



## Juridical Analysis on Provisions of the Number of Witnesses in Sharia Deed by a Notary

Rico Aldiano; Abdul Rachmad Budiono; Endang Sri Kawuryan

Law Faculty, Brawijaya University, Indonesia

<http://dx.doi.org/10.18415/ijmmu.v8i2.2312>

---

### **Abstract**

This study aims to analyze and formulate the provisions on witnesses in Law Number 30 of 2004 on notary position jo Law Number 2 of 2014 on Amendment to Law Number 30 of 2004 on notary position in the making of sharia notarial deed. This research is a normative legal research which utilizes statute approach and conceptual approach. The provision regarding the number of witnesses in making a sharia deed by a Notary is that if the witness consists of 1 (one) man, then it has to be followed by 1 (one) man. The absence of 1 (one) man can be replaced by 2 (two) women in accordance with the provisions of Islamic law based on Al-Qur'an Surah Al Baqarah [2:282]. Since the sharia deed is a deed that accommodates the provisions of Islamic law that are not contained in a conventional deed, according to the researcher, the sharia deed should be following the Islamic Law. For this reason, the provisions of the reading of sharia deeds by a notary before witnesses must provide an explanation that woman have the power of proof of ½ (half) of man in the reading of sharia deeds or a new rule that accommodates these provisions.

**Keywords:** *Witness; Sharia Deed; Notary*

### **Introduction**

Contract is important in every transaction, including contract/transaction in Islamic (sharia) business. An agreement must be recorded in the presence of a notary in order to obtain legal force. Accordingly, every business, including Islamic business, always needs a notary as a general officer who provides authentic deed according to his/her duties stipulated in Law Number 30 of 2004 on Notary Position (UUJN) jo. Law Number 2 of 2014 on Amendment to Law Number 30 of 2004 on Notary Position (UUJN Amendment).

Currently, sharia bank as a subsystem of the national banking system which is specifically regulated in Law Number 21 of 2008 on Sharia Banking also uses a notary service in every business activity, especially those related to Financing Contract Deed. Contract is important in Islamic banking transaction (Nurwulan, 2018). Sharia bank believes that the most important guarantee is the ability of customers to repay debts or obligations. Although bank should ask for additional guarantee, bank is not

required to ask for collateral in the form of goods which are not directly related to objects financed. Thus, guarantee is more likely to function as proof of goodwill from client to pay off the debt or commitment in fulfilling promise.

From an agreement, an obligation arises for the client to return the borrowed funds, in which problems frequently arise. One of the problems is that client is usually negligent in returning the borrowed funds, so, in this case, collateral is needed to make sure that the funds of the bank is returned. Transaction between bank and clients related to financing, especially *musyarakah* principle requires the involvement of notary institution. This is because a contractual agreement between bank and client needs an evidence showing a guarantee of loan repayment to the bank so that sharia bank can still develop.

Notaries who formulate a sharia financing contract are expected to pay attention to the terms and conditions of the validity of the contract as stipulated in Islamic law. The legal construction of the clause in each section of the sharia contract can be determined whether it is in accordance with sharia contract law. In the process of formulating sharia banking contract deed, notary needs to consider things stipulated in UUJN and understands sharia banking matters.

There have been no specific regulations regarding the form of sharia deed or sharia contract deed clauses. In practice, contract made by bank and client is still subject to positive law, financing contract made by notary is too. In order to be called an authentic deed, the notarized form of sharia contract deed must meet the applicable statutory provisions. Accordingly, the notary is obliged to pay attention to the provisions of UUJN in formulating the form of sharia contract deed. In fact, many notaries do not understand the principles of sharia in making and formalizing sharia contract deed, which happened to the same notary.

There are basically three types of contracts found in sharia banking including *musyarakah*, *mudharabah* and *murabah* contracts (Mujahidin, 2016). Contracts offered by sharia banks are not the same as debt or credit. *Musyarakah* is a cooperation contract between two or more parties for a certain business in which each party provides a portion of funds with a requirement that profits will be shared based on the agreement, while losses are maintained based on each portion of funds. *Mudharabah* is business cooperation contract between the first party (*malik, shahibul mal* or bank syariah) that provides capital and the second party (*amil, mudharib* or client) as the fund manager by dividing the business profits according to the agreement set forth in the contract, in which the losses are fully borne by the sharia bank unless the second party makes a deliberate mistake, is negligent, or violates the agreement (Mardani, 2014). In addition, *murabahah* contract is a contract to finance an item by confirming the purchase price to the buyer and the buyer pays a higher price as an agreed profit. Non-cash transaction in *mudharabah* contract is one of various types of contract in sharia banking. Non-cash contract in sharia banking is usually the same as non-cash transaction in conventional bank, namely credit card. There are some types of non-cash contract including *kafalah* contract, *qardh* contract, *ijarah* contract, and *sharf* contract (Yusup, 2015). In the implementation of these contracts, the profits obtained by bank can be in the form of fee (*ujrah*) from client for bank services in facilitating the contract.

