

## **Criminal Liability of Notaries in Cases of Unlawful Acts Deed Making**

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**Abstract.** *This study aims to analyze and describe the form of unlawful acts committed by notaries in the process of making deeds and to analyze and describe the criminal liability of notaries for unlawful acts in making deeds. This study uses a sociological legal approach. Based on the study, it was concluded that unlawful acts occurred due to 2 (two) factors, namely (1) Lack of caution when making deeds, and (2) Intentional acts in making deeds (making deeds that do not meet the specified requirements). If a Notary commits an unlawful act, the Notary will bear all losses incurred due to the existence of a deed. Apart from that, liability for losses does not eliminate criminal liability against Notaris.*

**Keywords:** *Criminal; Notary's; Responsibility; Unlawful.*

### **1. Introduction**

The implementation of UUJN is expected that authentic deeds made by or before a Notary can guarantee certainty, order and legal protection. If the duties and authorities given by the state to a Notary are not carried out properly and precisely, then errors and abuses made by the Notary can disrupt legal certainty and the sense of justice in society.<sup>1</sup>

In the UUJN, it is stipulated in Article 15 paragraph (1) regarding the authority of a notary, which confirms that:

"A notary is authorized to make authentic deeds regarding all acts, agreements and determinations required by statutory regulations and/or desired by the interested party to be stated in an authentic deed, guarantee the certainty of the date of making the deed, store the deed, provide a grosse, copy and extract of the

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<sup>1</sup>Habib Adjie and Sjaifurrachman, *Aspects of Notary Accountability in Making Deeds*, (Bandung: Mandar Maju, 2011), p. 7.

deed, all of which as long as the making of the deed is not also assigned or excluded to another official or other person determined by law."

Notaries in carrying out their profession in providing services, should act in accordance with applicable regulations. This is important because Notaries have an obligation to guarantee the truth of the deeds they make. Notaries are required to be more sensitive, honest, fair and transparent in making a deed in order to guarantee all parties directly involved in making an authentic deed.

In carrying out his/her position, a notary may not carry out everything according to his/her will. This is stated in Article 17 paragraph (1), UUJN, that a notary is prohibited from:

- a. carrying out a position outside his/her area of office;
- b. leaving the area of office for more than 7 (seven) consecutive working days without a valid reason;
- c. concurrently serving as a civil servant;
- d. hold concurrent positions as state officials; concurrently serving as an advocate;
- e. hold concurrent positions as leaders or employees of state-owned enterprises, regional-owned enterprises or private enterprises;
- f. hold concurrent positions as Land Deed Drafting Official and/or Class II Auction Official outside the Notary's place of residence;
- g. become a substitute notary; or
- h. carrying out other work that is contrary to religious norms, morality or propriety which may affect the honor and dignity of the position of Notary.

In addition to UUJN, there is a Notary Code of Ethics (hereinafter referred to as the Code of Ethics) which regulates the ethics of Notaries in carrying out their duties and in everyday life. In carrying out their duties, a Notary must adhere to the Code of Ethics, because without it, the dignity and honor of professionalism will be lost and they will no longer receive the trust of the public. Notaries are expected to have sufficient and in-depth knowledge and skills so that they are the mainstay in designing, compiling and making various authentic deeds.<sup>2</sup>

In the event of an unlawful act, the Notary as a public official can be held accountable based on the nature of the violation and the legal code it causes. In general, the usual liability imposed on Notaries is criminal, administrative and civil

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<sup>2</sup> Komar Andasmita, *Notaries with History, Role, Duties, Obligations, Secrets of Their Position*, (Bandung: Sumur, 1981), p. 14.

liability. This is a consequence of the violation or negligence committed by the Notary in the process of making an authentic deed.<sup>3</sup>

According to Munir Fuady, "unlawful acts in the context of criminal law and in the context of civil law are more focused on the differences in the nature of criminal law which is public and civil law which is private. In accordance with its public nature, then with criminal acts, there is a public interest that is violated (besides perhaps also individual interests), while with unlawful acts in the nature of civil law, only personal interests are violated."<sup>4</sup>

The jurisprudence regarding Notaries who have been sentenced to criminal and civil cases is: Denpasar High Court Decision: Number 27/Pid/2019/PTDPS Jo. Denpasar District Court Decision Number 196/Pid.B/2019/PN Dps which imposes a prison sentence of 1 (one) year and 4 (four) months on a Notary who has been proven legally and convincingly guilty of committing a criminal act, namely "Intentionally Providing an Opportunity or Means in a Criminal Act of Fraud". Supreme Court Decision Number 3703 K/Pdt/2021, which states the law that the act committed by a Notary is an unlawful act and states that the Deed made by the Notary is flawed and has no binding force.

