, especially in doing deeds according to UUJN provisions and statutory regulations.

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