In making deed, notaries need witnesses so that notary employees act as witnesses listed in the deeds being made. This is definitely allowed as long as the employees meet the requirements to become the witnesses as stipulated in article 40 of Law on Notary Position. Witnesses in the deed is also mentioned in article 16 paragraph (1) letter i of UUJN. If the obligation to present 2 (two) witnesses is neglected, based on article 41 of Law on Notary Position, the deed is threatened with losing his authenticity, so that it becomes an unauthentic deed. Women's testimony often becomes a debate regarding whether the position of women is equal to that of men. The widespread understanding among the Muslim community so far is that the value of women's testimony is  $\frac{1}{2}$  (half) that of men's, as contained in various fiqh books and commentaries. This understanding has received a lot of criticism

since it seems to place the position of women lower than men. As a result, there are many accusations that Islam is a religion that discriminates against women. Al-Qur'an has a very important role in life as in giving testimony. This research aims to analyze and formulate provisions regarding witnesses as referred to in the UUJN and UUJN Amendment on the making of sharia deed by notary.

## **Methods**

This research is a normative juridical research; research that focuses on the process of assessing norms in positive law (Ibrahim, 2006). It utilized a statute approach and conceptual approach. Statute approach is an approach carried out by examining all statutory regulations and legal regulations related to the legal issue being studied (Marzuki, 2008). Moreover, conceptual approach is a conceptual approach that departs from the legislation and doctrines that develop in the realm of legal science (Marzuki, 2008). This approach is considered important since the views and doctrines of legal science can be used as guidelines for building legal arguments in solving legal problems at hand. Additionally, the legal materials used in this research are divided into 2 (two): primary legal materials and secondary legal materials. Primary legal materials are binding legal materials, which consist of statutory regulations including UUJN and UUJN Amendment, as well as other laws and regulations that can be used to support this legal research. Secondary legal materials provide an explanation of primary legal materials, such as draft bills, research results, works of legal experts, books, legal dictionaries, and *Kamus Besar Bahasa Indonesia* (the Great Dictionary of the Indonesian Language). Those legal materials were analyzed using grammatical interpretation, systematic interpretation, and comparative law.

## **Results and Discussion**

### **Analysis of Deed Witnesses based on Islamic Law**

In an Islamic law agreement, the identity of the party is related to the terms and conditions of the agreement. Basically, this is not much different from positive law in general. The followers of *maddhab* (schools) have different perspectives regarding the terms and conditions of an agreement. Ardiansyah (2019) wrote that the adherents of Hanafi school believed that agreement only needs *ijab* and *qabul* (*sighat al-'aqd*), the requirements or terms of the agreement agreed upon by the subject of the agreement (*al-'Aqidain*), and the object of the agreement (*mahallul 'aqd*). *Ijab* and *qabul* require witnesses as people who directly see the contract made by the parties.

Notaries as public officers have the authority to make sharia deeds. Maha Yoga (2018) claimed that the authority of the notary is based on the theory of authority. Consequently, every act of government and/or public officers must be based on legitimate authority. This authority is obtained through 2 sources: 1) attribution, which is the authority granted or stipulated by a certain position, and 2) delegation, which can be in the form of a delegation based on laws and regulations and a mandate which is a delegation from a higher position. Sharia agreement law is part of Islamic law in the field of *muamalah*, which is open, meaning that everything in the field of *muamalah* can be modified as long as it does not contradict or violate the prohibitions set out in the Qur'an and the Sunnah of the Prophet Muhammad (Dewi, 2006). In other words, in making a sharia contract, a notary has the authority in the form of delegation, from UUJN and Compilation of Islamic Law (KHI) as long as the contract made meets the requirements of the Sharia Agreement Law.

Witnesses are an inseparable part of the conventional agreement and the sharia agreement. Witnesses in Arabic are known as *Asy-syahadah*, a form of *isim masdar* from the word *syahida-yasyhadu* which means attending, witnessing (with one's own eyes), and knowing. *Syahadah* also refers to *al-*

*bayinan* (evidence), *yamin* (oath/promise) and *iqrar* (confession). Witness means people who see or know. According to *syar'i* term, a witness is a person who is accountable for the testimony and puts forward because he/she witnessed something (event) that other people have not witnessed. In other words, a witness is a person who saw or knew, was able to account for and testify because he/she witnessed an event that was not witnessed by other people. The provisions regarding witnesses in the contract have been regulated in Islamic Law.

