

December 9<sup>th</sup> 2016



# The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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**UNISSULA PRESS**

ISBN. 978-602-1145-41-8

## TABLE OF CONTENTS

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Front Page .....	i
Information of the International Seminar .....	ii
Committee Composition .....	iii
Preface.....	iv
Greeting From The Dean Faculty of Law .....	vi
<b>INDONESIA’S KPK AND NSW’S ICAC: COMPARISONS AND CONTRASTS</b>	
Prof. Simon Butt .....	1
<b>CAN INDONESIA FREE ITSELF FROM CORRUPTION IN 2020?</b>	
Prof. Dr. Hikmahanto.,S.H.,LLM .....	4
<b>AN ACT TO ESTABLISH THE ANTI-CORRUPTION AGENCY, TO VEST POWERS ON OFFICERS OF THE AGENCY AND TO MAKE PROVISIONS CONNECTED THEREWITH.</b>	
Rohimi Shapiee.....	7
<b>STRATEGY TO CREATE INDONESIA FREE CORRUPTION IN 2020</b>	
Dr. Jawade Hafidz, S.H., M.H .....	11
<b>THE NETHERLANDS INGLOBAL CORRUPTION</b>	
Siti Malifah Marlou Feer, M.A. ....	28
<b>ROBUST YET FRAGILE: EFFORTS IN COMBATING CORRUPTION IN INDONESIA</b>	
Laras Susanti.,S.H., LLM.....	33
<b>LEGAL STATUS OF AKTOR’S FOR CORRUPTION (In the Perspective of Islamic Law)</b>	
Sumarwoto Umar .....	37
<b>THE ROLE OF LAW IN THE POVERTY REDUCTION STRATEGY</b>	
Lantik Kusuma Aji .....	46
<b>THE INDEPENDENCY OF THE INSTITUTION FOR THE PROTECTION AND THE ESTABLISHMENT OF HUMAN RIGHTS TOWARDS THE GLOBALIZATION ERA 2020</b>	
Khalid .....	55
<b>THE URGENCY OF ANTI CORRUPTION EDUCATION FOR COLLEGES IN INDONESIA</b>	
Siska Diana Sari.....	62
<b>THE PROBLEMS OF DIVORCE IN CUMULATION AT THE RELIGIOUS COURTS BASED ON THE PRINCIPLES OF SIMPLE, FAST AND LOW COST</b>	
Elis Rahmahwati.....	78
<b>DISPARITIES DECISION RELATED TO INTERPRETATION OF ARTICLE 2 AND 3 CORRUPTION ERADICATION ACT</b>	
Agung Widodo.....	87
<b>DIVERSITY ADULT AGE LIMITS POSITIVE LAW IN INDONESIA (Studies in Multidisciplinary Perspective)</b>	
Muhammad Andri .....	102

<b>THE APPLICATION OF BALANCE IDEA IN SETTLEMENT OF DOCTOR MALPRACTICE CASE THROUGH PENAL MEDIATION</b> Yati Nurhayati.....	111
<b>MODERNIZATION LAW AS A CRIME CORRUPTION VERY EXCEPTIONAL THROUGH ENFORCEMENT OF ETHICS</b> Dr. Sukresno, SH, M.Hum .....	118
<b>CORRUPTION POTENCIES IN LAND USE POLICY (A Case Study in Kuningan Regency)</b> Haris Budiman .....	126
<b>CORRUPTION PREVENTION AND CONTROLS</b> INP Budiarta .....	133
<b>ISLAMIC LAW VALUES TRANSFORMATION IN THE RECONSTRUCTION OF THE LEGALITY PRINCIPLE OF INDONESIAN CRIMINAL CODE</b> Sri EndahWahyuningsih .....	145
<b>JUSTICE AND CHARITY IN JAKARTA’S NORTH COAST RECLAMATION PROCESS THAT WILL LEAD TO INDONESIA CLEAN OF CORRUPTION</b> Untoro .....	155
<b>CORRUPTION CRIMINAL SANCTIONS WITH VALUES OF JUSTICE-BASED</b> Zulfiani.....	162
<b>THE REFLECTION OF ISLAMIC BANKING IN THEORY AND PRACTICE</b> Anis Mashdurohatun .....	171
<b>THE IMPLEMENTATION OF LOCAL WISDOM SIRI’NA PACCE AS AN EFFORT OF CORRUPTION ERADICATION IN INDONESIA</b> Muh. Afif Mahfud .....	181
<b>DISCOURSE POLITICAL LAW IN INDONESIA ON A COMPLETION OF PLATO PHILOSOPHY</b> Adrianus M. Nggoro,SH.,M.Pd.....	189
<b>STUDY OF INDONESIA’S PARTICIPATION IN ICSID</b> Agus Saiful Abib.....	202
<b>NOTARY ROLE IN THE IMPLEMENTATION OF EXECUTION PROCUREMENT OF GOODS AND SERVICES ARE FREE OF CORRUPTION BASED ON THE PRINCIPLE OF GOOD GOVERNANCE</b> Aris Yulia .....	211
<b>ANALYSIS WIRETAPPING AUTHORITY UPPER KPK LAW ENFORCEMENT IN THE PERSPECTIVE OF HUMAN RIGHTS</b> Ariyanto,SH.,MH.....	221
<b>SOCIAL WORKING PENALTY AS SOLUTION IN ERADICATING CORRUPTION IN INDONESIA</b> Desy Maryani.....	232
<b>LEGAL POLITICSOF EMPLOYMENT IN TERM OF PART OF TASK HANDOVER TO OTHER COMPANIES IN INDONESIA</b> Endah Pujiastuti.....	244

