

## The Legal Position of a Substitute Notary and the Deed He Makes Due to Notary Leave in Kudus Regency

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**Abstract.** *Substitute Notary is a consequence that a position must be continuous. This research aims to determine and analyze the legal position of a substitute notary and the deeds he or she makes in terms of notary leave in Kudus Regency and to find out and analyze the responsibilities of a substitute notary in making deeds due to notary leave in Kudus Regency. The approach method in this research is an empirical juridical approach, descriptive analysis research specifications, by collecting primary data from the results of observations and interviews as well as secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials, then the data is analyzed qualitatively to produce descriptive-analytical data, and then studied using legal certainty theory and responsibility theory. The research results show that during 2023 there will be no Notaries who will use their leave rights. Even though there is no Notary who uses his leave rights, legally if a Notary is on leave he must appoint a replacement Notary. The legal certainty of the position of a Substitute Notary and the deeds he makes are guaranteed by UUJN and Permenkumham Number 19 of 2019. The responsibility of a Substitute Notary in making a deed is actually limited to the formality of the deed because in reality the Notary or Substitute Notary is only an opmaken and verlijden.*

**Keywords:** *Certainty; Deed Leave; Substitute.*

### 1. Introduction

Indonesia is a developing country that has just recovered from the covid pandemic that hit all countries in the world. Indonesia has the potential to achieve economic growth above 5% in 2024.<sup>1</sup> Increasingly good economic growth will certainly have an impact on people's welfare. One way to encourage economic growth is by accelerating the pace of investment and opening new

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<sup>1</sup>Suahasil Nazara, url :<https://www.kemenkeu.go.id/information-publik/publikasi/berita-utama/Potensi-Perbangun-Ekonomi-Capai-5,2>

jobs in the regions with changes in the licensing process and expanding business fields for investment.

Indonesia as a country of law will certainly encourage economic growth with legal certainty in running it. One profession that plays a very strategic role, especially to realize certainty and ease of doing business in terms of starting a business, and other roles related to the economic activities of the community is the Notary profession.<sup>2</sup>

Notary is one of the professions that plays a role in the law enforcement process in Indonesia by providing certainty, order, and legal protection in society, especially in terms of the need for binding evidence in the form of making authentic deeds.<sup>3</sup>

Community services are carried out in a trustworthy, honest, thorough, independent, impartial manner and safeguard the interests of the relevant parties in the legal actions required by the client.<sup>4</sup>The provisions regarding the position of a notary are regulated in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary or more often referred to as UUJN. The law states that a Notary is authorized to make authentic deeds regarding all acts, agreements, and determinations required by laws and regulations and/or desired by the interested party to be stated in an authentic deed, guarantee the certainty of the date of making the deed, store the deed, provide grosse, copies and extracts of the deed, all of which are as long as the making of the deed is not also assigned or excluded to other officials or other people determined by law.

The Notary's function is quite vital in creating legal certainty for the community, placing the Notary as an extension of the state. The Notary carries out a task that is not easy and is not just a job, but the Notary is required to have moral character in order to maintain the dignity of his position. Philosophically, the main task of the Notary is to prevent conflict.<sup>5</sup>

Notaries as an extension of the state have a heavy responsibility, so to help improve the quality of Notaries in providing excellent, fast, effective and efficient service to the community, Notaries are given the right to take leave.<sup>6</sup>Notary leave can be taken after the Notary has carried out the duties of the Notary

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<sup>2</sup>Comments from the Minister of Law and Human Rights of the Republic of Indonesia, Yasona H, Laoly in the hallway of the Directorate General of Legal Administration and Human Rights on Wednesday, March 16, 2022 as contained in the website of the Ministry of Law and Human Rights, Central Java Regional Office on March 16, 2022, The Important Role of Notaries in National Economic Recovery, url:<https://jateng.kemenkumham.go.id/central-information/article/6718-peran-important-notaris-dalam-pemulihan-Ekonomi-nasional>

<sup>3</sup>Wibby Yuda Prakoso and Gunarto, 2017, Responsibilities and Legal Consequences of Notarial Deeds Made by Substitute Notaries After Their Term of Office is Completed, Jurnal Akta Vol.4 No.4 December, url:<http://jurnal.unissula.ac.id/index.php/akta/article/download/2524/1886>p.773.

