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## LEGAL CONSEQUENCES OF THE VALIDITY OF THE AUTHENTIC DEED IN THE NOTARY CONTRACT AGREEMENT BEFORE THE PARTIES IN THE ABSENCE OF A NOTARY

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### Abstract

**Background.** This study analyzes the legal consequences of the validity of authentic deeds in agreements (akad) made without the presence of a notary.

**Aims.** An authentic deed has an important role as a strong evidence in proving the validity of an agreement.

**Result.** However, the absence of a notary at the time of the contract can affect the validity and evidentiary strength of the deed.

**Conclusion.** Using a normative juridical approach, this study shows that the making of deeds without the presence of a notary can cause legal uncertainty for the parties involved and potentially cause adverse legal consequences.

**Implementation.** Therefore, the author suggests the need to affirm the obligation of the notary in ensuring his presence in person to ensure the certainty and legal force of the deed made.

**Keywords:** Notary, Deed, Authentic Deed, Legal Consequences

## INTRODUCTION

Everything in Indonesia must be subject to the law according to Article 1 paragraph 3 of the 1945 Constitution. Because of the importance of law in Indonesia, there are various professions related to law, one of which is Notary." Some sources state that the word 'notary' comes from the Latin 'notarius' which means 'writer' during the Roman Empire. The term 'Nota Literaria', which means 'to express orally', may have been derived from the word.<sup>1</sup>

The position of notary can be seen as a representation of the function of carrying out state work, through this position the state entrusts notaries to carry out some state affairs, especially in the making of authentic deeds, so that the existence of notaries is very important as an answer to the needs of the community to ensure legal certainty, especially in the field of civil law.<sup>2</sup> According to the provisions of Law Number 30 of 2004 which regulates Notaries, in article 1 paragraph (1) it is stated that the definition of Notary as a public official who has the authority to issue authentic deeds along with other additional authorities as stipulated in the regulation. This definition was later refined in Law of the Republic of Indonesia Number 2 of 2014 which is a revision to the Law on Notary Positions (UUJN). In this latest regulation, Article 1 paragraph (1) clarifies the position of the Notary as a public official who is given the authority to produce authentic deeds and exercise other authorities mandated by both the Law and other laws and regulations. Based on these definitions, it can be concluded that the main function or main task of a Notary is the making of an authentic deed.

Based on Sudikno Mertokusumo's thoughts published in 2006, a deed can be defined as a written document that has been completed with a signature and contains information about certain events that are the foundation for the formation of a right or relationship of engagement, where since the beginning of the preparation of the document has indeed been intended as an instrument of proof. There are two main categories of deeds, namely authentic deeds and deeds

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<sup>1</sup> R.Soegondo Notodisoerjo.1993.*Notary Law in Indonesia; An Explanation* . Jakarta: PT. Raja Grafindo Persada

<sup>2</sup> Habib Adjie.2014.*Indonesian Notary Law*, Fourth Edition, Bandung:PT. Aditama Resort

under hand. An authentic deed is an official document that meets the legal requirements, made by an authorized official. If it meets certain conditions, the deed is considered authentic when:

1. The form of preparation is in accordance with the law.
2. Preparation in front of the authorized general officials.

The preparation of deeds has been determined by Law Number 2 of 2014, article 38 in detail regulates the form of a notary deed.

An authentic deed has an important function as the most powerful and complete evidence in every legal relationship in society. Because the role of authentic deeds as a legal product is very important, the implementation of notary duties is strictly regulated and limited by the threat of sanctions as stipulated in the Law on the Position of Notary Authentic deeds as the strongest and fullest evidence have an important role in every legal relationship, namely especially to maintain the discipline of the notary in carrying out his position.<sup>3</sup> The deed must be prepared in accordance with the law and in the presence of the authorized official. The presence of a notary in the process of contracting or signing a minute is not only a formality, it is an absolute requirement as a party that guarantees the validity and legal certainty of the documents made. This is done so that the parties as clients get legal protection and disputes can be prevented in the future.

