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The degradation of Notarial deed in the aspect of Law on evidence

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The purposes of this study are to analyse the cause of the degradation of notarial deed; analyse the juridical implications in the proving process, if the Notarial deed is degraded from its position as an authentic deed; and analyse the responsibility of a Notary to the event of degradation to the deed he or she made. This study is legal research, which uses statute, case, and conceptual approaches. The legal material analysis was performed through the descriptive perspective. The results showed that the degradation of Notarial deed can occur if the process in creating a Notarial deed is not exhaustive, and does not fulfil the formal and material requirements of a deed, as stated in the provisions of the Law on the Notary office. The position of a Notarial deed as an authentic deed, and in the law upon proving, occupies the position as a strong evidence because it has a perfect and binding evidentiary value.

Keywords: *Degradation, Notarial deed, Law, Evidence*

INTRODUCTION

The law on evidence places evidence in the form of a letter and/or writings, which act as legal evidence and that are given the first or highest position in the order of evidence. Following this type of evidence, the order of evidence is the witness, presumption, testimony, and oath. According to the law of civil procedure, various forms of legal evidence, as per law, are admissible to be presented before the court as evidence to support statements claimed by the parties in a dispute. Since the essence of the evidence presentation process is to prove the legal event, legal connection, and legal consequences, the importance of the evidence presentation process here is to help the judge in making a decision.

The process of proving, and evidence in the form of writings or a letter, have a relation to the role of the Notary in creating authentic evidence in the form of a Notarial deed. The role of the Notary is highly urgent in creating legal certainty, and legal protection in civil matters, as well as serves

an important function in providing legal protection for the civil rights of related legal subjects and/or clients. The authority, role, and duties of a Notary are regulated in the Law on Notary Office (LNO).

Republic of Indonesia Law No. 2 of 2014 on the amendments of Republic of Indonesia Law No. 30 of 2004 concerning the position of Notary Office. It is stated that the Notary is a public official who is given the authority by the state to make authentic deeds and has other powers as stated in the Law. One of the Notary's authorities is making an authentic deed regarding all actions, agreements, and stipulations required by statutory regulations and/or that is desired by the parties concerned to be stated in the authentic deed. The Notary also has the authority and duty to: guarantee the certainty of the date in the making of a deed; to keep the deed; and provide the grosse, copy, and quote of the deed, which occur during the making of the deed, and that cannot be re-assigned or excluded to other officials or other officials determined by law. In addition, the Notary has the authority to validate a signature and determine the certainty of the date of an private deed (made without the presence of a Notary or any other legitimate officials) letter by registering it in a special book; make a copy of the original private deed document in the form of a copy containing the description as written and described in the concerned letter; validating the compatibility of the copy with the original documents; providing legal counsel in connection with the making of the deed; as well as making the deed related to land registration, and making the deed of minutes of auction (Tobing, 1980).

In the perspective of the law regarding proving for law of civil procedure, a notarial deed has a perfect and binding power of proof. In the sense related to the strength of evidence, the notarial deed, as an authentic document, has a complete or perfect evidential strength and has a binding power, as well as having fulfilled the minimum limit of valid evidence without the need for other evidence in a civil law dispute. Thus, if used as evidence in a civil case or presented as evidence to a third party, then the proving strength in a notarial deed is very strong and perfect. Hence, it is sufficient to prove what is contained in the deed without the need for other evidence, as long as it is related to what is stated in the deed. In addition, it also binds the judge in the examination of the civil case, so that the judge is bound by what is stated in the deed.

In the provisions of Article 1869 of the Civil Code regarding the power of proof of deeds, and in Law Number 2 of 2014 Amendment to Law Number 30 of 2004 concerning Regulation of Notary Position (hereinafter referred to as UUJN) also regulates the provisions of proof of deed, namely in Article 41, Article 44, Article 48, Article 49, Article 50 and Article 51.

