

NOTARY'S RESPONSIBILITY FOR THE BINDING OF SALE AND PURCHASE AGREEMENTS BEFORE A NOTARY WITHOUT WITNESSES' PRESENCE

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ABSTRACT

The Sale and Purchase Agreement (PPJB) binding is one of the instruments that includes a perfect or authentic evidentiary power. In practice, the sale and purchase agreement binding process, the process of signing the binding sale and purchase agreement, was carried out without the witnesses' presence. The research objectives are to determine the legal certainty of binding the sale and purchase agreement before a notary without the presence of witnesses and find out how the notary's responsibilities regarding the binding of the sale and purchase agreement before a notary without the presence of witnesses. The research approach method was a normative juridical approach. Furthermore, the data analysis employed a qualitative normative analysis method. The research results revealed that the binding of the sale and purchase agreement that the witnesses did not attend fulfilled the formal requirements based on Article 1868 of the Civil Code. The binding of the sale and purchase agreement would still provide legal certainty to the contractor because it was authentic. The authenticity of the deed did not change even though the binding process for the agreement was carried out without the witnesses' presence. The authenticity of the deed was absolute because it was made by or before a notary. The notary was entirely responsible for his deed if formal and material requirements were not fulfilled. If the sale and purchase agreement binding resulted in losses to the parties in a practical arrangement, the notary could be sued civilly and obliged to compensate for the losses incurred. The administrative responsibilities included written warnings, temporary dismissals, honorable discharges, and dishonorable discharges.

Keywords: Legal Certainty; Deed of Agreement; Notary; Witness.

INTRODUCTION

Land disputes occur because of limitations and high human needs for land.¹ Furthermore, the sale and purchase agreement binding involves several parties, including a notary official. The notary position was born out of a need, including the community.² Based on the historical aspect, a notary is appointed as a "public official" whose job is to serve the community, in line with what has been stated by R. Soegondo Notodisoeryo that a notary is an openbare-ambtaren public official concerning the primary authority or duties and obligations, namely doing authentic deeds.³

Creating an authentic deed is required by laws and regulations in the context of creating legal certainty, order, and protection. Hence, the meaning of legal certainty will be appropriately actualized if the parties understand the purpose of the deed.⁴ There are three main elements for the realization of an authentic deed. First, the form of an authentic deed must be determined by law. Second, it should be made by or before a public official. Third, the deed is made by or before a public official within the area of his authority. Thus, the essence of a notary in carrying out his functions and duties must be prudent because his responsibility is not limited to retirement from his position. In the process, the notary binds the seller and the buyer with a binding agreement to protect the parties from legal uncertainty and prevent unwanted legal consequences. The agreement is made between one party, the seller, or with another party or the recipient, or the buyer. Generally, an agreement is a legal relationship between one or more parties and another or more mutually binding parties. The essence of the agreement is explained in Article 1313 of the Civil Code. The principle of freedom of contract is interpreted as giving the freedom to agree or not to make an agreement.⁵

The role of a notary in making a bank credit agreement deed is vital where a notary, as a public official, must act professionally. One of them is bridging the creditors' and debtors' interests in making a credit agreement deed.⁶ In practice, the authors perceived an illustration where the authors worked, namely at Permata Bank. The process until the step where the binding agreement process at the bank was generally carried out in various stages. First, the prospective debtor met with the bank's marketing party to apply by completing administrative requirements. Then, the marketing would convey the completeness of related documents to the analyst. Furthermore, this analyst analyzed the customer's ability to determine whether they were in an eligible category for financing by the bank and also with several instruments that the bank has determined. If the bank approved this application, then the marketing party would submit a Credit Approval Letter (SPPK) and/ or LOO (Letter of Offering) to the

¹ Bernhard Limbong, *Opini Kebijakan Agraria*, PT. Dharma Karsa utama, Jakarta, 2018, p. i.

