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NOTARIAL LIABILITY FOR AUTHENTIC DEEDS DEGRADED INTO PRIVATE DEEDS AS A CONSEQUENCE OF FORMAL DEFECTS

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Abstract

A notarial deed derives its status as an authentic instrument not from the office of the notary alone, but from strict compliance with the form prescribed by law. Where formal requirements under Law No. 2 of 2014 amending Law No. 30 of 2004 concerning the Position of Notary (UUJN) are breached, the instrument does not become void; it is degraded, retaining only the evidentiary force of a private deed. This study examines two problems: first, which formal breaches trigger degradation and what the precise legal consequence of that degradation is; second, the form, basis, and limits of notarial liability toward parties who suffer loss as a result. Using a normative juridical method with statutory, conceptual, and case approaches - including Supreme Court Decisions No. 351 PK/Pdt/2018 and No. 1266 K/Pdt/2022 - this article argues that degradation is a statutory evidentiary sanction rather than a nullity, and that liability does not follow automatically from it. Degradation establishes only the objective element of unlawfulness; the notary is civilly liable under Article 84 UUJN in conjunction with Article 1365 of the Indonesian Civil Code only where fault, actual loss, and adequate causation are additionally proven. The article further shows that Indonesian doctrine and practice frequently conflate degradation with liability, producing disproportionate outcomes, and proposes a three-tier framework distinguishing technical-formal breaches, substantive-formal breaches, and breaches induced by the parties themselves, coupled with mandatory professional indemnity coverage and a clearer evidentiary allocation before the Notary Supervisory Council.

Keywords: Notarial Liability; Authentic Deed; Degradation; Formal Requirements; Evidentiary Force; UUJN

INTRODUCTION

The Indonesian civil law system assigns to the notary a function that is both preventive and evidentiary. Article 1868 of the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata, hereinafter "the Civil Code") defines an authentic deed as an instrument drawn up in the form prescribed by law, by or before a public official authorised to do so at the place of execution. Article 1 point 1 UUJN designates the notary as that official for the generality of private-law transactions. The consequence is procedural rather than merely symbolic: under Article 1870 of the Civil Code, an authentic deed furnishes conclusive proof (volledig bewijs) between the parties and their successors, so that a party invoking it need not prove its contents and a party disputing it bears the burden of tegenbewijs.

That evidentiary privilege is conditional. It rests on three cumulative dimensions of authenticity recognised in Indonesian notarial doctrine - external force (uitwendige bewijskracht), formal force (formele bewijskracht), and material force (materiele bewijskracht) - and the formal dimension is entirely a creature of statute. Where the notary departs from the form the legislature has prescribed, the instrument is not annulled but downgraded: it retains only the evidentiary value of a private deed. Purnayasa (2018) demonstrated that this degradation follows from a closed set of UUJN provisions read together with Article 1869 of the Civil Code, and that the deed's form under Article 38 UUJN is therefore constitutive rather than administrative. Lumban Gaol (2018) reached a parallel conclusion, observing that a notarial deed does not remain authentic ex officio but only for so long as both formal and material conditions of its creation are satisfied.

The practical significance of this mechanism has grown rather than diminished. Pertiwi and Velentina (2023) record that degradation increasingly appears not as an isolated procedural mishap but as the central issue in civil litigation, because a claimant who cannot overturn a deed on substantive grounds will attack its form instead.

Empirically, the recurring triggers are familiar to practitioners: parties who do not appear simultaneously before the notary; signatures collected sequentially over days; a deed transmitted for signature without being read; witnesses who are absent, unqualified, or added afterwards; unilateral alteration of the minute after execution; and execution outside the notary's territorial jurisdiction. Prahardika and Kawuryan (2018) documented such lapses in bank credit agreements, and Rahmayani (2020) analysed the specific case of a minute altered by the notary without the appearing parties' knowledge - a practice that, whatever its motive, forfeits authenticity outright.

