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REVIEW ARTICLE

CONTROVERSIAL ISSUES ON THE MAKING OF NOTARIAL DEED CONTAINING CHAINED PROMISE (*Beding Berantai*) WITH THE FREEDOM OF CONTRACT PRINCIPLE

David Tan
Faculty of Law, Universitas Internasional Batam
✉ davidtancyz@gmail.com

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ABSTRACT

In carrying out the duties as a civil law notary, it is possible that they find himself/herself composing a deed containing chained promise (*beding berantai*). Departing from this background, it can be drawn that the formulation of the problem, among others, how is the position of chained promise (beding) in Indonesian civil law order and how is the role of civil law notary balancing legal protection for the parties in making deed containing chained promise (beding). Another controversial issue is the chained beding faced with the freedom of contract principle. The purpose of this research is to understand the position of chained promise (beding) in Indonesian civil law order and the role of civil law notary balancing legal protection for the parties in making deed containing chained promise (beding). To answer the questions, a juridical normative approach is conducted. To obtain legal materials needed, it is then carried out by searching, collecting and reviewing library materials, legislation, research results, scientific works and other written documents. Data obtained from the result of study will then be analyzed qualitatively. From the results of study, it is known that chained promise (*beding berantai*) is an instrument or a way to transfer rights/obligations arising from an agreement to the party that obtains rights based on a special title. Recommendations given to the stakeholders are, namely civil law notary themselves in carrying out their duties and positions so that he/she could pay more attention to the points represented in his/her product of authentic (notarial) deed.

Keywords: *Beding Berantai*; Chained Promise; Notarial Deed; Freedom of Contract Principle

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INTRODUCTION

CIVIL relations between someone (*naturlijkpersoon*) or legal entity (*rechtspersoon*) with other legal subjects is an interaction that cannot be denied its existance. As social beings (*zoon politicon*) an interaction will often lead to new legal relations between legal subjects. This legal relationship arises because of urgent needs, especially those related to socio-economics. To prevent the legal relationship so that is does not become conflictual between legal subjects, then in the practice the parties

will pour the points of agreements reached in the form of provisions and conditions specifically regulated in the agreement. Not infrequently this agreement is made into a notarial deed before a civil law notary[1] as a public official authorized to make authentic deeds, one or another so that the authentic deeds has perfect verification power as evidence[2] (Prastomo 2017).

As a party deed (*akta partij*), the agreement made before the civil law notary by the parties is a description of what is explained or desired by the parties facing the notary. So it does not rule out the possibility that the contents of the deed made contains promises (*beding berantai*) from which one party (the pledge) to the other party (the recipient of pledge) which is actually desired to be implemented chainly and so on. The term is known as chained promise or *beding berantai*.

To protect the rights of each party in the agreement, the arrangement regarding agreements containing chain promises or *beding berantai* is important to be studied. As an example of civil relations, it is understood that the regulation regarding civil affairs regulated in the Indonesian Code of Civil Law (hereinafter referred to as "Indonesian Civil Code") is formed with a background of legal philosophy based on the principles of individualism with different abstract and analytical mindsets with legal ideas (*rechtsidee*) of Pancasila as the Indonesian legal philosophy. Pancasila which is based on helping mindset, mutual cooperation with a family bond concrete mindset (Latumeten 2017). The Supreme Court of the Republic of Indonesia has put forward a flow in interpreting colonial law products, namely juridical idealism which teaches that in processing a

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[1] The english translation of notary position in Indonesia is Civil Law Notary (not Notary Public). There are many misconception for the english translation of Indonesian notary position as a notary public. Just for the knowledge in history of law in the field of notary, that the beginning of the notariat institution was developed in the Northern Italy, in the 13th century being brought to France, where the notariat gained its peak of its development. On 6 October 1791, France issued legislation in the field of notariat. The law of 6 October 1791 was then amended with the 25 Ventôse an XI on 16 March 1803 where until now, the 25 Ventôse an Xi has undergone several changes. France colonizes the Netherlands and carries out the principle of concordation with the Netherlands in connection with the laws of that country. Under the French colony, the Dutch accepted the results of the efforts of the French state by implementing French legislation in the Netherlands. Indonesia also implemented the Dutch laws from the Netherlands through principle of concordation during the times of East Indies (*Hindia Belanda*). Thus the civil law legal system (continental europe legal system) know and recognizes the concept of authentic instruments (Indonesian translation: *dokumen autentik*), hence the concept of authentic instruments is based on the civil law concept of preventive justice. The common law legal system (Anglo Saxon) don't recognizes the concept of authentic instruments. For that the notary position in Indonesia if translated in english is Civil Law Notary and not Notary Public (Lantanea 2016).

[2] The perfect power of evidence means that those deed has to be deemed right, unless if it can be proved otherwise in front of the court of justice ruling.

statutory provision, it is not permissable to hold on only to what is from the law, as taught in juridical positivism, but must also pay attention to the soul[3] that controls the legal system that enforces the law, namely Pancasila as a legal philosophy which is contained in the preamble of the 1945 Constitution of the Republic of Indonesia (Koesnoe 1996).

