

Exploring the Role of Notaries in Common Law and Civil Law Legal Systems: A Comparative Analysis of Authentic Deed Making

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ABSTRACT

The role of notaries in Civil Law and Common Law legal systems, with a focus on Indonesia and Malaysia as examples of each. The Civil Law legal system in Indonesia regulates notaries as public officials responsible for making authentic deeds with strong evidentiary power in the eyes of the law. This study uses a normative research approach to explore the legal regulations governing notaries in both legal systems, by analyzing the UUJN in Indonesia and the Notaries Public Act 1959 in Malaysia. The main findings show that notaries in Civil Law have broader authority in making authentic deeds compared to Notary Public in Common Law, which focuses more on document verification and attestation. This difference reflects the characteristics of each legal system in regulating the role of notaries in maintaining legal certainty in society. Further research on these differences and similarities can provide valuable insights for legal development in both systems, as well as help formulate more effective strategies in meeting the increasingly complex and connected global legal needs.

Keywords: Authentic Deed, Civil Law, Common Law, Notary,

INTRODUCTION

The dominant and commonly used legal systems in various countries around the world are *Civil Law* and *Common Law*. Both legal systems recognize the importance of notarial institutions. In Indonesia, the recognized notary is the *Continental Law* notary or *Civil Law Notary*.¹ The institution recognizes two main legal systems, namely the Continental (Latin) system with *Civil Law* and the Anglo-Saxon or Anglo-American system with *Common Law*.² The development of notarization and the regulations related to notarial practice have adapted to changes in time, place, legal politics, and legal awareness in each country.³ It is important to understand the differences and similarities in the nature, function, strength of evidence, and application of notarial deeds in notarial practice in both legal systems, given the increasing international relations between

¹ Nadhif M. Alkatiri, Kanti Rahayu, *Perbandingan Tugas dan Wewenang Notaris Indonesia dan Amerika Serikat*, Yogyakarta: Tanah Air Beta, 2021, h.12

² Rizka Nurliyantika, dkk. "Studi Komparasi Tugas dan Wewenang Notaris di Indonesia dan Malaysia" *Repertorium Jurnal Ilmiah Hukum Kenotariatan*, Vol 11 No 2 (2022): 197

³ Rusdianto Sesung, dkk, *Hukum & Politik Hukum Jabatan Notaris*, Jawa Timur: R.A. De. Rozarie, 2017, h.121

countries. There are several relevant international civil law rules that need to be considered, especially in the context of international legal problem solving.

In *Civil Law Notary*, notaries have the authority granted by law to produce deeds that have strong and binding evidentiary power, such as authentic deeds.⁴ The distinctive characteristics of a notary in the *Civil Law* legal system are his independence and neutrality, which means looking out for the interests of all parties involved in a legal transaction to prevent future disputes from arising. In *Common Law*, a notary serves as an independent witness who not only secures the creation of legal documents, but also ensures that the process is carried out in compliance with applicable legal procedures. Whereas in *Civil Law*, notaries often have a more structured and formal role, with responsibilities that include not only the creation of authentic deeds but also the assurance of the legality and authenticity of legal documents as a whole. Both legal systems recognize that notaries have an important role in ensuring legal certainty and the protection of the interests of the parties involved in legal transactions, so maintaining the integrity and validity of legal documents is one of the main aspects of the notary function in modern legal societies.

The *civil law* legal system is characterized by codification, which is the recording of laws or statutes in a book (*code*). This codification collects as many legal provisions as possible in a systematic manner.⁵ According to Prita Miranti Suyudi, *civil-law* notaries, or often called Latin notaries, are civil law officials who are authorized by the government to make and issue authentic deeds and provide legal explanations to the parties involved. This is an authority that is not possessed by notaries in the *common-law* legal system.

The rapid development of law affects the duties of notaries in making deeds, following the rapid dynamics of human actions. This requires notaries to find ways or breakthroughs to meet the needs of society in accordance with the Law, known as Legal Discovery. This legal discovery is usually defined as the formation of law by judges or other legal officers who are given the task of implementing the law on concrete legal events. The position of notary is an important profession that lies in the authority granted by law to compile absolute means of proof. Therefore, authentic deeds made by notaries are considered valid and true. This is very crucial, especially for parties who need validity in personal or business matters.⁶