Several of the abovementioned articles regulate in detail the formal conditions on the notarial deed that should be given the attention of the Notary in making a Deed. Specifically, they are:

1. Formality of the form of the notarial deed (Article 38 of UUJN)
2. The terms of the appearer of Notary (Article 39 of UUJN)
3. Conditions to be a witness before the Notary (Article 40 of UUJN)
4. Conditions for the reading of a notarial deed (Article 44 of UUJN)
5. Conditions before making changes/revision to the content of a deed (Articles 48, 49, 50 of LNO)

This provision becomes highly important for the Notary because it is related to the position of the deed made in the perspective of the law on evidence. If the formal requirements for an authentic deed outlined by law are not fulfilled, then the authenticity of that deed will be degraded or in the sense of the strength of the deed, it no longer has the proving value as an authentic deed. The concept of deed degradation refers that the notarial deed, which was originally recognised by the law as an authentic deed, has decreased its authenticity, so that it only contains the same evidentiary value as the under-hand (made without the presence of a Notary or any other legitimate officials) deed.

The problem in this case concerns the degradation of the notarial deed, which previously was valued as an authentic deed, and has now become an under-hand deed. What causes this to occur? What are the juridical implications? What forms are the Notary's liability when the degradation of a notarial deed occurs? Therefore, as posed by this questions, the legal issues under this study are:

1. What is the cause of the degradation of a notarial deed?
2. What are the juridical implications in the proving process if notarial deed is degraded from its position as an authentic deed?
3. What is the responsibility of a Notary to the event of degradation to the deed he or she made?

CONCEPTUAL AND THEORETICAL REVIEW

Definition and Authority of the Notary

Definition of the Notary

Article 1 of the Law on the Notary Office states that a Notary is a public official authorized to issue an authentic deed, along with other authorities, as referred to in this law. The Notary is a position whose purpose is to manifest legal relations between the legal subjects in civil law and into a legal document. The role of the Notary is undoubtedly especially important in social life. Moreover, the work of a Notary is incredibly helpful to the Government in serving the community for the needs of legal certainty by providing legal protection in each authentic deed they make. Therefore, the Notary is appointed by the Government and can also be dismissed by the Government. In short, the Notary is a government official, however, is not paid by the Government. The Notary's income comes from the honorarium he or she receives for their service

in issuing an authentic deed, and in other duties that he or she is authorized to perform, according to the law.

The Notary's Authority

The Notary is a public official authorised to issue a deed. According to Article 1 of the Law No. 2 of 2014 on the amendment of the Law Number 30 of 2004 concerning the Notary Office the Notary is classified as a public official included in the professions within the field of law, and is authorised to issue authentic deeds in the field of civil law. A deed is issued by a public official who is authorised to authentically record or describe any action taken or any situation seen or witnessed by the public official. An authentic deed issued by a Notary can be accounted and can protect the citizens in carrying out legal actions. The strength of the issued authentic deed serves as perfect evidence for the parties.

The behaviour and actions of a Notary in carrying out their professional position must be in accordance with the code of ethics determined by the Indonesian Notary Association (INA). The Notary has professional ethics, where professional ethics are a series of moral codes specifically set for a Notary in carrying out the profession. These professional ethics become a standard for the Notary in providing a public service. Article 15 paragraph (2) of the Law on the Position of a notary which regulates the special authority of a notary to take certain legal actions, such as :

a) Legitimate signature and decide the definitive date of an private deed by registering it into a special book.
b) Administer under-hand letters by registering them in a special book.
c) Create a legal and/or original copy of under-hand letters in the form of identical copies that contain information explained or described in the concerning letters.
d) Provide attestation of a match between the copy and the original letter.
e) Provide legal counselling on the issuance of an authentic deed.
f) Issue a deed related to the land register.
g) Record the minutes of auction.

Based on the description above, the Notary's authorities that will be determined later depend upon the legislation established by the State institution (the Government, and the House of Representatives) or an authorised State Official. With such limitations, the referred laws and regulations must be in the form of an Act, and not under an Act. At a later date, certain rules may emerge that involve the Notary.

In addition to the authority, as referred to in paragraphs one, and two, the Notary has other authorities regulated in the legislation. The Notary's authority is not only regulated in the Law on the Notary Office, but it is also regulated in other laws and regulations. Those laws and regulations include:

a) The Civil Code
b) Law No. 25 of 1992 concerning Co-operation
c) Law No. 40 of 2007 concerning Limited Companies
d) Law No. 16 of 2001 concerning Foundation juncto Law No. 28 of 2004 on the Amendment of Law No. 16 of 2001 concerning Foundation
e) Law No. 41 of 2004 concerning Grant
f) Law No. 12 of 1995 Juncto Law No. 1 of 2009 concerning Flight

Types and Forms of Deed

Based on the law, there are two types of deeds: the authentic deed, and private deed, which can be explained as follows.