What remains contested is the consequence for the notary. Two positions dominate. The first, common in Indonesian legal writing and in claimants' pleadings, treats degradation as itself proof of notarial wrongdoing: once a court holds that a deed has fallen to private-deed status, liability for costs, damages, and interest is said to follow. The second, defended here, treats degradation as an evidentiary sanction attaching to the instrument, conceptually distinct from the personal liability of the official who drew it. The distinction is not academic. Under the first view, a notary who transposed a digit in a renvoi is exposed on the same terms as one who fabricated the presence of a party; under the second, the two are assessed by different measures of fault and causation. Arsya, Widhiyanti, and Ruslijanto (2021) note that Indonesian jurisprudence has not settled this question, and Imania, Ngadino, and Prasetyo (2020) observe that the resulting uncertainty erodes the legal protection notaries themselves are entitled to expect.

This article accordingly addresses two research problems:

1. Which violations of formal requirements cause a notarial deed to be degraded into a private deed, and what is the precise legal character and consequence of that degradation?
2. What is the form, normative basis, and outer limit of notarial liability toward parties suffering loss from such degradation?

The novelty of this study lies in disaggregating degradation from liability and proposing a graduated liability framework calibrated to the type of formal breach and to the contribution of the appearing parties themselves - a calibration absent from the existing literature, which has largely catalogued the triggers of degradation without theorising the responsibility that should follow.

RESEARCH METHOD

This is normative legal research (penelitian hukum normatif), treating law as a system of norms and using secondary data comprising primary, secondary, and tertiary legal materials. Three approaches are combined. The statutory approach examines the Civil Code (Articles 1320, 1365, 1868–1875, 1880), UUJN, and the Notary Code of Ethics. The conceptual approach draws on the doctrine of evidentiary force, Kelsen's typology of legal responsibility, and the causation doctrines of conditio sine qua non and adequate causation. The case approach analyses Supreme Court Decision No. 351 PK/Pdt/2018 (deed not read to the appearing parties) and Supreme Court Decision No. 1266 K/Pdt/2022 (procedural breach in execution), supplemented by supervisory-council practice.

Legal materials were collected through documentary study and analysed qualitatively, using systematic, grammatical, and teleological interpretation, with conclusions drawn deductively from general norms to the specific problem.

RESULTS AND DISCUSSION

The Formal Requirements of a Notarial Deed

Formal requirements are those conditions governing the manner of coming into being of the instrument, as distinct from material requirements governing the validity of the underlying legal act under Article 1320 of the Civil Code. Manuaba, Parsa, and Ariawan (2018) locate their observance within the principle of prudence (kehati-hatian), which they treat as the organising duty of the office rather than a mere professional courtesy. Four clusters can be distinguished.

1. **Structure of the deed.** Article 38 UUJN requires every deed to consist of a kepala akta (title, date, hour, and the notary's name and seat), a badan akta (identity and capacity of the appearing parties, their statements, and the identity of witnesses), and a penutup akta (a description of the reading, translation where applicable, execution, and any renvoi). Article 39 governs the legal capacity of appearing parties; Article 40 requires at least two instrumental witnesses satisfying statutory qualifications.
2. **Verlijden - reading and signing.** Article 16(1)(m) UUJN obliges the notary to read the deed before the appearing parties in the presence of at least two witnesses, and for all of them to sign immediately thereafter. Article 44 governs signature, including the requirement that the deed record any reason a party cannot sign. The exception in Article 16(7) - where all appearing parties declare they have read the deed themselves - must itself be expressly recorded at the close of the deed; where it is not, the exception fails.

3. **Integrity of the text.** Articles 48 to 51 prohibit alteration, addition, deletion, insertion, or overwriting except in the prescribed renvoi form, marginally initialled by the appearing parties, witnesses, and notary. Nawang and Putra (2021) show that these provisions protect the deed's external evidentiary force: an instrument whose physical integrity cannot be verified cannot speak for itself against third parties.
4. **Independence and jurisdiction.** Article 52 prohibits the notary from making a deed for the benefit of himself, his spouse, or relatives within specified degrees. Articles 17 and 18 confine the exercise of office to the notary's territorial jurisdiction.