An example of chained promise (*beding berantai*) practiced in the reality such as regarding information with the example clause of: in the event of actual conflict of interest arises between trustees and a third party, the parties will immediately inform all other parties. This example clause is taken from research paper by Stefanos Mouzas and Michael Furmston, as an example given from clause which is generally seen in an umbrella agreement. The clause although not specified, is naturally interpreted as a chained promise (*beding berantai*), namely not only that the said conflict of interest arises between trustees and a third party, but also if another party undertake the position of the trustees, he/she/they must immediately inform all other parties regarding the conflict of interest. The research paper by Stefanos Mouzas and Michael Furmston however mainly focuses on the paradigm shift from ordinary contract to umbrella agreement; why we should consider umbrella agreement; distinguishing an umbrella agreements; comparison of umbrella agreements with pre-contractual agreement, open trade agreements and general terms and conditions; and legal enforcement of an umbrella agreements (Stefanos Mouzas and Michael Furmston 2008).

Another empirical example of agreement made by the parties that essentially contains chained promise (*beding berantai*) from the observation of the writer is an agreement in the name of land allocation agreement made by Batam Indonesia Free Zone Authority (BIFZA) and the recipient of land allocation. It the agreement it is then agreed that if the land allocation period has expired, the land allocation recipient promise to hand over the allocated land back to BIFZA in a vacant position. The agreement also includes the giving of power of attorney from the land allocation recipient which gives authority to BIFZA to vacant the land if the land allocation recipient fails to do so. From the substance and formulation of the agreement, we know that BIFZA intends that such promise must be

[3] The Supreme Court's opinion that the laws from the colonial period in a concrete situation are set aside from the scope of the national legal system that is pulled out from *rechtsidee* by the unwritten law. In case of the articles of the colonial law however its interpretation cannot find its place in rechtsidee, in that case the articles of that colonial law are illegal in the national legal system. The real example regarding this is the Indonesian Code of Civil Law which is formed with the legal philosophical background based on the principle of individualism with abstract and analytical mindsets, which is different from the *rechtsidee* (ideals of the law) of Pancasila as the legal philosophy of the Indonesian nation, based on mutual help, cooperation, kinship ties with a concrete mindset.

treated everlasting even though the allocated land has been sold to another party by the land allocation recipient. But the agreement fails to stipulate such promise to be recognized as a chained promise (*beding berantai*). Furthermore if the object of land allocation agreement exceed 1.000 m^2 the agreement must be signed before an appointed civil law notary (*vide* Article 21 paragraph (3) of the Regulation of the Head of Batam Indonesia Free Zone Authority Number 10 of 2017 regarding Management of Land Administration).

According to the searches conducted by the writer, there are only a few handful of writing, research, study and article that specifically discuss about the position of chain promise (*beding berantai*) in the Indonesian civil law order and what is the role of civil law notary in balancing legal protection for the parties in making deed containing chain promise (*beding berantai*). Therefore the topic raised by the writer in this article can be classified as a topic that has an element of novelty and non-obvious. This novelty is a guarantee that the article made is an original work (Wibisana 2019).

Based on the description of the background, there are two problems that will be examined. The formulation of the problem includes the following: how is the the position of chain promise (*beding berantai*) in the Indonesian civil law order and what is the role of civil law notary in balancing legal protection for the parties in making deed containing chain promise (*beding berantai*)?

Research done to answer the problem is done by a juridical normative approach, namely research on legal principles (including legal notions, legal provisions of rules, norms, doctrines, jurisprudence and relevant official material). As a normative study, the focus of research to answer the problem lies in library research (secondary data in the form of primary legal materials, secondary legal materials and tertiary legal materials). From the results of the analysis it is expected that the results of descriptive research can be obtained which will provide an overview of the use of chain *beding* in agreements made before a civil law notary.

To furthermore enhance this research, the writer will elaborate more on the laws related to the topic raised in this research. The said laws are as follows, including but not limited to the Indonesian Civil Code, namely the provision as stipulated in Book Three regarding Engagement and the Law of the Republic of Indonesia Number 2 of 2014 regarding Amendments to Law of the Republic of Indonesia Number 30 of 2004 regarding Notary Position, especially the provision of Article 15 and Article 16 of the said law.

The supporting theory used in this research is the Responsive Law Theory by Philippe Nonet and Philip Selznick. According to this theory a

good law should give out more not just merely a law procedure. The law has to be competent and fair. It has to be able to identify the needs of the public and has the commitment to achieving substantive justice. Responsive law is the tradition of realist (legal realism) and sociologist (sociological jurisprudence) which has one main theme, which is to open the barriers of knowledge. Responsive law seeks to overcome the dilemma between integrity and openness, a responsive institution strongly maintains the things that are essential to its integrity while still paying attention or taking into account the existance of new forces in its environment. To achieve this, responsive law reinforces the ways in which openness and integrity can support each other despite the conflict between the two. The hallmark of responsive law it to look for the implied values contained in the regulations and policies. This flow of law also says that "the ideals" of responsive law is legality. The purpose of responsive law is competency, with the rules which is the subordinate of principles, main consideration from the purpose (purpose oriented), allowed use of discretion widely but according to the purpose and participation aspect is widened with the integration of legal and social advocation (Hastuti 2008). In this research, the responsive law theory by Philippe Nonet and Philip Selznick will be used to analyze the second problem regarding the role of civil law notary in balancing legal protection for the parties in making deed containing chain promise (*beding berantai*).

