

Juridical Analysis of the Use of Private Deeds as a Basis for Making Authentic Deeds by Notaries in the Conception of Legal Certainty

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Abstract. *This study aims to determine and analyze in a juridical way the use of private deed as the basis for making authentic deed by a Notary in the conception of legal certainty. This study uses a sociological juridical approach with descriptive analytical research specifications. The type of data used is primary data, namely the results of interviews and secondary data in the form of legislation, jurisprudence, court decisions that have permanent legal force, books, journals as well as expert opinions and other legal materials. Research data was collected through interviews and literature study. The data analysis method in this study uses qualitative data analysis methods. The research results show that: First, the use of an underhanded deed in making an authentic deed by a Notary is contrary to the elements of an authentic deed which require and determine that an authentic deed must be sufficient and perfect evidence regarding everything described in it which binds the parties and their heirs and those who obtain the rights thereof, as well as in the event that proving an authentic deed is sufficient evidence that does not require additional evidence, this is different from a private deed whose strength of proof depends on whether or not the deed under the hand is acknowledged by the maker, denial of the deed under the hand will place the burden of proof on the party using the deed under the hand. Second, from the aspect of authority,*

Keywords: Authentic; Construction; Private.

1. Introduction

A notary is a public official who is authorized by law to make authentic deeds as well as other deeds which are his authority based on Act No. 30 of 2004 concerning as amended by Act No. 2 of 2014 concerning the Office of a

Notary.¹The law also explains that the philosophical basis for granting authority by a Notary in making authentic deeds is so that in every legal event or legal action contained in a deed, it can act as authentic written evidence that guarantees legal certainty, order and legal protection for citizens, this is as explained in the preamble to Act No. 2 of 2014 concerning the Office of a Notary.²

The guarantee of legal certainty, order and legal protection for the people attached to authentic deeds is none other than because authentic deeds in evidentiary law are known to have 3 (three) types of evidentiary powers, namely: First, Outward evidentiary strength, namely the ability of the deed itself to prove its validity as a deed authentic if seen from its birth as an authentic deed that meets the requirements of an authentic deed. Second, the strength of formal proof, which means that an authentic deed must provide certainty that an event or fact described in the deed was actually explained by the parties who appeared before the official at the time stated in the deed. Third, the strength of material evidence,³It is the 3 (three) types of evidentiary strength that causes an authentic deed to always be said to have "binding" proving power, in the sense that what is written in the deed must be trusted by the Judge, that is, it must be considered as true, as long as its untruth cannot be proven. (*Persumptio iustae Causa*). Because of that, he is always considered to provide perfect proof (*volledig bewijs*) regarding what is contained in it so that he no longer needs additional proof.⁴

The second classification of deed, in addition to authentic deed with the power of proof as explained above, there are also private deed. Ahmadi Miru gives the meaning of an underhand deed as a deed made by the parties without involving an official authorized to make a deed such as a notary, PPAT, or other official who is authorized to do so.⁵According to Article 1876 of the Civil Code or Article 2 of the 1867 Ordinance No. 29 which contains provisions regarding the strength of proof of private writings from Indonesian people or their equivalent, stipulates that anyone who submits a private writing (deed under the hand), is obliged to expressly deny or acknowledge his signature.⁶From these provisions, it can be understood that in a private deed, the truth regarding the deed depends on whether the signature of the party who put the signature in the deed is acknowledged or denied.

