

The Limitations of Notary Legal Liability in Indonesia towards Disputed Authentic Deeds

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ABSTRACT

This study aims to determine the legal liability of a notary as a general official for doing authentic deeds when disputed in a court by the parties. The research type is normative juridical by using a law approach and a conceptual approach. The data collection technique is by studying literature in the form of primary legal materials and secondary legal materials. The data analysis technique uses a qualitative descriptive method. The result of the study shows that the notary who commits acts against the law can be sued by the parties for criminal, civil, or administrative liability. Meanwhile, the notary cannot be blamed for the disputes that arise later between the parties if the notary has acted according to the procedure. It is because the notary has only liability for the formal truth, namely in recording what was conveyed by the parties as stated in the authentic deed. A notarial deed that is not appropriate or defective will lose its authenticity, so it is only considered valid as a private deed.

Keywords: *Liability, Notary, Authentic Deed, Dispute*

ABSTRAK

Penelitian ini bertujuan untuk mengetahui tanggung jawab hukum notaris sebagai pejabat umum dalam membuat akta autentik apabila disengketakan di pengadilan oleh para pihak. Penelitian ini berjenis yuridis normatif dengan menggunakan pendekatan undang-undang dan pendekatan konseptual. Teknik pengumpulan data dilakukan dengan studi kepustakaan berupa bahan hukum primer dan bahan hukum sekunder. Teknik analisa data menggunakan metode deskriptif kualitatif. Hasil penelitian menunjukkan bahwa notaris yang melakukan perbuatan melawan hukum dapat dituntut pertanggungjawaban pidana, perdata, maupun administratif. Sebaliknya, ia tidak dapat dipersalahkan atas sengketa yang timbul kemudian dari para pihak apabila notaris telah berbuat sesuai prosedur. Hal ini karena notaris hanya bertanggungjawab terhadap kebenaran formil, yaitu dalam mencatatkan apa yang disampaikan oleh para pihak untuk sebagaimana dinyatakan ke dalam akta autentik. Kemudian terhadap akta notaris yang tidak sesuai atau cacat akan kehilangan sifat keasliannya sehingga hanya dianggap berlaku sebagai akta di bawah tangan.

Kata Kunci: *Covid-19, Pemberlakuan Pembatasan Kegiatan Masyarakat, Instruksi Menteri.*

Introduction

The need for written evidence is increasing in line with the growing demands for certainty and legal protection in various fields. In written evidence, there are the rights and obligations of the parties to a legal relationship, so it is expected to minimize the emergence of disputes. According to Article 1867 of the Civil Code of Indonesia (KUHPer), it indicates that proof by writing can be authentic writing or private writing. Although not sure that one day it would be used in a court, authentic writing (deed) is often done either by the parties as legal protection or documentary. According to Article 1868 of the Civil Code of Indonesia (KUHPer), it is stated that an authentic deed is a deed done in a form determined by law or before a general official authorized for that, at the place where the deed is done.

A general official is a person authorized by law to do authentic deeds. As long as the authority does not fall under other officials, the authority is owned by a notary.¹ The main task of a notary is in the realm of private law, so he is known as a general official, not a public official or a state administrative official. As Article 1 Paragraph (1) of Law Number 2 of 2014 concerning the Amendment to Law Number 30 of 2004 concerning Notary Position (the Notary Position Law) states that a notary is a general official authorized to do authentic deeds and has other authorities as referred to this law or other law. Article 1 Paragraph (7) of the Notary Position Law

(UUJN) emphasizes that a notarial deed is an authentic deed done by or before a notary according to the form and procedure stipulated in this law.

A notarial deed contains the truth about what was notified by the parties to the notary. The notary must include a statement that the contents of the deed are genuinely understood and follows the parties' wishes. It is done by reading out the contents and providing access to the information, including access to the relevant laws and regulations, to the parties who signed the deed. Thus, the parties can freely determine and agree on the contents of the deed.² A notary must make these efforts before the deed is signed by the parties to ensure they understand, agree, and will not dispute it at a later date.

However, the position of a notary as an official who does authentic deeds cannot be separated from problems that lead to conflicts.³ Not infrequently, a notary is sued by the parties who feel aggrieved or dissatisfied with the deed they made.⁴ A notary is summoned to court to provide information about the disputed deeds.