² Pengurus Pusat Ikatan Notaris Indonesia, *Jati Diri Notaris Indonesia*, PT. Gramedia Pustaka, Jakarta, 2019, p. 50.

³ R. Soegondo Notodisoeryo, *Hukum Notaris Di Indonesia Suatu Penjelasan*, PT. Raja Grafindo Persada, Jakarta, 2023, p. 42

⁴ Felix The, *Perlindungan Hukum Atas Kriminalisasi Terhadap Notaris*, Fakultas Hukum, Universitas Diponegoro, Jurnal Masalah-Masalah Hukum, Vol. 46, July 3, 2018, p. 219.

⁵ Agus Yudha Hernoko, *Hukum Perjanjian Asas Proposional dalam Kontrak Komersial*, Kencana, Jakarta, 2018, p. 110.

⁶ Mariah kamelia et al., *Peran Notaris Dalam Pembuatan Akta Perjanjian Kredit Dalam Perspektif Hukum Positif dan Hukum Islam*, Program Magister Kenotariatan, Universitas Sultan Agung, Jurnal Fakta, Vol. 4, No. 4, December, 2018, p. 577

prospective debtor if the prospective debtor had agreed upon the contents of the SPPK/ LOO, the next step was that the legal bank would make an order to the partner notary based on the SPPK and submit the order to the partner notary of the bank that has been selected.

The documentation requirements that must be fulfilled by the prospective debtor in general, namely the original Certificate, Building Permit (IMB), and the last year's Land and Building Tax (PBB), and other identity documents that must be fulfilled as a guarantee at the bank, then the notary would check the original certificate to the land office to ensure that it met the requirements for the process of imposing mortgage rights on its certificate. If the specified conditions have been met, the notary would determine the schedule for binding the agreement. In contractual relations between the bank and the debtor, the process of binding the sale and purchase agreement deed was frequently carried out as part of the credit process requirements or as a condition in binding the bank credit agreement. Efty Hendaru Sudibyo and Amin Purnawan⁷ explain that if the receivable is written off due to settlement or other reasons, the Mortgage is also automatically deleted. A mortgage is a debt guarantee whose burden is for the benefit of the creditor. In the process of binding the deed of sale and purchase agreement, the notary, under his authority, has a contribution to binding the deed of the agreement made between the customer and the bank. Procedurally, the bank requests the deed of the agreement through a partner notary. The sale and purchase binding process is requested in advance to the notary through a notary order letter whose substance requests to carry out the binding sale and purchase agreement deed under the notary's order. After fulfilling the conditions specified by the bank, the customer and the notary sign an agreement at a mutually agreed time.

In the process of binding the sale and purchase agreement deed, the process of signing the binding sale and purchase agreement deed is carried out without witnesses. The process that should be carried out is reading the deed by a notary in front of the parties attended by witnesses. The sale and Purchase Agreement binding is free, in which the substance contains the contractors' promises. Transferring rights to other parties so that the transfer obtains certainty, order, and legal protection has the urgency as authentic written evidence regarding circumstances, events, or legal actions carried out through certain positions, thus requiring an authorized official to implement it.⁸