ANALYSIS *of* CHAINED PROMISE (*BEDING BERANTAI*)

CHAINED *Beding* is an instrument or way to transfer rights/obligations arising from an agreement to parties who obtain rights based on special titles. Rights and obligations based on the *beding* will not automatically switch to the next owner. Here the *beding* must be promised again by the next sellers and buyers. Chained *Beding* has one diadvantage. Based on the nature *beding* is considered as individual rights, thus it can only be sued by certain parties. As a result if the chain *beding* forgot to be promised, there was a default. Chain *Beding* in nature is individual rights and not material rights. Therefore, although *beding* is listed on the sale and purchase deed, the *beding* has to be promised again each time. The buyer (in good faith) who is not aware of the *beding* is deemed not bound by it (Budiono 2014).

Chained *beding* in one hand is very complicated to be practised, but on the other hand, it is the only way to transfer rights/obligations arising

from an agreement to parties who obtain rights based on special titles. Therefore it is vital as such practice is still being used until now and the parties did not realize it to bring such legal responsibility. Even for the civil law notary, many of them also did not realize the importance for the stipulation of a dedicated article solely for the purpose of regulation regarding the promising of a chained *beding* to the next party if there is a transfer of rights and/or changes of the party in the deed.

I. CONCEPT *of* LEGAL POLITICAL PARADIGM IN CONTRACT DRAFTING

CONSTRUCTION of norms in paradigmatic perspectives, commonly known as a philosophycal foundation (philosophy of paradigm), it means the position of Pancasila as the basis of the country, especially in the context of implementing the law-forming process that all Pancasila values must be the main basis and/or reference source, to be further derived into legal principle, norm and the articles on a statutory regulations that will be formed (Idham 2010). Furthermore, Rodiyah (2006) highlighted that Indonesia is a state of law, meaning that the state of Indonesia has a strong juridical foundation in its role of carrying out development. The state must be build from two concepts, a democracy based on Godhead, Humanity, Unity, People and Justice (Arifin 2017).

The position of Pancasila as the basis of the state, the views of life and soul and the personality of the Indonesian nation and state as intended are very strategic and determine whether the law is valid or not, stipulated and promulgated as *regeling* to bind the public. If in reality Pancasila as the *philosophy of paradigm* is not followed but even deviate, then the worst risk is that the product of the law formed is declared null and void. In line with this, in parallel the product of the law will immediately get resistance from the people, and/or at least a judicial review will be carried out through a judicial institution in this case the claim is submitted to the Constitutional Court.

Besides the things mentioned above, a law (agreement) must also reflect the fulfillment of three basic principles of the rule of law, which are: supreme of law, equity before the law dan due process of law. Three basic principles of the rule of law if implemented holistically in operational terms will be able to reflect the general characteristic of a legal state that at least fulfills the three characteristic, namely: guarantee of the protection of human rights, the guarantee of judicial power or an independent judiciary and guarantee of the law enforcement of the principles of legality.

II. POSITION *of* CHAINED PROMISE (*BEDING BERANTAI*) IN THE INDONESIAN CIVIL LAW ORDER

BASED on the Indonesian Constitution's transitional provisions before it was amended, it is said that the existing and still valid rules can still be applied as long as the new rules have not been established. So regarding the applicable contract law in Indonesia, it still takes the existing provisions, namely based on the *Burgerlijke Wetboek* as a product of civil law inherited from the reign of the Dutch East Indies (Gilalo 2015). An agreement essentially is the meeting of the mind/mutual consent of the parties to achieve an agreed goal in order to provide maximum benefit to the parties. An agreement like a legal document deserves to fulfill at least three elements as stated by Gustav Radbruch, namely justice, expediency and legal certainty (Priyono 2018). The third book from *Burgerlijk Wetboek* adheres to an open system meaning that there is freedom in making agreements (contracts) with anyone thus determining its conditions, ferformance and made both in written form or verbally. In general, agreements that can be said to be valid have fulfilled the conditions, namely: (a) There is an agreement, (b) Capacity, (c) Certain things and (d) a lawful thing. Fulfillment of these four conditions, the agreement becomes valid and binding for them who is in the agreement (Gilalo 2015).

In the Civil Code agreement is an essential factor that animates the formation of contract/agreements. Agreements are usually expressed with the words "agree" or "*ijab-kabul*" (in Islamic law), accompanied by affixing signatures as proof of approval for all matters listed in the contract/agreement (Civil Code) (Ratna Sari 2017). This first condition can be broken if there is a force (*dwang*), oversight (*dwaling*), fraud (*bedrog*) or undue influence (*misbruik van omstandigheden*) (Tan 2018). According to the doctrine of undue influence, the promisor has a right to rescind (set-aside) a contract if the promisee took advantage of the relationship of influence that he had with the promisor (Saprai 2013).

The capacity to make engagements is the ability to do legal actions, both those carried out by individuals (personal entities) and corporations (legal entities). If the subject who commits legal action is in the form of an individual, according to Article 1329 of the Indonesian Civil Code, each person is capable of making an agreement unless the law states that it is incapable to enter into an agreement. As explained in Article 1330 of the Indonesian Civil Code. If the legal subject is in the form of a legal entity (for example a limited liability company, also known as *perseroan terbatas* or PT

in Indonesian), the authority to carry out legal actions is carried out for and in the name of PT interests which can only be carried out by adults who have directorship in the PT or adults who are authorized (power of attorney) by the board to represent the PT (Indiraharti 2014).