<b>RESOLUTION OF DISPUTES OF OUTSOURCING WORK FORCE IN THE COMPANY EMPLOYING OUTSOURCING SERVICE</b> Pupu Sriwulan Sumaya .....	256
<b>THE APPLICATION OF CORRUPTION LAW TO WARD CRIMINAL ACT IN THE FIELD OF FORESTRY</b> Ifrani .....	267
<b>THE EFFORTS OF ERADICATION OF CORRUPTION THROUGH INSTRUMENTS OF MONEY LAUNDERING LAW AND RETURN ACTORS' ASSETS</b> Yasmirah Mandasari Saragih.....	276
<b>AFFIRM ROLE OF EXISTENCE <i>RECHTSVERWERKING</i> TO ACHIEVING LEGAL CERTAINTY IN LAND REGISTRATION</b> Rofiq laksamana, Setiono, I Gusti Ayu Ketut Rachmi Handayani, Oloan Sitorus.....	287
<b>ANTI-CORRUPTION EDUCATION AT AN EARLY AGE AS A STRATEGIC MOVE TO PREVENT CORRUPTION IN INDONESIA</b> Ida Musofiana.....	304
<b>FREED INDONESIA'S CORRUPTION BETWEEN HOPE AND REALITY</b> Dr. Tongat, SH., MHum., Said Noor Prasetyo, SH., MH.....	313
<b>UTILIZATION OF INDONESIA MARINE RESOURCES IN AN EFFORT TO REALIZE INDONESIA TOWARDS THE SHAFT OF THE MARITIME WORLD</b> Dr.Lathifah Hanim, SH.M.Hum., M.Kn. and Letkol (mar) MS.Noorman, S. Sos., M.Opsla.....	319
<b>POTENTIAL CORRUPTION IN THE VALIDATION POLICIES ON ACQUISITION TAX OF LAND AND OR BUILDING</b> Lilik Warsito.....	325
<b>THE EFFORT OF LAW ENFORCEMENT IN COMBATING CORRUPTION IN SOUTH SUMATERA</b> Sri Suatmiati.....	334
<b>ETHICAL PERSPECTIVE AND THE MAPPING OF NORM IN CORRUPTION ACT</b> Siti Zulaekhah.....	344
<b>AN EXPANSION OF CONCEPT THE STATE ECONOMIC LOSS IN CORRUPTION IN INDONESIA</b> Supriyanto, Hartiwiningsih, Supanto.....	354
<b>JURIDICAL STUDIES ON SUBSTANCE AND PROCEDURE OF THE DISMISSAL OF THE PRESIDENT AND/OR VICE-PRESIDENT AFTER THE REFORMATION</b> Siti Rodhiyah Dwi Istinah.....	364
<b>THE ROLE OF THE SHARIA SUPERVISORY BOARD IN THE FRAMEWORK ENFORCING SHARIA PRINCIPLES AT THE INSTITUTE OF ISLAMIC BANKING IN SEMARANG</b> Aryani Witasari.....	376
<b>SEMARANG CITY GOVERNMENT ROLE IN CONSERVATION AND ENVIRONMENTAL PROTECTION TO THE CAPITAL OF THE NATIONAL HERITAGE IN INDONESIA</b> Achmad J Pamungkas ( <i>Indonesia</i> ), Carlito Da Costa ( <i>Timor Leste</i> ) .....	390