It can be said that the authentic deed made by the notary is problematic or there is an element of a violation. It may be because the notary did not act under the Legislation or the Notary Code of Ethics, whether negligence or intentionally. It means there is a one-sided error or bad faith by the notary or one of the parties. Then if the notary has violated the law in carrying out his duties,

¹Habib Adjie, *Hukum Notaris Indonesia: Tafsir Tematik Terhadap UU Nomor 30 Tahun 2004 Tentang Jabatan Notaris*. (Surabaya: PT Refika Aditama, 2008). P. 40.

²Dedy Pramono, "Kekuatan Pembuktian Akta Yang Dibuat Oleh Notaris Selaku Pejabat Umum Menurut Hukum Acara Perdata Di Indonesia," *Lex Jurnalica* 12, no. 3 (2015): 248-58.

³Anita Afriana, "Kedudukan Dan Tanggung Jawab Notaris Sebagai Pihak

Dalam Penyelesaian Sengketa Perdata Di Indonesia Terkait Akta Yang Dibuatnya," *Jurnal Poros Hukum Padjadjaran* 1, no. 2 (2020): 246-61.

⁴I Wayan Paramarta Jaya, Hanif Nur Widhiyanti, dan Siti Noer Endah, "Pertanggungjawaban Normatif Notaris Berkenaan Dengan Kebenaran Substansi Akta Otentik," *Rechtidee* 12, no. 2, (2017): 267-85.

he may be subject to sanctions. From this background, the author is interested in discussing further the limitations of notary legal liability for disputed authentic deeds by the parties.

Methodology

This study applies a normative juridical research methodology with a law approach by positive law as a source of existing law⁵, and a conceptual approach. Normative juridical research methods can be carried out by examining, studying, investigating, and observing research by legal theories, concepts, and principles.⁶ The data used come from primary legal materials and secondary legal materials. Primary legal materials are in the form of legislation, while secondary legal materials are from books and scientific papers relevant to the discussion. Furthermore, the data obtained for analysis will first be identified according to the research target. The data analysis technique uses a qualitative descriptive method to get prescriptive truth.

Discussion

There is no specific definition of proof in the legislation. However, based on the provision of Article 163 *Herzein Inlandsch Reglement* (HIR) and Article 283 *Reglement voor de Buitengewesten* (RBg), proof in a juridical sense is the presentation of legal evidence according to law to a judge who examines a case to provide certainty about the truth of events.⁷ It is because the judge must rely on other evidence besides his belief to

avoid arbitrary decisions and to ensure legal certainty.

In civil cases, an authentic deed is evidence that is binding and coercive. It means that the judge must assume that all legal events stated in the authentic deed are valid unless there is other evidence that can eliminate the power of proof of the deed. An authentic deed has perfect evidentiary power, so if there are parties who judge or declare that the deed is not authentic, they must prove it under the rule of law. Unlike criminal cases, a notarial deed as an authentic deed is evidence that cannot bind the investigator and judge in proof. The proof power of a notarial deed in a criminal case is of perfect value, but it cannot stand alone, so it requires support from other evidence.⁸

A notarial deed as an authentic deed has the nature and strength of initial, formal, and material proof that distinguishes it from a private deed. An authentic deed proves validity because it is considered initial until there is evidence to the contrary. With the power of initial evidence, the proof issue is only about the authenticity of the official's signature on the deed. In Article 1875 of the Civil Code of Indonesia (KUHPer), it is stated that the power of outward authenticity does not exist in a private deed.

The private deed is free evidence as stipulated in Article 1881 Paragraph (2) of the Civil Code of Indonesia (KUHPer). It means that the judge is free to determine whether the evidence can be accepted or not because a private deed does not have the power of authenticity like an authentic deed. A private deed will have the power of proof if both

⁵M. Najibur Rohman, "Tinjauan Yuridis Terhadap Regulasi Mata Uang Kripto (Crypto Currency) Di Indonesia," *Jurnal Supremasi* 11, no. 2 (2021): 1-10.

⁶Mohammad Mashulin Amjad, "Tinjauan Yuridis Sanksi Rehabilitasi Terhadap Pengguna Narkotika," *Jurnal Juristic* 1, no. 2 (2020): 1-11.