Regarding a certain matter, it means that what will be agreed upon must be clear and detailed (type, amount and price) or information on the object, known the rights and obligations of each party so that no dispute occurs between the parties.

The reason (*causa*) is lawful. The word *kausa* is translated from the word *oorzaak* (Dutch) atau *causa* (Latin) which is meant in the case of this agreement does not mean something that causes someone to make an agreement, but refers to the content and purpose of the agreement itself. For example in a sale and purchase agreement, the content and purpose or power of attorney is the one who wants the property rights of an item, while the other party wants money. Lawful clause mean that the content of the agreement do not conflict with the public order, decency and law (Lestari and Santoso 2017).

By fulfilling these four conditions, then an agreement becomes legal and legally binding for the parties who make it. The promised parties must intend that the agreement they make is legally binding. The court must be assured of the purpose of legally binding. Legally binding means that the agreement creates rights and obligations for parties that is recognized by the law (Evalina 2014).

As the agreement becomes a legally binding instrument, it also creates rights and obligations to the parties in the agreement. If such rights cannot be practiced and/or such obligations is not done by one party, then the agreement is considered breached. Breached in the agreement can come in may forms, such as: not doing what is stipulated, doing what is stipulated but partially, doing what is stipulated fully but late, or even doing what is not supposed to be done. If so then the agreement made for the sake of evidence can be used as a evidence in the court. Agreement can be done written or orally. For the sake of evidence in court, a written agreement is better and convenient. Whilst an oral agreement is taken into account by the law but still must be backed by another evidence. Written agreement can also made by the parties without the help of a general official, such as civil law notary or land registrar. This kind of agreement is known as *akta bawah tangan* in Indonesian terminology. *Akta bawah tangan* or literally means underhand deed are the deed made by the parties without the help of a general official. Contrary to that is the authentic deed. Authentic deeds are deed made by or before a general official appointed by the government who is also authorized in his/her place of appointment, to make such deed for the public, which is made in accordance with the laws and regulations.

Underhand deed can be used as an evidence in the court but it is still can be denied by the opposing party. If such denial occurs, then the plaintiff must back another evidence as a proof to back the underhand deed. On the other hand, an authentic deed is a deed with perfect proofing power, which means that the parties that it's name is written on it is the true party in the deed. The substance of the deed is also considered as truly made. The party with the name written on it cannot deny its acceptance to the deed, and if so the he/she is burdened by the obligation to proof their stand/denial.

Chained *beding* is an instrument or way to transfer rights/obligations arising from an agreement to the party that obtains rights based on a special title. If seen from *beding* identity as an instrument to transfer rights and/or obligations, then the *beding* is nothing but a form of agreement between the parties. In accordance with the translation of *beding* itself as a promise, the forms of the agreement itself enter into the order of the domain of civil law.

Therefore, the legal requirements of an agreement as stipulated in Article 1320 of the Indonesian Civil Code and the principles/principles of civil law must be considered before giving *beding*. If the *beding* violates the provisions of Article 1320 of the Indonesian Civil Code, the consequence of the defect is that it has the potential to become null and void or at least can be canceled (if it violates subjective conditions).

As one form of agreement in the constellation of civil law, the chain *beding* has generally been done a lot, both consciously and unconsciously. This can be concluded because sometimes the act of giving a *beding* is not only in the form of a stand-alone agreement, but is usually associated/linked/ accompanied by other legal actions, for example: 1) in relation to the sale and purchase of land and houses living in conjunction with a chain promise not to use the residence as a boarding house, 2) a lease agreement with the right to the tenant to transfer the rental rights in part or in whole to other parties, but limited to the need to support medium-sized small businesses, or 3) land allocation agreements from management rights holders to recipients of land allocations in which the land allocation recipient promises to the management right holder that he will return the land in a vacant state since the following land use rights expire with accompanying powers to enter the yard empty.

Due to the nature of the chain *beding* which are generally accompanied by other forms of legal action, it is not uncommon for legal actions to be referred to sometimes concerning the transfer of rights which are material rights. As it is known that the transfer of material rights switches automatically to the recipient of his rights because material rights are absolute rights that give direct power over an object (in this case

including material prosecution rights). The said power can be in the form of power to be given pleasure and the right to make a guarantee. This material right could be maintained against everyone and is "attached" to the object if the rights are transferred.

Problems arise if the transfer of material rights that are automatic in nature turns out to have a chain bed behind the material rights. As individual rights in the constellation of Indonesian civil law, *beding* does not directly/automatically transfer its rights or obligations to the holder of material rights. Due to individual rights is a right that only gives a claim or collection to a person, it should be considered as a promise/agreement which of course can only be maintained (or billed) on a particular party that binds itself to the agreement or *beding*.

The chained *beding* itself is born as a form of realization of the principle of consensuality and the principle of freedom of contract. The principle of consencuality focuses on achieving agreement as an important element in an agreement. If an agreement has been reached, then according to this principle an agreement has been closed so that it is only carried out by the parties. If the parties have agreed that a certain legal act will only be carried out by one party on the condition that the other party must provide certain promises that are eternal in nature, then the agreement to the agreement is a form of acceptance of the terms and conditions of the agreement in full, including chained *beding*.