<b>STUDYING THE WISDOM OF ZAKAT</b> Moch. Gatot Koco (Indonesia), Basuki R Suratno (Australia) .....	398
<b>HOMOLOGATION RECONSTRUCTION IN BANKRUPTCY THAT IS BASED ON DIGNIFIED JUSTICE</b> Agus Winoto .....	410
<b>RECONSTRUCTION OF EXECUTIVE AND LEGISLATIVE AUTHORITY IN MAKING GOOD GOVERNANCE (GOOD GOVERNANCE) VALUES BASED ON WELFARE</b> Mohamad Khamim .....	420
<b>THE TASK RECONSTRUCTION AND BPKP'S AUTHORITY IN THE CASE OF JUSTICE VAUE BASED CORRUPTION</b> Sarbudin Panjaitan .....	429
<b>THE RECONSTRUCTION OF MADLIYAH AND IDDAH MAINTENANCE AND MUT'AH IN DIVORCE CASE FOR JUSTICE AND WELFARE</b> Mustar .....	438
<b>JURIDICAL ANALYSIS OF THE ALLEGED CRIMINAL OFFENSE TO MANUFACTURE A NOTARY DEED</b> Subiyanto .....	446
<b>REVITALIZATION DEAL IN AKAD HYBRIDS IN SHARIA BANKING VALUE BASED ISLAMIC JUSTICE</b> Masduqi .....	452
<b>RECONSTRUCTION OF LEGAL PROTECTION DISTRICT HEAD IN THE ELECTION IMPLEMENTATION OF VALUE-BASED JUSTICE</b> Kukuh Sudarmanto Alugoro .....	462
<b>ABUSE OF AUTHORITY OFFENSE THEOLOGICAL RECONSTRUCTION LAW ERADICATION OF CORRUPTION (LAW NUMBER 31 OF 1999 JO. LAW NUMBER 20 OF 2001) BASED ON VALUE OF JUSTICE</b> As'adi M. Al-ma'ruf .....	472
<b>RECONSTRUCTION OF THE DAILY PAID WORK AGREEMENT IN THE EMPLOYMENT LAW BASED ON JUSTICE</b> Christina N M Tobing .....	479
<b>THE LAW AND THE IMPACT OF MARRIAGE SIRRI</b> Sahal Afhami .....	489
<b>CRIMES AGAINST CHILDREN AS ACTORS</b> Muhammad Cholil .....	503
<b>RECONSTRUCTION OF CRIMINAL PROCEDURAL LAW (KUHP) ABOUT THE DETENTION</b> Muhammad Khambali .....	512