The binding of the deed of sale and purchase agreement (Land and Building) in practice is made in the form of an authentic deed as the first step to maintaining a commitment to transfer rights in the form of a Deed of Sale and Purchase, even though in essence the form of a deed of sale and purchase agreement is not in the Civil Code. However, developments in community needs require that the agreement be born with the principle of freedom of contract. The sale and purchase agreement deed binding is made authentically, aiming to provide the parties with certainty and legal protection. Through a notary, the parties can formulate the contents of the clause according to the interests in the binding deed of the sale and purchase agreement. However, binding the sale and purchase agreement deed does not always run well. Sometimes, the agreement is canceled either by the parties or through a court decision; thus, it has a juridical impact. The binding of the sale and purchase agreement deed (PPJB) carried out by a notary without the presence of witnesses is unsuitable practice with the provisions of Law Number 2 of 2014 on Amendments to Law Number 30 of 2004 concerning the Position of Notary, i.e., a minimum of two people witness. Hence, when carrying out the binding agreement, the notary excludes Article 40 paragraph 1, which requires the presence of witnesses before the notary, while the emphasis is on authentic deeds based on Article 1868 of the Civil Code. Based on the practice above, we can examine more deeply that ideally, the result of making a notary sale and purchase agreement binding deed will be in the form of an authentic deed under Article 1868 of the Civil Code. However, if the actualization is without witnesses, whether the notary deed will still provide legal certainty for the parties is unknown. In practice (*dass sein*) of the binding of a deed of sale and purchase agreement before a notary, there are frequently some matters that are not in line with the process of signing the agreement, whether intentional or indeed, due to the ignorance of a notary.

Fulfilling formal requirements for the essential elements of an authentic deed can be done first. It must be in the form determined by law. Second, it is made by and before a public official. Third, the deed was made by or before a public official authorized and at the place where the deed was made. If these formal requirements are not met, the deed is imperfect. The provisions of the formal requirements determined by law imply that the specifications for the form of the deed referred to the provisions of the laws and regulations. It should be made before a public official means an authentic deed made before an authorized public official appointed by law, including a notary, if it is related to the deed of sale and purchase agreement. Meanwhile, the presence of an authorized public official where the deed was done relates to the jurisdiction of the office doing the authentic deed based on the area where the deed was created.

The material requirements for an authentic deed include: first, containing the parties' agreement; second, the contents of the description of the legal act; and third, the making of the deed is intentionally intended as evidence. In terms of material, it can be interpreted that the substance of the deed was made based on the parties' agreement. The deed explains the contents of the interest in the form of a legal act, and the deed is intended as evidence. "Regarding the form of the agreement, there are no binding provisions because the agreement can be made orally or in writing. If it is written, the agreement means evidence if the parties experience a dispute. For certain agreements, the law determines a separate form; thus, if that form is denied, then the agreement is invalid. Hence, the written form of an agreement is not only a means of proof but also to fulfill the conditions for the existence of that event (agreement)"⁹.

⁷ Efty Hendaru Sudibyo et al., *Peranan Notaris Dalam Pembuatan Akta Izin Roya Hak Tanggungan Karena Hapusnya Hutang Dalam Perspektif Kepastian Hukum*, Magister Kenotariatan, Universitas Islam Sultan Agung, Jurnal Akta, Vol. 4, No. 2, June, 2018, p. 186.

⁸ Habib Adjie, *Hukum Notaris Indonesia-Tafsir Tematik Terhadap Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris*, Rafika Aditama, Bandung, 2018, p. 14

⁹ I Ketut Oka Setiawan, "Hukum Perikatan", Sinar Grafika, Jakarta, 2018, p. 43.

Based on the background that the authors have described, the authors identified several problems as follows: first, what was the legal certainty of the binding sale and purchase agreement before a notary without the witnesses' presence? Second, what was the notary's responsibility towards binding the sale and purchase agreement before him without the witnesses' presence?

RESEARCH METHOD

This research employed normative juridical research. The data was taken from practitioners/ academicians/ legal experts who were directly involved in making the binding sale and purchase agreement, legal experts relevant to the binding of the sale and purchase agreement that had been outlined in the form of books, journals, and other scientific writings or can be called as normative juridical research. The research design was descriptive-analytical research. The research data consisted of secondary data obtained using document or literature studies data collection techniques. Analysis of both primary and secondary data was carried out with qualitative normative.