⁷ M. Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP Pemeriksaan Sidang Di Pengadilan, Banding, Kasasi Dan Peninjauan Kembali*. (Jakarta: Sinar Grafika, 2000). P. 283.

⁸ Retno Wulan Sutantio, *Hukum Acara Perdata Dalam Teori Dan Praktek*. (Bandung: Mandar Maju, 1989).

parties to the deed have acknowledged the truth.⁹

The power of formal proof of an authentic deed lies in ensuring the truth of the date, the proper signatures, the valid identities of the parties, and the clear place about where the deed was done. In this case, the parties have explained what is written in the deed. Meanwhile, the power of material proof of an authentic deed is a certainty that the parties do not only explain to the notary but also prove that they have done as stated in the material of the deed. An authentic deed must be recognized as valid unless it can be established that the deed is fake. As the formulation of Article 1870 of the Civil Code of Indonesia (KUHPer) states that an authentic deed provides perfect proof of the contents.

Legislators give the authority to do authentic deeds only to a notary, while for other general officials, this authority is limited to certain deeds. The forms of notary's liability:¹⁰ First, a notary must do a deed properly and correctly, under the law and the will of the parties, without making it up.

Second, a notary is required to produce quality deeds, namely those that can fulfill the legal will and requests of the parties. Third, the notary makes a deed that has a positive impact, meaning that the deed has perfect proof power to protect the parties. The deed can be about the notary's testimony about what he saw, witnessed, and experienced in his position as a general official, called a deed done by a notary. Meanwhile, information from the parties that an agreement has been made and asking a

general official to declare it in a deed is referred to as a deed done before a notary.

Regarding the obligation to read the deed he made, in Article 16 Paragraph (7) of the Notary Position Law (UUJN), a notary is allowed not to read the deed he made with an exception, namely if the parties want the deed not to be read because the parties have read the deed themselves. Hence, they feel they already know and understand the contents of the deed.

Provisions regarding this matter must be stated in the closing part of the deed and on each page of the minutes of the deed initialed by the parties, witnesses, and the notary. Outside of that exceptional condition, according to Article 16 Paragraph (1) letter I of the Notary Position Law (UUJN), the notarial deed must be read by the notary himself without being represented by another person. It is because reading a deed by a notary is part of the formalization (*verlijden*) of the deed.¹¹

Unfortunately, the practice of field (*das sein*), many notaries do not read out the deed they made though at the end of the deed, it is stated that the deed has been read by a notary, or many notaries let the parties sign the deed in the presence of their assistant. It can potentially lead to problems later on. The notarial deed is not under what the parties want, or the parties may not understand the contents of the deed, which will lead to misunderstandings and multiple interpretations regarding the contents of the deed made by the notary. Finally, one of the parties to the

⁹ Dedy Pramono, "Kekuatan Pembuktian Akta Yang Dibuat Oleh Notaris Selaku Pejabat Umum Menurut Hukum Acara Perdata Di Indonesia," *Lex Journalica* 12, no. 3, (2015): 248-58.

¹⁰ Abdulkadir Muhammad, *Etika Profesi Hukum*. (Bandung: Citra Aditya Bakti, 2001). P. 93-94.

¹¹ I Wayan Arya Kurniawan, "Tanggung Jawab Notaris Atas Akta Yang Tidak Dibacakan Dihadapan Para Penghadap," *Acta Comitatus* 3, no. 3 (April 29, 2019): 489, <https://doi.org/10.24843/AC.2018.v03.i03.p08>.

deed may default, or the deed cannot be used properly.

In carrying out their duties, a notary must be guided by the Notary Position Law (UUJN) and other regulations related to the making of a deed, as well as the Notary Code of Ethics formulated by the Indonesian Notary Association. However, it is possible that in carrying out his obligations, a notary makes a mistake in doing a deed with legal consequences. It can be caused by the lack of knowledge (*onvoldoende kennis*), the lack of experience (*onvoeldoende ervaring*), or the lack of understanding (*onvoldoende inzicht*) from the notary.¹² Negligence of the notary in making the deed, which causes the deed to be legally flawed, will result in the notary being declared against the law. The act must fulfill the formulation that the act is prohibited by law and there are losses arising from the actions of a notary.¹³

The liability of a notary who commits an unlawful act can be divided into two, active and inactive. It is active if the notary does an act that causes harm to the other party, while it is inactive if the notary does not perform an act that is a must, thereby harming the other party.¹⁴ Before the notary is sentenced to civil sanctions, it must be proven beforehand that there is indeed a loss due to the unlawful act of the notary so the notary concerned can be held liable.

