

Electronic Notary Deed: A Legal Certainty Study Based on the Law of Notarial, the Law of the Limited Liability Company and the Law of Electronic Transaction and Information

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The problem right now with regard to an authentic deed is the existence of a notary obligation which is affirmed in Article 16 Paragraph (1) letters c and m Notarial Law states. Notary has obligations, including the obligation to attach letters and documents and fingerprints of parties on the Minutes of Deed. In addition, the Notary also has the obligation to read the Deed before the parties, attended by at least 2 (two) witnesses, or 4 (four) special witnesses for the making of a will under the hand, and signed at the same time by the parties, witnesses, and Notary. The substance of these articles becomes contradictory if related to Article 77 Paragraph (1) concerning Limited Liability Company Law; which confirms the General Meeting of Shareholders can also be held through teleconferencing media, video conferences, or other electronic media facilities that allow all GMS participants to see and hear each other directly and participate in meetings. In the explanation of Article 77 Paragraph (4) of the Limited Liability Company Law it is explained that what is meant by being approved and signed is to be approved and signed physically or electronically. On the other hand, the Notarial Deed cannot be declared as an Electronic Document so that it cannot be used as legal evidence as intended in Article 5 Paragraph (1) of the Information and Electronic Transaction Law. Based on legal issues in the three Laws mentioned above, namely the Law of Notary Position, the Limited Company Law and the Electronic Information and Transaction Law, the author will conduct an analysis of legal certainty and legal benefits regarding the Notary Deed electronically. The

approach used in this paper is the normative juridical approach. Based on the Civil Law, the Notarial Law, and the Electronic Transaction and Information Law, making electronic deeds is still difficult or impossible to implement because there is no legal basis that can provide clear legal certainty. A more concrete and clear rule regarding the position of the electronic notary deed, which includes the process of making the deed, is the position of the deed as evidence and the strength of proof in the judicial process.

Key words: *Legal Certainty, Electronic Notary Deed, Law.*

Background

Notary profession has long been known in Indonesia even long before Indonesia's independence, namely during the Dutch colonial rule. Initially, the existence of a Notary was a necessity of the European people in Indonesia in an effort to create an authentic deed, especially in the field of trade. Nowadays the Notary profession is increasingly popular in the community. Its existence is increasingly needed in making authentic written evidence from a legal act carried out by the community. So it is not uncommon for various laws and regulations to require certain legal actions to be made in an authentic deed. Notary and deed products can be interpreted as an effort by the state to create certainty and legal protection for community members (Hartanti dan Nisya, 2013).

The importance of the Notary profession lies in its main task as an authentic deed maker. Article 1870 of the Civil Code states that an authentic deed provides absolute proof for the parties making it. The notary is given the authority by law to create this absolute proof (Hartanti dan Nisya, 2013). Based on Article 1868 of the Civil Code it states that what is meant by an authentic deed is a deed in the form determined by the law made by or in the presence of the public official in charge of it in the place where the deed was made. The authentic deed is usually made in the form of an agreement, relating to the agreement made by members of the community, it can be understood that the existence of the Notary profession is a public official in charge of making authentic deeds as stated in article 1868 of the Civil Code (Nico, 2003), (Agus Santoso, 2012).

The problem right now with regard to an authentic deed is the existence of a notary obligation which is affirmed in Article 16 Paragraph (1) letters c and m of Law Number 30 of 2004 concerning Notarial Law. Law of the Republic of Indonesia Number 2 of 2014 concerning Amendment to Law Number 30 of 2004 concerning Notarial Law (hereinafter referred to as the Notarial Law) states, Notary has obligations, including the obligation to attach letters and documents and fingerprints of parties on the Minutes of Deed. In addition, the Notary also has the obligation to read the Deed before the parties, attended by at least 2 (two) witnesses,

or 4 (four) special witnesses for the making of a will under the hand, and signed at the same time by the parties, witnesses, and Notary.

Based on this Article, it is clear that the Notarial Law emphasises the presence of the parties and the notary's obligation to read the deed. Article 16 Paragraph 11 of the Notarial Law confirms that violations of Article 16 Paragraph (1) letter c concerning the attachment of letters, documents and fingerprints to the Minutes of Deed, may result in the Notary being subject to sanctions in the form of written violations, temporary terminations, respectable dismissals, or dismissal with no respect. While Article 16 Paragraph 9 of the Notarial Law confirms that if there is a violation of Article 16 Paragraph (1) letter m of the Notarial Law, the deed concerned only has the power of proof as a deed under the hand.

