

## **The Role of a Notary in the Implementation of Credit Agreements and Settlement of Defaults with a Mortgage Right Guarantee**

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**Abstract.** *This study aims to analyze the role of notaries in resolving defaults in credit agreements with collateral rights related to Supreme Court Decision Number 42 PK/TUN/2021. and to analyze the obstacles faced by notaries in resolving defaults in credit agreements with collateral rights related to Supreme Court Decision Number 42 PK/TUN/2021 and their solutions. This study uses a normative juridical research approach. The specifications in this study are descriptive analysis. The theories used include the theory of authority and the theory of legal certainty. Based on the research, it is concluded that the role of notaries who also serve as Land Deed Officials (PPAT) in resolving defaults in credit agreements with collateral rights, as reflected in Supreme Court Decision Number 42 PK/TUN/2021. Notaries not only play a role in making authentic deeds such as sales and purchase deeds and deeds of granting mortgage rights, but also bear preventive legal responsibility to ensure that the collateral object is truly valid both formally and materially. Repressive aspects, Notaries play a role in providing information or becoming expert witnesses in court when the validity of authentic deeds they have made is questioned. Failure by notaries to implement the principle of prudence, such as not verifying land status, physical ownership, or potential disputes, can result in the issuance of legally flawed deeds and lead to the cancellation of mortgage rights and the loss of the bank's preferential rights as a creditor. (2) Internal obstacles include negligence on the part of banks that accept Land Ownership Certificates (SHM) without conducting due diligence, as well as weak integrity and professional ethics from notaries/PPATs who do not verify the validity of the collateral object thoroughly. External obstacles come from the BPN which is negligent in verifying the physical and legal status of the land before issuing SHM, as well as from customers who deliberately hide information about the status of disputes or unclear ownership history of the land used as collateral. Solutions include joint checks on the collateral*

*object by banks, notaries/PPATs, and debtors; strengthening ethical guidance and supervision by professional organizations for notaries/PPATs; strict internal audits at the BPN before issuing certificates; as well as legal education to customers regarding the importance of transparency and validity of guarantee documents.*

**Keywords:** Credit Agreements; Default; Mortgage; Notary; Settlement.

## 1. Introduction

The increasing national development that focuses on the economic sector requires very large funds, so it requires a very strong Guarantee Rights institution that is able to provide legal certainty for interested parties, which encourages increased community participation in development to create a prosperous, just and prosperous society based on Pancasila and the 1945 Constitution. One of the facilities that has a strategic role in procuring funds is banking institutions, which have helped fulfill the need for funds for economic activities by providing loans, including through bank credit, which is in the form of a credit agreement between the creditor as the lender or credit facility and the debtor as the debtor.<sup>1</sup> Public Officials in this case, namely Notaries, have a very important role in implementing the Credit Agreement that will be used by the Bank and the Debtor. In this case, the Notary plays a role in providing legal protection, legal certainty and justice for them, one of which is legal protection for the Bank regarding the collateral bound by the Mortgage Right that will be used to provide credit facilities and will be stated in the credit agreement of both parties, and used as collateral for debt repayment for the Bank if the Debtor defaults.<sup>2</sup>

Notaries are authorized to make authentic deeds regarding certain legal acts, for example regarding land rights or Ownership Rights for Apartment Units, and including credit agreement deeds are deeds made by Notaries as evidence that certain legal acts have been carried out. Therefore, if the legal act is canceled or annulled, then the deed in question no longer functions as evidence of the legal act, so it must be ensured that in its implementation the Notary has carried out his duties and authorities in implementing the Credit Agreement and binding Mortgage Rights in accordance with applicable laws and regulations. Of course, Notaries in providing legal protection, justice and legal certainty for the parties, namely in the implementation of credit agreements and binding Mortgage Rights, often encounter several problems faced by Notaries which then give rise to debates between Banks, Debtors and Notaries, so that there is the emergence of

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<sup>1</sup>Risma Wati Sitompul dkk, (2022), Perlindungan Hukum Terhadap Kreditur Pada Perjanjian Kredit Dengan Jaminan Hak Tanggungan, *Jurnal Rectum*, Vol. 4, No. 1, p. 95-109