Associated with the principle of the freedom of contract and the reality that the private law (agreement) in the Indonesian Civil Code adheres to an open system. Everyone is free to carry out agreements in any form, whether the form and nature are specifically regulated in the Indonesian Civil Code and whose forms and characteristics are not specifically regulated in the Indonesian Civil Code. This promise is one form of implementation of the principle of freedom of contract. The achievement of an agreement on the form of an agreement is considered as submission to the following obligations with all accompanying rights (if any) as the power of binding legislation. This is also a differentiating factor that puts promise (*beding*) as an individual right that is different from material rights. As an individual right, he was born from an agreement agreed upon by the parties so that it was clearly different from material rights which were primarily born because of the law (material rights arose from the arrangements in Book II of the Indonesian Civil Code which embraced a closed system). The reality of the nature of Book II of the Indonesian Civil Code which adheres to a closed system is that parties cannot enter into agreements that give birth to new material rights other than those that has been stipulated in Book II of the Indonesian Civil Code.

Ordinary promise (*beding*) must be distinguished with chained promise (*beding*). In the opinion of the writer, an ordinary promise (*beding*) is a general form of the terms and conditions in the agreement, namely *beding* that is carried out only specifically for the party in the agreement and for a certain time, for example an appointment to deliver goods at certain times and conditions or promise to pay the price in full no later than the agreed date. Unlike the case like a chained promise (*beding*). Chained promise (*beding*) are promises (*beding*) which are intended to be general in nature (multi-parties for several occasions / multi party for several occasions) and are eternal to give rise to chained characteristics. In order for a chain *beding* to have a binding nature, the *beding* must be expressly stated / expressed in the agreement, so that the parties in the agreement are consciously and really aware of the purpose of the *beding* that will be applied on a chain basis, this must be realized that the chain *beding* is intended to apply even after the main achievements in the main agreement have been fully implemented. Noting and considering that there is a potential party that promises a chain of default even after the main achievements in the main agreement have been carried out in full, due to the inherent nature of the *beding* agreement so that the principal agreement is memorable without an exit clause, of course declared expressly to be an important matter and becomes a benchmark of whether a promise (*beding*) has a chain character or not (Budiono 2014).

Not infrequently there are also *beding* that are intended to have chain properties but are not promised as a chain *beding*, which is expressly stated as a chain *beding*, so the *beding* has the consequence of being a promise (*beding*) normal If something like this happens then the law of *beding* must be considered as ordinary *beding* because it is not expressly expressed / expressed. Moreover, it has been regulated in Article 1342 of the Civil Code which is the basis of the argument that if the words in the agreement made by the parties are clear, the parties are considered bound even though the statement of intention that has been given is not in accordance with the original intent and purpose. Lawmakers moved on to the opinion that only less clear statements must be interpreted. The sound of the provisions of Article 1342 of the Civil Code must be read if it has been determined what was actually promised if the parties, then the parties and judges may not deviate from what has been stated (the nature of interpretation is not permitted if the words of an agreement are clear, this is what is meant with the principle of *sens clair* or the doctrine of clarity of meaning (Sutiyoso 2013).

However as the freedom of contract principle state that the parties in the agreement are free to determine the substance/content of the

agreement as long as it does not conflict with the public order, decency and propriety. The principle is clearly reflected in Article 1338 of the Indonesian Civil Code which states that all agreement made legally are binding as a law for those who make them (Prasetyo 2017). The freedom of contract principle results in the open system of our legal private law (civil law) system. The regulations are complementary (*aanvullen*, regulatory). Freedom of contract principle means that the parties are free to determine the contents of agreement and with whom to enter into a contractual agreement. This principle also known as principle of party autonomy, which determines the "existence" (*raison d'etre*, *het bestaanwaarde*) of an agreement. This principle is universal with the limitation only in the context of public interest and in the contract there must be a reasonable balance (Pangaribuan 2019).

The property and contract law are for "ends that are objectively good" for the individual and those around him. This reality then, justifies both freedom of contract and limitation to the freedom. To the end, a few are moral absolutes, or exceptionless norms. They are derived from deductions from moral precepts and guard the boundaries of contract. Hence, the law recognizes the freedom of contract would not be honoured in these situations (Allen 2018). The controversial issue is that the chained promise (*beding berantai*) is a fruit of freedom of contract principle, which everyone has the right and freedom to promise whatever they want, as long as it is agreed upon by the parties. The consensuality is needed and so on for the rest of the three other condition for an agreement to be legally valid, as stipulated in Article 1330 of the Indonesian Civil Code. Because of that this also includes chained promise (*beding berantai*). The parties that enter into an agreement are given the right and freedom to give out promise whatever they will,including chained promise (*beding berantai*). It remains valid so long as the condition for an agreement to be legally valid were met (*vide* Article 1330 of the Indonesian Civil Code).