¹Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of Notary, <http://peraturan.go.id>, accessed on 8 May 2022

²*Ibid.*

³Sudikno Mortokusumo, 2009, Indonesian Civil Procedure Code, Liberty, Yogyakarta, 162-164

⁴Ahmadi Miru, 2010, Contract Law and Contract Drafting, Rajawali Press, Jakarta, p. 15

⁵Ahmadi Miru, Op Cit. Thing. 15

⁶R. Subekti, 2007, Law of Evidence, Pradya Paamita, Jakarta, p. 28

Ahmadi Miru further explained that, if in the deed under the hand the signatory denies the signature, then the party submitting the deed under the hand (the party who benefits) is required or must try to prove that the signature is correct by using other evidence. , that is why the private deed has the principle "always considered fake as long as its authenticity is not proven".⁷ Regarding this matter, it is also confirmed as the Supreme Court Jurisprudence through the rules in Decision Number 537K/Pdt/1985 which basically states that:

the Plaintiff's main evidence is the P-1 evidence, even though that evidence is expressly denied or denied by the Defendant in its entirety. Means that the rebuttal includes the contents and signatures listed therein. Thus the letter of evidence has no evidentiary value at all. Whereas the witnesses presented by the Plaintiff did not know directly about the making of the letter, because the witnesses signed separately, not in the presence of the parties (plaintiff and defendant), but by being visited by the plaintiff one by one at their respective residences.⁸

Based on the explanation above, it can be said that from the aspect of proof, underhanded deeds do not have outward, formal and material evidentiary strength, this is because the strength of proof of underhanded deeds depends on whether or not the signature of the party listed in the deed is acknowledged under the hand, this was also explained by Sudikno Mortokusumo in his book Indonesian Civil Procedure Code which basically states that: "because the signature of the deed under the hand can still be denied, the deed under the hand does not have the power of proof of birth".⁹

The lack of strength to prove the birth of an underhanded deed as stated by Sudikno Mortokusumo brings juridical consequences if an underhanded deed does not guarantee legal certainty and does not provide legal protection either. This is evident because of the deed under the hand "life or death" the deed under the hand still depends on whether the deed is recognized or not, and as long as the signature is disputed, the function and value of the deed under the hand can be said to be non-existent and the party submitting the deed is obliged to prove authenticity.¹⁰

Based on the explanation regarding private deed as described above, the

⁷Ahmadi Miru, Op City, p. 15

⁸M. Yahya Harahap, 2007, Civil Procedure Law: Lawsuits, Trials, Confiscations, Evidence and Court Decisions, Sinar Graphic, Jakarta, p. 601

⁹Sudikno Mortokusumo, OpCit. Thing. 165

¹⁰M. Yahya Harahap, Op Cit. Thing. 599

discourse regarding the use of private deed in making authentic deed by a Notary is always interesting to discuss, this is because, an authentic deed requires certainty, in the sense of certainty regarding the date of the deed and the signature of the party -the parties to the deed, it is certain that what was written is what was explained by the parties to the deed, and it is certain that the information in the form of an event or legal action has actually occurred so that what is explained in the deed is perfect evidence. Unlike the case with private deed, the truth of which both the signature and the content cannot be ascertained so that the signature can still be disputed.

Discourse regarding the use of underhanded deed in making authentic deed is an interesting matter and will always raise legal questions: "whether an underhanded deed which from a legal aspect of proof does not provide guarantees of legal certainty and legal protection is compatible with an authentic deed which has the nature of legal certainty and legal protection so that it can be used as a basis for making an authentic deed by a Notary?". This legal question arises because in fact, the use of private deed by a Notary in making authentic deed is still found, both in the form of power of attorney on behalf of the parties and in the form of minutes of statements of decisions of the extraordinary general meeting of shareholders in which there is a power of attorney.

2. Research Methods

This research was conducted using the Sociological Juridical Priesthood method. Amirudin et al. in his book Introduction to Legal Research Methods reveals that the use of sociological legal research is to find out how the law is implemented including the law enforcement process.¹¹The specification of this study uses descriptive analysis, namely to provide an overview of the operation of a rule of law, especially those related to the use of private deed in making authentic deed. Sources of data come from primary data and secondary data with data collection methods using interview techniques and literature studies. Data analysis was carried out using qualitative analysis methods.