Islam regulates testimony in Al-Qur'an meaning: "...and do not conceal testimony, and whoever conceals it, his heart is surely sinful." (Al-Qur'an Surah Al-Baqarah :283). The requirements for witnesses in Islamic law include being Muslim, male, mature, intelligent, and fair based on the legal basis of Al-Qur'an surah Al Baqarah verse 282, meaning: "O you who believe, when you deal with each other in contracting a debt for a fixed time, then write it down. Let a scribe write it down between you with fairness; and the scribe should not flinch to write as Allah has taught him, so he should write exactly the way it is; and let him who owes the debt dictate. And let him have piety (*takwa*) towards Allah, his Lord, (and let him guard himself against His Orders) and let him not diminish anything from it ; but if he who owes the debt is unsound in understanding, or weak or (if) he is not able to dictate himself, let his guardian dictate in justice (with fairness); and call in to witness from among your men two witnesses; but if there are not two men, then one man and two women of such as you approve as witnesses, so that if one of the two (women) forgets, the other (woman) may remind her; and the witnesses should not refuse when they are summoned; do not become weary to write it (your contract) (whether it is) small or large, together with the date of payment. This is more equitable in the Sight of Allah and assures greater accuracy in testimony and the nearest (way) to prevent doubts among yourselves, except when it is ready merchandise which you give and take (cash in-cash out) among yourselves from hand to hand, then there is no sin on you if you do not write it down. But take witnesses whenever you buy-sell with one another, and let no harm be done to the scribe or to the witness; and if you do (it), then surely it will be wickedness (*Fisq* = going out of the Way of Allah or falling out of the path of Allah) for you. Have piety (*takwa*) towards Allah and Allah teaches you, and Allah is the All-Knowing of all things." (Al-Qur'an Surah Al-Baqarah :282).

Masriani (2016) writes that, through Al-Qur'an surah Al-Baqarah: 282, sharia transactions must be written in the contract so that each of parties has proof that an agreement has been made. Consequently, the position of witnesses in a contract has been determined both by statutory regulations through UUJN and Islamic Sharia through Al-Qur'an Surah Al-Baqarah.

In article 16 paragraph (1) letter 1 and article 40 of UUJN, it is stated clearly the number of witnesses and the requirements to become witnesses in a deed (Purbatin, 2017). UUJN also confirms that the validity of an authentic deed is signed immediately after the deed is read out in front of the parties and witnesses. However, UUJN does not regulate the gender of the witnesses. This is different from the provisions of witnesses in Islamic law in the field of *muamalah*, that the number and gender of the witnesses have been clearly determined.

Al-Baqarah 282 also explained that in making an agreement, the scribe of the contract should be witnessed by at least two male witnesses, and the absence of male witnesses can be replaced by two women. Pradiptasari (2017) also affirmed that notary/conveyancer may not refuse to write a deed unless there is a reason justified by law to reject it. There is a requirement for a guardian/supervisor for persons who are incapable of committing legal acts, attended by two male witnesses or one male witness and two female witnesses. The presence of witnesses is an affirmation that the notary/conveyancer and the witness are not parties to the sale and purchase agreement. Thus, based on Al-Baqarah 282, there must be witnesses in the sharia contract. The number of witnesses has also been arranged, including 2 male witnesses, in which if one male witness cannot attend, he can be replaced by two female witnesses.

There is a special value related to the role of a man as a witness who can be replaced by two women. Wahyudi (2009) confirmed that It must be understood that the ayah/paragraph mentioned relates to accounts payable transactions. At that time, there were restrictions on the role of the domestic sphere. Women are inexperienced and unfamiliar with accounts payable transactions. Accordingly, it is natural for women to be considered to have a weak memory for witnessing. Therefore, two female witnesses are required, in which if one of them forgets, the other can remind her.

### **Analysis of Deed Witnesses based on Law on Notary Position (UUJN)**

The definition of witness in UUJN is an inauguration of a notary deed requiring two witnesses as stipulated in article 16 paragraph (1) letter l jo article 40 paragraph (1) of UUJN. Febiana (2013) asserted that the witnesses are not responsible for the contents of the deed which constitute the wishes and statements of the parties. However, the UUJN basically does not regulate the types of witnesses that required. There are two types of witnesses in a notary institution: *attesterend* witnesses and *instrumentair* witnesses. Witnesses in this study involved *instrumentair* witnesses. *Attesterend* witness is a witness who introduces the appellant to a notary since the appellant cannot be recognized or has no identity or the notary doubts his/her identity, so the notary asks the *attesterend* witness to introduce the appellant. The introduction of the appellant must be stated in the deed. An appellant who is not known is required to have one *attesterend* witness. If there are two appellants, they can introduce each other to the notary. Thus, one of *verlijden*, at the time of signing the deed, an *attesterend* witness is not required to sign, but there is also no prohibition if they still want to sign.

Sujanayasa (2016) believed that the *instrumentair* witness is a witness in the notary deed who participated in making the deed. It is called an *instrumentair* witness (*instrumentaire getuigen*) since they participated in the making of the deed (instrument) by signing, testifying about the truth of the existence and the fulfillment of formalities required by law as stated in the deed and witnessed by witnesses. The notary is obliged to present two witnesses when the deed is read and signed. The witness to this deed comes from a notary employee. The presence of witnesses testifies that the formality of making deeds stipulated by law has been achieved.