The problem happen when the parties that come into an agreement which includes chained promise (*beding berantai*) that don't fully understand the legal provisions and regulations, including but not limited to the provision for the promisor to promise it to the next party that replace its position. Failure to do so is a breach of agreement (namely the chained promise) which may result a lawsuit. Thats why this becomes controversial issue because the freedom of contract principle that give birth to many thing, including but not limited to chained promise (*beding berantai*), at the end of the day, is still not fully the "freedom" of contract and still limited by the law as written. This however is the empirical evidence of the law that didn't recognize the freedom of contract. The implementation is left

hanging without the law to fully and explicitly rule and stipulate how it was meant to be. Hence the parties that come into the agreement must consult a person who fully understands the law. This is a true setback for the law in reality that such implementation of law is dependent to the subjective manner of the person. Even so, not every person who understand the law, fully understand the provision regarding chained promise (*beding berantai*). As one of the legal profession trusted by the government to the private matter of the people, the profession of civil law notary is the law profession that mainly work with agreement after lawyer/advocate. Furthermore regarding the role of notary to balance the legal protection for the parties in the making of authentic deeds that contain chained promise (*beding berantai*) will be elaborated in the next elaboration.

THE ROLE *of* CIVIL LAW NOTARY TO BALANCE LEGAL PROTECTION FOR THE PARTIES IN THE MAKING OF AUTHENTIC DEEDS THAT CONTAIN CHAINED PROMISE (*BEDING BERANTAI*)

CIVIL law notary is a general official authorized to make authentic deeds and other authorities as referred to in the law. Indonesian notary belong to latin notaries which according to Blacks are carrying out the task of serving the needs of the community in the private or civil sphere, and because notary is *amaneunsis*, only constrict what is said *Notarius* in Roman Law is *Draughtsman*, *an amaneunsis* is the person who records what is done by someone else or acknowledges what others have written. Latin notary attributes are person whose attitute and position are neutral and firm. Notary may not make a deed if not requested. Notarial deed must be written and can and must meet the apllicable laws and regulations. Viewed form its position, then a notary is tasked with carrying out part of the authority of the government. The legal actions contained in a notary deed are not legal actions of the notary, but are legal actions that contains actions, agreements and stipulations of parties who request or want their legal actions to be stated on an authentic deed. So the parties to the deed are bound to the contents of an authentic deed. Notary is not an artisan making deed or a person who has a job of making a deed, but the notary in carrying out his office is based on or equipped with various legal sciences

and other sciences which must be mastered in an integrated manner by a notary and deed made before or by a notary having the position of proof (Hendra 2014).

In general, the deed is a letter that is signed, contains information about events or things that are the basis of an agreement, it can be said that the deed is a writing with which stated a legal action. Authentic deeds are perfect evidence as referred to in Article 1870 of the Indonesian Civil Code, it gives among the parties including his/her heirs or those who have the rights of the parties that is perfect evidence of what was done/stated in this deed. This means having the strenght of evidence in such a way because it is considered to be attached to the deed itself so that it does not need to be proven again and for the judge it is "compulsory proof/necessity" (*Verplicht Bewijs*). Therefore, whoever states that the authentic deed is fake/false, he/she must prove the falsehood of the deed, therefore, authentic deeds have external proof power, formally and materially. It is different from the party made deed which for the judge si free evidence because the new party made deed has the material evidence power after its formal strenght has been proven, while the power of formal proof has only taken place, if the parties concerned know the truth of the contents and method of making the deed (Hendra 2014).

Based on the description above, then the deed made authentically by a general official has a perfect proofing value of a deed that includes:

1) Strenght of Authentic Proof (*Uitvendige Bewijskracht*)
   The strenght of authentic proof means that the deed itself has the ability to prove itself as an authentic deed.
2) Strenght as a Formal Proof (*Formele Bewijskracht*)
   In the formal sense, hence the certainty of the date of the deed is guaranteed, the truth of the signature contained in the deed, the identity of the person present (*comparanten*), as well as the place where the deed was made as long as a party deed, that the parties have explained as described in the deed, while the truth of the statements themselves is only certain between the parties themselves.
3) Strenght as a Material Proof (*Materiele Bewijskracht*)
   The contents of the information contained in the deed is valid as true, the content has certainty as it really is, is a legitimate piece of evidence between the parties and the heirs and recipients of the recipients of their rights, with the understanding: (a) that if the deed is used before the court is sufficient and that the judge is not permitted to ask for another proof of evidence beside it; and (b) that the contrary proof is always permissable with the usual evidentiary instruments permitted according to the law.

Authentic deed are perfect evidence for both parties, this means that the contents of the deed by the judge are considered true as long as the untruth cannot be proven. Authentic deeds do not require recognition from the parties concerned in order to have the power of proof. This brings a lot of convenience for the parties in the deed, as it cuts a lot of documental requirements if the deed is being used for court hearing in the court.

Civil law notary as a public official who has the authority to make authentic deeds and in carrying out the task of serving the needs of the community in the private or private sphere is likely to face agreements that promise chain *beding*. For this reason, notary understanding of chain *beding* is needed. Moreover, seeing the role of notaries as an extension of the government (executive) by paying attention to norm construction in paradigmatic perspectives, especially with philosophical foundations (philosophy of paradigm), constitutional (constitutional paradigm) and juridical (juridical of paradigm) is very important for underlying the implementation of the duties of a notary in order to remain trustworthy and trusted.

As a civil law notary in the state of law (*rechtstaat*) Indonesia, authentic deed products made must be able to be authentic legal evidence and reflect legal products that can provide certainty and legal protection for all Indonesian citizens (in general) and for the parties (at especially). The trust given by the parties to the civil law notary in translating a legal act into an authentic deed must be able to meet the needs of the parties for the legal certainty and protection of the law itself, both to those that have been seen now and the things that have not yet been seen and must be anticipated. Therefore, it is very important for a civil law notary to be able to constrict the deed based on a philosophical, constitutional and juridical foundation (philosophy, constitutional and juridical of paradigm), as appropriate to make a product of legislation. It is said that it should be appropriate like making a product of legislation because in truth the authentic deed product will later become a different but inseparable law binding on the parties (*pacta sunt servanda*) (Idham 2010).