However, in its implementation, there are still often incidents when the contract is represented by employees or Notary staff, so that the contract takes place not in front of the Notary concerned. This situation is caused by various factors, such as time constraints, distance, negligence, and the busyness of the Notary, so that to speed up and make it easier, the agreement process is still carried out in front of the parties. The absence of a notary in the process can be considered a violation of the applicable legal process.

A similar case related to the practice of contract representation by notary staff in front of the parties without the presence of a Notary has occurred in Kendari City found in the report book of the Regional Supervisory Council (MPD) document dated January 29, 2013, there is a record containing a complaint containing a complaint of alleged violation of the notary professional code of ethics with the initials HR, in the process of making the deed it is known that the parties who should have been present did not directly meet with the HR notary, rather, it only interacts with its staff. This was acknowledged by the HR Notary in front of the Regional Supervisory Council (MPD) of the Kendari City Notary. There are cases that end with the filing

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<sup>3</sup> Summariono.1995.*Norms for Law Enforcers*, Kanisius: Yogyakarta ,page 35

of a lawsuit and result in a court decision, as happened at the Banyuwangi District Court in 2014, with case number 192/Pdt.G/2014/PN. It is known that in the making of the deed there was a typographical error, and the reading of the deed in front of Defendant II as an audience was carried out by the staff of the Notary. Not only that, there was also a report in the City of Yogyakarta related to the Notary's negligence, namely not reading the deed in front of the parties because it caused losses for the parties concerned this case is contained in the decision of the Yogyakarta Special Regional Supervisory Council Number 03/Pt/Mj. PWN DDIY/VI/2016.<sup>4</sup>

From the problems described by the author above, there are legal consequences of the absence of a notary during the contract agreement before the parties, in addition to the change in the status of the deed to a deed in hand, which is an important issue to be further researched. In addition, the absence of a Notary can also have consequences for the notary himself and losses for the parties to the agreement. These problems show that there is still a discrepancy between the ideal law (*das sollen*) and the legal reality that occurs in the field (*das sein*).

This paper aims to examine the legal consequences in detail in the notary contract agreement made without the presence of the notary directly in front of the parties concerned and the efforts to prevent the notary's direct absence from the contract before the parties.

Referring to the problems explained earlier, the author is interested in compiling a paper entitled "The Validity of Authentic Deeds in Notary Contract Agreements in the Presence of the Parties Without the Presence of a Notary."

## METHODS

In this study, a normative approach method is used, by conducting a study of secondary data, through a literature search in the realm of law. To obtain comprehensive information, the author utilizes a variety of sources including primary legal material in the form of the Notary Position Law (UUJN), secondary legal material consisting of various journal articles and literature that are related to the research topic, and equipped with tertiary legal material obtained from the exploration of various online sources to strengthen this research.

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<sup>4</sup> Muhammad Tiantanik Citra Mindo, et al.2018.*Notary's Civil Responsibility for Deeds Read by Notary staff in the Presence of the Witness*. Legal Lantern, Vol 5, Issue 1

## DISCUSSION

### **Legal Consequences in a Notary Contract Agreement in the Presence of the Parties Without the Presence of a Notary**

Public understanding of all forms of fraud committed by Notaries is very important. With a good understanding, it is hoped that the public and law enforcement officials realize that the Notary profession is a position that is under strict supervision from the Government. This form of supervision includes monitoring in relation to the implementation of Notary duties in accordance with the regulations that have been set by the UUJN and the applicable code of ethics. This supervision is done through the Notary Supervisory Council (MPN) at the regional, provincial, and central levels.

In addition to supervision from the Government, in the internal environment of the Notary profession itself, there is an organization of the Indonesian Notary Association (INI) which has an Honorary Council. This board plays a role in supervising and handling violations of the code of ethics committed by Notaries at various levels. With this supervision system, it is hoped that a Notary can carry out their duties responsibly, carefully, and always be guided by the applicable law. This action aims to prevent irregularities or violations in every action taken by a Notary.