Furthermore, Angelina (2018) wrote that the *instrumentair* witness in a notary deed can provide security for the notary if the deed is questioned by a party acting as a deed comparator or a third party. In addition, the *instrumentair* witness also serves as a means of evidence considering that they could provide information at the trial. It can be classified as evidence with witnesses or confessions. Thus, the *instrumentair* witness has the duty to listen to the reading of the deed by a notary and see the signing of the deed, but does not have to understand the substance of the deed being read and does not have to memorize the deed.

### **Analysis of the Number of Witnesses in the Making of Sharia Deeds to Provide Legal Certainty to the Related Parties**

**External sanctions are sanctions against a notarial deed in carrying out his/her duties which do not take a series of actions that must be taken against (or for the benefit of) the parties who appear before the notary and other parties which result in the interests of the parties not being protected. External sanctions in a notarial deed have the power of proof as unauthentic deed and the deed becomes null and void by law.**

As stipulated in article 1320 of the Civil Code, an agreement must fulfill the validity of the agreement, namely the existence of an agreement between two or more parties, ability to act, the existence of certain things, and the existence of a lawful cause. If the agreement violates the objective conditions of a certain matter and a lawful cause, then the agreement is null and void. Meanwhile, if the

agreement violates the subjective conditions, namely agreement and ability to act, the agreement may be canceled. The following are factors that can cause a deed to be canceled or can be canceled:

*The first one* is having no authority and inability to act. In general, the law distinguishes between the authority to act and the ability to act. Children, from birth and even in the womb, are legal subjects and therefore have legal authority (Article 1 paragraph (2) of the Civil Code). The authority to act from a legal subject to take legal action can be limited by or through law. Everyone is considered capable of taking legal action, but this freedom is limited by the power of objective law. Those who are said to have no skills in taking legal action are people who generally cannot take legal actions. Children under a certain limit age are associated with a measure of quantity, namely age.

The appellant in making a notary deed must meet the requirements at least 18 years of age as referred to in Article 39 paragraph (1) of UUJN. Those who do not have the authority to act or are not authorized are people who are not allowed to take certain legal actions. Notaries (including witnesses) who have helped to draw up a will from the heir may not enjoy the slightest part of what they have granted them with the will (Article 907 of the Civil Code). This means that the notary may receive a will grant from someone else as long as it is not from the client who made the will before him/her.

*The second one is* defects of will. The Civil Code (Article 1322 - Article 1328 of the Civil Code) stipulates limitatively the existence of defects of will including errors/deviations (*dwaling*), fraud (*bedrog*), and coercion (*dwang*). It is said to be fraud when someone deliberately with his will and knowledge leads astray in other people. Threats occur when someone moves another person to take a legal action, namely by breaking the law, threatening, and causing harm to that person or their property or to a third party. Abuse of circumstances is a situation where someone acts because of a special situation to take legal action and the opposing party misuses this. These special circumstances occur because of coercion or emergency, abnormal mental state, or inexperienced.

*The third one is* contrary to law. The prohibition that is stipulated by law with respect to the agreement will relate to three aspects of the legal act including: the implementation of the legal action; substance of legal action; the purpose and objective of the legal action. An agreement is not null and void if it is made when there is no prohibition on the making of the law, but it turns out that later there are provisions in the law that prohibit it. However, it can be canceled or executed after a certain permit. Determination of whether an agreement has a null and void effect because it is against the law is at the time the agreement is made.

*The fourth one is* contrary to public order and good morals. In general, legal actions are considered contrary to public order or they violate or contradict the basic principles (fundamental) of the social order, while legal actions are considered contrary to morality if they violate or are contrary to the moral norms of a society. According to Islamic law, a contract is a meeting of *ijab* and *qabul* as a statement of the will of two or more parties to obtain a legal effect on its object. Thus, *ijab-qabul* is an act or statement to show a willingness to make a contract between two or more people so that they are avoided or out of a bond that is not based on *syar'i*. Accordingly, in Islam, not all agreements can be categorized as a contract, especially agreements based on Islamic law. Every contract in Islamic law must fulfill the terms and conditions of an agreement, including: *Al-aqidani*, the parties directly involved with the contract; *Mahallul 'aqad*, the object of the contract; *shighatul 'Aqd*, statement of contract sentences that are usually carried out through statements of offer (*ijab*) and acceptance (*qabul*). In Islamic law, the conditions are called the formation of a contract (*syuruth al-in'iqad*). The first condition is the parties that must meet the two conditions for the formation of the contract, including the conformity of *ijab* and *qabul* or reaching an agreement; contract assembly unit. The third condition is the object of the contract, which must fulfill three conditions for the formation of the contract (that the object of the contract can be

submitted, can be defined, and can be transacted). In addition, the fourth condition for the formation of a contract is that it is not against the sharia.

