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Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

Reconstruction of the Regulation of Notary Authority in the Production of Authentic Deeds in Sharia Financial Institutions

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Abstract. *The principle of buying and selling (Al Buyu') is no exception related to Fiduciary Rights in Sharia transactions in Notaries, this can be done with Sharia financial transactions, on the principle of buying and selling regarding Fiduciaries (movable objects). In reality, it is not uncommon for the implementation of sharia banking to not fully reflect the values of Islamic teachings and the true value of social justice. For example, this can be seen from the unclear reference to the rate of return for sharia finance. The approach method in this research uses sociological juridical. Data collection was carried out through field research studies. This research data processing uses primary data which is divided into primary and secondary legal materials. As a result of this research, the researcher provides conclusions and suggestions that financing institutions actually carry out unilateral execution of fiduciary guarantee objects without going through the relevant government agencies and based on applicable laws and regulations. Even though their actions can be categorized as Unlawful Acts (PMH) as stated in Article 1365 of the Civil Code, and consumers can also file a claim for compensation based on this legal basis.*

Keywords: Authority; Fiduciary; Finance; Guarantee; Institute.

1. Introduction

The very rapid growth of sharia banking cannot be separated from the role of Bank Indonesia which pays special attention to the development of sharia banking in Indonesia. As regulator,

Reconstruction of the Regulation of Notary Authority in ...

(Febya Chairun Nisa, Anis Mashdurohatun, Bambang Tri Bawono & Jawade Hafidz)

**PROCEEDING OF INTERNATIONAL CONFERENCE ON
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ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

BankIndonesiaprovide serious and sincere attention in encouraging the development of sharia banking. This spirit is based on the belief that sharia banking will bring 'benefits' for improving the economy and equal distribution of social welfare. First, Islamic banks are closer to the real sector because the products offered, especially in financing, always use underlying transactions in the real sector so that their impact is more real in encouraging economic growth. Second, there are no products that are speculative in nature (gharar) so they have strong resistance and have been tested for their toughness from the direct hit of the global financial crisis. From a macro perspective, sharia banking can provide support for creating stability in the financial system and national economy. Third, the profit-loss sharing system which is the spirit of sharia banking will bring fairer benefits to all parties, both for ownersfundas depositors, entrepreneurs as debtors and banks as managers fund.¹

In reality, it is not uncommon for the implementation of sharia banking to not fully reflect the values of Islamic teachings and the true value of social justice. For example, this can be seen from the unclear reference to the rate of return for sharia finance.² The return value shared in the sharia financial system, including sharia banking, should be a real result from business activities. Unfortunately, reference yield values are not yet available, so Islamic financial institutions often equate them with interest rates in the conventional system. Apart from being unfair, this can pose a reputation risk for the Islamic financial system because there is no essential difference with the conventional system..

Based on the background above, the author is interested in writing a journal with the title "Reconstruction of Notary Authority Regulations in Making Authentic Deeds in Sharia Institutions".

Talking about theory, 3 (three) theories will be referred to to analyze this research, namely:

a. Basic Theory (Grand Theory): Pancasila Theory of Justice. In the context of Pancasila, the concept of justice is related to the fifth principle, namely social justice. The essence contained in the principle "Social justice for all Indonesian people" contains two meanings. The first relates to the social dimension of justice in national life, covering all Indonesian people, not belonging to a certain group of people, and should be applied in every area of life. Second, it refers to society which can be 'subjects' (actors) and 'objects' (targets of justice).³

¹Ibid., p. 2.

²Ibid., p. 6.