The substance of these articles becomes contradictory if related to Article 77 Paragraph (1) of Law Number 40 Year 2007 concerning Limited Liability Companies (hereinafter referred to as the Limited Liability Company Law), which confirms the General Meeting of Shareholders can also be held through teleconferencing media, video conferences, or other electronic media facilities that allow all GMS participants to see and hear each other directly and participate in meetings. In the explanation of Article 77 Paragraph (4) of the Limited Liability Company Law it is explained that what is meant by being approved and signed is to be approved and signed physically or electronically (Habib, 2014).

The substance of the two articles is regulated in different laws: the implementation of the duties of Notary is regulated in the Law of Notary Position and the establishment of a limited liability company is regulated in a Limited Liability Company Law; which is one of the articles in conducting a General Meeting of Shareholders (GMS) that has eliminated the provisions regarding Notary obligations as affirmed in Article 16 Paragraph (1) letters c and m of the Notarial Law. The two contradictory arrangements can corner the Notary when the GMS deed is problematic or as evidence in the judicial process, in the sense that if there is a problem with the GMS the results regarding the procedure for making a Notarial Deed, whether it is subject to Article 16 Paragraph (1) of the Notarial Law or to Article 77 Paragraph (1) Limited Liability Company Law (Habib, 2014).

This problem also missed with the enactment of Law No. 11 of 2008 on Information and Electronic Transactions (hereinafter in this article will be referred to as the Law on Information and Electronic Transactions). Article 5 Paragraph (1) of the Information and Electronic Transaction Law states that Electronic Information and / or electronic Documents and / or printouts are valid legal evidence. That is, Electronic Information and / or Electronic Documents and / or printouts thereof is an extension of valid evidence that applies in Indonesian Procedural Law. However, Article 5 Paragraph (4) letters a and b of the Information and Electronic Transaction Law are affirmed as follows:

- “(4) Provisions concerning Electronic Information and / or electronic documents as referred to in Paragraph (1) shall not apply to:
- a. Letters which according to the law must be made in the form of a written deed; and
 - b. Letters along with the documents which according to the Law must be made in the form of a notarial deed or deed made by the official of the deed maker.”

Based on the above article, it is clear that the Notarial Deed cannot be declared as an Electronic Document so that it cannot be used as legal evidence as intended in Article 5 Paragraph (1) of the Information and Electronic Transaction Law. This certainly does not answer the problems faced in Article 77 Paragraph (1) of the Limited Liability Company Law.

The presence of the Information and Electronic Transaction Law has made the Indonesian Notary world naive. Whereas the storage of documents related to the world of Notaries besides being made on paper and in order to last a long time can also be made electronically with certain materials, for example Minutes Deed in addition to being made on paper, can also be scanned for later storing as Electronic Documents, someday if needed can be opened and can be copied as usual. Such Minutes storage can be done by Notary as a form of security (Habib, 2014). The Electronic Information and Transaction Law actually limits the authority of Notary in making electronic deeds.

Based on legal issues in the three Laws mentioned above, namely the Law of Notary Position, the Limited Company Law and the Electronic Information and Transaction Law, the researcher will conduct an analysis of legal certainty and legal benefits regarding the Notary Deed electronically.

Research Method

The approach used in this paper is the normative juridical approach. This approach is to examine theories, concepts and principles of law as well as legislation (Zainuddin, 2010). This writing is analytical descriptive, which is a form of research that aims to describe the applicable laws and regulations, associated with legal theories (Suharmisi, 1992). This writing uses secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials. All legal materials obtained will be concluded by analysing, interpreting and drawing conclusions according to the problem and put it in the form of sentences (Mardalis, 2010).

Literature Review

Review of Notary Deed

Deed is an inscription made on purpose to be used as evidence of an event and signed by the author. What is meant by the signing is to put the name of the signer – so the initials (abbreviation signatures) are deemed inadequate (Sudikno, 1979). Deed can be divided into two types, namely authentic deed and deed under the hand. Article 1868 of the Civil Code states that an authentic deed is a deed made by or before an authorised official for such purpose according to the law (Riduan, 2000).