<sup>4</sup>Article 16 Paragraph (1) UUJN

<sup>5</sup>Andyna Susiawati Achmad, 2023, The Responsibility of the Notary's Legal Profession in Malpractice and Deliberate Dishonesty Actions, Jejak Pustaka, Jogjakarta, p.3.

<sup>6</sup>Consideration of Minister of Law and Human Rights Regulation Number 19 of 2019

office for 2 years. Granting the right to Notary leave certainly has implications for the vacancy of the position in the Notary's office, so that the Notary is required to appoint a Replacement Notary to carry out the duties and obligations of the Notary in the office.

Regarding the notary leave application rules also apply to Notaries in Kudus Regency. Currently, the number of notaries in Kudus Regency is 139 notaries.<sup>7</sup>According to the rules, the appointment of a Substitute Notary as the executor of duties and obligations is also carried out. The problem that sometimes arises is what if the Notary is on leave and appoints a Substitute Notary in accordance with existing regulations, the Substitute Notary who replaces is less trusted in his performance by the client, this is because in reality the Notary that the client is targeting is not the same "person" as the one who meets him.

Apart from the client's right to choose to use the services of a Substitute Notary or to move to another Notary or wait for a Notary who is on leave, the author is interested in analyzing and reviewing the Legal Position of a Substitute Notary and the Deeds He Makes Due to the Notary's Leave in Kudus Regency.

## **2. Research Methods**

This thesis research uses empirical legal research methods. Empirical legal research is a legal research method that attempts to see the law in the sense that it can be said to see, research, how the law works in society.<sup>8</sup> Empirical legal research aims to obtain legal knowledge empirically by going directly to the object.<sup>24</sup> The empirical legal approach also aims to see the reality that exists in practice in the field.<sup>9</sup> Analytical-descriptive research specifications, by collecting primary data from the results of observations and interviews as well as secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials, then the data is analyzed qualitatively to produce descriptive-analytical data, and then studied using the theory of legal certainty and the theory of responsibility.

## **3. Results and Discussion**

### **3.1. Legal Position of Substitute Notaries and Deeds Made by Them Due to Notary Leave in Kudus Regency**

Amount There are currently 139 (one hundred and thirty nine) notaries in Kudus Regency.<sup>10</sup> Of that number, in 2023 until now, no one has applied for leave to the Kudus Regency Regional Supervisory Council (MPD).<sup>11</sup> According to the head of the Kudus Regency MPD, this is because, firstly, we know that the application for

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<sup>7</sup><https://silandu.kemenkumham.go.id/sinotaris#> accessed on February 13, 2024 at 10.52 WIB.

<sup>8</sup>Jhonaedi Efendi & Johnny Ibrahiim, 2018, Normative and Empirical Legal Research Methods, Prenada Media Group, Depok, p. 150.

<sup>9</sup>Agung Nugroho and Sukarmi, 2020, Notary Authority in Installing Mortgage as Effort to Settle Bad Credit (Second Way Out), Sultan Agung Notary Law Review, Vol. 2, No. 2, url :<http://jurnal.unissula.ac.id/index.php/SANLaR/article/view/11447> p.93.

<sup>10</sup> <https://silandu.kemenkumham.go.id/sinotaris> accessed on February 13, 2024 at 00.15 WIB

<sup>11</sup>Data disclosed up to the time of interview on February 12, 2024 at 13.00 WIB

leave to the MPD is for leave of no more than 6 (six months) and the procedure for applying for leave is too complicated, including the application must be submitted 30 (thirty) days before the leave.

The second reason is because the UUJN was ratified in 2014, at which time the number of Notaries was not as many as now, so the regulation regarding replacement Notaries is no longer relevant, because there are still many other active Notaries.<sup>12</sup>This is also the background to the elimination of Article 1 Number 4 of Law Number 30 of 2004 in Law Number 2 of 2014 which mentions special substitute notaries.