³Andreas Doweng Bolo, Bartolomeus Samho, Stephanus Djunatan, Sylvester Kanisius Laku, Pancasilan Liberating Power, (Yogyakarta, Kanisius, 2012), p. 251

Reconstruction of the Regulation of Notary Authority in ...
(Febya Chairun Nisa, Anis Mashdurohatun, Bambang Tri Bawono & Jawade Hafidz)

**PROCEEDING OF INTERNATIONAL CONFERENCE ON
THE LAW DEVELOPMENT FOR PUBLIC WELFARE**

ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

b. *Middle Theory*: Legal System Theory. This theory talks about law as a system, Lawrence M. Friedman suggests that there are components contained in law, namely:⁴

a. The component called structure, namely institutions created by the legal system such as district courts, administrative courts which have the function of supporting the working of the legal system itself. These structural components enable the provision of legal services and work on an orderly basis.

b. The substantive component is in the form of legal norms, be they regulations, decisions and so on, all of which are used by law enforcers and those who are regulated.

c. The cultural component of law, namely consisting of ideas, attitudes, hopes and opinions about the law. This legal culture is differentiated between internal legal culture and external legal culture, namely the legal culture of society in general.

c. *Applied Theory*: Progressive Legal Theory. Progressive law is a legal thought that seeks to fight for justice and benefit, rather than legal certainty.⁵ Then the law is formed to humanize humans, with the aim of producing justice and prosperity for humans, non-humans are forced to conform to what the law wants, so the law needs to listen to the opinions of the wider community so that the results of its regulations can produce rules that are appropriate to what humans need (that's what is called law for humans are not humans for the law). The formation and enforcement of Indonesian law requires the development of progressive legal ideas as coined by Satjipto Rahardjo.

In reality, it is not uncommon for the implementation of sharia banking to not fully reflect the values of Islamic teachings and the true value of social justice. For example, this can be seen from the unclear reference to the rate of return for sharia finance. The return value shared in the sharia financial system, including sharia banking, should be a real result from business activities. Unfortunately, reference yield values are not yet available, so Islamic financial institutions often equate them with interest rates in the conventional system. Apart from being unfair, this can pose a reputation risk for the Islamic financial system because there is no essential difference with the conventional system.

⁴Lawrence Friedman, see in Gunther Teubner (Ed), *ibid*, 1986. p. 13-27. William J. Chambliss and Robert B. Seidman, *Law, Order and Power*, Reading, Mass: Addisn-Wesly, 1971, p. 5-13. Also in Lawrence Friedman "Law and Development, A General Model" in *Law and Society Review*, No. VI, 1972. in Esmi Warassih, Op Cit. p.81-82.

⁵Suteki, *Progressive Law: Law with a Transcendental Dimension in the Indonesian Context*. Muhammadiyah University of Surakarta Scientific Publications, Proceedings of the National Seminar/January 2018, p. 9-15.

Reconstruction of the Regulation of Notary Authority in ...
(Febya Chairun Nisa, Anis Mashdurohatun, Bambang Tri Bawono & Jawade Hafidz)

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ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

In a Fiduciary case, namely the Execution of Motor Vehicle Collateral in a Financing Agreement carried out by a non-bank financing institution that is not registered as a Fiduciary guarantee, this is one of the issues that will be discussed in this research. In relation to providing

collateral to creditors, the action taken by the financing institution is to execute the collateral. In other words, if the consumer (debtor) neglects his obligations or breaks his promise in the form of the consumer failing to fulfill his obligations when it is time for the debt to be repaid, then in such an event, the creditor can execute the Fiduciary Security object. Violations committed by this financing institution certainly have an impact on the legal protection and legal force of the Fiduciary Guarantee agreement entered into by the financing institution with the debtor as consumer.

As a result of the Fiduciary Guarantee not being issued a Fiduciary certificate, the object of the Fiduciary Guarantee does not have direct execution rights. When a consumer defaults or delays occur, the financing institution cannot execute the collateral object. Financing institutions actually carry out executions unilaterally without going through the relevant government agencies and based on applicable laws and regulations. Even though their actions can be categorized as Unlawful Acts (PMH) as stated in Article 1365 of the Civil Code, and consumers can also file a claim for compensation based on this legal basis.