This study aims to analyze and describe the forms of unlawful acts committed by notaries in the process of making deeds and to analyze and describe the criminal liability of notaries for unlawful acts in making deeds.

## 2. Research Methods

The writing in this study uses a sociological legal approach by viewing the law in real terms and examining how the law applies in society. The writing in this study is descriptive analytical. The data used for this study comes from two data sources, namely primary and secondary data obtained from interviews then supplemented with secondary data from primary, secondary and tertiary legal materials. This study uses a qualitative analysis method, with this method it is expected to obtain clear data regarding the main problem, then the analysis process is carried out simultaneously with the data collection process<sup>5</sup>.

## 3. Results And Discussion

### 3.1. Forms of Unlawful Acts Committed by Notaries in Making Deeds

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<sup>3</sup> R. Subekti, Civil Procedure Law, (Bandung: Bina Cipta, 1989), p. 93

<sup>4</sup>Munir Fuady, Unlawful Acts (Contemporary Approach), (Bandung: Citra Aditya Bakti, 2005), p. 22.

<sup>5</sup>Ranto Cahyoko & Jawade Hafidz. "Implementation of Traffic Accident Insurance for Violations of Traffic Regulations in the National Social Security System", Journal of Legal Sovereignty Volume 7, No 1 (2024). P. 105, url: <http://jurnal.unissula.ac.id/index.php/RH/article/view/37127/9907>, accessed 09 June 2024.

In fact, in the making of deeds, it is very rare for a Notary to be included in the PMH category if the making of the deed is in accordance with UUJN. It can happen that the documents of the parties who come to the notary are sometimes doubted as to their authenticity so that the deed becomes invalid or PMH. One example is A selling a house to B then they agree to make a notary's deed of sale and purchase. When meeting the notary, A said that his wife had died based on the death certificate he brought. After the sale and purchase agreement was completed with a deed issued by the Notary. A few months later, in fact his wife was still alive and then his wife sued that the deed of sale and purchase was not legally valid.

The case form here is not on the Notary but rather the parties who deliberately make the data look like the original so that the Notary is sure of it. An example of a form of PMH that clearly has an element of intention carried out by the Notary when making a deed, for example there is a relationship between the parties, it could be the seller or buyer with the notary. The relationship could be family or friends so that they work together to manipulate the data to facilitate the document and then include it in the deed. This form of PMH is indeed deliberate by the Notary, so it is called PMH which can be Criminal, Civil and also both.

In addition to the description, there is a Supreme Court Decision that has been listed above in the background, namely the PMH case that has been decided and has permanent legal force, namely the Denpasar High Court Decision: Number 27 / Pid / 2019 / PTDPS Jo. Denpasar District Court Decision Number 196 / Pid.B / 2019 / PN Dps, and Supreme Court Decision Number 3703 K / Pdt / 2021 which states that unlawful acts against deeds made by notaries are legally flawed resulting in no binding force.

From various cases of unlawful acts ranging from District Court Decisions and Supreme Court Decisions and examples of cases that the author has made, it can be seen that there are many forms of unlawful acts. When viewed from these cases, the form of PMH is essentially intentional and unintentional in accordance with the understanding and form of PMH put forward by the experts above. So, based on the cases and also examples of PMH cases, there will be many PMHs arising from a deed by a notary.

Based on an interview conducted by the author with Mr. Dr. Dian Arianto, SH, SE, M.Kn. as the chairman of INI (Indonesian Notary Association) in Batam city, he said that:

One form of unlawful act (PMH) is caused by a relationship between the deed maker and the deed made not in accordance with the existing rules in this case UUJN so that it is contradictory and results in losses in the future. The form of PMH here can occur in 2 (two), namely lack of caution when making a deed or intentionally the deed made by the maker does not meet the specified

requirements. This lack of caution can be because the Notary lacks understanding in making a deed such as the example that every notary must follow the existing changes so that the notary must attend meetings that have been determined by the organization to provide an understanding of the existing changes. If the notary rarely attends meetings and rarely sees the existing changes, this is where the notary can be less careful in making a deed. While in the intention here, there is a relationship between the deed maker and the parties, it could be close friends or family. For example, in making a deed, it turns out that there is a lack of preparation because they feel that close friends or the notary's family do not question the shortcomings and still issue a deed. The deliberate or careless making of a deed is very vulnerable to PMH because the Notary's actions here have resulted in losses for those who require the deed.