<sup>2</sup>Mukhtar Mukhtar & Amir Machmud, (2022), Tanggung Gugat Notaris Atas Kelalaian Dalam Membuat Akta Perjanjian Kredit Bank, *Jurnal Justice Aswaja*, Vol. 1, No. 1, p. 66-77

alternative steps taken and agreed upon by the parties with the Notary, so that the process of implementing credit agreements and binding Mortgage Rights continues to run at a fast tempo and causes losses for one of the parties.<sup>3</sup>

According to Article 1 number 7 of Law Number 30 of 2004 concerning the Notary Office (UUJN) as amended by Law Number 2 of 2014, a notarial deed is an authentic deed made by or before a notary according to the form and procedures stipulated in the Notary Office Law. In the General Explanation, it is stated that a notarial deed essentially contains formal truth in accordance with what the parties notified the notary. However, regarding what is meant by an authentic deed, the UUJN does not provide further explanation.<sup>4</sup> Through an authentic deed that clearly defines rights and obligations, guarantees legal certainty, and is also expected to prevent disputes. Although such disputes are unavoidable, in the dispute resolution process, an authentic deed, as the strongest and most complete written evidence, makes a real contribution to the cost-effective and expeditious resolution of cases. A notary is a public official authorized to create authentic deeds, provided that the creation of certain authentic deeds is not reserved for other public officials.<sup>5</sup> The preparation of authentic deeds is required by law to create certainty, order, and legal protection. Authentic deeds are prepared by or before a notary, not only because they are required by law but also because they are desired by the parties concerned to ensure the rights and obligations of the parties, ensuring certainty, order, and legal protection for the parties concerned and for society as a whole.

In the implementation of credit agreements involving mortgage guarantees, Supreme Court Decision Number 42 PK/TUN/2021 provides a concrete illustration of the importance of valid land title documents used as collateral. In this case, MYK., et al. sued the Head of the Banyuasin Regency Land Office and other parties, claiming that the issuance of a Certificate of Ownership (SHM) for the land plot used as the subject of the mortgage was invalid. They argued that the land plot actually belonged to them, not to the party formally listed as the SHM holder. This case highlights a fundamental problem in mortgage-based credit transactions, where the validity of the certificate is a primary requirement for the validity of the collateral provided to the creditor, as was the case with Bank Negara Indonesia (BNI) in this case. The State Administrative Court (PTUN) at first instance acknowledged that the issuance of the SHM contained legal defects. This implied

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<sup>3</sup>Denico Doly, (2011), Kewenangan Notaris dalam Pembuatan Akta yang berhubungan dengan Tanah, *Negara Hukum*, Vol 2, No. 2, p. 269-286

<sup>4</sup>Deny Fernaldi Chastra, (2021), Kepastian Hukum Cyber Notary Dalam Kaidah Pembuatan Akta Autentik Oleh Notaris Berdasarkan Undang-Undang Jabatan Notaris, *Indonesian Notary*, Vol. 3, Issue 3, p. 248-267

<sup>5</sup>Pramono, Dedy. (2015), (2021), Kekuatan Pembuktian Akta yang Dibuat oleh Notaris Selaku Pejabat Umum Menurut Hukum Acara Perdata di Indonesia. *Lex Jurnalica*, Vol. 12, No. 3, p. 142-151

that the legal basis for the bank's encumbrance of the land mortgage was problematic. However, after going through the appeal, cassation, and judicial review (PK) processes, the plaintiffs' claims were denied. The bank's appeal was granted, thus the first instance lawsuit was declared inadmissible, and the Supreme Court rejected the plaintiffs' cassation and judicial review. This confirmed that in formal evidence, the validity of the land ownership certificate remains legally recognized, so the attached mortgage rights are still considered valid. The purpose of this study is to determine and analyze the role of notaries in resolving defaults in credit agreements with collateral rights related to Supreme Court Decision Number 42 PK/TUN/2021. It is also to determine and analyze the obstacles notaries face in resolving defaults in credit agreements with collateral rights related to Supreme Court Decision Number 42 PK/TUN/2021 and their solutions.