The Statutory Triggers of Degradation

UUJN does not leave the consequence of formal breach to judicial discretion. It specifies degradation expressly and exhaustively, as set out in Table 1.

Table 1. Formal breaches under UUJN and their evidentiary consequences

Provision breached	Sanctioning provision	Consequence
Art. 16(1)(m), 16(7) - reading and execution	Art. 16(9)	Private-deed force
Art. 38-40 - structure, capacity, witnesses	Art. 41	Private-deed force
Art. 43(1)-(4) - language and translation	Art. 43(6)	Private-deed force
Art. 44(1)-(4) - signature	Art. 44(5)	Private-deed force + express right to claim
Art. 48(1)-(2) - alteration of content	Art. 48(3)	Private-deed force + express right to claim
Art. 49(1)-(3) - renvoi	Art. 49(4)	Private-deed force + express right to claim
Art. 50(1)-(4) - deletion of words or figures	Art. 50(5)	Private-deed force + express right to claim
Art. 51(1)-(3) - correction of typographical error	Art. 51(4)	Private-deed force
Art. 52(1) - conflict of interest	Art. 52(3)	Private-deed force + express right to claim

Two features of this scheme deserve emphasis. First, the sanction is automatic and objective: it attaches to the instrument by operation of law, without regard to the notary's intention, once the breach is established. Second, the statute itself distinguishes between provisions that merely degrade and provisions that additionally create an express right of recourse against the notary - a distinction the literature routinely overlooks but which is central to the analysis in section 3.4.

La Ode (2022) illustrates the practical stakes through the degradation of a testamentary gift deed, where the loss of authenticity reopened the entire distribution of an estate. Nuryasinta (2024) treats the adjacent case of deeds proven false, correctly separating falsity - which goes to material truth - from formal defect, which goes only to form.

Degradation Is Not Nullity: The Correct Legal Characterisation

A persistent error in pleadings is to treat a degraded deed as void. It is not. Article 1869 of the Civil Code provides that an instrument which is not authentic - whether through the official's incapacity or through a defect in form - nonetheless has the force of a private writing where it has been signed by the parties. The deed survives; only its evidentiary rank falls. The practical consequences of that fall are nevertheless serious, and four should be distinguished.

First, the burden of proof reverses. Under Article 1875 of the Civil Code, a private deed acquires the same evidentiary force as an authentic deed between the signatories - but only once the signature is acknowledged or judicially established. The party relying on the deed must therefore prove what it previously did not have to prove. Where the counterparty simply denies the signature, the deed's probative value is suspended pending expert or other evidence.

Second, external evidentiary force is lost entirely. A private deed does not prove itself against third parties. This is decisive in security, corporate, and land transactions, where the instrument's function is precisely to be opposable to persons who did not sign it.

Third, the date ceases to be certain. Article 1880 of the Civil Code provides that a private deed does not have a fixed date against third parties until it has been registered or the date otherwise established. In transactions where priority or sequence determines outcome, degradation can be more damaging than nullity, because the parties may not discover the defect until priority is contested.

Fourth, the deed remains binding inter partes. Where both parties acknowledge their signatures and do not dispute content, a degraded deed may well produce the intended legal effect. This point is frequently missed and matters for the assessment of loss: if the transaction achieved its purpose notwithstanding degradation, the claimant may have suffered no recoverable damage at all.

Supreme Court Decision No. 351 PK/Pdt/2018 exemplifies the mechanism. The deed had not been read to the appearing parties, and the closing did not record any Article 16(7) declaration in substitution. The Court held that the failure of verlijden deprived the instrument of authentic force, leaving it with private-deed value only. The decision is instructive precisely because the Court did not annul the underlying transaction: it adjusted the evidentiary standing of the instrument and left the substantive dispute to be resolved on other proof. Supreme Court Decision No. 1266 K/Pdt/2022 follows the same logic in relation to procedural breach in execution, confirming that Indonesian jurisprudence treats degradation as an evidentiary consequence rather than a substantive one.