3. Results and Discussion

3.1. Juridical Analysis of the Use of Private Deeds as a Basis for Making Authentic Deeds by Notaries in the Conception of Legal Certainty

¹¹Amiruddin and Zainal Asikin, 2014, Introduction to Legal Research Methods, PT. Rajagrafindo Persada, Jakarta, p. 134

The results of the author's research show that in Notary practice, the use of underhanded deeds, especially in the transfer of material rights, is still found, one of the underhanded deeds which later became a polemic and was widely discussed in Kendari City was the making of a Notary deed in the form of a Statement of Resolutions of the General Meeting of Shareholders Extraordinary based on the Deed below in the form of Minutes of Minutes of Extraordinary General Meeting of Shareholders of one of the Limited Liability Company in Kendari City, where based on the Notary Deed the share ownership of several shareholders is transferred without the knowledge of the shareholders, so that the shareholders, one of whom is the Minister in President Joko Widodo's Cabinet, reported that there was an act of falsifying the letter which resulted in a criminal conviction for those who falsified documents which almost involved a Notary making an authentic deed.

Based on the legal issues above, the author will argue whether in the conception of legal certainty, private deed can be used as a basis for making authentic deed by a Notary. In the provisions of Article 1870 of the Civil Code (Article 165 HIR/Article 285 RBG) Subekti explains that:¹² according to article 1870 of the Indonesian Civil Code or article 165 HIR/RIB (article 285 RDS) an authentic deed provides between the parties and their heirs or people who receive rights from them a perfect proof of what is contained therein. Evidence that is "binding", in the sense that what is written in the deed is true, as long as the untruth is not proven. And he gives a perfect proof, in the sense that he doesn't need any additional proof. It is a binding and perfect evidence.

The strength of proof above is called material evidentiary power, which means that legally (juridically) the contents of the deed have proved its truth as true against everyone who makes or orders to make (including his heirs or other people who get rights from him). This is what is called a "prevue preconstituee" meaning that the deed really has material evidential power. For this reason, the authentic deed acts as perfect evidence and binds the parties making the authentic deed. Thus anyone who disputes the truth of an authentic deed as evidence, then he must prove the opposite.¹³

Based on the legal provisions and expert opinion above, the Notary should really act carefully in examining every piece of evidence presented to him, because there are times when a appearer is the holder of the power of attorney who acts for the benefit of another party (the person giving the power of attorney) in a notary deed, for example in the case above, where the shareholders in the minutes of the meeting have given the power to go before the notary so that the

¹²R. Subekti, Op Cit. Thing. 27

¹³NG Yudara, 2006, Main Thoughts, Around the Position and Functions of Notaries and Notary Deeds According to the Indonesian Legal System, Renvoi, Number 10.34.III, March 3, 2006

notary makes an authentic deed in the form of a statement of meeting resolutions in the context of transferring the rights to the shares of the shareholders. In this case, the Notary must ask for the identity of the power holder and evidence on which the appearer acts for and on behalf of and on behalf of the authorizer,

Ensuring the correctness of the power of attorney contained in the Minutes of the Extraordinary General Meeting of Shareholders must be carried out with authentic deeds, this is because the authentic deed provides sufficient and perfect evidence regarding the information described in it and is binding on the parties who make it, heirs or anyone who obtains rights from them, this provision is clearly broken down in Article 1870 of the Civil Code (165 HIR and Article 285 HIR). In other words, with this deed, a Notary can believe that it is true that the party giving the power of attorney or ordering to make an authentic deed really wants to make a Notary deed mediated by an attorney so that the party is bound by the deed that the Notary wants to make.