RESEARCH RESULTS AND DISCUSSION

Legal Certainty of Binding Sale and Purchase Agreement before a Notary without the Witnesses' Presence

Notaries, as public officials, have the authority to make authentic deeds. Authentic deeds have perfect evidentiary power to guarantee legal certainty in default between the parties. The financing provided by a bank as a financial institution must be able to provide legal protection for givers and recipients. For the parties, solid legal certainty will provide security and comfort in making agreements.¹⁰

A notary is an occupation that requires him to prioritize professionalism and the nobility of professional dignity and put forward legal certainty and accountability in carrying out his duties and functions as a public official. Notaries must have qualified technical skills to ensure high-quality deeds with perfect evidentiary value, certainty, and legal responsibility. The authors believe two matters make a notary have high-quality qualifications. First, the notary carries out his duties and functions based on the Law on the Position of a Notary. Secondly, a notary upholds and carries out his professional ethics. The attainment of legal certainty is divided into two main elements: first, the law must be firm and not multi-interpretive; and second, the power that implements the law must not be arbitrary in applying the law and adhering to the principle of legality.¹¹

Legal certainty in a deed of agreement is a substantial value. The legal certainty protects the parties and the values of the notary's responsibility as the deed maker, which are carried out correctly. Failure to meet legal certainty will trigger discomfort and insecurity. People interested in service will have an unfavorable view of a notary as a public official. The notary's position essentially has two fundamental core tasks, first, to provide services and legal certainty for the deeds he makes. Secondly, the notary is given the authority to consistently strengthen the law in the civil jurisdiction area to ensure a sense of security and peace for the community. It is examined based on Gustav Radbruch's theory of legal certainty, which states that justice and legal certainty if properly considered, will guarantee security and order in a country. Positive law is upheld and obeyed to achieve the goal of the law, i.e., legal certainty and justice. The substance of the notary stated in Article 1 point 1 of Law Number 2 of 2014 on the Amendment to Law Number 30 of 2004 concerning a Notary's Position. Essentially, a notary is a public official with the authority to create authentic deeds. The granting of this authority exists as part of creating legal certainty for the public in civil areas such as contractual relations, agreements, sales and purchases, inheritance, and other forms of deed as long as this authority is given to a notary.

The theory of legal certainty by Gustav Radbruch conveys that justice and legal certainty, if correctly considered, will guarantee security. Furthermore, the order will be adequately achieved if a public official upholds the norms, laws, and regulations, especially Article 1868 of the Civil Code on authentic deeds, to guarantee legal certainty to the community. In the theory of legal certainty, Hans Kelsen also emphasizes that laws containing general rules serve as guidelines for individuals who behave in society concerning fellow individuals and society. The existence of these rules and their implementation creates legal certainty.

Authentic and private deeds, in principle, aim as evidence. Authentic deeds theoretically will provide perfect evidentiary power; hence, by perfection, the deed is considered as it is and cannot be interpreted differently. Meanwhile, a private deed has the power of proof as long as the parties acknowledge it and there is no denial from one of the parties, both in terms of the substance of the deed and the technicality of signing the deed. Therefore, the judge can interpret the deed differently if there is a denial in the lawsuit. Authentic and private deeds must substantially comply with the provisions of the formulation of the legal requirements of an agreement, i.e., based on Article 1320 of the Civil Code. In the material aspect, it is a law for those who carry out the agreement (Article 1338 of the Civil Code) (*Pacta sunt servanda*). The value of perfect evidentiary strength in an authentic deed in an agreement is not by itself but must go through a process under statutory regulations.

The authors in this research focused on discussing Article 1868 of the Civil Code, which states: "An authentic deed is a deed made in a form determined by law by or before an authorized public official at the place where the deed was created". Meanwhile, the material requirements for an authentic deed, i.e., containing the parties' agreement, the contents of the description of the legal acts, and the deed making, are intentionally intended as evidence. The notary must appropriately actualize formal and material requirements because, in principle, the notary is responsible for carrying out these formal and material requirements. In making the sale and purchase agreement deed, the notary must attempt to complete it with a value of truth, clarity, and validity. For instance, starting from the head of the deed must substantially reflect the contents of the deed. It is not justified to contain typing typos or

¹⁰ Anton Suyatno, *Kepastian Hukum dalam Penyelesaian Macet Melalui Eksekusi Jaminan Hak Tanggungan Tanpa Proses Gugatan Pengadilan*, Kencana, 2018, Jakarta, p. 225.