<b>BASED ON JUSTICE PROBLEMS OF DISPUTE RESOLUTION REGIONAL CHIEF ELECTION (GOVERNOR, REGENTS AND MAYOR)</b>	
Esti Ningrum .....	520
<b>RECONSTRUCTION REGIONAL MINIMUM WAGE (UMR) IN RENEWAL OF EMPLOYMENT LEGAL REMEDIES BASED INDONESIA THE VALUE JUSTICE PANCASILA</b>	
Urip Giyono .....	531
<b>IMPLEMENTATION OF LAW AS TO MAINTAIN SECURITY IN THE CONTEXT OF PROFESSIONAL POLICE POLMAS (CASE STUDY IN LAMPUNG POLICE)</b>	
Muhammad Yaman .....	539
<b>RECONSTRUCTION OF CRIMINAL SANCTIONS PENAL CODE ACTORS ON ABORTION CRIME BASED ON THE VALUE OF JUSTICE</b>	
Hanuring Ayu Ardhani Putri .....	549
<b>REGISTRATION FIDUCIARY GUARANTEE REALIZE LEGAL PROTECTION OF CREDITORS AND DEBTOR</b>	
Ansharullah Ida .....	556
<b>RECONSTRUCTION OF LEGAL DISPUTES MEDIATION IN HEALTH CARE FOR PATIENTS HOSPITAL BASED ON THE VALUE OF JUSTICE</b>	
Teguh Anindito .....	569
<b>RECONSTRUCTION OF CRIMINAL SANCTIONS AGAINST CRIME OF ACTORS AND MURDER MURDER IN PLAN BASED ON VALUE OF JUSTICE CRIMINAL CODE</b>	
Maria Marghareta Titiek Pudji Angesti Rahayu Teguh Anindito .....	579
<b>IMPLEMENTATION OF PENAL MEDIATION IN CRIMINAL LAW</b>	
Aji Sudarmaji .....	587
<b>FAIR SETTLEMENT RECONSTRUCTION OF PROBLEMATIC CREDIT DISPUTE AT BANK RAKYAT INDONESIA (STUDY CASE AT MEDAN-SINGAMANGARAJA BRI BRANCH OFFICE)</b>	
Bachtiar Simatupang .....	594
<b>RECONSTRUCTION OF THE WASTE MANAGEMENT LAW BASED ON WELFARE VALUE</b>	
M. Hasyim Muallim .....	616
<b>RECONSTRUCTION LAW OF PUNISHMENT AGAINST CHILDREN NARCOTICS ABUSE-BASED PROGRESSIVE LAW</b>	
Salomo Ginting .....	625
<b>LEGAL PROTECTION PROBLEM OF WIFE AND CHILDREN OF POLYGAMY SIRRI IN INDONESIA</b>	
Muhlas .....	639

<b>IDEAL RECONSTRUCTION OF REHABILITATION PUNISHMENT FOR NARCOTICS ADDICTS AND ABUSER'S VICTIMS JUSTIFIED BASED ON THE LAW OF THE REPUBLIC OF INDONESIA NO. 35 YEAR 2009 (CASE STUDY IN SUMATERA UTARA PROVINCE)</b>	
Ahmad Zaini .....	648
<b>IMPLEMENTATION OF ACCELERATION SYSTEMATIC LAND REGISTRATION FULL IN HUMBANG HASUNDUTAN DISTRICT</b>	
Ruslan .....	658
<b>RECONSTRUCTION OF STATUS AND AUTHORITY OF THE SHARIA COURT IN THE NATIONAL JUDICIAL SYSTEM BASED ON JUSTICE</b>	
Jufri Ghalib .....	667
<b>RECONSTRUCTION OF LIABILITY NOTARY PUBLIC OFFICERS TO ACT AS A VALUE-BASED JUSTICE</b>	
Elpina .....	679
<b>RECONSTRUCTION OF CONSUMER PROTECTION LAW IN MAKING THE BALANCE BUSINESS BASED BUSINESS AND CONSUMER VALUE OF JUSTICE</b>	
Ramon Nofrial .....	693
<b>RECONSTRUCTION OF LAND USED RIGHT EIGENDOM VALUES BASED ON JUSTICE AND LEGAL CERTAINTY</b>	
Hakim Tua Harahap .....	706
<b>RECONSTRUCTION OF DIVERSION CONCEPT IN CHILD PROTECTION OF CONFLICT WITH THE LAWS BASED ON THE VALUE OF JUSTICE</b>	
Ulina Marbun .....	726
<b>RECONSTRUCTION OF PARATE EXECUTION MORTGAGE RIGHTS TO LAND BASED ON THE VALUE OF JUSTICE</b>	
Zaenal Arifin .....	740
<b>THE RECONSTRUCTION OF DIVORCE DUE TO MARITAL STATUS UNDER THE UNAUTHORIZED GUARDIAN AS VALUE OF JUSTICE</b>	
Abdul Kholiq .....	751
<b>THE RECONSTRUCTION OF LEGAL AID LAW FOR CHILDREN WHO GET CONFLICT WITH LAW IN PROCESS OF JUSTIFICATION FOR CHILDREN BASED ON THE VALUE OF PANCASILA</b>	
Adi Mansar .....	767
<b>MEDIATION RECONSTRUCTION AS ONE OF THE ALTERNATIVE SETTLEMENT OF DECLINE IN THE COURTS BASED ON THE VALUE OF JUSTICE (Study at the Simalungun District Court)</b>	
Mariah S.M. Purba .....	778
<b>POLYGAMIC POLICY IN INDONESIA (Analysis of Polygamic Arrangements and Practices 1959-2015)</b>	
Warman .....	790