2. Research Methods

The approach method in this research uses a type of sociological juridical research, namely legal research using a juridical-sociological approach, namely legal research carried out by examining library materials or primary data.⁶ Research specifications are carried out descriptively analytically, namely a way of describing the condition of the object under study based on actual facts at this time. In this case, it is describing the reconstruction of the regulatory authority of Notaries in making authentic deeds at sharia institutions. Empirical research due to socio legal And Researchers took research places at Sharia financial institutions (Sharia Savings and Loans and Financing Cooperatives, Sharia Conventional Banks, Sharia People's Credit Banks, Sharia Gadai), Notary offices in Pati Regency, and BPN Pati Regency, Central Java, Indonesia. Research in this dissertation research requires data obtained by conducting Field Research, namely a collection of data obtained by means of either interviews and/or questionnaires. carried out by directly observing the competent parties.⁷ The data analysis method used to describe and process the data collected in this research is qualitative description. Qualitative descriptions are

⁶Reza Banakar and Max Travers, Theory and Method in Socio-Legal Research (Oregon, 2005), p xii.

Reconstruction of the Regulation of Notary Authority in ...
(Febya Chairun Nisa, Anis Mashdurohatun, Bambang Tri Bawono & Jawade Hafidz)

**PROCEEDING OF INTERNATIONAL CONFERENCE ON
THE LAW DEVELOPMENT FOR PUBLIC WELFARE**

ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

used in the method of describing data in this research because the main data used is not in the form of numbers that can be measured.⁸

3. Results and Discussion

As of February 2012, the sharia banking industry in Indonesia had a network of 11 Sharia Commercial Banks (BUS), 24 Sharia Business Units (UUS), and 155 BPRS, with a total office network of 2,380 offices spread across almost all corners of the archipelago.⁷ Apart from that, the sharia banking industry was also able to show high accelerated growth with an average of 40.2% per year in the last five years (2007-2011), while the average national banking growth was only 16.7% per year. Therefore, the sharia banking industry is dubbed 'the fastest growing industry'. This is because the growth of sharia banking is very fast, even higher than the growth of national banking.

The very rapid growth of sharia banking cannot be separated from the role of Bank Indonesia which pays special attention to the development of sharia banking in Indonesia. As a regulator, Bank Indonesia pays serious and sincere attention to encouraging the development of sharia banking. This spirit is based on the belief that sharia banking will bring 'benefits' for improving the economy and equal distribution of social welfare. First, Islamic banks are closer to the real sector because the products offered, especially in financing, always use underlying transactions in the real sector so that their impact is more real in encouraging economic growth. Second, there are no products that are speculative in nature (gharar) so they have strong resistance and have been tested for their toughness from the direct hit of the global financial crisis. From a macro perspective, sharia banking can provide support for creating stability in the financial system and national economy. Third, the profit-loss sharing system which is the spirit of sharia banking will bring fairer benefits to all parties, both for fund owners as depositors, entrepreneurs as debtors and banks as fund managers.⁸ Basically, The management of conventional banks and Islamic banks has similarities, especially in the technical side of receiving money, transfer mechanisms, computer technology used, general conditions for obtaining financing, proposals, financial reports and so on. However, with the existence of a sharia basis and in accordance with Government Regulations regarding Sharia Banks, including Law Number 21 of 2008 jo. Law Number 10 of 1998 jo. In Law Number 7 of 1992 concerning Sharia Banking there are also several differences, including those concerning legal aspects, organizational structure, financed businesses, and work environment as well as the existence of a Sharia Supervisory Board in the organizational structure and the existence of a profit sharing system.

⁸Ibid., p. 2.

Reconstruction of the Regulation of Notary Authority in ...
(**Febya Chairun Nisa, Anis Mashdurohatun, Bambang Tri Bawono & Jawade Hafidz**)

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THE LAW DEVELOPMENT FOR PUBLIC WELFARE**

ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

This difference, as previously mentioned, in this case occurs due to the use of sharia principles in the system used in sharia banks.