¹¹ E. Fernando M. Manulang, *Legisme Legalitas Dan Kepastian Hukum*, Frenada Media Group, Jakarta, 2018, p. 154.

other forms of errors in the head of the deed. The editorial in each article outlined must be straightforward and clear and not contain multiple interpretations; hence, it can be interpreted differently. Each article must provide a complete description, contain legal certainty, and not move to another article in an unclear manner, details, and technical details if something matters to be stipulated in the agreement.

In addition, making a sale and purchase agreement must also contain the truth by providing legal advice beforehand to the appearer regarding the importance of the deed's correctness and the legal consequences of not conveying everything untrue. The notary must attempt to mitigate the risk of possible disputes by preparing a safe and strong legal agreement deed to create legal certainty for the person appearing before him. To achieve legal certainty, notaries need to consider aspects of formal and material requirements by using the principles of prudence and minimizing errors in the future. Extensive knowledge in the practice of making a deed of agreement is expected to have an impact on the quality of the deed made. In carrying out its duties and functions, a notary makes and evaluates a deed based on the principle of legal presumption (*presumptio iustae causa*), which means that any deed made by a notary must be considered valid until someone has the authority to declare the deed invalid. Hence, the use of this principle is substantially relevant to Article 1868 of the Civil Code, in which, in principle, the deed authenticity will remain attached to the deed made by a notary. Meanwhile, no party has the authority. In this case, the court declares the deed with the power of proof under the hand, or the deed is canceled.

In a practical setting, a sale and purchase agreement deed made before a notary but without the presence of witnesses referring to Article 1868 of the Civil Code and the principle of the presumption of validity (*presumptio iustae causa*) must be considered valid, binding, and authentic, until there is an authorized party who declares juridically the deed is inauthentic or canceled. Thus, making a sale and purchase agreement deed without witnesses' presence will still have authentic value. The authenticity of the deed is attached to the deed.

The argument for the authenticity of the sale and purchase agreement remains embedded in efforts to achieve the values of legal certainty that exist in the authentic deed. Suppose technical matters override the presence of witnesses as a measure that can abort the sale and purchase agreement deed. In that case, it becomes risky for losses to the parties and even the notary. The norms in Article 1868 of the Civil Code do not regulate technically but substantially regulate the terminology of the meaning of an authentic deed. Based on the terminological norms in Article 1868 of the Civil Code, the authors believe that the sale and purchase agreement will still be an authentic deed even if witnesses are not present. Moral values in making an authentic deed more critical, such as honesty and awareness of the authority limits in making a sale and purchase agreement, are prioritized to assess the authenticity of the deed. In principle, the absence of witnesses in the process of creating an authentic deed will only result in technical imperfections in the process of a deed. If the parties agree that the absence of witnesses is due to some circumstances and in the future, there is no denial by the parties of the deed drawn up by a notary. In essence, the authenticity of the sale and purchase agreement is not lost in the witness's absence.

The profession of a notary is demanded based on the quality of the deed produced, not the substance of the deed material made. The responsibility for the deed material is borne by the parties who agree. However, the notary ethically must provide advice when the deed material is deemed contrary to the provisions of laws and regulations. The sale and purchase agreement is an agreement that is commonly implemented. If it has not fulfilled the provisions in the process, its most basic problem is ethics and morals, which cannot be regulated through law because it relates to the personality of the notary. In principle, legal certainty in authentic deeds cannot be measured mathematically, but the implication is that it impacts legal certainty.