Authentic deed

An authentic deed is a deed made by an official authorised for this purpose by the authorities, which is in accordance to the stipulated provisions, both with, and without assistance from the concerning parties, and that records what is requested to be contained therein by the concerning parties. Authentic deeds mainly contain a description from an official, who explains what they have done, and what they have witnessed.

An authentic deed, according to the provisions of Article 1868 of the Civil Code, is "a deed in the form that determined by the law, made by or in the presence of public officials in charge for it, in a place where the deed made".

An authentic deed is a product issued by a Notary. There are two forms of deed which are issued by a Notary, namely:

a) A deed issued by a Notary, which is also called official deed. It is a deed that is issued by an authorised official, where the official explains what he or she has witnessed, and what he or she did. Thus, the initiative does not come from the person and/or the party whose name is explained in the deed. The special feature of this deed is that it excludes a comparison, and the Notary bears the full responsibility for the issuance of this deed.

b) A deed made in the presence (of a Notary, which is also called a partij-deed. This is a deed that is made in the presence of authorised officials, and the deed is made at the request of the concerning parties. A distinctive feature of this deed is the existence of a comparison part that explains the authority of the parties proposing the Notary to issue the deed (Sjaifurrachman & Adjie, 2011).

Private deed

Private deed is a deed that is drawn up and signed by the parties agreeing to the engagement or between the interested parties only. According to Sudikno Mertokusumo, private deeds are deeds that are deliberately made to prove by the parties without assistance from an official. So it is solely made between interested parties

Concept of Proving

The meaning of 'prove' is to convince the judge to the truth claimed in the arguments or statements presented in a dispute. Thus, it is obvious that the evidence is only needed in litigation procedures before a judge or court. Proving is a system that has structure and is mutually supportive in the interests of finding evidence of truth concerning matters in a dispute resolution. At this stage of proving, the judge will be able to explore a variety of truths, both formal and material, which are presented by the parties in the interest of settling the dispte by finding the construction of a fair resolution that will be manifested in the legal outcome of the court. In other words, the judge's decision (Subekti, 2005).

To assess the strength of evidence, there are several systems or theories of the proving process. They are (Subekti, 2005):

1. The positive of eviden system, which is a proving procedure based solely on evidence that is justified by law or is valid according to the law. This means that if an act has been proven in accordance with the evidence referred to by the law, then the judge's conviction is no longer necessary.
2. The Judge conviction of evident system, which is based only on the judge's conviction. It is a proving process that is based solely on a judge's conviction, and what might be seen to stand out from the result is the attitude of the judge's subjectivity.
3. The Judge logical judgement evident system, which is based on the judge's logical judgment. In this system, the role of evidence has been abolished and the consideration goes only to the rationality of the event.
4. The negative evident system, which is a proving process that is not only based on the judge's conviction, but also on the available evidence. In a negative evidentiary system there are two things that become the condition to prove the charge to the accused, namely:
    a. the existence of legitimate evidence justified by law;
    b. the existence of conviction and/or conscience in the judge, which is based on the presented evidence, thus the judge is convinced to the charge to the defendant.

RESEARCH METHOD

There are two types of legal research, namely normative legal research, and empirical legal research. Normative legal research refers to the concept of law as a rule with its doctrinal–nomological methods that are based on the principles of teaching that govern behaviour. The types of legal philosophy study, pure law study, and American sociological jurisprudence study are included in the area of normative research (Erliyani, 2020).

In the discussion of this legal problem, I will use the type of normative legal research that emphasises normative issues by analysing various regulations related to the legal issues in the discussion. This is further supported by legal doctrines, legal principles, and legal theory. The applied approaches in this study were the statute approach or approach of law, case approach, and conceptual approach. The data used in this study is secondary data by prioritising various regulations as primary legal materials. It is supported by secondary, and tertiary legal materials.