<b>LAW ENFORCEMENT AGAINST CORRUPTION IN PERSPECTIVE OF HUMAN RIGHTS IN INDONESIA</b> Sekhroni .....	798
<b>THE PRINCIPLE OF NATURAL JUSTICE AND HUMAN'S RIGHT PROTECTION FOR CITIZENS IN ERADICATION OF CORRUPTION IN INDONESIA</b> Indriyana Dwi Mustikarini .....	809
<b>PREVENTING LAND MAFIA USING POSITIVE LAND REGISTRY SYSTEM</b> Bambang Sulistyowati .....	816
<b>UNRULY PASSENGER IN AVIATION: THE REGULATIONS AND CASES IN INDONESIA</b> Adya Paramita Prabandari .....	826
<b>EDUCATION ANTI-CORRUPTION IN INDONESIA: PROBLEMS, CHALLENGES AND SOLUTIONS</b> Alwan Hadiyanto .....	839
<b>SPIRITUAL URGENCY OF RELIGIOUS AND EXPENSES OF EVIDENCE IN COMBATING CORRUPTION IN INDONESIA</b> Sulistyowati .....	852
<b>SUE FOR THE STATE ADMINISTRATION OF JUSTICE IN INDONESIA</b> Sarjiyati .....	863
<b>CONSISTENCY MODEL OF COURT DESIGNATION TO FOSTER PARENT RIGHTS AUTHORITY DUE TO DIVORCE ON CHILDREN</b> Erna Trimartini .....	873
<b>AN INVESTIGATION AUTHORITY OF CRIMINAL ACT ON CORRUPTION IN CRIMINAL JUSTICE SYSTEM IN INDONESIA</b> Sukmareni .....	885
<b>PRO CONS THE EXISTENCE OF DEATH PENALTY IN CORRUPTION ACT OF 1999 IN INDONESIA</b> Anis Rifai .....	903
<b>PENAL MEDIATION IN SOLVING MEDICAL MALPRACTICE CASES AS AN ALTERNATIVE OF PENAL SANCTIONS BASED ON LOCAL WISDOM</b> Sri Setiawati .....	913
<b>SPECIAL PROTECTION OF CHILDREN IN CRIMINAL JUSTICE SYSTEM</b> Achmad Sulchan .....	922
<b>MORAL REFORM BUREAUCRACY AS PREVENTION OF ILLEGAL PAYMENTS TO INDONESIA CLEAN OF CORRUPTION</b> Herwin Sulistyowati .....	932
<b>STANCE AND AUTHORITY OF PEOPLE'S CONSULTATIVE ASSEMBLY DURING REFORMATION ERA 1945</b> Ahmad Mujib Rohmat .....	944



<b>TAXES AND ALMS SEEN FROM ISLAMIC LAW</b>	
Mohammad Solekhan .....	954
<b>DIVERSION IN COURT (Case Studies in Karanganyar District Court)</b>	
Anita Zulfiani .....	964
International Seminar	
Photos.....	971

# JURIDICAL ANALYSIS OF THE ALLEGED CRIMINAL OFFENSE TO MANUFACTURE A NOTARY DEED

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## **A. THE BACKGROUND**

Occurred facts civil law that is the buying and selling transaction with the object of property rights of the land, it resulting the appearance of *absolute* ownership transition. The Constitution No. 5 of 1960, the main points of Agrarian Article 20 (2), the property rights can be switch and to be redirected to another part<sup>1</sup>. That agreement of buy and sell have been born in seconds the reached of “agreed” regarding goods and prices<sup>2</sup>. Because it happened switch over of rights that is the *absolute* property rights according to the Civil Law its happened a legal relationship. So that buy and sell legitimately according to the Civil Law it can be poured into the authentic deed that made in front of the Notary public that is the deed of “the keel agreement treaty of buying and selling with the authority”.

Buying and selling of the land rights be poured into the authentic deeds that made in front of the Notary public on his authority according to the constitution, and the Notary is not a part, at the instance of the parts to poured into the authentic deed and further more it's the lifelong responsibility notary and the notary have the principle of formal correctness so it does not have responsibility to the contents of the deed, but then is in dispute against the bad tagged, The deed has been made Notary made basic a legal disputes in involving notary that made, anytime notary can be assign as a suspect/be detained which had no connection with the contents of the deed.