Supervision of Notaries is carried out, among others, by digging up information from fellow colleagues or by monitoring the Notary's social media. The MPD still tolerates Notaries who leave their duties as long as when leaving their duties, the Notary does not exercise his authority in making deeds, or other authorities as referred to in Article 15 of the UUJN.<sup>13</sup>

The authority, obligations and prohibitions of a substitute Notary after taking the oath of office, being inaugurated and the submission of the protocol by the notary to the substitute notary are the same as the notary he replaced. The substitute notary is fully responsible for the truth of the deed he made.<sup>14</sup>

Substitute Notary has the same competence as a Notary. The requirements to be appointed as a Substitute Notary are, 2 (two) years of experience as a Notary staff and a bachelor's degree in law are sufficient provisions to be appointed as a Substitute Notary so that the client should not doubt his/her ability.<sup>15</sup>

The legal status of a substitute Notary determines the legal certainty of the deeds he makes so that the deeds made still have the force as authentic deeds. Radburg interprets legal certainty with positive law, which means that positive law is a statutory regulation, so the legal certainty of the position of a substitute Notary arises from the existence of a Notary who applies for leave and the Notary himself is regulated in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (UUJN). This law was followed up further with the issuance of Permenkumham Number 19 of 2019 concerning the Requirements and Procedures for Appointment, Leave, Transfer, Dismissal, and Extension of the Term of Office of Notaries.

UUJN regulates Notary as a "position" (een ambt). "een ambt is een instituut met eigen erkring waaraan bij de instelling duurzaam en welomschreven taak en bevoegdheden zijn verleend"<sup>16</sup> (a position is an institution with its own scope of

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<sup>12</sup>Radot BM Sitompul, interview, Chairman of the Kudus Notary Supervisory Board as well as Notary and Land Deed Making Officer in Kudus Regency at the office of Notary & PPAT Radot BM. Sitompul, SH on Monday, February 12, 2024 at 13.00 WIB.

<sup>13</sup>Radot BM Sitompul, interview

<sup>14</sup>Radot BM Sitompul, interview

<sup>15</sup>Radot BM Sitompul, interview

<sup>16</sup>NE Algra and HCJG Janssen, 1983, *The Beginning of Law*, Bina Cipta, Bandung, page 175 quoted by Ridwan HR, 2003, *State Administrative Law*, UII Press, Yogyakarta, page 52

work which is formed for a long period of time and which is given authority and duties).

Position is a position that indicates the function, duties, responsibilities, authority and rights of an employee in an organizational unit.<sup>17</sup> A position is created for a long time, which means that the position must be continuous even if the person in charge changes. The position is permanent, while the office holder (*ambtsdrager*) can change.<sup>18</sup> In relation to Notary leave, a Notary may leave his office but the functions, duties and authority of the Notary position must remain, for this reason Article 25 Number 3 states that during the leave, the Notary shall appoint a Replacement Notary.

The legal status of a substitute Notary depends on the legal status of the Notary. The Notary who appoints a substitute Notary must be truly authorized to do so, to be appointed as a Notary, the prospective Notary must meet the requirements as stipulated in UUJN Article 3 Jo Permenkumham Number 19 of 2019 Article 2 Number 1.

Article 17 Paragraph 1 letter b states that Notaries are prohibited from leaving their area of office for more than 7 (seven) consecutive working days without a valid reason. Notaries can use their right to leave as stated in Article 25 UUJN which can be taken after carrying out their office for 2 years.

In fact, many Notaries are found to have left their positions for more than seven consecutive days without using their right to leave. This is the authority of the Supervisory Board as the implementer of supervision of the behavior and implementation of the Notary's position.<sup>19</sup>

Laws are made with the hope that they can be implemented well. The purpose of law is to create an orderly social order, so it is hoped that with the existence of law there will be order and balance in society,<sup>20</sup> then the legal regulations regarding the position of Notary should also be implemented.

The purpose of law according to Gustav Radbruch is justice, certainty and utility.<sup>21</sup> *Iustitia fundamentum regnorum*, justice is the highest, fundamental and absolute value in law,<sup>22</sup> and the highest justice is conscience.<sup>23</sup> *summum ius summa iniuria*, absolute legal certainty is the highest injustice. No matter how

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<sup>17</sup>Muhammad Hadin Muhjad, 2018, Notary Position in the Perspective of Administrative Law, *Lamlaj* Volume 3 Issue 1, March, Faculty of Law, Lambung Mangkurat University, Banjarmasin, ISSN: 25023136, url : <https://www.lamlaj.ulm.ac.id/web/index.php/abc/article/view/71> p. 85.