To provide legal certainty, a notary must employ the precautionary principle in carrying out his position. The parties' statements facing the sale and purchase agreement drafting must be explored for their formal and material truth. If the notary has carried out the precautionary principle of the sale and purchase agreement he made, then the deed has authenticity even without the witnesses' presence. When considering the deed of agreement, its authenticity is not in doubt. In the practical arrangement, many are canceled or considered to have the strength of proof under the hand, not because of the witnesses' absence but rather to defaults made on the material of the deed. One of them is related to rights and obligations. The witnesses' presence is significant to ensure that the sale and purchase agreement is carried out. However, it is not a measure of the loss of the deed authenticity made by a notary and the value of legal certainty being reduced. The terminological argument in Article 1868 of the Civil Code explains that if a deed has been done in a form that has been determined by law by or before an authorized public official, then in principle, the deed authenticity will remain attached and provide legal certainty even though witnesses do not attend the sale and purchase agreement.

Notary's Responsibility for Binding the Sale and Purchase Agreement Before A Notary without Witnesses' Presence

In carrying out their duties and functions, notaries must uphold the norms contained in laws and regulations, especially Law Number 2 of 2014 on Amendments to Law Number 30 of 2004 concerning the Notary's Position and Notary Code of Ethics. Violation of Notary Office Law (UUJN) provisions results in the deed only having the power of proof as a private deed and will cause legal consequences. The losses impact the parties, both the seller and the buyer, to the point that the court can cancel the deed. In the case of causing a loss, a public official can be held responsible for negligence in making the deed. In principle, the notary's responsibility can be charged based on fault (liability) in making a bank agreement deed. The imposition of responsibility on a notary is necessary if the violation was committed intentionally as part of the notary's negligence. However, suppose the error lies in the substance of the contents of the deed. In that case, the notary cannot be held accountable because he only records what the contractor wants in a contractual relationship.

In practice, the losses suffered are infrequent because the parties carry out their rights and obligations to the point of settlement. However, because it rarely occurs, the practice of signing a deed of agreement without the presence of witnesses is frequently committed by the parties as a risk-free practice. Hans Kelsen's theory of responsibility explains the obligation to be born because of the law that regulates and imposes obligations on legal subjects. Given the imposition of obligations, legal subjects must be able

to carry out these obligations as a form of responsibility and obedience to legal orders. Failure to comply with this obligation will result in sanctions.

The notary can be sued by the aggrieved party and ask the court to return the losses suffered for the deed he made if he can explain, prove, and convince the judge that the loss suffered from the deed is due to the notary's negligence. It is not easy to prove. A notary's liability can be requested both civilly and criminally. The notary is civilly liable if what a notary does only covers the area of civil loss, such as violations due to the witnesses' absence. However, if the negligence is in the form of falsification of documents carried out by a notary, then criminal liability can be imposed on the notary. In essence, the notary is not responsible for the contents of the deed he made because the contents of the deed are the parties' will.

The notary is passive if it only expresses the contractual relationship desired by the contractor. In the authors' opinion, the notary also has responsibility for the contents of the deed if the contents are contradictory and have the potential to cause harm to the parties or other parties, e.g., in the case of a notary making an authentic deed of agreement between the parties when transferring a house without the bank approval, even though the object of the agreement is in the authority of the bank. Consequently, it can be considered legal smuggling, and the notary can be held liable by the bank or other harmed party. The notary should not think about the release of responsibility and override the contents of the deed of the appearers without considering the risk of loss that may occur in the future. A qualified notary will certainly not carry out these contradictory practices; even though, theoretically, the notary is not responsible for the contents of the deed desired by the parties.

In a practical arrangement, the notary can be asked for legal advice by his appearers regarding the material truth of a deed. In this position, the notary has the independence to provide correct and accountable advice. However, deviations often come from the norm and are carried out by a notary because it facilitates the client's interests. In such practice, if in the future there is a loss from the deed made by the notary, then the notary, according to the author's opinion, can be held responsible for the deed he made.