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<sup>1</sup> Subekti, *Kitab Undang-Undang Hukum Perdata*, Pradnya Paramita, Jakarta, 2008, page 622.

<sup>2</sup> R. Subekti, *Aneka Perjanjian*, Cetakan VII, Alumni Bandung, page 2.

## B. FORMULATION OF THE PROBLEM

From the description above may be with drawn a formulation of the problem that has to do with this paper.

“Do Notary could become a criminal suspects in deed made”

## C. DISCUSSION

### 1. Making the authentic deed in front of a Notary.

The interest of the part are protected with that deed. the contents of the deed are head deed about the number, the date and the time when the deed are made, official name, the jurisdiction, and the identity of the parts is the subjective terms, the deed bodies consists of the contents of the deed being objective conditions and the end of the deed which is related with read out the contents of the deed and also affixed signature and a finger print of the parts, witnesses and Notary with the principal clause a payment in full with the authority, where the seller giving a special authority that the power of the law are deviate from the Articles 1813 Book of the Law of Civil Law because already available *acecoir*. It is intended that the buyer still be able to take a legal action anytime. The Law No. 2 of 2014 about the Notary position Article 1 (1) mentioned “Notary is a public official authorized made an authentic deed and another authority as intended in this Constitution<sup>3</sup>.

A public official term is a translation of the term *Open bare Ambttenaren* which are contained in an Article 1 Notary Position Regulations and Article 1868 Burgerlijk Wetboek (B.W), Article 1 Notary Position Regulations mention that : “*De notarissen zijn openbare ambtenaren uitsluitend bevoegd, om authentieke akten op te bereene algemeene verordening gebiedt of debelanghebbenden veriangen, reksels uit te geven; alles voorzoover het opmaken dier akten door eene algemeene verordening niet ook aan andere ambtenaren of personen opgedragen of voorhehouden is, and an Article 1868 Burgerlijk Wetboek (B.W) mention that : “Eene authentieke acte is de zoodanige welke in de wettelijken vorn is verleden, door of ten overstaan van openbare ambtenaren die daartoe bevoegd zijn terplaatse alwaar zulks is geschied..<sup>4</sup>*”

<sup>3</sup> Undang-Undang Nomor.2 Tahun 2014, page 2.

<sup>4</sup> Habib Adjie, *Sekilas Dunia Notaris & P.P.A.T*, C.V. Mondar Maju, Bandung, 2009, page 15

The provisions of an Article 1868 B.W mention that the deed can be said an authentic deed if its eligible as follows :

1. That deed made by (*door*) or made in front of (*ten overstaan*) a public official (*openbare ambtenaren*).
2. That deed must be made in the form of (*vorm*) which has been specified by the constitution (*wettelijk/e vorm*).
3. The public official that made the deed must be authorized to make that deed, an authority by work area (territory) or the time when that deed are made.<sup>5</sup>

Law of the Republic of Indonesia Number 2 2014 about the Notary position that the notary as public official be based on Article 1 (1), bentuk (*vorm*) Notarial Deed based on Article 38 paragraph (1) are determined such like an authentic deed have a perfect verification power and the notary authorized based on Article 1 (7) and the jurisdiction facing to the officials. Philipus.M. Hadjon<sup>6</sup>. Explain that authorized obtainable through three sources, there are : attribution, delegation and mandate. The authority attribution in the usual outlined through division of state power by constitution, while an authority of delegation and mandate an authority that comes from delegation.

The deed that Notary made constitute a written evidence, there for the constitution be given a perfect verification power. According to Article 165 H.I.R (Article 285 and Article R.Bg B.W 1870 and 1871) an authentic deed for the parties and their heir and they acquire rights of him is a perfect evidence about what is contained in it and even about what contained in the deed as a mere narrative the latter is just along what is described if there is a direct relationship with the principal deed<sup>7</sup>.

The Deed said to be authentic as long as cannot be proven otherwise (*acta publica probant sese ipsa* principle) even have a the strength of evidence outwardly, that is to say that who's questioned the deed then he has the burden verification toward his refute on the authentic deed (Article 138 H.I.R, R.Bg 164, 148 Rv) ..