Proof by writing is done either through authentic writings or underhand writings. Article 1866 of the Civil Code states that the main evidence is written evidence. This shows that written evidence is considered the most important and main evidence in the proof stage in court. Proof by writing involves documents that can be in the form of authentic deeds, which are notarized or authorized officials, as well as documents under the hand, which are made by the parties concerned without the involvement of official

⁴ Gladys Natalie Sirait, Benny Djaja, "Pertanggungjawaban Akta Notaris sebagai Akta Autentik Sesuai dengan Undang-Undang Jabatan Notaris" *Unes Law Review*, Vol 5 No 4 (2023): 3365

⁵ Ahmad Rifai, *Penemuan Hukum oleh Hakim Dalam Perspektif Hukum Progresif*, Jakarta: Sinar Grafika, 2011, h. 17

⁶ Erina Permatasari dan Lathifah Hanim, "Peran dan Tanggung Jawab Notaris terhadap Pelaksanaan Pendaftaran Badan Hukum Perseroan Terbatas melalui Sistem Online" *Jurnal Akta*, Vol 4 No 3 (2017): 401-402

officials. In a legal context, this written evidence has a very significant weight because it provides clarity and certainty over the facts in dispute. Written evidence is the main basis for judges to assess the truth of a case and make a fair decision. The primacy of written evidence reflects the importance of accurate documentation and recording in all legal transactions, both in personal and business matters.⁷

The role of notaries in deed-making is not uniform across the world's legal systems. In *civil law* systems, notaries have broad and deep responsibilities, given the importance of legal codification. They act as the guardians of legality, ensuring that every deed created complies with the provisions of the legal codification. In addition, notaries often act as legal advisors, helping clients understand and comply with applicable laws.

In contrast, in the *common law* system, the role of notaries is more limited and less comprehensive than in *civil law*. *Common law* relies more on precedents and court decisions rather than codified written law. In *common law* countries, notaries are usually only involved in certain administrative tasks such as attestation of signatures and documents, and are not deeply involved in the creation of complex deeds or contracts. As such, while notaries in both legal systems must adapt to the rapid development of the law, the way they do so differs. *Civil law* notaries must be able to navigate and interpret the ever-evolving legal codification, whereas *common law* notaries focus more on administrative compliance and document attestation. Therefore, it is important to conduct further study and research on the different roles of notaries in these two legal systems. An in-depth understanding of the role of notaries in *civil law* and *common law* will not only help in identifying the challenges they face but also in formulating effective strategies to meet the legal needs of people in different jurisdictions. Such research will provide valuable insights into how the role of notaries can be optimized in different legal contexts, given the fundamental differences between the codification of law in *civil law* and the use of precedents in *common law*.

METHOD

In legal research, certain approaches are needed to resolve legal issues, as a basis for compiling precise, logical, and accurate legal arguments.⁸ This research uses normative research methods, which focus on the inventory of positive law, legal principles and doctrines, legal discovery in concrete cases, legal systematics, comparative law, and legal history.⁹ Normative legal research can be interpreted as a process to find legal rules, legal principles, and legal doctrines to answer the legal issues at hand. In addition, legal research aims to produce arguments, theories, or concepts as solutions or answers to the problems at hand.¹⁰ This research uses a statutory approach that will refer to the rules of law relating to notaries in making deeds, one of which is Law Number 2 of 2014 concerning the Notary Position. The method of collecting materials in this research

⁷ Rosdalina Bukido, "Kedudukan Alat Bukti Tulisan Terhadap Penyelesaian Perkara di Pengadilan Agama Manado" *Jurnal Ilmiah Al-Syir'ah*, Vol 9 No 1 (2011): 475

⁸ Irwansyah, *Penelitian Hukum Pilihan Metode & Praktik Penulisan Artikel*, Yogyakarta: Mitra Buana Media, 2020

⁹ Abdul Kadir Muhammad, *Hukum dan Penelitian Hukum*, Bandung: PT. Citra Aditya Bakti, 2004, h.52

¹⁰ Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana, 2010

is carried out through library research, which also analyzes the role of notaries in making authentic deeds.

RESULTS AND DISCUSSION

The Role of Notary in Civil Law System

Civil Law Notary is a notary in the Latin notarial environment.¹¹ In Latin, a notary, who is a public official in the notariat, is *ajurist*.¹² Apart from notaries, another profession that provides legal services is lawyers. These lawyers assist their clients mainly in the area of procedural law related to disputes between individuals in civil matters or charges brought by the state against individuals in criminal matters. In addition to providing these services, lawyers also provide advice to their clients, with such advice being given only for the benefit of the client requesting such advice.