If in construction the authentic deed, a civil law notary will pay attention to the philosophical, constitutional and juridical foundation (philosophy, constitutional and juridical of paradigm), it will appear that if it is agreed upon in the chained *beding* agreement, the notary should explain in full about what the promise is (*beding*), the consequences that will arise are related to the agreement notarized in the notarial deed, and what must be considered in the future so that the parties can clearly understand the chain *beding*.

Because the majority of the viewers are certainly not a jurist or law person who understands the law, then the civil law notary should be able

to anticipate the potentials that will arise from the chained *beding* based on the notary's legal knowledge and constrict it entirely into the deeds in the form of articles-articles, one and the other in order to provide comprehensive and neutral understanding and legal protection for the parties. In line with the way of seeing a civil law notary by the public eye, in the position of a civil law notary attached with them is a unique characteristic that distinguishes civil law notary from other profession in the community, even to carry out the position they are necessary to be appointed by the government. They are private people who are only bound by the laws regarding their position and subsequently free in carrying out their authority given by the law. The position of civil law notary in the midst of the community and the strenght of proof from the authentic deed they made, form the perception that the civil law notary position is a position of trust. The trust given by the law and community requires the civil law notary to be responsible in carrying out that trust as good as possible and to upholds the legal ethics, dignity and nobility of the civil law notary position (Edwar, dkk. 2019).

Of course, the civil law notary must explain comprehensively about the chained *beding* in a juridical manner giving rise to the rights and obligations of the parties. Besides that the civil law notary must also have anticipated the consequences that will arise if the any party breaks the chained promise or chained *beding*, along with anything that must be considered in the future related to the chained *beding* even though the main achievements which are essential elements in the agreement have been fulfilled by the viewers. Maybe the explanation and delivery given by the notary to the parties does not have to be done as law lectures in general, but rather poured directly into the substance of the deed articles which are then read and explained to the parties as part of the obligations of a civil law notary as stipulated in Article 16 paragraph (1) letter m of the Law of the Republic of Indonesia Number 2 of 2014 regarding Amendments to the Law of the Republic of Indonesia Number 30 of 2004 regarding Notary Position.

The Republic of Indonesia is a legal state (*droit constitutionel*), meaning that any establishment of a state institution must have a legal basis so that the state institution can carry out its duties and authorities in accordance with the laws governing it (Dilaga 2017). As a law institution of public official, civil law notary is governed in the Law of the Republic of Indonesia Number 2 of 2014 regarding Amendments to Law of the Republic of Indonesia Number 30 of 2004 regarding Notary Position. This serves as the legal basis of the civil law notary in Indonesia starting from 2004 (before the civil law notary was governed by the *Reglement op Het Notarisambt in Indonesië*).

However, the implementation of the things mentioned above indirectly is part of the obligation of a notary in carrying out his position as stated in Article 16 paragraph (1) letter a and letter e of the Law of the Republic of Indonesia Number 2 of 2014 regarding Amendments to Law of the Republic of Indonesia Number 30 of 2004 regarding Notary Position. It is true that there are no sanctions and consequences imposed on the civil law notary for not carrying out the above mentioned materially and formally because notaries are not parties to the deed, there are also no consequences for the civil law notary for not comprehending the law thoroughly and deeply (not a fatal error for a notary that results in the null and void of the deed and deed concerned only having the power of proofing as an under hand deed/*onderhand*).

Whilst another argument for the importance of the role of civil law notary in the making chained *beding* is in the form of the authority of the civil law notary as stipulated in Article 15 paragraph (1), paragraph (2) and paragraph (3) of the Law of the Republic of Indonesia Number 2 of 2014 regarding Amendments to the Law of the Republic of Indonesia Number 30 of 2004 regarding Notary Position. On of which is the authority of a civil law notary to give out legal counseling in relation to the making of an authentic deed (notarial deed). Legal counseling done by the civil law notary are part of the contribution of civil law notary to the national law development done through the socialization of laws and regulations to increase public of the legal awareness in obtaining justice to carry out their rights and obligations in the making of authentic deed. Legal counseling can be done by the civil law notary with giving out the right understanding on the related laws and regulations in accordance with the deed that the parties wanted to be made. The civil law notary also doesn't receive any honorarium in providing legal counseling to clients (Ningsih 2019).