In reality, it is not uncommon for the implementation of sharia banking to not fully reflect the values of Islamic teachings and the true value of social justice. For example, this can be seen from the unclear reference to the rate of return for sharia finance.⁹ The return value shared in the sharia financial system, including sharia banking, should be a real result from business activities. Unfortunately, reference yield values are not yet available, so Islamic financial institutions often equate them with interest rates in the conventional system. Apart from being unfair, this can pose a reputation risk for the Islamic financial system because there is no essential difference with the conventional system. In general, every Islamic bank in carrying out its business has at least four operational principles, namely¹⁰:

- a. The mudharabah principle is an agreement between two parties where the first party is the owner of the funds/sahibul mal and the second party is the fund manager/mudharib to manage an economic activity by agreeing on a profit sharing ratio for the profits to be obtained while the losses that arise are at the risk of the owner of the funds as long as there are no evidence that the mudharib committed fraud or misconduct. Based on the authority given to the mudharib, mudharabah is divided into mudharabah mutlaqah where the mudharib is given complete authority to determine the desired investment choices, while the other type is mudharabah muqayyaddah where the investment direction is determined by the owner of the funds while the mudharib acts as executor/manager (al-musyarakah, al-mudharabah, al-muzara'ah, and al-musaqah).
- b. The principle of Musyarakah is an agreement between parties to invest capital in an economic activity with the distribution of profits or losses according to the ratio agreed upon. Musyarakah can be permanent or temporary with a decrease periodically or all at once at the end of the project period.
- c. The Wadiah principle is a deposit where the first party entrusts funds or objects to the second party as the recipient of the deposit with the consequence that the deposit can be taken back at any time, where the depositor can be charged a deposit fee. Based on the authority given, wadiah is differentiated into wadiah yadhamanah, which means that the entrusted recipient has the right to use the entrusted funds/goods to be utilized without the entrusted recipient having an obligation to provide compensation to the entrusted person with the

⁹Ibid., p. 6.

¹⁰Nurul Ihsan Hasan, 2014, *Sharia Banking (An Introduction)*, Jakarta, Gaung Persada Press Group, p.153.

Reconstruction of the Regulation of Notary Authority in ...

(**Febya Chairun Nisa, Anis Mashdurohatun, Bambang Tri Bawono & Jawade Hafidz**)

**PROCEEDING OF INTERNATIONAL CONFERENCE ON
THE LAW DEVELOPMENT FOR PUBLIC WELFARE**

ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

agreement that it can be taken whenever necessary, while on the other hand, wadiah amanah does not provide authority. to the entrusted recipient to utilize the goods/funds entrusted.

d. The principle of sale and purchase ('Al Buyu') consists of: Murabahah, namely a sale and purchase agreement between two parties where the buyer and seller agree on a selling price consisting of the purchase price plus purchase costs and profit for the seller. Murabahah can be done in cash or by deferred payment or installments. Salam is the purchase of goods with payment in advance and the goods are delivered later. Ishtisna' is the purchase of goods by order and a process is required to make them according to the buyer's order and payment is made in advance at once or in installments. in stages, Ijarah, namely the activity of renting an item in exchange for rental income, if there is an agreement to transfer ownership at the end of the rental period, it is called Ijarah mum-tahiya bi tamlik (the same as an operating lease). Wakalah, namely the first party gives authority to the second party (as a representative) for certain matters where the second party receives compensation in the form of a fee or commission, and Kafalah, namely the first party is willing to be the guarantor for the activities carried out by the second party as long as it is in accordance with what was agreed where the first party received compensation in the form of a fee or commission (guarantee). In Indonesia, the development of Sharia financial institutions has an impact on other instruments, such as Notary institutions which have been involved in issuing legal certificates regarding a number of Sharia business contracts. In order for an agreement to have legal force, it must be recorded in front of a notary. Therefore, every Sharia business, including Sharia businesses, always requires a Notary as an official who makes authentic deeds according to their duties as regulated in Law no. 2 of 2014.¹¹

Article 1868 of the Civil Code reads, "An authentic deed is a deed made in the form determined by law by or before a public official authorized to do so in the place where the deed is made." Meanwhile, Article 1 point 1 UUJN as an organic law (a law whose formation was ordered by the legal basis above) states that the position of a notary is "a notary is a public official, who has the authority to make authentic deeds and has other authorities as intended in this law or based on other laws." The task of a Notary is to carry out the work of making a deed as authentic evidence, which is based on Article 1 number 1 that the Notary has the authority to make an authentic deed which is further clarified in Article 1 number 7 UUJN "Notarial Deed, hereinafter referred to as the Deed, is an authentic deed made by or in the presence of a Notary according to the form and procedures stipulated in this Law".