The main duty of a notary is to assist his or her clients in the creation of notarial deeds. In performing their duties, notaries must act *impartially* (*onpartijdigheid* - *impartiality*) and have an independent position (*onafhankelijkheid* - *independency*), not being subject to any party.¹³ These traits and characteristics are typical of Latin notarization, which a notary must uphold and carry out conscientiously. Basically, any individual appointed as a notary is considered a public official who has the authority to make all types of authentic deeds, unless the law explicitly grants such authority to other persons or officials for certain types of legal acts. Notaries in the Latin notarial system have a monopoly on the making of authentic notarial deeds in the realm of private law, although there are other officials who also have the authority to make authentic deeds in certain contexts.¹⁴

Notaries are not allowed to make certain types of deeds that have been excluded by law. The authority to make these deeds is only given to specific officials or individuals in accordance with the provisions of the law. For example, population registration officials in the course of their duties may make authentic deeds that have the legal force of public officials, but they are not notaries in the true sense of the word. The same applies to Consuls-General, who in their place of duty are authorized to make authentic deeds in accordance with the applicable regulations in the country concerned.¹⁵ For example, under Articles 143 and 218 of the Commercial Code, bailiffs in district courts also have

¹¹ M.J.A. van Mourik, *Civil Law and the Civil Law Notary in the Modern World*, makalah pada Ceramah Ilmiah “Pengaruh Globalisasi pada Common Law dan Civil Law (khusus BW)”, 3 Maret 1992, Jakarta.

¹² Fariz Rachman Iqbal, “Kekuatan Pembuktian Akta Notaris Yang Cacat Formil (Studi Kasus: Perkara Nomor 1769/K/Pdt/2011)” *Jurist Diction*, Vol 3 No 1 (2020): 79

¹³ Wanis Aisyah Oktavia, dkk, “Kedudukan Akta dan Akibat Hukum Terhadap Notaris Yang Melakukan Rangkap Jabatan” *Acta Diurnal*, Vol 3 No 1 (2019): 25

¹⁴ Rizky Amalia, “Pertanggungjawaban Notaris terhadap Isi Akta Autentik yang Tidak Sesuai dengan Fakta” *Al-Ishlah: Jurnal Ilmiah Hukum*, Vol 24 No 1 (2021): 190

¹⁵ Donico Doly, “Kewenangan Notaris dalam Pembuatan Akta yang Berhubungan dengan Tanah” *Negara Hukum*, Vol 2 No 2 (2011): 270

the authority to draw up draft protest deeds.¹⁶ Thus, in the Latin notarial system, notaries hold a special role as public officials who have the authority to make authentic deeds in private law, but they are not the only officials who can perform this act, as some types of authentic deeds can also be made by other officials or individuals specified by law.

In Indonesia, which follows the Civil Law legal system, regulations regarding the procedures for notarial deeds, the role, authority of notaries, and other aspects related to notarial deeds are set out in Law No. 30/2004 on the Office of Notary as amended by Law No. 2/2014 on the Office of Notary (UUJN). This law comprehensively regulates notarial practices in Indonesia, including the procedures that must be followed in making notarial deeds, the role of notaries in validating legal documents, and the authority that notaries have in terms of resolving various private legal issues.

The UUJN includes provisions that regulate the requirements to become a notary, registration procedures, supervision, and the obligations and responsibilities of notaries in carrying out their duties. In addition, this Law also regulates procedures to ensure that deeds made by notaries have strong legal validity in the eyes of the law. In this regard, the duties and authorities of notaries are described in Article 1 paragraph 1 of UUJN, where notaries have the authority to make authentic deeds and other authorities as stipulated in UUJN. These other authorities are outlined in Article 15 of Law Number 2 of 2014 which amends Law Number 30 of 2004 concerning the Position of Notary, which states that:

- (1) Notaries are authorized to make authentic Deeds concerning all acts, agreements, and stipulations required by laws and regulations and/or desired by the parties concerned to be stated in an authentic Deed, to guarantee the certainty of the date of making the Deed, to keep the Deed, to provide a grosse, copy and quotation of the Deed, all insofar as the making of the Deed is not also assigned or excluded to other officials or other persons stipulated by law.
- (2) In addition to the authority as referred to in paragraph (1), a Notary is also authorized:
 - a. certify the signature and determine the date certainty of the underhand letter by registering it in a special book;
 - b. record the underhand letter by registering it in a special book;\
 - c. make a copy of the original underhand letter in the form of a copy containing the description as written and described in the letter concerned;
 - d. attesting the suitability of the photocopy with the original letter;
 - e. provide legal counseling in connection with the making of a Deed;
 - f. make a Deed relating to land; or g. make a Deed of auction minutes.