DISCUSSION AND ANALYSIS

The Cause of Degradation to Notarial Deed

The term 'deed' in Dutch is referred to as '*acte*', and in English, it is called 'act' or 'deed'. According to Sudikno Mertokusumo (2006), a deed is a signed letter containing the events that form the basis of rights or engagement, which is made intentionally for an evidentiary purpose. According to Subekti (2005), a deed is different from a letter, where a deed is a form of writing that is purposedly made and signed to serve as evidence of an event. Based on this opinion, it can be concluded that what is meant by deed is:

a) An act (*handeling*) or legal action (*rechtshandeling*).

b) A form of writing which is issued to be used and/or submitted as evidence to a legal action, which is in the format of a letter that is admissible as evidence in proving an event (Situmorang & Sitanggang, 1993).

On the other hand, Irwan Soerodjo (2003) proposed that there are three essential components to fulfil the formal conditions to be met by an authentic deed, namely:

a) It is in the form that is regulated by the law.
b) It is made by or in the presence of a Public Official.
c) It is a deed made by or in the presence of Public Official that is authorised to do so in the place where the deed was made.

From the aforementioned provisions, it can be understood that a notarial deed in the provision in the law on proving is classified as an authentic deed. However, to be an authentic deed, there are

requirements that must be fulfilled by a notarial deed. In other words, the parties must create it in the presence of a Notary or it must be made by the Notary themself, and must obey the provisions regulated in the Law on the Notary Office.

This means that a notarial deed, as an authentic deed, must be made to meet the requirements stipulated in the Law. The formal provisions or conditions in the issuance of a deed can be found in the Law. A notarial deed must be made according to the form outlined in Article 38. It must contain three parts: the beginning of the deed, the body of the deed, and the conclusion of the deed.

The beginning of the deed consists of the title of the deed; the number of the deed; the time, date, month, and year when the deed was made; and the full name and place of the Notary who made or witnessed the making of the deed.

The body of deed consists of:

a) The complete name, place and date of birth, nationality, occupation, position, rank, and the address of the parties or whoever they represent in appearing before the Notary.
b) An explanation concerning the status and the purpose of the parties in appearing before the Notary.
c) The content of the deed that records the purpose of the parties in a detailed explanation.
d) The complete name, place and date of birth, occupation, position, rank, and the address of the witnesses involved in the making process of the deed.

The conclusion component of a deed consists of a description on the recital of the deed, as referred to in article 16 paragraph 1. It also contains a description on the signing or translation of the deed, a description on the identity of the witnesses involved in the deed, and a description of whether or not there was a change, amendment or deletion in the deed, as well as replacement or alteration of the deed.

In the making of a notarial deed and to meet the requirements so that the Notary is considered to be conscientious, the accuracy of the Notary must pay attention to: the age of the parties; the competency of the parties as legal subjects; they must know the parties, recognise or be introduced by the parties to the witnesses; and they must also consider whether the witnesses are competent according to the law. In addition to the provisions of articles 38, and 39, the Article 40 must also be considered by the Notary in making a deed, where the making a deed must be attended by at least two witnesses, and the deed must be recited before being signed.

There is also a condition to be met relating to the accuracy of the Notary in making an authentic deed. In other words, as mentioned in Article 16, the notary must be honest, thorough, and careful.

In addition, Article 16 also outlines several conditions that must be fulfilled by the Notary in making a deed.

The requirements for the deed to be recited before being signed is also regulated in article 16 paragraph 1. It is a formal condition in making a deed. If this procedure is not performed by the Notary, then the deed will be degraded into an under-hand deed. The provision concerning the degradation of a notarial deed is affirmed in article 16 paragraph (9).

However, it should be underlined that in this case, degradation occurs in the quality of the deed in terms of its evidentiary strength in the procedure of settling a civil case. It does not mean that the name of the deed has changed from being made as a notary deed into an under-hand deed. The name or status of the deed is legally fixed as a notarial deed, however, the strength in proving the events contained in it is no longer perfect, as in the strength of an authentic deed. It only bears the power of proving as an under-hand deed.

Through evidentiary strength, it is also intended that it will be required when the deed is used as one of the forms of evidence in the examination of a civil case in court.