More importantly, goods and services must be lawful so that transactions for haram goods and services are canceled due to Islamic law. The goods being transacted must be half in ownership. It is prohibited to sell something that is not yet owned or controlled, such as in a short sale transaction in the capital market. Based on the aforementioned description, every contract carried out has worldly and *ukhrawi* (otherworldly) consequences, because every agreement/contract in Islam has an accountability to *yaumul qiyamah*. In sharia banking, the contract carried out also has worldly and *ukhrawi* consequences because the contract is based on Islamic law. The appellant often violates an agreement that has been made if the law is based on positive law only. However, in Islam, the agreement has responsibility up to *yaumul qiyamah* (Antonio, 2001). In Islamic law, as depicted in Hasyiyah Ibn 'Abidin, there is contract law. Contract law is a legal effect arising from a contract which is divided into two types: (Anwar, 2010):

1. *The first one* is the main law of the contract; the main legal consequence which is the common goal that the parties intend to realize with the contract as a means to make it happen.
2. *The second one* is purpose of the contract; the main purpose to be realized by the parties, for example to transfer the ownership of an object in exchange for a sale and purchase agreement. If the contract can be realized so as to create a transfer of ownership of the goods in the sale and purchase agreement, then the transfer of ownership is the result of the main law.

The *fiqh* scholars argued that a contract that has met the terms and conditions has binding power on the parties who make the contract. The contract that is binding for the parties who carry out the contract is divided into three types:

1. *First*, a binding contract that cannot be canceled at all. The marriage contract is included in a contract that cannot be canceled except in ways that are canceled by *syara'*;
2. *Second*, a binding contract but can be canceled at the will of both parties, as contained in a sale and purchase agreement;
3. *Third*, a contract that binds one of the parties to the contract such as *ar-rahn* and *al-kafalah* contracts.

An invalid contract is a contract that has shortcomings in the terms and conditions which causes all legal consequences of the contract to be invalid and does not bind the parties to the contract. Moreover, *hanafiyah* scholars divide invalid contract into two types: void contract (*batil*) and deficient contract (*fasid*). A contract is said to be void if the contract does not fulfill one of the terms or there is a direct prohibition and *syara'*, for instance the object or one of the parties is not capable of acting legally. Additionally, *fasid* contract is a contract that is basically mandated, but the nature of the contract is not clear. The *batil* and *fasid* contracts have the same essence, that both are invalid and do not result in any law, including:

**A contract can end if the contract has a certain time limit and is canceled by the parties having the contract whose nature is not canceled increases.**

*Second*, in a binding contract, a contract can be deemed terminated if: (a) the purchase contract is *fasid* contract, for example there are elements of deception, one of the terms and conditions is not fulfilled, (b) enactment of conditions, *khiyar aib* (option of defect), or *khiyar rukyah* (option of

inspection), (c) the contract was not implemented by either party; and (d) achieving the goal of the contract perfectly.

*Third*, if one of the parties who made the contract dies. In this case, *fiqh* scholars state that not all contracts automatically end with the death of one of the parties to the contract, one of which is leasing. The contract will also end depending on the approval of other people if it does not get approval from the owner of the capital.

A contract is considered terminated when the goal has been achieved. In a sale and purchase contract, for example, the contract is deemed to have ended when the goods are owned by the buyer and the price has become the property of the seller. In the pledge and insurance deed (*kafalah*), the deed will be deemed to have ended when the debt has been paid. Unless the goal has been achieved, the contract is deemed to have ended when a *fasakh* occurs or the time has ended. *Fasakh* occurs when the following causes: *first*, *fasakh* due to things that are not justified by *syara'* as mentioned in the damaged contract, for example the sale and purchase of goods that do not meet the requirements for clarity; *second*, *fasakh* due to *khiyar*, including *khiyar rukyah* (option of inspection), conditions or assemblies; *third*, *fasakh* due to one of the parties with the consent of the other party canceling the contract because he/she regrets the contract that was just done. *Fasakh* in this case is called *iqalah*. Concerning this issue, the hadith of the hadith of the Prophet Muhammad, narrated by Abu Daud, teaches that whoever grants a request for cancellation of a person who regrets for the sale and purchase contract made, Allah will remove his troubles on the Day of Resurrection.; *fourth*, *fasakh* due to obligations arising from the existence of a contract that is not fulfilled by *khiyar* parties, the party concerned. For example, in *khiyar*, in the process of payment, the seller says that he sells his goods to the buyer within a week. If the buyer pays within the specified time, the contract can take place. If the price is not paid within the specified time, the sale and purchase contract will be canceled; and *Fifth*, *fasakh* due to the time has ended, as in a lease agreement with a certain term and cannot be extended.