The role of notaries in notarial deeds in Indonesia, which adopts the Civil Law legal system, reflects the authority granted to them by Law Number 30 of 2004 concerning the Notary Office (UUJN) and its amendment in Law Number 2 of 2014. As a public official, a notary has a very important role in the process of making notarial deeds, which are considered authentic deeds that have strong evidentiary power in the eyes of the law.

¹⁶ Yesika Adhisdea Baderan, "Sertifikat Hak Milik yang Diperoleh Penggarap Atas Dasar Surat Keterangan Kepemilikan Dari Desa (Studi di Kabupaten Puhuwanto Provinsi Gorontalo)", *Jurnal Res Justitia: Jurnal Ilmu Hukum*, Vol 3 No 2 (2023): 234

Notaries in Indonesia are responsible for ensuring that every notarial deed they create meets the requirements set out in UUJN, such as clarity of content, legal validity, and clear consent from all parties involved.¹⁷ They must also verify the identity of the parties involved and ensure that they are acting on their own volition and awareness in the transaction or agreement recorded in the deed. In addition, notaries in Indonesia also have an obligation to maintain the confidentiality of documents and information that they become aware of in their professional capacity, in line with the public trust given to them as guardians of integrity and legal certainty in society. The behavior of notaries in performing their duties in notarial deeds is crucial to ensure that public trust in the notary institution as the guardian of justice and the validity of legal documents is maintained. As such, the role of notaries in Indonesia's Civil Law legal system is not only limited to the creation of notarial deeds, but also includes the obligation to maintain high standards of ethics and professionalism in every aspect of their work.

The Role of Notaries in the Common Law System

In countries with the Anglo-Saxon or Anglo-American system, there are Notary Public who have different roles and duties compared to notaries in the Continental (Latin) system.¹⁸ To provide further examples, the United Kingdom and the United States were chosen as representatives of Common Law countries. The development of the business world also affects the work of notaries. The notary, as a legal practitioner, must understand the differences in the concept of notarial office and its impact on the two main legal traditions.¹⁹ The different legal systems require notaries to analyze both traditions.

In Malaysia, as an example of a Common Law legal system that has influences from the Anglo-Saxon system, there is a Notary Public that has a unique role in the legal system. Notary Public in Malaysia is tasked with notarizing and giving legal force to certain legal documents, such as deeds of agreement, wills, or other documents that require legal verification. They also play a role in witnessing and certifying signatures on such documents, so that the documents have strong evidentiary power in the eyes of the law.

Section 4(1) of the Notaries Public Act 1959 clarifies that every notary public has the privilege and power to carry on his practice in Malaysia, by performing the functions normally performed by notaries in the United Kingdom, subject to certain conditions, for the purposes and to the extent necessary.²⁰ However, such powers do not extend to activities such as administering oaths or certifying affidavits or laws used in courts or other places in Malaysia, or to take or prove affidavits or laws in accordance with the law. Article 4(2) explains that:²¹

“administer any oath or affirmation in connection with any affidavit or statutory declaration which is executed—

¹⁷ Rahmad Hendra, “Tanggungjawab Notaris terhadap Akta Otentik yang Penghadapnya Mempergunakan Identitas Palsu di Kota Pekanbaru” *Jurnal Ilmu Hukum*, Vol 3 No 1 (2013)

¹⁸ Basyarudin, “Budaya Hukum Notaris dalam Menjalankan Jabatan” *Dinamika Sosial Budaya*, Vol 23 No 1 (2021): 66-77

¹⁹ Ma Junyu “Notary According to Civil Law and Common Law That Related Strongly with International Civil Transactions” *Jurnal Akta*, Vol 7 No 3 (2020)

²⁰ Thaufiq Deen, O. Argo Victoria, Sumain, “Public Notary Service in Malaysia”, *Jurnal Akta*, Vol 5 No 4 (2018):1018

²¹ Law of Malaysia, Notaries Public Act 1959

- i. for the purpose of confirming or proving the due execution of any document;
- ii. by any master or member of the crew of any vessel in respect of any matter concerning that vessel; or
- iii. for the purpose of being used in any court or place outside Malaysia, and may take or attest any such affidavit or statutory declaration;”