<sup>18</sup>Idem., p.53.

<sup>19</sup>Article 67 Paragraph (5) of the UUJN states: "Supervision as referred to in paragraph (1) includes the behavior of Notaries and the implementation of the Notary's Office.

<sup>20</sup>Sudikno Mertokusumo, 1999, *Understanding Law: An Introduction*, Op.Cit., page 71.

<sup>21</sup>Yapiter Marpi, 2020, *Legal Science: An Introduction*, PT. Zona Media Mandiri, Tasikmalaya, p.43.

<sup>22</sup>Hyronimus Rhiti, 2011, *Philosophy of Law*, Atma Jaya University, Yogyakarta, p.239.

<sup>23</sup>Ida Bagus Gede Putra Agung Dhikshita, 2021, *Manifestation of Gustav Radbruch's Theory of Legal Purpose and the Positivist School*, Constitutional Advocate: Constitutional Content Creator, p.2. accessed at <https://advokatkonstitusi.com/manifestasi-theori-bangun-Hukum-gustav-radbruch-dan-mashab-positivisme-di-indonesia/> on February 19, 2024 at 12:33 WIB.

good the legal considerations in a judge's decision are, if it only prioritizes legal certainty, then what is realized is only procedural justice, and legal certainty in a decision that is fair according to the judge, can actually be an extraordinary injustice for those seeking justice.<sup>24</sup>

Utilitarianism is often associated with Jermy Bentham's utilitarian theory. "The greatest happiness of the greatest number", the law must provide the greatest happiness for many people. To realize the objectives of the law, justice, certainty and utility must run in harmony, cannot be alone but still refer to the principle of priority as Gustav Radbruch stated that to apply the law properly and fairly in fulfilling the objectives of the law, the priority is justice, then utility, and after that is legal certainty.<sup>25</sup>

Regarding the legal status of a deed made by a Substitute Notary, the provisions of Article 1868 of the Civil Code can be explained as the conditions for a deed to be considered an authentic deed, namely:<sup>26</sup>

1. The deed is made by (door) or made in the presence (tenoverstaan), a public official (openbare ambtenaren);
2. The deed must be made in the form (vorm) that has been determined by law (wettelijke vorm);
3. The public official who makes the deed must have authority based on the area/work region or time when the deed was made.

A substitute notary has the same duties and authorities as a Notary. A Notary is bound by UUJN, so the main duties and authorities of a Notary have been explained in UUJN, namely that his main duty is to make authentic deeds, in addition to land deeds and auction minutes.<sup>27</sup>

The deed made by a Substitute Notary has the same status as the deed made by the Notary he/she is "replacing" as long as it is in accordance with the existing laws and regulations, so the parties who happen to make a deed with the Substitute Notary should not doubt the status and legal certainty of their deed, their deed has the legal force of an authentic deed.

Everyone is considered to know the law (*presumptio iures de iure*), but it is better for the Substitute Notary to take a little time in making the deed, by providing an understanding of his position and the deed that will be made. This is related to the rights of the client as a consumer using the Notary's services.

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<sup>24</sup>Supreme Court Magazine, Edition XXIV/2020, pp.94-95.

<sup>25</sup>Melisa, et al., 2023, Legal Position in Realizing Justice and Welfare in Indonesia, AL-MANHAJ: Journal of Islamic Law and Social Institutions Vol.5 No. 1 E-ISSN: 2686-4819, url:<https://ejournal.insuriponorogo.ac.id/index.php/almanhaj/article/view/2084> p.242.

<sup>26</sup>Sugeng Budiman and Widhi Handoko, 2020, Legal Policy Towards Notaries as Witnesses and Evidence of Authentic Deeds Based on Justice, Unissula Press, Semarang, pp. 177-178.