¹¹Mertokusumo, S. (2012). Civil Procedure Law. Yogyakarta: Liberty. h. 54.

Reconstruction of the Regulation of Notary Authority in ...
(Febya Chairun Nisa, Anis Mashdurohatun, Bambang Tri Bawono & Jawade Hafidz)

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THE LAW DEVELOPMENT FOR PUBLIC WELFARE**

ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

Every financing transaction at a Sharia bank requires a contract. Contracts or financing agreements made by banks and customers can be made through private deeds and/or notarial deeds. In practice, banks generally determine the form of the deed based on the amount of financing to be carried out. The private financing deed is made by the bank itself with agreement and bargaining with the customer. Generally, making a deed under your own hands is because the parties don't want to bother and want to reduce the cost of making the deed, because they feel they have enough and remember that the value of the financing is not too large. Meanwhile, notarial financing agreements are made by banks and customers in front of a notary due to the amount of financing and the large risks, so an authentic deed is needed as strong evidence.¹²

An agreement is a written agreement between a Sharia Bank or UUS and another party which contains the rights and obligations for each party in accordance with Sharia principles. In implementing a financing agreement by making a private deed, there are two types of deed, namely, the first is that the bank usually only legalizes the deed, where the bank and the customer go before the Notary with the financing agreement that has been agreed upon and has been reviewed by the Sharia supervisory board and approved by the head of the bank branch office and then the deed is signed before a Notary. Legalization is intended to determine the certainty of the date and validate the signatures of the parties. Second, namely the financing deed which is only registered, that is, the process of making the agreement and signing the financing deed is not carried out in the presence of a Notary and does not involve a Notary. After the financing agreement has been agreed and has been reviewed by the Sharia supervisory board and approved by the head of the bank branch office and completed signed by the parties, then the deed is taken to the Notary for registration (waarmerking).¹³

The principle of buying and selling ('Al Buyu') is no exception regarding Fiduciary Rights in Sharia transactions in Notaries, this can be done with Sharia financial transactions, on the principle of buying and selling regarding Fiduciary (movable objects). Fiduciary guarantee is the transfer of ownership rights to objects in trust as collateral (collateral) for the repayment of creditor receivables. The provisions in Article 1 number 1 of Law Number 42 of 1999 concerning Fiduciary guarantees state, "Fiduciary is the transfer of ownership rights to an object on the basis of trust, provided that the object whose ownership rights are transferred remains in the control of the owner of the object."

¹²Setyowati, R. (2016). Notary in Sharia Banking Disputes. *Journal of Legal Issues*, Vol. 45, (No. 2). h. 19

¹³Muhammad, DW (2014). Collateral Position in Musyarakah Financing Agreements at Sharia Banks. *Journal of Business Law*, Vol.33, (No.3). h. 5.