## **2. Research Method**

This thesis research uses a normative legal research method that focuses on the analysis of statutory regulations and legal doctrine to answer the legal issues studied, with a statutory approach to study the conformity between regulations and a case approach through a review of court decisions that have permanent legal force.<sup>6</sup>The research specifications are descriptive-analytical in nature with the aim of describing, outlining, and analyzing existing legal regulations in relation to the theory and practice of their implementation. The data sources used are secondary data, including primary legal materials in the form of the 1945 Constitution, the Civil Code, the Mortgage Law, and the Banking Law; secondary legal materials in the form of books, journals, scientific articles, and previous research; and tertiary legal materials in the form of other supporting documents. Data were collected through literature studies and document studies, while data analysis was conducted qualitatively by systematically inventorying legal materials and presenting them descriptively to obtain a clear picture in solving the research problems.

## **3. Research Results and Discussion**

### **3.1. The Role of Notaries in Resolving Defaults in Credit Agreements Secured by Mortgage Rights in Relation to Supreme Court Decision Number 42 PK/TUN/2021**

Notaries who also act as Land Deed Officials (PPAT) play a crucial role in land administration, particularly in relation to land registration data. Based on Government Regulation Number 24 of 1997 concerning Land Registration, the transfer or encumbrance of land rights can only be recorded if supported by a PPAT Deed as legal evidence. A PPAT is a public official authorized to issue authentic deeds for certain legal acts relating to land rights or ownership rights to apartment

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<sup>6</sup>Soerjono Soekanto. (1981), *Pengantar Penelitian Hukum*, Jakarta : UI Press, p. 201

units. The PPAT's primary duty is to carry out part of the land registration process by drafting a deed as evidence of the legal act, which will later serve as the basis for updating land registration data due to changes in rights. These legal acts include transactions such as sales, gifts, exchanges, entry into a legal entity, distribution of joint rights, and granting of mortgages.<sup>7</sup>

Indonesia's agrarian legal system recognizes the crucial role of various parties, including the Land Office, landowners, purchasers, and notaries/PPATs, in ensuring legal certainty and protecting land rights. Supreme Court Decision No. 42 PK/TUN/2021 clearly demonstrates the complexity of land disputes involving overlapping ownership rights, administrative negligence, and potential procedural irregularities in the issuance of Land Ownership Certificates (SHM).

In the decision of the Supreme Court of the Republic of Indonesia Number 42 PK/TUN/2021, where the plaintiffs are: H. MYM, Hj. D, YY, AP, and the defendants are: Defendant I: Head of the Banyuasin Regency Land Office, Defendant II: PT. Bank Negara Indonesia (Persero) Tbk., Defendant III: WS, TLH, EMS, ECW, EICW.

The case in Supreme Court Decision Number 42 PK/TUN/2021 originated from a land dispute that occurred in Gasing Village, Banyuasin Regency, South Sumatra Province. The plaintiffs, namely H. Muhammad Yusuf Mekki and three others, felt aggrieved by the issuance of a large number of Certificates of Ownership (SHM) for land parcels that they claimed had been legally controlled either through inheritance or hereditary control. The land was allegedly transferred administratively and the certificates issued to other parties without legal procedures and without involving or notifying the parties who actually physically controlled the land. The certificates were issued by the Banyuasin Regency Land Office and registered in the names of various individuals who later became defendants in this case.

The problem became more complex because some of the disputed SHMs were known to be collateral for a financing facility involving PT Bank Negara Indonesia (Persero) Tbk. Therefore, the bank was also included as a defendant. The plaintiffs believed that the issuance of the SHMs was legally flawed because it violated the principles of good governance, particularly regarding prudence, transparency, and formal validity. They filed a lawsuit with the Palembang State Administrative Court (PTUN) requesting that the SHMs be declared invalid and ordered to be revoked from the land register.

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<sup>7</sup>Arsyilla Destriana dan Tiurma Mangihut Pitta Allagan. (2022), "Peran Pejabat Pembuat Akta Tanah Dalam Administrasi Pertanahan Melalui Sertipikat Tanah Elektronik." *Palar (Pakuan Law Review)*, Vol. 8. No. 1, p. 91-106.