The next category of binding the sale and purchase agreement by not presenting witnesses is a violation resulting in losses to the contractor, which can be categorized as unlawful acts as stated in Article 1365 of the Civil Code, which states, "Any unlawful act that brings harm to other people, obliges the person due to his fault issuing the loss, compensate for the loss". The essence of the article contains elements that must be fulfilled from the notary's unlawful act, including: first, the existence of an unlawful act; secondly, there must be an error; third, there must be losses incurred; and fourth, there is a causal relationship between actions and losses.

If we examine based on these elements, the binding of the sale and purchase agreement that is not attended by witnesses, i.e., there is a claim that normatively contains an element of unlawful act and an error, it implies that there is a causal relationship between the act and the loss that can be proven without having to commit deeper interpretation; thus, in the end, what becomes the key is whether the binding of sale and purchase agreement has a detrimental effect on the appearer when a violation occurs. The judge will decide based on the facts unearthed in the verification process; hence, it is possible for the imposition of the notary's liability in the form of compensation for losses to be carried out fairly.

Hans Kelsen's theory of responsibility is in line with Article 1365 of the Civil Code that unlawful acts that result in losses must be sanctioned as a form of responsibility for actions committed by legal subjects. Hans Kelsen's theory of responsibility also aligns with what is implied in Law Number 2 of 2014 on Amendments to Law Number 30 of 2004 concerning the Position of Notary Public in Article 40, which emphasizes the failure to attend witnesses; thus, losses occur due to violations. Therefore, the prosecution's responsibility to the notary to replace the loss of costs and interest can be committed.

In some instances, it even leads to crime. Enriko Silalahi and Akhmad Khisni¹² state in their conclusion that: "Notary Office Law (UUJN) does not mention the application of criminal sanctions but legal action against violations committed by the Notary invites elements of forgery on intentional/ negligence in making authentic letters/ deeds. The deed contents are false. After being subjected to administrative sanctions/ Professional code of ethics for the position of Notary and civil sanctions, the sanction can be withdrawn and qualified as a criminal act committed by a Notary".

An element of error against the notary can be proven by several elements, including: first, the day, date, month, and year of facing; second, time and place of facing; and third, the signature contained in the deed of agreement. Proving the error requires honesty from the parties and the notary when signing. Suppose there is no witness in the signature, but the witness signs at a different time in the future. In that case, we can normatively categorize it as containing an element of error that can be held accountable to the notary. The obstacle in proving the element of loss and causality of the deed will determine the burden of liability for losses to the notary. Normatively, losses in unlawful acts without witnesses in the sale and purchase agreement binding can be requested for material and immaterial losses.

The material losses must be proven with certainty. They cannot be estimated with estimates, while immaterial losses in the form of damages to the reputation of the deed made or in other forms, which are usually immaterial losses converted into material losses with a size determined by the plaintiff. Thus, the elements of the notary's mistake and the consequences of the binding deed of the sale and purchase agreement deed must be proven with certainty; hence, the notary's burden of responsibility can be decided in the fairest way possible.

The law also protects notaries in carrying out their duties and functions as officials making authentic deeds. Several notaries are involved in making deeds that contain elements of fraud, or notaries are suspected of having done fake authentic deeds, and several

¹² Enriko Silalahi et al., Legal Review of Malpractice Notary in The Notary's Deed, *Jurnal Akta*, Vol. 5, Issue 3, September, Universitas Islam Sultan Agung, 2018, p. 653.

appearers deny the authentic deeds that the notary made. It becomes problematic if the responsibility falls on the notary, so legal protection for a notary cannot be ruled out. Legal protection for a notary does not mean eliminating the notary's responsibility as a sanction for his mistake. However, it is possible if the notary carelessly does it.