It is a different matter if the power of attorney is exercised by private deed as stated in the minutes of the meeting. This is because a deed in hand does not provide certainty regarding the date of the deed, the signatures of the parties can be denied, the identity in the deed can be questioned and so on.¹⁴ Meanwhile, on the other hand, a notary deed (authentic) requires certainty about which party has an interest in the deed, because uncertainty about the parties who have an interest in the deed will lead to uncertainty about the binding strength of the authentic deed that the notary wants to make. Uncertainty of interested parties in an authentic deed will also have consequences for the uncertainty of all things described in an authentic deed, and this is not desired by the provisions of Article 1870 of the Civil Code (165 HIR and Article 285 RBG) which explicitly requires an authentic deed as perfect evidence regarding everything that is explained in the deed, becomes sufficient and binding evidence for the parties who appear before them, who order them to appear and their heirs and also the party who obtains rights from them.

Regarding the above, the Notary should be able to examine and test the deeds presented to him, so that these deeds can provide legal certainty. This was also stated by AW Voors by stating that:¹⁵

Het is voor de notaris vanzelfsprekend om elke deed te toetsen op zijn rechtsbetrouwbaarheid en om bij contract ervoor te waken, dat de rechten van alle partijen vaststaan en duidelijk zullen spreken. Dit maakt dat de notaris geen

¹⁴Tan Thong Kie, 2007, Notary Studies and Notary Practices, PT. Ichtar Baru van Hoeve, Jakarta p.508

¹⁵Ibid p. 461

juridische waaghals is, dat hij de zekere weg volgt en ini twijfelgevallen zich liever onthoudt dan dat hij het glibbering pad der rechtsonzekerheid gaat.

Translated by Tan Thong Kie:¹⁶

Of course, a notary must examine every deed regarding its certainty in law and keep the rights of all parties definite and clear in each contract. This is what results that a notary is not a brave person in the field of law; he follows the sure path and in doubtful matters he prefers inaction than to tread the slippery path of legal uncertainty.

Based on the above arguments, a conclusion can be drawn that legally an underhanded deed cannot be used as a basis for making an authentic deed by a Notary, this is because a privately held deed legally does not provide good certainty regarding the date of the deed, the signature and its contents can be denied or denied, the identity of the parties may be questioned and there is an obligation to prove the truth of the deed by the party who benefits or uses the deed if the deed is denied. While an authentic deed is a deed that must provide guarantees of certainty and legal protection for the parties and guarantees of order for society in general. Therefore regarding private deed to be used in making an authentic deed, Tan Thong Kie gave a message that "Never accept either a transfer of rights or the encumbrance of a power of attorney under the hand, if the signature of the power of attorney is not legalized; this brings great danger."¹⁷

3.2. Authority of a Notary in Making Authentic Deeds Based on Private Deeds

Regarding the use of private deed in making authentic deed, it can be seen from the notary's authority in making authentic deed whose function is to have sufficient and perfect evidentiary power that guarantees legal certainty, guarantees of legal protection and public order. As the conclusion in the discussion of the author's problem formulation above, it is known that private deeds do not have legal certainty both in terms of the date of manufacture, the signature in the deed and the contents of the deed can be denied, and the burden of proof on the party using the deed, it can be concluded that A notary is not authorized to make authentic deeds based on private deeds. This is based on the legal reason that an authentic deed requires that the contents of the deed

¹⁶Ibid.

¹⁷Tan Thong Kie, Op City, Hal. 54-55

have proven its truth as true against everyone who makes or orders to make (including his heirs or other people who get rights from him), and this is what is called perfect evidence and binding according to Article 1870 of the Civil Code Jo. Article 165 HIR (Article 285 RBG). Because an authentic deed proves the truth as true for everyone who makes and orders it to be made as well as the heirs and anyone who gets the rights thereof and has sufficient evidentiary power in the sense that he is sufficient to prove himself, then a deed under the hand should not using an underhand deed is not used as a basis for making an authentic deed by a Notary.

Regarding the use of an underhand deed in making an authentic deed, Tan Thong Kie gave a message with the statement that "Never accept either a transfer of rights or the encumbrance of a private power of attorney, if the signature of the power of attorney is not legalized; this brings great danger."