Notarial Liability: Basis, Forms, and the Requirement of Fault

The theoretical frame

Kelsen's distinction between liability grounded in fault (culpability) and absolute liability is useful here. Degradation under UUJN is an absolute consequence: it follows from the breach without inquiry into the notary's state of mind. Liability of the notary, by contrast, is culpability-based. Conflating the two collapses a distinction the statute itself maintains, and it is the source of much of the incoherence in current practice.

Civil liability

The statutory bridge is Article 84 UUJN, which provides that breaches of the enumerated provisions - Articles 16(1)(i) and 16(1)(k), 41, 44, 48, 49, 50, 51, and 52 - which cause a deed to have only the force of a private deed or to be void, constitute grounds for the injured party to claim reimbursement of costs, damages, and interest from the notary. This provision does not create strict liability; it identifies the circumstances in which a claim may be brought. The claim itself is governed by Article 1365 of the Civil Code and requires four cumulative elements:

1. Unlawful act. Satisfied objectively by the formal breach itself, since UUJN imposes a statutory duty.
2. Fault. Intention or negligence, assessed against the standard of a reasonably prudent notary. Marzuki (2018), analysing typographical errors in a minute after a copy had issued, argues persuasively that not every deviation evidences negligence.
3. Loss. Actual, concrete, and provable. Where the transaction achieved its purpose despite degradation, this element may fail.
4. Causation. An adequate causal link between the breach and the loss.

The fourth element is the most under-analysed in Indonesian practice and the most consequential. Applying conditio sine qua non alone yields absurd results: but for the notary's failure to record the reading, the claimant would not have lost a priority contest that in truth turned on a competing creditor's earlier registration. The doctrine of adequate causation is the appropriate filter: liability extends only to loss that the breach, in the ordinary course of events, was apt to produce. A notary whose renvoi was irregular is answerable for the evidentiary weakening that irregularity typically produces, not for every downstream commercial misfortune the claimant can associate with the transaction.

Administrative and ethical liability

Article 85 UUJN provides a graduated scale of administrative sanctions - written warning, temporary suspension, honourable dismissal, and dishonourable dismissal - imposed through the Notary Supervisory Council. These sanctions are imposed for breach of duty as such and are therefore available even where no party has suffered loss and no civil claim lies. Amalia and Yusa (2021) analyse the parallel ethical regime administered by the Indonesian Notaries Association, which addresses conduct not exhausted by the statutory scheme. Administrative and ethical liability are the natural home for purely technical breaches, and it is a defect of current practice that such breaches are routinely litigated civilly instead.

The limits of criminal liability

Islam, Sukirno, and Prabandari (2021) emphasise that criminal liability requires conduct satisfying the elements of a criminal offence - typically Article 263 or 266 of the Criminal Code, concerning forgery and the procurement of false statements in an authentic deed. Formal defect alone does not supply mens rea. A notary who neglects to read a deed has breached UUJN; he has not thereby committed forgery. Where a notary knowingly records a presence that did not occur, the position is different, but the difference lies in intention and falsity, not in the formal defect.

A Graduated Framework

The preceding analysis supports disaggregating formal breaches into three categories, each attracting a distinct liability response.

Category I - Technical-formal breaches. Irregular renvoi, minor errors in the heading, imperfect recording of a witness's particulars. These breaches degrade the deed but rarely cause independent loss and rarely evidence want of prudence. The proportionate response is administrative: correction, warning, and supervision. Civil liability should require the claimant to prove a specific loss traceable to the defect.

Category II - Substantive-formal breaches. Failure of verlijden, absence of the appearing parties, unqualified or absent witnesses, unilateral alteration of the minute, conflict of interest under Article 52. These breaches strike at the reasons authenticity is conferred at all - the notary's personal verification that these parties said these things at this time. Fault is readily inferred, and Article 84 UUJN provides a direct route to compensation. Rahmayani (2020) treats unilateral alteration as the paradigm case, and rightly so.