Based on the description above, the contract is invalid or not binding on the parties if it does not meet the terms and conditions, one of which is a witness. Besides, the position of witnesses in Islamic law consists of two witnesses who are male, Muslim, and fair. If there are no two male witnesses, then two female witnesses are the same as the testimony of one male witness. Thus, the testimony must be fulfilled in making the contract. This is based on the opinions expressed by Imam Malik and Imam Shafi'i based on Surah Al-Baqarah 282.

Law on Notary Position (UUJN) stipulates that deeds must be drawn up in the presence or by a public officer, in the presence of witnesses, accompanied by a reading by a notary and signed immediately and so on. The actions required by Notary Position Regulations (PJM) must be stated in the deed. The second requirement for an authentic deed is that it is mandatory for it to be made in front of or by a public officer. The word "in front of" implies that the deed is made at the request of someone, while the deed made "by" a public officer is due to an incident, inspection, decision, and so on. The third requirement is that the deed officer must have the authority.

To fulfill the wishes and requests of the parties, the notary may provide suggestions according to the wishes and requests of the parties, and not the notary's advice or opinion. In other words, the contents of the deed are the actions of the parties and not the deeds or actions of the notary. The definition above is one of the juridical characteristics of a notary deed. In this case, the notary is not a party to the deed or is outside the parties. Therefore, if at any time the notary deed is disputed, the notary position is not as a party or participant in conducting or assisting the parties in the qualifications of Criminal Law or as a defendant or co-defendant in the qualification of civil law (Adjie, 2009). Based on the aforementioned description, deeds made by notaries have perfect evidentiary power because they prove the validity of the deeds without the need for other proof.



Gustav Radbruch confirmed that legal certainty will be achieved when the law is developed in a sustainable manner and adheres to the principles. Likewise, the making and development of laws must be related to one another, leading to a unity that does not contradict each other (Adjie, 2009). However, with regard to the provisions regarding witness deeds, there are no clear provisions and tends to result in no synchronization between the provisions on the number of witnesses in the UUJN which obliges the notary to read the deed made in front of 2 (two) witnesses with Islamic law stating that a female witness has power of proof of  $\frac{1}{2}$  (half) of male witness. This will cause problems if the notary reads the deed in front of 1 (one) male witness and 1 (one) female witness, which will cause confusion in thinking about the number of witnesses. It is because, according to UUJN, 1 (one) male witness + 1 (one) female witness = 2 (two) witnesses; while according to Islamic Law 1 (one) male witness +  $\frac{1}{2}$  (half) male witness (since 1 (one) female witness is considered as  $\frac{1}{2}$  (half of male witness)) = 1  $\frac{1}{2}$  (one half) witness.

A notary who does not read the deed in front of 2 (two) witnesses in accordance with the provisions of UUJN will result in the notary deed only having the power of proof as unauthentic deed (Adjie, 2009). These provisions are explicitly stated in the articles in UUJN which mention that notary deed is considered unauthentic deed if the provisions are violated. Based on the description above, each deed read by a notary must present at least 2 (two) witnesses. Witnesses must meet the following requirements: 18 years of age, proficient, understand the language used, can sign, do not have a marital relationship or blood relationship either in a straight line up or down without limitation of degrees and sideways to the third degree. In addition, parties and witnesses must be known by the notary or introduced and explained about their identity and authority to the notary by the appellant. If these requirements are not fulfilled, the deed only has the power of proof as unauthentic deed.

According to Article 171 HIR, the witnesses explain what they saw, heard or felt, along with the reasons or causes and how they knew the things they explained. The special feelings that occur because of the mind are not viewed as witness. Witnesses are generally divided into 4 (four) types: eyewitness, is a witness who directly witnesses an incident; a witness who is deliberately presented, is a witness who is deliberately presented to see an event or someone who is asked to be a witness for an event that will be carried out; hearing witness, is a witness who does not see an incident directly but he/she hears from other people (*testimonium de auditu*); and a deed witness, is a witness who knows, understands, and comprehends the procedures for a deed to be drawn up and his/her name is included in the deed concerned/deed witness (notary and conveyancer).

Importantly, the position of the witnesses on notarial deed is different from the witnesses in general as mentioned above. Besides witnesses of notarial deed or witnesses in general are the witnesses who hear and see for themselves an event that has occurred, for example if sale and purchase occur and the purchase money is given from the buyer to the seller, so the witnessed physically see the incident themselves. However, in the deed witness, buyers who have submitted their purchase money to the seller via bank transfer can only be proven with proof of transfer. Accordingly, the witness other than the deed witness knows very well the legal events that takes place in the transaction, while the deed witness does not know anything about the physical handover of the money.