At the first instance, the Palembang State Administrative Court granted the plaintiffs' lawsuit and declared the disputed certificates null and void. However, at the appeal level, the Medan State Administrative High Court overturned the decision, and at the cassation level, the Supreme Court also rejected the plaintiffs' appeal. Dissatisfied, the plaintiffs filed a judicial review (PK) application with the Supreme Court, including new reasons supporting their claims. In the PK, the Supreme Court finally accepted their application, overturned the previous cassation decision, and reaffirmed the Palembang State Administrative Court's decision. The Court declared that the issuance of the SHM was invalid because it was not based on proper legal action and violated the legal rights of the party who had previously controlled the land.

In its ruling, the Supreme Court annulled the Cassation Decision Number 133 K/TUN/2020 and the Medan High Court Decision, and upheld the Palembang State Administrative Court Decision Number 66/G/2018/PTUN-PLG which declared the cancellation or invalidity of a large number of Land Ownership Certificates (SHM) for land plots in Gasing Village previously issued by the Banyuasin Regency Land Office.

The Court stated that the issuance of the SHM by the Land Office was carried out without complying with the principles and procedures of proper land administration law, particularly in terms of checking physical control, the validity of ownership of the land plots, and without considering the legal rights of the plaintiffs who had previously controlled the land. In its consideration, the Court also assessed that there was an act of maladministration and a violation of the principle of prudence by the authorized officials. The Court ordered that all SHMs declared invalid be removed from the land register and the land administration system.

The presence of a PPAT (Assistant Land Deed Making Official) notary is an important part of the legal process of a credit agreement that uses mortgage rights as collateral.<sup>8</sup> Land Deed Officials (PPAT), as the official issuing land deeds, are responsible for ensuring that the collateralized object is free from disputes and legally sound, both formally and substantially, because notaries have the authority to issue authentic deeds regarding legal acts related to land. In practice, deeds drawn up by PPATs, in this case sales and mortgage deeds, are used as legal evidence by banks as ownership documents that transfer rights and secure collateral for proposed loans. However, in a case involving Supreme Court Decision Number 42 PK/TUN/2021, it was revealed that the Land Ownership Certificate (SHM) was obtained illegally, as it did not meet the requirements for issuing a

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<sup>8</sup>Rocky Samuel Palantung, (2021), *Prosedur Penerbitan Sertifikat Hak Milik Atas Tanah Melalui Jual Beli Menurut Peraturan Pemerintah Nomor 24 Tahun 1997*, *Lex Privatum*, Vol. IX, No. 6, May, p. 99-88



certificate. The legal deed process—based on physical control and historical rights—impairs the rights that should have existed, thus impairing the certificate's competence to complete the transfer of land rights by granting a mortgage. In cases of default on the loan agreement, the bank has the right to execute the collateralized object under the Mortgage Law.<sup>9</sup> However, if the collateral is revoked by the court due to procedural and substantial defects, the bank loses its legal basis for enforcement. The impact is not only administrative but also legal, as the bank's position as a preferred creditor changes to that of a regular (concurrent) creditor, no longer possessing privileges in debt repayment. This situation undoubtedly causes significant losses, both for banking institutions and for the continuity of the national financing system, due to the weak legal basis that should have been maintained from the outset by the Land Deed Official (PPAT).

The role of a notary/PPAT in resolving defaults related to mortgage rights is not only limited to the aspect of making deeds,<sup>10</sup> but also involves preventive legal responsibility. Land Deed Officials (PPATs) are required to act with caution, professionalism, and high integrity to ensure that the objects listed in the deed are truly legally valid and do not give rise to potential future disputes. Failure to perform this function not only impacts the PPAT's credibility as a public official but also has direct implications for the effectiveness of guarantee enforcement by banks and legal protection for creditors.

In the repressive aspect, a notary public plays a role in providing testimony or acting as an expert witness in court when the validity of an authentic deed they have drawn up is questioned. This occurs when one of the parties to the agreement or a third party challenges the material or formal validity of the deed. Notaries have an obligation to maintain the integrity of the deed they have drawn up because an authentic deed is a product of official authority granted by the state. In other words, when a dispute arises, a notary public is obligated to be present to ensure that the deed was drawn up according to procedure, meets formal and material requirements, and is based on accurate information from the parties present.