<sup>27</sup>Romanda Arif Kurnia and Umar Ma'ruf, 2018, Implementation of Notary's Duties and Authorities in Making Deeds Related to Land, Jurnal Akta Vol.5 No. 1 March, url :<https://jurnal.unissula.ac.id/index.php/akta/article/view/2618/0>p.305

### **3.2. The Responsibilities of a Substitute Notary in Making Deeds Due to Notary Leave in Kudus Regency**

The results of the MPD data research stated that no Notary in Kudus Regency had applied for leave, even so, regarding the existence of a Substitute Notary, it is legal and guaranteed by law, the rules exist, and the duties, authorities, prohibitions, and responsibilities are very clear. The Substitute Notary is fully responsible for what is done while serving as a Substitute Notary and after the term as a Substitute Notary is completed.<sup>28</sup>

A notary is obliged to appoint a replacement notary if he/she leaves his/her area of office for more than 7 (seven) consecutive working days for a valid reason.<sup>29</sup> A valid reason is a justifiable reason that is submitted in writing or stated in a letter of application or notification.<sup>30</sup> The fact in the field is that many notaries leave their area of office for more than seven working days without appointing a Replacement Notary. This is tolerated by the MPD as long as when leaving the area of office the Notary does not exercise his authority to make a deed.

MPD should carry out preventive and curative activities including coaching for Notaries so that the Notary's attitude and behavior do not harm the dignity of Notaries, one of which is by requiring reporting or notification when a Notary leaves the Notary's duties and position even though later he does not appoint a Replacement Notary. This is for legal order and regulations and to facilitate supervision of Notaries.

The Substitute Notary is responsible for every deed he makes, so the implementation of the duties of the Substitute Notary is the same as the Notary who is being replaced, as stated in Article 33 Number (2) UUJN including regarding the oath of office (Article 4), authority (Article 15), obligations (Article 16) and prohibitions (Article 17), unless the Law stipulates otherwise.

The responsibility of the Substitute Notary in making a deed is based on fault of liability, that is, the Substitute Notary is responsible if the deed he or she makes contains an error or intentional violation.

The responsibilities of a Substitute Notary can be divided into two, namely:<sup>31</sup>

- a. The Substitute Notary's responsibility for deeds made while the Substitute Notary was still serving as Notary.

An error in carrying out a profession can be caused by a lack of knowledge or ignorance (*onvoldoende kennis*), lack of experience or flying hours (*onvoldoende ervaring*), or lack of understanding (*onvoldoende inzicht*).

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<sup>28</sup>Radot BM Sitompul, interview

<sup>29</sup>Article 17 Number 1 letter a UUJN

<sup>30</sup><https://djp.kemenkeu.go.id/kppn/jakarta2/id/profil/kinerja-dan-kode-atik/kode-istik-pns.html#:~:text=Alasan%20yang%20Legal%20is%20alasan,%2FPMK.01%2F2021.>

<sup>31</sup>Dedi Yansah, 2023, Responsibilities and Legal Protection for Substitute Notaries for Authentic Deeds They Have Made, Masters Thesis in Notary Law, Sultan Agung Islamic University, Semarang, pp. 72-73

Responsibility based on fault is in line with Hans Kelsen's theory which states that an individual is responsible for the errors or violations committed.<sup>32</sup>Mistakes in civil law are not only due to intent but also due to carelessness.<sup>33</sup>Mistakes in making deeds made by a substitute Notary while still carrying out his/her duties as a Notary can be made in the manner as regulated in Article 50 of the UUJN.

The changes made must indicate the changed part, if it does not indicate the changed part then the change is void and results in the deed only having the power of proof as a private deed. This can be a reason for the party who suffers a loss to demand reimbursement of costs, damages, and interest from the Notary.

b. Responsibility of the Substitute Notary for deeds made after the term of office is completed (after the notary protocol is returned from the Substitute Notary to the Notary)

Article 65 of the UUJN implicitly states that even though the Notary Protocol has been returned, the Replacement Notary is responsible for every deed he makes.

This means that when there is a problem or error in making a deed, the Substitute Notary remains personally responsible for the error and the parties can demand reimbursement of costs, damages and interest from the Substitute Notary, because the Substitute Notary cannot make corrections to the deed after the position he holds is completed, for this reason it is necessary to apply the principle of caution in making deeds that is always used.