## 2. Legal protection for Notary profession

While an authentic deed evidentiary value have a strong verification, there are :

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<sup>5</sup> H.Husni Thamrin, *Pembuatan Akta Pertanahan Oleh Notaris*, Laksbang Pressindo, Yogyakarta, 2011, page 23.

<sup>6</sup> H.Husni Thamrin, *Pembuatan Akta Pertanahan Oleh Notaris*, *Op.Cit*, page 67.

<sup>7</sup> H.Husni Thamrin, *Pembuatan Akta Pertanahan Oleh Notaris*, *Loc.Cit*, page 31s

1. Outwardly probative value (*Uitwendige Bewijskracht*) which is in conformity with the rule of law which has been determined an authentic deed on terms.
2. Formal (*Formele Bewijskracht*) that something incident and that fact carried out in deed are really carried out by a notary or be explained by the parties overlooking listed in the deed.
3. Material (*Materiele Bewijskracht*), certainty about a deed material what is called in the deed constitute proof of legitimate for parties that a deed be delivered and pour into Partij deed.

If the parties and another parties are not the parties question that deed no need to pull the notary as a defendant/join a defendant or reported, even considered participate acts so entangled or convicted as a create offense as mentioned at Article 55 of the Criminal Code, participate, if used the argument of this article related with an authentic deed position then there is an indication the criminalization of law. Notary be suspect, except in the extreme notary deliberately to fulfill a personal interests such as entering a faked information in the authentic deed directly related by deed minuta attached, there is a parties are not attend, there's unknown renvoi one of the parties thus becoming a source of dispute. However it needs to be reviewed what if there a parties are not attend, not attending in unison or notary sign in the deed outside his territory, there are changes/renvoi within minuta deed, whether to the things mentioned above are categorized as a criminal offense?, all those in UUN instead of criminal sanctions it is called deed under the hand due to legal redress.

In the decision of the Supreme Court number: 1642 / K / Pdt / 2005, that in a civil action often included a civil action due to incomplete defendant resulting *error in persona*./error of law subject then the claim is not accepted./*Niet Ontvankelijk verklaard*.

In the decision of the Supreme Court number : 702 K/K/Sip/1973, September 5, 1973, that an authentic deed made by notary as the deed, if the parties to the dispute, a legal certainty that notary can not be punished because the deed he made is an authentic deed already according to the Law, with principles "no punishment without fault" or "*culpabilitas* principle"<sup>8</sup>.

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<sup>8</sup> Sri Endah Wahyuningsih, *Prinsip-prinsip individualisasi pidana dalam hukum pidana Islam*, Badan penerbit Universitas Diponegoro, Semarang, page 116

## D. ENDING

### 1. Conclusion

Consideration verdict Constitutional Court 49/2012 for Notary as a public official calls on law enforcement must be maintained authority and specially treated in order to maintain the dignity of the notary in the proceeding sprudence necessary of the law enforcer in action without injuring the principle of rule of law (Ps 1 v 3 Constitution), include the notary's name and signature interpreted the notary as a party to the deed so it is placed as a defendant/ a joint defendant/ witness / suspect / defendant, put notary position misguided do not understand the position of Notary in the National legal systems, then the demands deeds against the law (*onrecht matigedaad*) pursuant to Article 1365 can not be done.

Notary legal protection if in a civil action are never comes it can verdict *Verstek* if the decision is adverse Notary it can apply for resistance *Verzet* and needed assistance to defend their legal rights and if the notary present follow the trial then no need to answer in the principal case how ever must be answered the exception to the authority of the Notary.

### 2. Suggestion

- a. Because the Notary in their <sup>6</sup> profession vulnerable to problems which can be included in a criminal case it is necessary accompany mentor advocacy of the Honorary Council of Notaries / MKN so investigators do not necessarily call as a witness and then as a suspect.
- b. The law reform related to Article 55 of the Criminal Code need to be tested in the *judicial Review* so that it's not become an Article were easily made the ore by unscrupulous investigators to ensnare Notary criminalized as a result of its will become disabled in the community if the status of the convict, *spikis*, related to the moral and the material that must be borne to his family.

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### CONSTITUTION

*Code of Civil law.*

*Act No. 5 of 1960, of the Basic Regulation Highlights Agraria.*

*Act No. 2 of 2014 concerning Notary.*