Juridical Implications When a Notarial Deed is Degraded

A notarial deed, as an authentic deed, is mentioned in the Law on the Notary Office. Thus, it means that a notarial deed has an evidentiary value as an authentic deed, which can be differentiated into several types consisting of formal, external, and material evidentiary value. In the provisions of the law on proving, authentic deeds have a strong and perfect evidentiary strength because according to the law on proving, an authentic deed has three kinds of evidentiary value: external, formal, and material.
Relating to the strength of an authentic deed as evidence, in this case, there are three aspects that must be considered when the deed is made. These aspects are related to the evidentiary value, namely (Adjie, 2014):

External Value

The external value of a notarial deed is the value of the deed itself to prove its validity as an authentic deed. If viewed from the outside (external) as an authentic deed, and in accordance with predetermined legal rules regarding the terms of an authentic deed, then the deed is valid as an authentic deed until proven otherwise, meaning that until someone proves that the deed is not an authentic deed outwardly. In this case, the burden of proving rests with those who deny the authenticity of the notarial deed. There are some parameters to determine the notary deed as an authentic deed, i.e. the signature of the concerned Notary; both in the minutes, and the copy; and throughly from the beginning of the deed (starting from the title) until the end of the deed.

Formal Value

A notarial deed must provide certainty that the event and facts mentioned in the deed are actually carried out by the Notary or explained by the parties who are present at the time, as stated in the deed in accordance with the procedures that have been determined in the making of the deed. It acts formally to prove the truth and certainty regarding the day, date, month, year, and time when the parties met the Notary; who the parties are; the initials and signatures of the parties, the witnesses, and the notary; to prove what was seen, witnessed, and heard by the Notary (on the official deed and/or minutes); and record the statement or explanation given by the parties (on the parties' deed).

Material Value

The certainty on the material value of a deed is very important, as that which is recorded in the deed serves as valid evidence for the parties who ask for the issuance of the deed or those who enjoy the rights and apply to the public, unless there is evidence to the contrary (*tegenbewijs*). The information or statement stated/contained in official deed (or minutes) or the statement that the parties claim and/or mention in the presence of a Notary and the parties must be considered to be true.

The Notary's Liability When Degradation to the Deed Occurs

As an official who bears great responsibility in upholding the law in order to protect the public from various legal problems, it is obvious that a Notary is expected to show a dedicative performance to support their noble position (Soegondo, 1991).

The article 44 paragraph (5) stated that if a Notary violates the provisions concerning the making of an authentic deed, then the evidentiary value of the notarial deed is degraded and it becomes an under-hand deed. In this case, the Notary must be responsible for that problem, so he must compensate if the deed owner feels disadvantaged and sues the Notary in a civil law procedure. This means that the problem of a notarial deed degradation will cause harm to the deed owner or other parties associated with the deed. In addition, article 16 paragraph (9) also mentions the provisions regarding the degradation of a notarial deed. It is obvious that this problem can also be a reason for the party who becomes disadvantaged due to degradation of the notarial deed to sue for compensation from the Notary. If the Notary is proven to be guilty in the issuance of the deed, for instance there is negligence or there is an indication of embezzlement or fraud or falsification of the contents of the deed, then the Notary will be held liable. If the Notary's act is classified as a crime, either intentionally or because of negligence or because of conspiracy, then the Notary can be charged for criminal responsibility.

CONCLUSION

Based on the explanation in the discussion, the following conclusions can be offered:

1. The degradation of a notarial deed can occur if the process of making a notarial deed is not exhaustive and does not fulfil the formal and material requirements of a deed, as stated in the provisions of the Law on the Notary Office.
2. From the positions of a notarial deed as an authentic deed, and in the law on proving, the notarial deed document occupies the position of a strong form of evidence because it has a perfect and binding evidentiary value. If a notarial deed is degraded, this means that there is a decline of degree in the evidence's value. Subsequently, the evidentiary value falls and becomes equal to the evidentiary value possessed by an under-hand deed. In this case, it will cause implications to the process of proving in a civil law procedure. Notarial deeds that have been degraded will become weak forms of evidence in the process of proving in a civil law case.
3. In regard to the Notary's liability in the instance of degradation to a notarial deed, the Notary is burdened with legal responsibilities, which covers civil, criminal, and State administrative liabilities. In accordance with the form and type of the Notary's mistake, for instance if the mistake is in the area of civil law, then the Notary will be charged for civil liability. This is outlined in the provisions of the Law on the Notary Office. If the Notary is proven to have committed negligence or behaved intentionally in a criminal act related to the making of the deed, the Notary shall be held liable in a criminal law procedure. However, to charge a Notary for liability, in this case, the proving effort must be made in advance to prove the occurrence of the act undertaken by the Notary that resulted in the deed issued being degraded, and the cancellation of the notarial deed must occur with a court decision.

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