The form of PMH depends on the case and the existing problem and if the notary who carries out the PMH is for the issuance of the deed based on the discussion above, there are 2 (two) things that must be seen, namely whether there is a lack of caution or whether there is an element of intent due to the relationship. Of course, these two things must fulfill the elements of PMH as explained above. Because the position of a notary based on UUJN is an official who is authorized to make a deed (*minuta*).

### **3.2. Lack of Care by Notaries in Making Deeds Resulting in Unlawful Acts.**

Referring to UUJN, it is not clearly stated that one must be careful but adheres to the Principle of caution when making a deed. It can be seen in Article 16 paragraph (1) letter a regarding the obligations of a notary that in carrying out his/her position, a notary must act in a trustworthy, honest, thorough, independent, impartial manner, and protect the interests of the parties involved in making the law. However, in the explanation of Article 16 paragraph (1) letter a, the meaning is not explained, for example, the obligation of a notary to act carefully from the article.

So, this condition can be a norm ambiguity or vague van normen. Aarnio said that "interpretation in turn has been understood as a linguistic matter" or interpretation is caused by language factors.<sup>6</sup>The word-by-word understanding of the law must be clear so that there are no different interpretations. It could be that as a result of different interpretations, the way of making the deed is also different for each person.

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<sup>6</sup>I Made Pasek Dianta, 2015, Normative Legal Research Methodology (In Justification of Legal Theory), 1st Edition, Prenada Media Group, Denpasar. P. 119-120.

For example, a different careful interpretation is that Notary A in making a deed of sale and purchase can only accept certificates and other documents related to making the deed because the certificates and documents are original. While Notary B does not only accept land certificates and documents of the parties but clarifies the documents to the relevant institution. In this case, Notary C does not only accept certificates, documents of the parties, clarifies the authenticity of the documents to the authorized agency but looks at the object for which the deed of sale will be made.

From the problems exemplified above, all of them are in accordance with UUJN but have different methods. The problem is if there is a lawsuit against the deed of sale and purchase and it turns out that there is a party who is harmed, it is automatically very rare for the notary to be involved in bearing the loss even though the deed was issued to the parties. If we look at such problems, where is the principle of caution and/or thoroughness carried out by the notary in making the deed, while the three examples above are already the principle of caution and thoroughness even though the methods are different.

From the background that the author listed that the notary who was sentenced because he was proven to have committed PMH and also in the District Court and in the Supreme Court that the author studied there were notaries who were sentenced to PMH. This means that if the notary is proven to have committed PMH on a deed, he will be sentenced. But the problem that the author exemplified above, the notary was never sentenced even though this happened more often. It could be because the notary has been considered careful in making a deed based on the UUJN while the parties have already suffered losses from the deed.

### **3.3. The Existence of an Intentional Element by a Notary in Making a Deed Which Resulted in an Unlawful Act.**

Intention is usually the result of his actions already knowing what will happen so that more completely is intention is wanting and knowing. In criminal law, there are 2 theories of intention, namely: the theory of will and the theory of knowledge. The theory of will (*wilstheorie*) is the will to formulate elements of the crime in the formulation of the law (Simons, Zevenbergen) while the theory of knowledge (*voorstelling-Theorie*) is intentional meaning imagining the consequences of his actions (Frank).

Therefore, a notary in making a deed if there is an element of intent actually already knows the consequences if PMH occurs. Previously it has been discussed above that PMH is not only criminal but also civil related to compensation for losses incurred. Based on the results of an interview with the Head of INI in Batam City, Mr. Dr. Dian Arianto, SH,.SE,. M.Kn. said that:

If a notary is proven to have intentionally made a deed into PMH and caused losses to the parties, the notary concerned will bear the criminal sanctions and

compensation for the losses personally. Usually the sanctions given by the INI organization are administrative sanctions but must follow a court decision, meaning that there must first be a court decision stating that the notary concerned is guilty and/or compensates for the losses. Usually the administrative sanctions given by this organization cannot precede a court decision.