Category III - Breaches induced by the appearing parties. Parties who insist on signing separately, who supply false identity documents, or who decline to await a translation, and who then invoke the resulting defect. Article 1365 does not permit a claimant to found a claim on a state of affairs he himself procured. Budiono, Sugiarto, and Zuhdi (2023) and Sonbai, Mahendrawati, and Santika (2022) argue that the prudence principle, properly understood, includes the notary's duty to refuse - but a refusal that is overborne by the parties' insistence, and documented as such, should operate to exclude or substantially reduce liability. The deed is still degraded; the notary is not still liable.

The framework's practical payoff is that it explains why the statute distinguishes provisions that merely degrade from those that also create a right of recourse. Articles 44, 48, 49, 50, and 52 - the provisions carrying an express right to claim - cluster around breaches involving the integrity of the instrument and the notary's independence. Articles 16(9), 41, 43(6), and 51(4) - which degrade without expressly creating recourse - cluster around procedural form. The legislature, in other words, has already sketched the distinction that doctrine has failed to develop.

RECOMMENDATIONS

Mandatory professional indemnity insurance. Indonesia has no compulsory notarial indemnity scheme, unlike a number of civil law jurisdictions in which such cover is a condition of practice. Compulsory cover would separate the question of compensating the injured party from the question of ruining the notary, and would allow courts to assess loss without the implicit reluctance that personal exposure produces.

Standardised execution protocols. Fadila, Sugiri, and Wisnuwardhani (2020) show, in the analogous context of reporting duties, that clear internal procedure is the most effective protection against inadvertent breach. A mandatory execution checklist - recording who was present, at what time, what was read, and in what language - would both reduce breaches and supply contemporaneous evidence in any later dispute.

Evidentiary allocation before the Supervisory Council. Where a notary produces a contemporaneous execution record, the burden should shift to the complainant to displace it. Ballan (2022) notes the difficulty notaries face in reconstructing execution circumstances years afterwards.

Legislative clarification of Article 84. The provision should state expressly that it identifies grounds for a claim and does not dispense with proof of fault, loss, and causation under Article 1365. Sihombing (2023) and Saragih and Djaja (2023) both note the interpretive drift toward automatic liability that the current wording invites.

Digital execution infrastructure. Siswanto, Adiyatma, Nnawulezi, and Kabano (2025), comparing Indonesian and Rwandan approaches to electronic notarial acts, observe that verified digital execution can evidence simultaneity and identity far more reliably than paper practice. Any Indonesian move toward cyber notary should treat evidentiary robustness of verlijden, rather than convenience, as its design objective.

CONCLUSION

Degradation of a notarial deed into a private deed is a statutory evidentiary sanction imposed on the instrument, operating automatically upon breach of the formal requirements enumerated in Articles 16(9), 41, 43(6), 44(5), 48(3), 49(4), 50(5), 51(4), and 52(3) UUJN, read with Article 1869 of the Civil Code. It is not nullity: the deed subsists and, once signatures are acknowledged, binds the parties under Article 1875 of the Civil Code. What is lost is conclusive force without further proof, opposability to third parties, and certainty of date.

The liability of the notary is a separate question governed by a different logic. Article 84 UUJN identifies the breaches that may ground a claim; it does not convert degradation into automatic liability. Civil liability arises only where unlawfulness, fault, actual loss, and adequate causation are cumulatively established under Article 1365 of the Civil Code. Administrative liability under Article 85 UUJN and ethical liability under the Code of Ethics operate independently of loss, and are the proportionate response to purely technical breach. Criminal liability requires elements - falsity and intention - that formal defect does not supply.

This article has proposed a three-tier framework distinguishing technical-formal breaches, substantive-formal breaches, and breaches induced by the appearing parties, and has argued that the statute's own distinction between provisions that merely degrade and provisions that additionally create recourse already points toward it. Giving that distinction doctrinal effect - supported by compulsory indemnity cover, standardised execution protocols, and a clearer allocation of the evidentiary burden - would protect injured parties without exposing notaries to liability disproportionate to their fault, and would restore to the authentic deed the certainty that is its entire justification.

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