Witnesses of notarial deed are witnesses who participated in the making of deeds (instruments). Therefore, a witness in this case is called an *instrumentair* witness (*Instrumentaire Getuigen*). By signing the deed, it means that they give testimony about the truth of the existence and fulfillment of the formalities required by Article 38 of the UUJN Amendment. The *instrumentair* witness in this case is usually the employee of the notary. Thus, the notary has an obligation to keep secret everything regarding the deed drawn and all information obtained in the making of the deed in accordance with the oath/promise of office, unless the Law stipulates otherwise as provided for in the provisions of Article 16 paragraph (1) letter f of UUJN, stating “keep everything about the deed that he/she has drawn up and all

information obtained to make the deed in accordance with the oath/promise of office, unless the Law stipulates otherwise.”

It is also emphasized in the explanation in letter f that the obligation to keep everything related to the deed and other documents confidential is to protect the interests of all parties related to the deed. Accordingly, when the investigator summoned the witness of the notarial deed, there had actually been disclosure of the secret through the witness deed. This is the meaning that investigators do not know and understand which can damage the authenticity of the notarial deed.

Based on the description above, it can be understood that notaries and witnesses to the deed cannot be involved with the police or investigators if the parties whose names are written on the deed do not carry out the contents of the deed or if there are injured parties. In fact, the deed made by a notary is the basis. When notaries and witnesses are still alive, they will usually be questioned. However, if the notary and the actual witness has passed away, it is impossible to make a statement unless Police Investigation Report is made on the tombstone concerned. Therefore, the focus is on the deed, not on notaries and witnesses. It demonstrates that it is very inappropriate and contrary to UUJN if investigators, judges and prosecutors summon witnesses for deeds which are an integral part of the formalities of a notary deed as an authentic deed.

The position of a witness in court has a fairly important role as a means of evidence if there is no other means of evidence to provide information on an incident/dispute. In the text of *fiqh* books, the problem of testimony in court is required to be male, except for testimony relating to property (*huquq al-amwal*) or bodily rights. It is as if the rights of women are not recognized in comparison to men. It indicates that there has been a gap between *fiqh* texts and the social reality. *Fiqh* texts are no longer enforced with concrete realities but are only used as reading and discourse. This problem is certainly not an easy thing to answer by stating that today's society is indeed corrupt and has abandoned religious teachings. However, we need to see the substance of the problem from the testimony question. A question then arises: is the gender requirement in testimony something *qoth'I* or *dzanny* (Ihsanudin, 2002).

Baidowi (2005) strongly advocated that based on the moral message in Al-Qur'an, the position of men and women is equal. In fact, lately there have been many problems in which women have started demanding their rights in the space for their activities which have been limited and discriminated against by the treatment of messages in the text of Al-Qur'an as the source of all liberating Islamic law (Arfa, 2004). In the Compilation of Islamic Law (KHI), in a transaction, especially marriage, the presence of witnesses is a prerequisite for the marriage contract. Thus, every marriage must be witnessed by two witnesses as regulated in the provisions of Article 24 of KHI. These witnesses can be asked for information in connection with the investigation of their case. Consequently, witnesses must be present not only to witness the marriage contract directly, but also to be asked to sign the Marriage Certificate at the time and place the contract is executed. According to Abu Hanifah, the witness functions to provide information (*I'lan*) that a contract has been carried out (Rofiq, 1998).

In Article 25 of the KHI, the requirements for witnesses include: Muslim men, fair, mature (*akil baligh*), not having a memory impairment, and not hearing impaired. The presence of witnesses is a necessity that cannot be left behind since the witness has the duty to provide formal legal marriage (Article 26 of KHI) (Department of Religious Affairs, 2000). Legal actions carried out by sharia banks and clients in financing, especially in making the deeds in sharia banks, require a deep understanding of sharia (Islamic) economics. Matters regarding the contract must be studied and understood as an absolute basis in making a sharia deed. According to Habib Adjie, the notary position is a neutral institution. Therefore, sharia banking deed can be made not only by Muslim notaries but also notaries who are Christian, Catholic, Hindu, Buddhist, or other religions and beliefs. They have the same right to make a

sharia banking deed as long as all procedures for making deeds according to the UUJN/UUJN Amendment are fulfilled.

### **Conclusion**

The provision regarding the number of witnesses in the making of a sharia deed by a notary is that if the witness consists of 1 (one) male witness, he must be followed by 1 (one) male witness. The absence of 1 (one) male witness can be replaced by 2 (two) female witnesses in accordance with the provisions of Islamic law based on Al-Qur'an surah Al-Baqarah verse 282. In order to provide legal certainty regarding the provision of the number of witnesses in the reading of the sharia deed, a regulation or statement must be made which clearly explains the power of proof of female witnesses in the reading of the sharia deed by a notary. Since the sharia deed accommodates the provisions of Islamic law that are not contained in conventional deeds, according to the researchers, it is best to follow the principles of Islamic law, including witnesses. Accordingly, the reading of the sharia deed by the notary in front of the witness must provide an explanation if women have the power of proof of ½ (half) of men, or a new rule should be made to accommodate these provisions.