Usually, a notary's intention to PMH a deed is clearly the notary's own fault, because it has violated and contradicted UUJN. It is only right that the notary will bear the losses that will be caused by the act against a deed. Previously discussed above, that the notary's intention began with the relationship between the deed maker and the parties, whether close friends, family and others.

### **3.4. Notary's Responsibility in the Event of Unlawful Acts in Making Deeds**

In understanding Notary as a profession, Liliana Tedjosaputro presents the philosophy, nature of the profession and professionalism in an integral way. According to her, the requirements of balance, harmony and compatibility in accordance with Pancasila are things that must be considered. These three things must be operationalized in understanding the gradation of various interests in community life which include individual interests, community interests (general), state interests and professional organization interests:

- 1) The client's interests, which can be individual or collective. These client interests are directly related if professional malpractice occurs. In relation to professionals, the client's position is dependent and in a confidential condition within the framework of providing services;
- 2) The interests of the community are closely related to the nature of the profession which must prioritize public interest services (altruistic nature). Careless professional services will harm the interests of the community that must be served;
- 3) State interests, as long as they concern state interests, the problem will be closely related to social policies in the form of development programs, especially development in the legal field and more specifically improving the quality of law enforcement;
- 4) The interests of professional organizations, professional members and organizational rules in relation to administrative mechanisms are very important, but the role of the organization which is no less important is ensuring that professional services are carried out according to actual professional standards.<sup>7</sup>

Based on the discussion above, associated with the theory put forward by the author, namely the theory of criminal responsibility, then of course there is a

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<sup>7</sup> Liliana Tedjosaputro, *Professional Ethics of Notaries in Criminal Law Enforcement*, Yogyakarta, Bigraf Publishing, 1995, p. 45.

responsibility if someone violates the law so that it results in losses to others. In line with the opinion put forward by the author above, namely R. Soerso regarding "onrechtmatige daad" which in essence every act that causes losses to others must be held accountable for the loss. Where the will of the theory of criminal responsibility, namely criminal responsibility, is referred to as "toerekenbaarheid", "criminal responsibility", "criminal liability". That criminal responsibility is intended to determine whether a suspect/defendant is held responsible for a crime that occurs or not. In other words, whether the defendant will be convicted or acquitted. If he is convicted, it must be proven that the action taken was unlawful and the defendant is able to be responsible. This ability shows the fault of the perpetrator in the form of intent or negligence. This means that the action is reprehensible, the accused is aware of the action taken.

If a person is harmed due to the actions of another person, and there is no agreement between them (contract legal relationship), then according to the law a legal relationship also arises or occurs between those people which causes the loss.<sup>8</sup>.

According to Hans Kelsen, there are 4 (four) types of responsibility, namely:

- 1) Individual responsibility means that an individual is responsible for the violations he/she commits;
- 2) Collective liability means that an individual is responsible for an offense committed by others;
- 3) Liability based on fault means that an individual is responsible for violations that he/she commits intentionally and with the intention of causing harm;
- 4) Strict liability means that an individual is responsible for the violations he commits because they are unintentional and unforeseen.<sup>9</sup>.

Based on the problems that the author has put forward when combined with the theory that the author has put forward that if a PMH occurs due to a deed, then the responsibility is certainly against the maker of the deed. However, it is necessary to first see whether the act was indeed caused by the notary or not depending on the court's decision. From the cases that have occurred and have been put forward by the author above, all responsibility is imposed on the notary who is proven legally and convincingly to have carried out PMH.

In other words, if a Notary Official commits an Unlawful Act in issuing a Deed, then if the elements of the crime alleged against him are fulfilled, the Notary can be charged with the provisions of the Criminal Code, or Criminal Liability can be

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<sup>8</sup> AZ Nasution, Consumer Protection Law, Jakarta, Diapit Media, 2002, p. 77.

<sup>9</sup> Hans Kelsen, Pure Legal Theory, Translated by Raisul Mutaqien, Bandung, Nuansa and Nusamedia, 2006, p. 140.



applied. This is as per the criminal decision, namely: Denpasar High Court Decision: Number 27 / Pid / 2019 / PTDPS Jo. Denpasar District Court Decision Number 196 / Pid.B / 2019 / PN Dps which imposes a prison sentence of 1 (one) year 4 (four) months to a Notary who has been proven legally and convincingly guilty of committing a criminal act, namely "Intentionally Providing Opportunity or Means in the Criminal Act of Fraud", namely violating the provisions of Article 385 paragraph (1) of the Criminal Code Jo. Article 56 paragraph (2) of the Criminal Code.