Viewed through the theory of authority, which essentially states that authority (*bevoegdheid*) is the legal power granted by statutory regulations to public officials to carry out certain legal actions within the scope of their positions and areas of duty. According to this theory, as stated by HD Stout and Utrecht, authority encompasses three main elements: competence, discretion, and legal limitations.

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<sup>9</sup>Christina Tri Budhayati. (2018). Jaminan Kepastian Kepemilikan Bagi Pemegang Hak Atas Tanah Dalam Pendaftaran Tanah Menurut UUPA. Vol. 2, No. 2, p. 125-138.

<sup>10</sup>Mira Novana Ardani. (2019), Tantangan pelaksanaan kegiatan Pendaftaran Tanah Sistematis Lengkap dalam rangka mewujudkan pemberian kepastian hukum. *Gema Keadilan*, Vol. 6. No. 3, p. 268-286.

In the case of Supreme Court Decision Number 42 PK/TUN/2021, it was proven that the Land Office and PPAT involved had exceeded or abused their authority by issuing land title certificates without going through a valid legal verification process, thereby violating the principles of legality and administrative prudence. Notaries/PPATs, as public officials authorized to make authentic deeds based on Article 15 of Law No. 2 of 2014, must comply with the limits of legal authority that require every action to be based on valid legal facts. When authority is used without caution and is not proportional to the applicable legal provisions, then the act is invalid and results in the resulting document being legally flawed, as well as causing harm to both the parties and the legal system as a whole.

### **3.2. Obstacles and Notary Solutions in Resolving Defaults in Credit Agreements with Mortgage Guarantees Related to Supreme Court Decision Number 42 PK/TUN/2021**

In making an agreement there are obstacles or constraints which can be classified into two that is internal constraints and external constraints, where internal constraints come from banks and notaries, while external constraints come from BPN and customers, the author describes these constraints as follows:

#### **1. Internal Constraints**

##### **a. Obstacles originating from the bank, negligence from the bank include:**

The SHM used as collateral in the credit agreement was obtained through an illegal procedure because it was issued without complying with legal principles. The bank officials were negligent in accepting the SHM as collateral without conducting due diligence on the validity of the certificate, including the physical ownership status and potential disputes over the land.

Bank officers should not rely solely on the administrative existence of certificates, but should also assess the collateral, which includes checking the land's history, ownership status, and the possibility of claims or control by third parties. Failure in this regard indicates that the bank's internal collateral evaluation system is not equipped with an early detection mechanism for problematic certificates. Problematic SHMs have been used as the basis for establishing legal credit relationships, which were ultimately annulled by the courts, resulting in the bank losing its preferential rights as the mortgage holder.

This negligence has legal consequences for the bank, because when the mortgage object is declared invalid, the mortgage agreement based on it also loses its legal force. This causes the bank to lose its status as a secured creditor and shifts to a concurrent creditor, lacking the privilege of collecting receivables.



b. Obstacles originating from notaries: Ethical aspects and personal integrity

Ethical and personal integrity issues can also become internal obstacles when Land Deed Officials (PPATs) fail to perform their functions independently and professionally, but instead are more likely to follow the wishes of the parties, particularly when they involve influential or financially powerful parties. This lack of prudence is evident in the existence of SHMs being revoked for land still physically controlled by other parties, which should serve as a warning to Land Deed Officials (PPATs) to refuse to issue deeds before the land's status is clearly established.

The solution to this problem is to strengthen the ethical guidance and oversight system by professional organizations such as the Association of Land Deed Officials (IPPAT) and technical supervisory authorities such as the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (ATR/BPN). This guidance must prioritize an understanding of the values of integrity and moral responsibility in deed preparation. Supervision of ethical violations must also be accompanied by strict sanctions to create a deterrent effect and restore the dignity of the PPAT profession as a bearer of the public mandate.

Notaries/PPATs are required to conduct documented due diligence on land before drafting a deed, including field confirmation, requesting proof of physical possession, and requesting a certificate of non-dispute from the sub-district or village head. This process can be formalized in the form of a legality checklist, which is a mandatory attachment to every deed submitted for registration at the land office. Without these documents, the deed cannot be submitted as a basis for transfer or encumbrance of rights.