**PROCEEDING OF INTERNATIONAL CONFERENCE ON
THE LAW DEVELOPMENT FOR PUBLIC WELFARE**

ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

In Article 4 of Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary, it is stated that a Fiduciary guarantee is an accessory agreement to a main agreement which creates an obligation for the parties to fulfill a performance, so the Fiduciary guarantee agreement has the character of dependence on the main agreement, its validity is solely determined by whether the main agreement is valid or not, as a conditional agreement, which can only be implemented if the provisions implied in the main agreement have or have not been fulfilled. The imposition process is considered simple, easy and fast, whether from the Fiduciary giver or from the Fiduciary recipient. This form of collateral is widely used in lending and borrowing transactions, but does not guarantee legal certainty. Based on this consideration, Law Number 42 of 1999 concerning Fiduciaries regulates (the obligation to) register Fiduciary guarantees in order to provide certainty to interested parties. so that it can provide legal protection for Fiduciary collateral parties.¹⁴ The obligation to register Fiduciaries in Article 11 Paragraph 1 of Law 42 of 1999 concerning Fiduciaries states, "Registration of objects encumbered with Fiduciary guarantees is carried out at the domicile of the Fiduciary giver and the registration includes objects, both within and outside the territory of the Republic of Indonesia. Indonesia to fulfill the principle of publicity, as well as a guarantee of certainty to other creditors regarding objects that have been encumbered with Fiduciary collateral." Regarding Fiduciary executions, there is a 2021 Constitutional Court decision which states that Fiduciary guarantees cannot be executed immediately. The debtor must declare himself incapable/in default/or there is a judge's decision stating that the debtor is in default. However, the term debtor does not exist in Sharia financial institutions, but there is the term customer and in Sharia creditors are called shohibul maal.

In a Fiduciary case, namely the Execution of Motor Vehicle Collateral in a Financing Agreement carried out by a non-bank financing institution that is not registered as a Fiduciary guarantee, this is one of the issues that will be discussed in this research. In relation to providing collateral to creditors, the action taken by the financing institution is to execute the collateral. In other words, if the consumer (debtor) neglects his obligations or breaks his promise in the form of the consumer failing to fulfill his obligations when it is time for the debt to be repaid, then in such an event, the creditor can execute the Fiduciary Security object. Violations committed by this financing institution certainly have an impact on the legal protection and legal force of the Fiduciary Guarantee agreement entered into by the financing institution with the debtor as consumer.

¹⁴Rachmadi Usman, Op.Cit., p.164.

Reconstruction of the Regulation of Notary Authority in ...
(Febya Chairun Nisa, Anis Mashdurohatun, Bambang Tri Bawono & Jawade Hafidz)

**PROCEEDING OF INTERNATIONAL CONFERENCE ON
THE LAW DEVELOPMENT FOR PUBLIC WELFARE**

ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

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4. Conclusion

Every financing transaction at a Sharia bank requires a contract. Contracts or financing agreements made by banks and customers can be made through private deeds and/or notarial deeds. In practice, banks generally determine the form of the deed based on the amount of financing to be carried out. The private financing deed is made by the bank itself with agreement and bargaining with the customer. Generally, making a deed under your own hands is because the parties don't want to bother and want to reduce the cost of making the deed, because they feel they have enough and remember that the value of the financing is not too large. Meanwhile, notarial financing agreements are made by banks and customers in front of a notary due to the amount of financing and the large risks, so an authentic deed is needed as strong evidence.¹⁵ The principle of buying and selling ('Al Buyu') is no exception regarding Fiduciary Rights in Sharia transactions in Notaries, this can be done with Sharia financial transactions, on the principle of buying and selling regarding Fiduciary (movable objects). As a result of the Fiduciary Guarantee not being issued a Fiduciary certificate, the object of the Fiduciary Guarantee does not have direct execution rights. When a consumer defaults or delays occur, the financing institution cannot execute the collateral object. Financing institutions actually carry out unilateral execution of fiduciary collateral objects without going through the relevant government agencies and based on applicable laws and regulations. Even though their actions can be categorized as Unlawful Acts (PMH) as stated in Article 1365 of the Civil Code, and consumers can also file a claim for compensation based on this legal basis.

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Reconstruction of the Regulation of Notary Authority in ...
(**Febya Chairun Nisa, Anis Mashdurohatun, Bambang Tri Bawono & Jawade Hafidz**)

**PROCEEDING OF INTERNATIONAL CONFERENCE ON
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ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

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Reconstruction of the Regulation of Notary Authority in ...
(Febya Chairun Nisa, Anis Mashdurohatun, Bambang Tri Bawono & Jawade Hafidz)

**PROCEEDING OF INTERNATIONAL CONFERENCE ON
THE LAW DEVELOPMENT FOR PUBLIC WELFARE**

ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

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Constitution Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions.

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(**Febya Chairun Nisa, Anis Mashdurohatun, Bambang Tri Bawono & Jawade Hafidz**)