The responsibility of a notary in the event of PMH on a deed depends on the problem and also the court's decision. Based on data obtained by the author during field research such as court decisions, usually notaries are sentenced to those who are proven guilty, such as bearing all losses incurred due to a deed. In addition to replacing losses, it does not eliminate criminal sanctions against notaries to the extent that the elements of a crime are met. So, PMH can be punished civilly, namely replacing all losses incurred, can be criminally and can be both.

There are also additional sanctions imposed by the INI organization on notaries. Based on information and interviews with the chairman of this that the author has discussed above, usually what is given is an administrative sanction. Which is the imposition of this sanction depends on the organization because it is an internal organization. But it is very important to note that the imposition of sanctions can precede a verdict, meaning that there must first be a court decision declaring a notary guilty due to PMH of a deed. Because remembering that a person cannot be said to be guilty before there is a court decision saying that a person is guilty.

Notaries in carrying out their duties are not free from mistakes, both intentional and unintentional. The mistakes made by the Notary allow the Notary to deal with legal responsibility, both civil, administrative and criminal. If it turns out that the deed contains elements of false information, then the deed is null and void by law, meaning that the law considers that there was never an agreement or is automatically void without having to sue. The situation is returned to its original state before there was an agreement. In this case, it must first be proven whether there was an element of a criminal act in its making, meaning after the suspect has been sentenced to a criminal offense.<sup>10</sup>

Criminal provisions are not regulated in the UUJN, but a Notary may be subject to criminal liability if the Notary commits a criminal act. The UUJN only regulates sanctions for violations committed by a Notary against the UUJN as stipulated in Article 84 and Article 85. These sanctions may be in the form of a deed made by a Notary that does not have authentic power or only has the power as a deed under

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<sup>10</sup>Putri AR, *Legal Protection for Notaries (Indicators of Notary Job Duties that Implicate Criminal Acts)*, (Medan: Softmedia, 2011), p. 108.

hand (Article 84). The Notary himself may be given sanctions in the form of verbal warnings, written warnings, temporary dismissal, honorable dismissal, or dishonorable dismissal (Article 85).

The implementation of the duties of the Notary Office is within the scope of the law of evidence, this is because the duties and authorities of the notary are to make evidence desired by the parties in certain legal actions. The existence of such evidence is within the scope or level of civil law.

Because the notary's job is to make the deed at the request of the parties, without a request from the parties, the notary will not make anything. The notary makes the deed based on evidence or information/statements of the parties stated or explained or shown to or before the notary, and then the notary frames it outwardly, formally and materially in the form of a notarial deed, while still adhering to the legal rules or procedures or procedures for making deeds and the legal rules relating to the legal actions concerned which are stated in the deed.

The role of a notary in this case is also to provide legal advice in accordance with the existing problems as required by Article 15 paragraph (2) letter e. UUJN. Any legal advice given to the parties and then stated in the relevant deed remains a desire. The form of desire is as follows: (a). Article 55 of the Criminal Code, namely participating in committing a crime together, there must be at least two people, namely the person who committed it and the person who participated in the criminal event.<sup>11</sup>

#### **4. Conclusion**

Form of Legal Act carried out by Notary in Making Deed as implied in Civil Code 1365 to Article 1380. Article 1365 has at least 5 (five) elements, namely the existence of an act, the act is against the law, there is a loss for the victim, there is a causal relationship between the act and the loss, and there is an error. If these elements are not fulfilled, it is not customary to call it one of the forms of PMH. Meanwhile, the existence of the form of PMH occurs due to 2 (two) factors, namely (1) Lack of caution when making the deed, and (2) There is intent in making the deed (making the deed does not meet the specified requirements). The Notary's responsibility in the event of an unlawful act on a deed depends on the problem at hand. If the Notary is proven to have committed PMH, the Notary will bear all losses incurred due to the existence of a deed (Civil). In addition to the liability for losses does not eliminate criminal liability against the Notary, and there are also sanctions imposed by INI (Indonesian Notary Association) but the sanctions applied cannot precede the Court's Decision.

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<sup>11</sup>R. Soesilo, Criminal Code (KUHP) and its complete comments, article by article, Bandung, PT. Karya Nusantara 1989, p. 72

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