Against this opinion, Tan Thong Kie implicitly provides a way so that private deeds provide certainty about the date, signatures of the parties to the deed and the contents of the deed, and so that the party submitting the underhanded deed is not burdened with proof when there is an objection from the other party. make a deed, the Notary can apply other authorities that are described in Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of a Notary, namely to legalize the deed under the hand.

Article 1874a states: If the interested party wishes, apart from the matters referred to in the second paragraph of the previous article, in privately signed writings, a statement may also be given from a Notary or other official appointed by law stating that the signatory is known to him or has been introduced to him, that the contents of the deed have been explained to the signer, that afterwards the signing was carried out in the presence of the official. In this case the provisions of the third and fourth paragraphs of the previous article apply.

The authority of a Notary in carrying out legalization is seen in Article 15 paragraph (2) of Act No. 2 of 2014 concerning Remedies for Act No. 30 of 2004 concerning the Office of a Notary which basically states that a notary in his position also has the authority to certify signatures and determine certainty of date letter in hand, by registering it in a special book.¹⁸

Salim HS. in his book *Techniques for Making Deeds I* states in essence that a legalized private deed is a deed that must be signed and ratified in front of a Notary/authorized official. The meaning of ratification of private deed is:

¹⁸Akhmad Khisni, Dimas Agung Prastomo, 2017, *The Legal Consequences of Underhanded Deeds Legalized by Notaries*, Journal of Deeds Vol. 4 No.4 December 2017 Unissula, p. 792

1. The notary guarantees that the person whose name is listed in the contract is the person who signed the contract; and
2. The notary guarantees that the date of the signature is carried out on the date stated in the contract.¹⁹

De Bruyn defines legalization (*lelalisatie*) as a legal action that must fulfill several conditions, namely (a) that the notary knows the person who has signed it; (b) that the contents of the deed have been explained and explained (*voorhouden*) to the person; and (c) that person then signs his signature before a notary. De Bruyn further explained that such a legalized signature could not be denied, unless the notary's statement was accused of being false.²⁰

Albert Widya Arung Raya, SH, M.Kn. states that in order to be able to provide legal certainty for an underhand deed that is to be used as the basis for making an authentic deed, the deed should be legalized, because with legalization the Notary can: Examine the identities of the parties described in the deed; Can confirm the date of making the deed, notify the contents of the private deed and can assess whether the contents of the private deed were made freely and without coercion, fraud or abuse of circumstances; Ensuring the approval of the deed through the signing of the parties in the private deed and if necessary requesting the affixing of the thumbprint of each party; and Retrieve and store documentation of the legalization process. This is very useful so that the parties to the underhand deed are prevented from denying their signature.

Based on the legal provisions and the opinions of the experts above, it can be concluded that in order for an underhanded deed to be used in making an authentic deed, the underhanded deed must first be legalized by a Notary using his authority based on Article 1874a KHUPerdata jo. Article 15 paragraph (2) of Act No. 2 of 2014 concerning Remedies for Act No. 30 of 2004 concerning the Office of a Notary. With this legalization, private deed can be given certainty regarding the date of the deed, certainty regarding the contents of the deed because it has been notified and explained to the makers and certainty regarding the identity of the party and the signature of the making party because it was carried out in the presence of an official who was authorized to do so.

4. Conclusion

His heirs and anyone who gets rights from him. Therefore, in order for a private deed to be used as a basis by a Notary in making an authentic deed, the Notary can provide certainty regarding the date, contents and signature of the private deed by applying other powers stipulated in Article 1874a jo. Article 15

¹⁹Salim HS., 2015, *Deed Making Techniques One (Theoretical Concept, Notary Authority, Form and Minuta Deed)*, Rajagrafindo Persada, Jakarta, p. 52

²⁰Tan Thong Kie, *Op Cit.*, p. 519

paragraph (2) of the UUJN is related to the legalization of underhanded deeds.

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Regulation:

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