The word 'Notary' or other language 'Openbare Ambtenaren' means a public official with the authority to draw up an authentic deed. The Law on the Position of Notary (UUJN) in article 1, 7 formally defines a notary deed. Based on these provisions, what is meant by a notary deed or referred to as a deed is an official document that qualifies as an authentic deed, the creation of which is carried out both by the notary and in the presence of a notary, by following the provisions of the format and procedures that have been specifically applied in the laws and regulations. This definition affirms the special status of documents made with the intervention of a notary under the procedures stipulated in the UUJN.

An authentic deed is a legal document prepared by or in the presence of an official with authority, in a form that has been determined by law. This document reflects the agreement of the relevant parties and regulates the rights and obligations of each party, thereby providing legal certainty and minimizing the potential for future disputes. If a dispute still occurs, an

authentic deed functions as written evidence with perfect evidentiary power to speed up and simplify the process of resolving the case efficiently.<sup>5</sup>

Based on the provisions of the Notary Position Law (UUJN), a notary must read the deed in front of the audience by a minimum of 2 (two) witnesses, or 4 (four) witnesses specifically for the will deed under hand, and must be signed at the same time by all parties involved including the witness, witness, and Notary, as stipulated in Article 16 paragraph (1) letter m. The Law also regulates legal consequences if these requirements are not met. In article 16, paragraph (9), it is stated that when the provisions in paragraph (1) letter m or paragraph (7) are not fulfilled, then the status of the document will have the force of a deed under hand.

However, there are exceptions to the obligation to read the deed. According to article 16, paragraph (7) of the UUJN, the notary is not obliged to read the Deed if the audience does not desire to read it because they have read and understood the content themselves. This exception must meet the formal requirements, namely, the information must be included in the closing of the deed, and every page of the Deed Minute must be paraphrased by the witness and the Notary.

Due to the law that arises, legal consequences will arise if the notary is considered to have ignored regulations related to formal or material requirements in preparing an authentic deed. The deed can be degraded into a deed under hand and canceled. If the subjective elements of an agreement, including mutual agreement and legal competence, are not met, the interested parties can cancel the notary deed. According to Habib Adjie (2019),

Non-compliance with the provisions in the UUJN when making it can cause an authentic deed to not function as a deed with perfect evidentiary power. The deed will be considered only as a deed under the hand that does not have the authority to be evidence.

A notary deed can be considered a deed under hand when:

1. Made by a public official who does not have authority
2. At the time of making, there is no authorized public official
3. There is a defect in its shape.

After being signed by the interested parties to the deed, it can still function as a deed under hand.

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<sup>5</sup>Hartanti Sulihandari and Nisya Rifani.2013.*Basic Principles of the Notary Profession*. Jakarta: Dunia Cerdas, pp.13-14.

Suppose the deed under hand is required in the legal proceedings. In that case, the Court will ask for additional evidence to establish the content of the deed and declare the acceptance of the signature under it received by another party contained in the deed. Evidence such as witnesses, suspicions, and so on. If additional evidence supports the content of the deed, then the deed is recognized as having substantial evidentiary value, equivalent to an authentic deed.

Notaries must comply with the Law on the Notary Position (UUJN) when drafting an authentic deed. If the conditions are ignored, the deed will not be recognized as an authentic deed, but as a deed under hand. According to Habib Adjie (2019),. Some of the rules that cannot be violated include:

1. Not complying with Article 16 paragraph (1) of Law Number 2 of 2014 concerning UUJN.
2. Not complying with Article 16 paragraphs (7) and (8) of the same law;
3. Contrary to Article 41, which refers to Articles 39 and 40 of the UUJN;
4. Not complying with the provisions in Article 52 of the UUJN.