It can be explained that a notary public may administer oaths or certify any affidavit or legal statement signed for the purpose of confirming or proving the execution of any document, as well as to any captain or member of the crew on any matter relating to the vessel. They also have the authority to notarize documents to be used in any court or other place outside Malaysia, as well as may take or prove any affidavit or legal statement in accordance with the provisions of the act. It can be concluded that notaries in the Notaries Public Act 1959, are as follows:

1. Certify official documents intended for use overseas.
2. Administering oaths to be used abroad.
3. Certify affidavits and legal declarations intended for use abroad, including:
 - a. Terkait dengan masalah pengadilan.
 - b. Untuk membuktikan pelaksanaan dokumen.
 - c. Untuk masalah yang terkait dengan kapal laut.

In Malaysia, the role of a notary public in deed making is to notarize and give legal force to legal documents such as deeds of agreement, deeds of purchase-sale, and deeds of testament. They are responsible for witnessing the signatures of the relevant parties, ensuring the validity of the documents in accordance with the applicable Common Law in Malaysia, and fulfilling all relevant legal requirements. Notaries also provide legal certainty by making the documents authentic evidence that can be used in court or in other legal transactions.

Comparison of the Role of Notary in Civil Law and Common Law

In the Civil Law legal system, notaries have a clearly defined role as public officials responsible for making authentic deeds. They have broad authority to make deeds that have evidentiary power in the eyes of the law, such as deeds of agreements, wills, or other transactions regulated by law. Notaries in a Civil Law system, such as the one in Indonesia, have a primary duty to ensure the clarity and validity of the documents they create, as well as to verify the identity and will of the parties involved in the legal transaction. Their authority is based on the Notary Law which provides a clear framework of deed-making procedures, supervision, and moral and ethical responsibilities that must be adhered to.

In countries with a Common Law legal system, such as in Malaysia, the role of notary is held by Notary Public. Notary Public do not have the same authority as notaries in the Civil Law system, but they have an important role in notarizing certain legal documents, especially those dealing with international transactions or those that require recognition abroad. They are tasked with witnessing signatures on documents such as deeds of agreement, as well as to give these documents the legal force to be used internationally. The role of the Notary Public in Common Law is often limited to the

verification and attestation of documents that meet certain requirements, as provided for in the Notaries Public Act 1959 in Malaysia.

There are advantages and disadvantages of each legal system in making authentic deeds, namely as follows:

- **Civil Law:** Pros: Notaries have a clear role defined by law, making them the custodians of stable and standardized legal certainty. Disadvantages: Sometimes rigid in formal procedures, requiring strict adherence to rules that can slow down the legal process.
- **Common Law:** Pros: Flexible in handling legal documents of an international nature, allowing for overseas use with internationally recognized verification. Disadvantages: Subject to different policies in different jurisdictions, resulting in variation in legal treatment between countries.

The fundamental difference between Civil Law and Common Law in the role and authority of notaries has a significant impact on international legal and business practices. Civil Law systems provide strong legal certainty through notaries who have a clear and defined role, making them the guardians of the validity of legal documents domestically. In contrast, Common Law offers flexibility in the recognition of legal documents internationally, facilitating cross-border transactions more easily. In international business, harmonization of legal document recognition between jurisdictions is key to facilitating transactions and reducing legal risks, with Notaries in the Civil Law system and Notary Public in Common Law playing a role in building this bridge between different legal systems. Awareness of the differences in the role and authority of notaries between Civil Law and Common Law is important for entrepreneurs and international legal practitioners to optimize the use of their legal documents in various countries.

CONCLUSION

The fundamental difference between the role of notaries in Civil Law and Common Law systems illustrates the significant impact on international legal and business practices. The Civil Law system, as applied in Indonesia, establishes notaries as public officials who have a special role in creating authentic deeds, which support legal certainty and clarity in domestic legal transactions. They are responsible for verifying the validity of documents, ensuring the identity of the parties involved, and maintaining high ethical standards. In contrast, under the Common Law prevailing for example in Malaysia, the Notary Public has a focus on attesting certain documents that require international recognition, such as deeds of covenant, with its role being more limited yet crucial in facilitating cross-border transactions. Awareness of these differences is important for international businesses and legal practitioners to make optimal use of their legal documents in various jurisdictions, reducing legal risks and facilitating smooth cross-border operations

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