## 2. External Constraints

### a. Land Office (BPN)

The National Land Agency (BPN) officers were deemed negligent in carrying out their function of verifying and ensuring the formal and material legality of land before issuing a Land Ownership Certificate (SHM). The certificates were issued without a physical inspection, without clarification of previous ownership status, and without regard for the existence of land ownership by other parties who had held the land for generations. These actions directly contradict the principle of prudence and good governance.

This negligence not only resulted in defective certificates being issued, but also resulted in losses for third parties, such as banking institutions that used SHM as collateral for loans, as well as plaintiffs whose land rights were disregarded. This demonstrates weak internal oversight and standard operating procedures within the land office, where data verification processes were not carried out properly. BPN officers should be responsible for assessing the validity of land registration

applications, including through coordination with PPAT (PPAT), sub-district/village officials, and re-measurement in the field.

The solution that needs to be implemented is strengthening the internal oversight system within the land office. Every stage of the land certificate issuance process must undergo an audit, particularly the data verification stage. This oversight must not be merely a formality but truly substantial, involving a competent team to verify the conformity of the certificate application with the conditions of ownership on the ground and the supporting documents submitted by the applicant.

#### **b. Customer dishonesty**

Customers, in this case debtors, have dishonest or manipulative intentions, some of whom deliberately conceal important information regarding disputes or the legal status of land. Some customers, knowing that the land they intend to use as collateral is still in dispute or whose inheritance rights have not been resolved, still insist on using it as collateral to obtain financing from the bank. This is certainly very detrimental to the bank as the creditor if the certificate is later revoked by the court, as stipulated in Decision Number 42 PK/TUN/2021. For Notaries/PPATs, the limited ability to conduct an in-depth investigation of all data provided by customers presents a particular obstacle.

These external obstacles can be addressed through increased education and legal counseling for prospective borrowers regarding the importance of valid land ownership documents and the legal consequences of providing false information. Banks, as lenders, also need to establish stricter verification systems, including requiring legal due diligence before accepting an object as collateral.

#### **4. Conclusion**

The role of a notary who also serves as PPAT in resolving defaults in credit agreements with Mortgage guarantees, as reflected in Supreme Court Decision Number 42 PK/TUN/2021. Notaries not only play a role in drafting authentic deeds such as deeds of sale and purchase and deeds of mortgage, but also bear preventive legal responsibility to ensure that the collateral is truly valid, both formally and materially. In the repressive aspect, notaries play a role in providing testimony or acting as expert witnesses in court when the validity of the authentic deeds they have drawn up is questioned. Failure by notaries to uphold the principle of prudence, such as failing to verify land status, physical ownership, or potential disputes, can result in the issuance of legally flawed deeds and lead to the cancellation of mortgage rights and the loss of the bank's preferential rights as a creditor. The obstacles faced by notaries in resolving defaults in mortgage-backed credit agreements, as reflected in Supreme Court Decision Number 42 PK/TUN/2021, include both internal and external factors. Internally, banks'

negligence in accepting Land Ownership Certificates (SHM) without due diligence, and the weak integrity and prudence of notaries or PPATs in verifying the legal status of the land, have resulted in serious legal consequences, with flawed certificates being used as the basis for credit agreements. Externally, the National Land Agency (BPN) was deemed negligent in issuing SHMs without factual verification of physical control and land ownership history, and there was dishonesty on the part of customers who concealed information about the status of the land pledged as collateral. All of these obstacles demonstrate a disregard for the principles of prudence and legal certainty, which should be the primary foundations for deed preparation and certificate issuance. The solutions offered include implementing joint checking, strengthening the professional ethics monitoring system, improving BPN internal audits, and providing legal education to debtors, so that every credit agreement can be drawn up based on valid and dispute-free documents and collateral objects to ensure legal protection for all parties. The suggestions from this writing are Strengthening Verification and Due Diligence Procedures by Notaries/PPAT, this examination is in the form of a checklist that must be signed by all parties as evidence of caution and transparency before the deed is signed and registered. Optimizing ethical guidance and supervision by professional organizations and the ATR/BPN The Indonesian Notaries Association (INI) together with the Ministry of ATR/BPN needs to intensify the development of professional integrity and ethics. The implementation of strict sanctions for ethical violations must be implemented consistently to maintain the dignity of the Notary/PPAT office.

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