### **References**

- Adjie, H. (2009). *Hukum Notaris Indonesia Tafsir Temantik Terhadap UU No.30 Tahun 2004 Tentang Jabatan Notaris*. Bandung: Refika Aditama.
- Angelina, N, P. (2018). Kedudukan Hukum Saksi Instrumentair Terkait Keautentikan Akta Notaris. *Jurnal Acta Comitatus*, 3(3), 516.
- Antonio, M. S. (2001). *Bank Syariah dari Teori ke Praktek*. Jakarta: Kencana.
- Anwar, S. (2010). *Hukum Perjanjian Syariah*. Jakarta: Kencana.
- Ardiansyah, M. (2019). Perwujudan Asas Keseimbangan dan Keadilan Dalam Pembuatan Akta Persekutuan Komanditer Berdasarkan Akad Mudharabah. *Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan*, 4(2), 323.
- Arfa, F. A. (2004). *Wanita Dalam Konsep Islam Modernis*. Jakarta: Pustaka Firdaus.
- Baidowi, A. (2005). *Tafsir Feminis Kajian Perempuan dalam Al-Qur'an dan Mufasir Kontemporer*. Bandung: Nuansa.
- Dewi, G. (2006). *Aspek-Aspek Hukum Dalam Perbankan dan Perasuransian Syariah di Indonesia*. Jakarta: Kencana.
- Febiana, L. (2013). Notaris Sebagai Saksi Dalam Penyidikan Otentisitas Akta. *Jurnal Ilmiah Mahasiswa Universitas Surabaya* 2(1), 8.
- Ihsanudin, Najib, M., Hidayati, S. (2002). *Panduan pengajaran Fiqh Perempuan di Pesantren*. Yogyakarta: YKF dan Ford Foundation.
- Ibrahim, J. (2006). *Teori dan Metodologi Penelitian Hukum Normatif*. Malang: Bayumedia Publishing.
- Maha Yoga, I. G. K. P. (2018). Kewenangan Notaris Dalam Pembuatan Surat Keterangan Waris Untuk Warga Negara Indonesia. *Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan*, 3(2), 137.
- Mujahidin, R. A. (2016). Aplikasi Akad Murabahah Menggunakan Akad Wakalah di Bank Syariah Mandiri Cabang Panorama Kota Bengkulu.
- Mardani. (2014). *Hukum Bisnis Syariah*. Jakarta: Kencana.
- Marzuki, P. M. (2008). *Penelitian Hukum Cetakan ke-2*. Jakarta: Kencana.
- Masriani, Y. T. (2016). Urgensi Akta Notariil Dalam Transaksi Ekonomi Syariah. *Journal of Islamic Studies and Humanities*, 1(1), 15.
- Nurwulan, P. (2018). Asas Perbankan Syariah dan Penerapannya Dalam Akta Notaris Menurut Undang-Undang Jabatan Notaris. *Jurnal Hukum Ius Quia Iustum*, 25(3), 625.

- Pradiptasari. (2017). Sinergitas Hukum Islam dengan Peranan Notaris dan Pejabat Pembuat Akta Tanah (PPAT) dalam Menghadapi Masyarakat Ekonomi ASEAN (MEA). *Jurnal Akta*, 4(4), 548.
- Purbatin, A. R. (2017). Pembuatan Akta Syariah oleh Notaris di Wilayah Purwokerto dalam Perspektif Hukum Islam. *Jurnal Repertorium*, 4(2), 55.
- Rofiq, A. (1998). *Hukum Islam di Indonesia*. Jakarta: PT Raja Grafindo Persada.
- Sujanayasa, I. K. (2016). Kedudukan Saksi Instrumentair Akta Notaris Dalam Kaitannya Dengan Pasal 16 ayat (1) Undang-Undang Nomor 30 Tahun 2004 Tentang Jabatan Notaris. *Jurnal Acta Comitas*, 1(2), 286.
- Wahyudi, M. I. (2009). Nilai Pembuktian Perempuan dalam Hukum Islam. *Musawa: Jurnal Studi Gender dan Islam*, 8(1), 122.
- Yusup, Deni K. (2015). Peran Notaris dalam Praktek Perjanjian Bisnis di Perbankan Syariah. *Jurnal Hukum*, 4(12), 20-30.

### **Legislations**

- The Republic of Indonesia. (2014). Law Number 2 of 2014 on Amendment to Law Number 30 of 2004 on Notary Position. Nomor Lembaran Negara 3 Tahun 2014.
- The Republic of Indonesia. (2008). Law Number 21 of 2008 on Sharia Banking. Nomor Lembaran Negara 94 Tahun 2008.

### **Other**

- Departemen Agama RI Direktorat Jenderal Pembinaan Kelembagaan Agama Islam 1999/2000. Bahan Penyuluhan Hukum.

### **Copyrights**

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).