Civil law notary should do take care and notice of the abovementioned. As a public official whose authority is to make an authentic deed (notarial deed) which serves as a perfect proof in the court of law. Civil law notary must also give out legal advice and give legal counseling to the parties as part of his/her authority as stipulated in Article 15 paragraph (1), paragraph (2) and paragraph (3) of the Law of the Republic of Indonesia Number 2 of 2014 regarding Amendments to the Law of the Republic of Indonesia Number 30 of 2004 regarding Notary Position. In accordance with the responsive law theory by Philippe Nonet and Philip Selznick, a good law must be able to identify the needs of the public. As the needs of the public was known regarding chained promise (*beding berantai*) in an agreement, civil law notary should be able to identify and give counseling regarding the rights and obligations of the parties in regard to the chained promise (*beding berantai*) and duly rule/stipulate it in the

authentic deed made. As responsive law reinforces the ways in which openness and integrity can support each other despite the conflict between the two, the task of civil law notary in giving out counseling and advice insures that openness is guaranteed to all parties that there is no implied intentions to one party that will bring harm to the other party. Such the integrity of law is also preserved well by bringing justice and certainty to all parties in the authentic deed. As the stipulation of the chained promise (*beding berantai*) in the authentic deed by the civil law notary becomes a perfect evidence in the eyes of law, this also reflect the ideals of responsive law which is legality. With the main consideration basis of purpose (purpose oriented), the act of civil law notary in such manner proves to be beneficial to maintain the purpose of law. Responsive law theory also allowed the use of discretion widely but according to the purpose and participation aspect with the integration of legal and social advocation. By doing so, a civil law notary that give out legal advice and counseling, become the concrete example of a civil law notary as a public official practicing discretion but within the law (which is allowed by the law as stipulated in Article 15 paragraph (1), paragraph (2) and paragraph (3) of the Law of the Republic of Indonesia Number 2 of 2014 regarding Amendments to the Law of the Republic of Indonesia Number 30 of 2004 regarding Notary Position).

As already mentioned before that the civil law notary isn't a party to the deed itself, meanwhile the parties are. And so the terms and conditions as stated in the deed made by the civil law notary becomes a fully binding instrument for the parties, including but not limited to the chained *beding* (if there is any). As chained *beding* must be promised again and again if there is a transfer of party or changes in the party of the deed, failure to do so is a default which will results to the promisor being liable to every legal responsibility, expenses and costs. If the civil law notary didn't explain the chained promise (*beding*) well to be fully understand by the parties, then even though the civil law notary is not part of the deed, whilst he/she is also not required by the positive law to explain thoroughly, as part of the civil law notary action, indirectly results to someone (usually the promissor) to be in vulnerable position in the eyes of the law. For such the law tends to assess it as the promissor's fault rather than the civil law notary's. So it is inappropriate for such thing to happen due to the civil law notary's incomprehension. Such unfortunate that the Indonesian positive law did not regulate such things as the responsibility of the civil law notary too. But so due to the concept of the civil law notary is not a party in the deed and such deed is constructed upon the request of the parties without coercion or pressure from any party. Therefore only the parties that are solely responsible to what is stated in the authentic deed.

Although what has been mentioned above, related to the implementation of the position of a real civil law notary who is considered an educated, academic, intellectual, authoritative and trustworthy person, he certainly has a moral responsibility. It is widely understood that the implementation of the position of a notary public is as much as possible is a remuneration or a notary's contribution to the knowledge he has (academically) and the trust given to him by the people and the government together through the government (juridically-formal). Therefore, studying in an ongoing manner is important for a civil law notary in carrying out his position so that it is always be trustworthy and dependable.

Based on what was elaborated above, the writer emphasize the necessity of the civil law notary to be able to understand and implement this research results, namely in the form of chained *beding* which is being transferred from one party to another party if there is any changes. Such request is merely on the moral side, so as the responsibility of someone with the educational background such as a civil law notary, must not bring any harm or risk to another person which usually did not understand the law. The civil law notary is also responsible to give legal advice as stated in the law, also as a jurist he/she is the product of educational institution for the good of all mankind.

CONCLUSION

CHAINED promise (*beding*) is an instrument or way to transfer rights/obligations arising from an agreement to the party that obtains rights based on a special title. If seen from *beding* identity as an instrument to transfer rights and / or obligations, then the *beding* is nothing but a form of agreement between the parties. As an individual right, he was born from an agreement agreed upon by the parties so that it was clearly different from material rights which were primarily born because of the law (material rights arose from the arrangement in Book II of the Civil Code which adheres to a closed system). The party that gives the *beding* of the chain is obliged to promise that it will be returned if the material rights are transferred because otherwise he is deemed to have defaulted.

Ordinary *beding* must be distinguished by chain *beding*. An ordinary *beding* is nothing but a *beding* that is carried out only specifically for parties in the agreement and for a certain period of time. Chain *beding* are promises (*beding*) which are intended to be general in nature (multi-parties for several occasions/multi parties for several occasions) and are eternal to give rise to chained characteristics. According to Article 16 paragraph (1) letter a

and letter e of the Republic of Indonesia Law Number 2 of 2014 concerning Amendments to the Law of the Republic of Indonesia Number 30 of 2004 concerning Notary Position, a Notary in carrying out his position is obliged to act trustworthy, honest, thorough, independent, impartial, and safeguard the interests of the parties involved in legal actions (letter a) and provide services in accordance with the provisions of this Act (letter e). For this reason, in terms of converting agreements containing chain *beding* to authentic deeds, it is recommended to stakeholders, notaries to:

1) explain in full about what a chaine promise (*beding*) is;
2) the consequences that will arise are related to the agreement notarized in the notarial deed; and
3) what must be considered in the future so that the viewers can clearly understand the chained *beding*.

It is true that there are no sanctions and consequences imposed on the notary for not carrying out the above. But the full implementation of the duties and positions of a notary public is the responsibility of the notary publicly for the knowledge and trust given to him.

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