Then, the consequence of this action is the imposition of civil responsibility in the form of compensation. Thus, the imposition of responsibility must be fair. Where it is possible to make the sale and purchase agreement binding, the witnesses' absence is the appearer's will. If it occurs, the mistake in making the deed of agreement cannot necessarily be the burden of responsibility the notary bears. The notary is responsible for carrying out statutory orders in making a sale and purchase agreement in connection with this authority; thus, the notary can be responsible for making an authentic deed.

In the author's opinion, Hans Kelsen's theory of responsibility relevant to a notary's authority in making authentic deeds can be described as follows: first, the material responsibility for the deed that a notary has made. This responsibility includes the notary's ability to pour out the deed desired by the contractor in a contractual relationship. The notary must ensure that the contents of the deed are not contrary to laws and regulations. Secondly, the responsibility as a public official (*openbaar ambtenaar*) authorized to make authentic deeds. The notary must uphold the notary profession by prioritizing legal certainty in carrying out his duties and functions. In this case, the notary ensures that his deeds must be based on the provisions of laws and regulations. Third, in civil liability, the notary can be compensated if the deed he has made causes a loss. Fourth, criminal responsibility, the notary can be held accountable before the court for the deed, either directly or indirectly participating in falsifying documents, for instance, or in other forms that can be criminally punishable. Fifth, administrative responsibility, the notary can be held administratively responsible for his deed and can be subject to administrative penalties in the form of written warnings, temporary dismissals, and honorable and dishonorable discharges.

The form of notary responsibility is a consequence of the authority granted by law to public officials (*openbaar ambtenaar*) to achieve legal certainty and legal order. In the authors' opinion, the most critical responsibility as a public official (*openbaar ambtenaar*) is moral responsibility by ensuring the implementation of laws and regulations and a notary's code of ethics. This responsibility is intended to correct the negligence committed by a notary from an authentic deed he has made; hence, public trust in public officials can create legal order.

The authors found several cases regarding the binding of sale and purchase agreements which witnesses did not attend before several matters caused the notary. First, the notary ruled out the presence of witnesses due to technical matters when and where the agreement was made. Second, the notary followed the client's wishes to sign at the time and place specified. Third, the client's interests were prioritized for signing because of the need to disburse funds. Fourth, the notary's experience indicated that signing without the presence of witnesses was not a problem in the future because the debtor did not default. Fifth, there was weak enforcement of the code of notary ethics by the Regional Supervisory Council or Notary Honorary Council.

The notary's responsibility for the binding of the sale and purchase agreement without witnesses' presence that are relevant to Hans Kelsen's theory of responsibility can be accounted for in the form of civil liability, which allows the notary to request compensation or administrative responsibility, in the form of a written warning, temporary dismissal, honorable discharge, and dishonorable dismissal; when in practice, it results in losses for the parties. Obligated Efforts to mitigate the risk of a sale and purchase agreement binding without witnesses' presence by a notary can be carried out using various methods, including first, ensuring that the notary provides an understanding to appearers on the binding mechanism under laws and regulations. At this point, the notary provides enlightenment to the appearers so that the possibility of the appearers requesting something that is not in line with the procedure is closed. Second, the notary must be accustomed to legal order and orderly recording to prioritize the precautionary principle in making authentic deeds. Third, the notary strives to carry out good and professional governance of the notary's office by upholding the values of the notary's code of ethics and laws and regulations; hence, service to clients does not reduce ethical values as a notary.

CONCLUSION

The binding of the sale and purchase agreement before a notary without the presence of witnesses provides legal certainty to the contractors because it is authentic based on Article 1868 of the Civil Code and has fulfilled the formal and material requirements. The deed authenticity has not changed even though the binding process is done without witnesses.

The notary is fully responsible for his deed if formal and material requirements cannot be fulfilled completely. Furthermore, in a practical arrangement, the binding of the sale and purchase agreement results in losses to the parties, then the notary can be prosecuted civilly and is obliged to compensate for the losses incurred.

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