For the deed not to become a deed under hand and still have legal force as an authentic document, it is necessary to follow the process and provisions of making an authentic deed. In Decision No. 1420 K/Sip/1978 on May 1, 1978, the Supreme Court emphasized that the court could not cancel a notary deed, only stating that the deed did not have legal force.

Several provisions in particular articles clearly state that if the Notary commits a violation, then the deed he prepares only has the probative value of the deed under hand. According to Irawan Soerodjo, for a deed to be legally valid, it must meet three conditions:

- 1) In the form prescribed by law.
- 2) Made by a public official.
- 3) Made where the deed is prepared by or in the presence of an authorized public official.<sup>6</sup>

In the process of 'verlijden,' the deeds are made through the reading and signing of the deed, which a notary must read to categorize it as an authentic deed. The Law on the Notary Position regulates this in Article 16, paragraph 1, letter m. In practice, the things described can be proven by an authentic deed. The purpose of upholding the truth of the law and protecting the interests of the disputed party is the evidentiary power of the act.

In addition to drafting an authentic deed, notaries are also in charge of checking the validity of documents. Responsibility for legal defects in an authentic deed lies with the notary who prepares it. As a result of the law that requires the maker of an authentic deed to fulfill it,

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<sup>6</sup> Irawan Soerodjo, *Legal Certainty of Land Rights in Indonesia*, Arkola, Surabaya, 2003, p. 148.

the Notary will be given civil sanctions, namely that he can be held financially responsible for losses, including refunds, damages, and interest.

This is based on:

1. The legal relationship established between the notary and the presence can be classified as a form of legal bond that arises as a consequence of actions that violate the provisions of the law. Things that are indicators of illegal acts include the existence of an activity or action, the activity is not under the provisions of the law, resulting in losses, there is a causal correlation that connects the action and the impact of the loss caused, and it is proven that there is a fault factor from the perpetrator. If the notary does not comply with the rules outlined in the Law on the Notary Position, the action taken can be considered an unlawful act. As a result, making a deed by a Notary that is not under these provisions can cause losses experienced by the parties and/or related parties.
2. The work of notaries is less careful, less thorough, and inaccurate in:
  - a. The administrative process of making deeds in accordance with the UUJN; and
  - b. The application of legal provisions in authentic deeds that may not be based on expertise in the field of notary and legal knowledge in general.<sup>7</sup>

The Central Examination Panel has the authority to impose administrative sanctions on notaries who are proven to have committed violations, These sanctions are in the form of:

- Verbal reprimands,
- Written reprimand,
- Temporary stops,
- Respectful Respect,
- Disrespectful dismissal

The legal impact on notaries according to the Law on the Notary Position is stated in article 16 paragraph (9), which states that if one of the provisions in paragraph (1) m and paragraph (7) is not fulfilled, then the deed made only has the probative value as a deed under hand. The sanctions given can be in the form of administrative and discipline, because violations of the obligation to read the deed are not classified as criminal acts in the UUJN.

The role of the Supervisory Council in this case can summon the notary concerned but it must be in accordance with the procedure, there must really be a problem that arises, and there is a reporter who reports then the Ministry of Law and Human Rights will assign the

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<sup>7</sup> Sibuea Mia Augina Romauli, et al. *Notary Civil Liability for Comparatively Defective Sale and Purchase Binding Agreement Deed*. Journal of Legal Voices Volume 4 Number 1, March 2022

Regional Supervisory Council to summon the notary concerned, the Supervisory Council will hold a trial with the aim of conducting an examination and determining a decision whether the notary concerned is right to do what is reported by the reporter, if proven guilty, then the Regional Supervisory Council will prepare a letter of recommendation to the Regional Supervisory Council to hold a hearing to examine and determine decisions on community law, which can then be submitted to the Regional Supervisory Council for further action.

According to the code of ethics, this leads more to a violation of office, not to ethics, but ethically, committing a violation including not reading the deed and appearing in front of this person is still wrong because it has violated the Law on the Notary Position.