Based on Article 1365 of the Civil Code of Indonesia (KUHPer), every action that violates the law and harms others obliges the person who caused the

loss because of his mistake to replace the loss. Then, Article 1366 of the Civil Code of Indonesia (KUHPer) stipulates that everyone is responsible not only for losses caused by his actions but also for losses caused by his negligence or carelessness. Furthermore, Article 1367 of the Civil Code of Indonesia (KUHPer) mentions that a person is not only responsible for losses caused by his actions but also for those caused by the actions of people who are his dependents or caused by goods under his control.

The Notary Position Law (UUJN) does not stipulate the obligation for a notary to investigate the material truth of the data submitted by the parties. As a result, problems can arise from parties who falsify their identity documents or objects that are transacted with bad intentions and purposes, so they often drag the notary. Therefore, the judge will only involve a notary to seek the formal truth of the deed. Formal truth is the truth stated by the parties. The notary only records what is explained by the parties who appear before the notary and has no obligation to find the material truth.

Errors regarding the contents of the deed due to incorrect information (intentionally or unintentionally) from the parties cannot be liable for by the notary because the contents of the deed have been confirmed to the parties by the notary.¹⁵ Thus, even though the deed contains the notary's name, he is not positioned with the parties whose names are listed in the deed. The notary is neutral in doing the deed and is obliged to provide legal advice if a party requests

¹² Koeswadiji, *Tanggung Jawab Notaris Selaku Pejabat Umum*, ed. Center of Documentation and Studies of Business Law (Yogyakarta, 2003).

¹³ Fransisco Ch. Poae, Henry R. Ch. Memah, dan Marthin L Lambonan, "Pertanggung Jawaban Hukum Terhadap Notaris Dalam Kesalahan Pembuatan Akta," *Lex Et Societatis* 8, no. 4, (2020): 115-24.

¹⁴ Aprilia Putri Suhardini, Imanudin, dan Sukarmi, "Pertanggungjawaban Notaris Yang Melakukan Perbuatan Melawan Hukum Dalam Pembuatan Akta Autentik," *Jurnal Akta* 5, no. 1, (2018): 261-66.

¹⁵ Sudikno Mertokusumo dan Iskandar Oeripkartawinata, *Hukum Acara Perdata Indonesia: Cetakan Kelima*. (Yogyakarta: Liberty, 1998). P. 3-4.

it. However, if there is an error in the legal advice later, the notary may also be sued liable for the material truth by the judge.

Article 1869 of the Civil Code of Indonesia (KUHPer) stipulates that a notarial deed has the power of proof as a private deed if the general official concerned is not authorized, the deed does not have a general official, or the deed is defective in its form.¹⁶ A private deed can be canceled if there are no or less subjective requirements based on the agreement's validity, such as if the parties are not capable of acting in law or there is no agreement. Then, it becomes null and void if the deed is done not meet the objective requirements, namely a sure thing and a lawful cause.

The related parties or people who are directly affected by the loss due to a notary's error can demand civil sanctions in the form of payment of compensation fees or interest. This claim is not based on the assessment of the evidence that has changed due to violating the provisions of the Notary Position Law (UUJN), but on the legal relationship between the notary and the parties.¹⁷ The next liability of a notary for violating the provisions of the Notary Position Law (UUJN) is administrative sanctions in the form of a written warning, temporary dismissal, honorable dismissal, or dishonorable dismissal. Meanwhile, the criminal liability of the notary is not found in the Notary Position Law (UUJN).

Considering the authority of a notary is regulated in the Notary Position Law (UUJN), a notary receives criminal protection as stated in Article 50 of the Criminal Code of Indonesia (KUHP) that

whoever commits an act to implement the provisions of the law, will not be punished. However, this does not mean that a notary can be utterly free from criminal snares.

Criminal liability can be imposed if a notary commits a criminal action himself.¹⁸ It means the liability arises not because of his position but because of his action that has fulfilled the offense element. Not infrequently notary is drawn as a party who participates or assists in committing a criminal act, namely making or providing false information in a notarial deed.¹⁹ This aspect relates to violations of the Notary Position Law (UUJN) which can lead to acts of falsifying the deed as referred to in Chapter XII Second Book of the Criminal Code of Indonesia (KUHP) regarding the forgery crime of letters, particularly in Article 264.