The liability for deeds made by a Substitute Notary after not serving as a Substitute Notary can be divided into two civil liability and criminal liability. The liability of a Notary or Substitute Notary should only be related to the making of the deed (formal) and not related to the content of the deed (material). If formally proven guilty, then they can be prosecuted criminally.

The purpose of proof is to prove that a criminal event actually occurred and that the defendant is guilty and must be held accountable.<sup>34</sup>In making a deed, the Notary only carries out UUJN's wishes, namely *opmaken* and for the rest the Notary has the obligation to *verlijden*.

*Opening* namely the stages of notifying the applicant's wishes to the Notary, requesting the applicant to make a deed, and hearing the application. The notary records the wishes of the parties according to what he himself has heard, seen and witnessed.

*Download* can be interpreted as "a collection of words containing all the actions for the occurrence of a Notarial deed which appears as a finished product of a Notary's work according to the law". (1) the Notary seeing the reality of an action or event (*het waarnemen door de notaris van een handeling of daadzaak*), (2) the Notary telling in writing about the event he saw (*het schriftelijk relateren*)

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<sup>32</sup>Hans Kelsen, 2019, *Pure Legal Theory: Basics of Normative Legal Science*, Nusa Media, Bandung p.140

<sup>33</sup>Riduan Syahrani, 1998, *The Ins and Outs and Principles of Civil Law*, Alumni, Bandung, p.279.

<sup>34</sup>Darwan Prinst, 1998, *Criminal Procedure Law in Practice*, Djambatan, Jakarta, p.133.



daarvan) and reading by the Notary and signing by the interested party, including confirming his refusal and again the departure of a person before signing the deed.<sup>35</sup>

The role of a Notary in making an authentic deed is as a public official who frames the will and desires of the parties. That the inclusion of the name of a Notary in the Deed is not an act of participation or ordering, or helping to carry out a certain legal action carried out by the parties but this is a formal aspect of a Notary deed according to UUJN,<sup>36</sup> So it is only right that the Notary is only responsible for the formal authenticity of the deed.

The only preventive measure that can be taken by a Notary in making an authentic deed to prevent errors is to exercise authority in making an authentic deed. A Notary must always make a deed in accordance with the form and procedures stipulated by law.<sup>37</sup>

#### 4. Conclusion

The legal status of the Substitute Notary and the Deed made by the Substitute Notary is very clear in terms of legal certainty, namely because it is regulated in the UUJN and also Permenkumham Number 19 of 2019, that the reality in society, Notaries do not use their leave rights when the Notary leaves the Office of Duty, this is the responsibility of the MPD as the Notary Supervisor in the region. Enforcement of regulations by the Supervisory Board requires justice, benefit and certainty, so that it can provide the best solution for Notaries. The responsibility of the Substitute Notary in making a deed is carried out individually, so that it still applies even though he is no longer carrying out the duties of the Notary Office. The responsibility of the Substitute Notary is related to errors in making a deed, which errors can be corrected as long as the Substitute Notary is still serving as a Notary with the procedures in Article 50 of the UUJN, but if the error is made when he is no longer serving as a Notary, the Notary individually and the parties can sue for reimbursement of costs, damages, and interest against the Substitute Notary. However, in reality, the Notary or Substitute Notary as long as they make a deed according to the UUJN order, the Notary is only responsible for the originality of the deed, this is because the Notary only serves as "opmaken" and "verlijden".

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<sup>35</sup>Widhi Handoko, Note: The articles in Notariswet do not contain any official explanation regarding the differences in the wording of "opmaken" and "verlijden", Webinar Paper, June 27, 2020, *Ibid.*, quoted by Sugeng Budiman, pp. 183-184.

<sup>36</sup>Sumini and Amin Purnawan, The Role of Notaries in Making Notarial Deeds, *Jurnal Akta* Vol. 4 No. 4 December, url :<http://jurnal.unissula.ac.id/index.php/akta/article/download/2498/1862>p.564.

<sup>37</sup>Umar Ma'ruf and Dony Wijaya, 2015, *Journal of Legal Reform* Volume II No. 3 September-December, url:<https://jurnal.unissula.ac.id/index.php/PH/issue/view/191>p.299.

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