### **Efforts to Prevent Direct Notary Absence in the Contract Before the Parties**

Seeing the legal impact caused by the absence of a notary, there needs to be an effort aimed at reducing the risk of this happening. Here are the things that can be applied:

1. Application of Electronic Systems for Notary Attendance.

Every agreement made before a notary can use an electronic recording system as proof that the notary is actually present. This system can be in the form of a video conference accompanied by digital recordings, which can later become authentic evidence in the trial in the event of a dispute.

2. Strengthening the Role of the Notary Supervisory Council (MPN) in Supervision.

The institution in charge of supervising the position and profession of notary has the responsibility to carry out the function of supervision and guidance to the maximum. The purpose of this action is to ensure legal certainty, order, and legal protection for everyone who uses the services of a Notary. Therefore, during their duties, notaries must always be guided by and based on laws and regulations that specifically regulate the position of Notary. In other words, every provision listed in the regulation must be complied with and implemented by the Notary in the practice of his position.<sup>8</sup> The Notary Supervisory Council has the obligation to carry out supervision, the steps that can be taken include:

- a. Formal Supervision, which includes administrative appeals, petitions, and objections.

Supervision by the Regional Supervisory Board is preventive, requiring the permission of the superior before a decision is taken. The responsibility of the Notary Supervisory Board is stated in Decree No. M.39-PW.07.10 of 2004 by the Minister of Law and

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<sup>8</sup> Habib Adjie, *Notary Supervisory Council*, PT. Refika Aditama, Bandung, 2015, p. 101  
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DOI: <https://doi.org/10.62885/abdisci.v3i2.732>

Human Rights. Examples of repressive supervision include postponement or cancellation of Decisions.

b. Informal Supervision: A temporary suspension of activities and assessments is part of this supervision.

1). The Regional Supervisory Council is a formal supervisory institution that must obtain permission from its superiors before making decisions related to objections, petitions, or administrative appeals. The responsibility of the Notary Supervisory Council is regulated in Decree No. M.39-PW.07.10 of 2004 by the Minister of Law and Human Rights of Indonesia. Unilateral termination of decisions is a characteristic of repressive supervision.

2). Evaluation procedures and deferral of action are examples of informal supervision strategies.

External supervision is supervision by a body outside the government (executive). The supervision by the Indonesian Notary Association of its members is a clear example.

Two Types of Government Supervision: Supervision is carried out in a preventive and repressive manner. Preventive surveillance, also known as a priori surveillance, is carried out before a government decision is made. Meanwhile, repressive supervision is implemented after the decision is issued, with the intention of correcting the mistakes that have occurred.

Legal supervision aims to assess the validity of the Notary deed and consider the legal consequences that may arise. Authority of the Regional Supervisory Council as per MPN Regulation Article 71 of the UUJN, Article 13 & 14 of the Regulation of the Minister of Law and Human Rights Number M.02.PR08.10 of 2004,

3. Many people are not aware of their right to meet directly with the Notary in question not only with the notary staff they must get, so it is important to understand the public about these rights. For this reason, it is necessary to disseminate widely information so that the public has the courage and ability to think critically in applying for the cancellation of the deed and reporting if violations of the procedure are found.

## CONCLUSION

That an Authentic Deed cannot be executed without the presence of the notary concerned even though it is represented through the notary staff. Without this element, only the deed under hand will be produced. The physical presence of a notary is required during the

reading and signing of the deed. The absence of a notary during this procedure is legally unjustifiable, and such actions can result in the deed not having evidentiary value and triggering legal disputes in the future.

To prevent problems in the legal aspect, it is necessary to hold preventive efforts, including the implementation of an electronic attendance system as evidence of notary attendance to support proof, as well as optimizing the role of the Notary Supervisory Council (MPN) in carrying out both preventive and repressive supervision and the need for public awareness in fulfilling their rights during the deed making process. Notary awareness as a public official is needed to uphold professional ethics and obey all existing legal regulations.

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