Summoning a notary to the process of examining criminal cases is not easy. In requesting information on reports of certain parties, the police, prosecutors, or judges are required to get approval from the Notary Honorary Council.²⁰ The Notary Honorary Council may refuse an investigator's request to grant permission to examine a notary. If the notary continues to attend the examination process without approval from the Notary Honorary Council, the risk is borne by the notary himself. The imposition of criminal sanctions against a notary can only be carried out if the conditions collectively have been met; namely the notary fulfills the offense element in the Criminal Code of Indonesia (KUHP) and also violates the

¹⁶ H.R. Daeng Naja, *Teknik Pembuatan Akta: Buku Wajib Kenotariatan*. (Yogyakarta: Penerbit Pustaka Yustisia, 2012). P. 65.

¹⁷ Ahmad Farich Sulthoni, "Batas Pertanggungjawaban Notaris Atas Pembuatan Akta Otentik," *Jurnal Ilmu Kenotariatan* 2, no. 1, (2021): 69-90.

¹⁸ R. Soegondo Notodisoerjo, *Hukum Notarial Di Indonesia: Suatu Penjelasan*. (Jakarta: Rajawali Pers, 1982).

¹⁹ Habib Adjie, *Hukum Notaris Indonesia: Tafsir Tematik Terhadap UU Nomor 30 Tahun 2004 Tentang Jabatan Notaris*. (Surabaya: PT Refika Aditama, 2008). P. 24.

²⁰ Habib Adjie.

Notary Position Law (UUJN). It is done not only to minimize the potential for criminal sanctions against the notary but as a function of protection.

Although the law provides a liability burden for the actions committed by a notary, it does not mean that every loss suffered by the parties can be held liable by a notary. If the error element comes from the parties themselves, the notary, as a general official, cannot be held legal liability for the notarial deed. The notary only records what the parties say, so the false information submitted by the parties is the liability of the parties. Article 1865 of the Civil Code of Indonesia (KUHPer) essentially states that the party who feels his rights have been violated is obliged to verify that his rights have been violated by others. Therefore, if the party who thinks his rights have been harmed cannot prove the violation, the claim for compensation based on an unlawful act cannot be realized.

The notary's liability for the deed he has made continues even though the notary has retired from his position. It is because there is no further explanation regarding the limitations of the notary's post-retirement liability for the authentic deed he made, so it is still a debate among notaries until this day.²¹ A notary must always be careful and thorough in his duties as a general official. A notary must avoid disgraceful acts and carry out the positions assigned by the state in doing good deeds. It is to maintain the image and dignity of the notary institution that carries out the duties of the office not solely for personal interests but for the benefit of society.

Conclusions

Based on the description, we can conclude that an authentic deed by a notary provides legal certainty in society. The deed becomes the strongest and

perfect evidence that can contribute to dispute resolution. Because what is stated in the authentic deed must be accepted unless the interested party can prove the existence of defects in the authentic deed before the court.

There are still many cases of a notary being sued because of the deed he made, so the notary is said to have committed an unlawful act. It can happen because of the professionalism lack of the notary in his duties or there is an element of bad faith from the notary. A notary who makes a mistake can be sued by criminal, civil, or administrative liability, and the defect of a notarial deed will only be considered a private deed. Thus, the judge is no longer bound to judge the deed as perfect evidence and can be canceled or nullified by law depending on whether or not the legal conditions of the agreement are fulfilled. Meanwhile, if the fault comes from the parties and the notary has done his duties according to the procedure, the notary cannot be held liable.

A notary should always strive for professionalism and good faith in his duties of the position entrusted to him. On the other hand, the parties to the notary must also ensure that the deed they have made is following the will, consciously and without coercion. A notary must comply with applicable legal provisions and provide legal counseling before the deed is signed so the parties can understand the rights and obligations of each contained in the deed. These things are essential to minimize the risk of disputes arising in the future, which can bring harm to oneself or other parties.

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²¹ Zakiah Noer dan Yuli Fajriyah, "Pertanggungjawaban Notaris Terhadap

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