In an authentic deed there are three types of proof power. First, it has the power of formal proof, which proves between the parties that they have explained what is written in the deed. Second, it has material proof, which proves between the parties that what they explained, then wrote on the deed, actually happened. Third, it has the power of proof of existing, which proves not only between the parties concerned but also against the third party, that on the date written in the deed, both parties have approached the public official and explained what is written in the deed (Subekti, 1977).

Article 1 Number 1 of the Notarial Law confirms that a Notary Public is authorised to make an authentic deed and has other authorities as referred to in this Law or based on other Laws. This Notary's authority is followed up in Article 15 Paragraph (1), which includes the Notary having the authority to make an authentic deed regarding all actions, agreements and stipulations required by regulations. Article 15 Paragraph (3) of the Law of Notary Position states that the Notary has other authorities regulated in statutory regulations.

Explanation of Article 1 number 1 and Article 15 Paragraph (1) of the Law on Notary Position is clearly stated. Elucidation of Article 15 Paragraph (3) of the Law of Notary Position states that what is meant by "other authorities regulated in legislation" includes the authority to certify transactions conducted electronically (cyber notary), make a deed of endowment pledge, and a mortgage airplane (Habib, 2015).

Review of Legal Certainty

According to Peter Mahmud Marzuki, legal certainty contains two meanings, namely the first existence of general rules that make individuals know what actions may or may not be done, and secondly in the form of legal security for individuals from government abuse because of the existence of general legal rules that individuals can know what may be imposed or carried out by the State to the individual (Peter, 2008).

According to Radbruch, a legal sense can be divided into three aspects which all three were required to arrive at an adequate legal sense. The first aspect is justice in the narrow sense, this justice means equal rights for all people before the judiciary. The second aspect is the goal of justice or finality, this aspect determines the content of the law, because the content of the law is in accordance with the objectives to be achieved. The third aspect is legal certainty or legality, this aspect guarantees that the law can function as a rule (Heo, 1982).

Legal certainty requires the creation of general regulations or generally accepted methods, so as to create a safe and peaceful atmosphere in society. Legal certainty can be achieved in certain situations, for example (Jan, 2003):

- a. The availability of legal rules are clear, consistent and easy to obtain;
- b. The ruling agencies (government) apply these legal rules consistently and are subject to and obedient;
- c. Citizens in principle adjust their behavior towards these rules;
- d. Independent and impartial judges apply these rules consistently whenever they resolve disputes.
- e. Concrete judicial decisions are implemented.

Results Analysis and Discussion

Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia confirms that Indonesia is a state of law. In maintaining legal certainty, the role of government and the court is very important. The government must not issue implementing regulations that are not regulated by law or contrary to the law (Peter, 2008). One profession that plays a role in providing legal certainty is the Notary. Notary function is to give certainty and continuity of civil law for the entire business community. Notary must be reliable, unbiased, able to keep a secret, and give assurances or evidence (Hartanti dan Nisya, 2013).

Notary and actual products can be interpreted as an effort by the state to create legal certainty and protection for community members. Considering that in the area of private / civil law, the state places Notary as an authorised official in the matter of making an authentic deed, in the interests of proof. Positive law in Indonesia has regulated the position of notary in a law (Hartanti dan Nisya, 2013).

Legal issues are, on the one hand, Notarial Law assert the authority and obligation of Notary, including Article 16 Paragraph (1) c and m stating Notary has the obligation to attach a letter and documents and fingerprints of parties on the Deed Minutes. The notary also has the obligation to read the Deed before the parties, attended by at least 2 (two) witnesses, or 4 (four) special witnesses for the making of a will, under the hand, and signed at the same time by the parties, witnesses, and notaries.

On the other hand Article 77 Paragraph (1) of the Limited Liability Company Law confirms that the General Meeting of Shareholders can also be conducted through teleconferencing media, video conferences, or other electronic media facilities that allow all GMS participants to see and hear each other directly and participate in meetings. In the explanation of Article 77 Paragraph (4) of the Limited Liability Company Law it is explained that what is meant by being approved and signed is to be approved and signed physically or electronically.

The disharmony of these two laws is supplemented by the Information and Electronic Transaction Law which also states that a Notary Deed cannot be categorised as an Electronic Document based on Article 5 Paragraph (1) and Paragraph (4) of the Electronic Information and Transaction Law. It becomes a problem when the Notary Public makes a GMS Deed, and then if the GMS Deed has problems or as evidence in the judicial process, in the sense that if there is a problem with the GMS results regarding the procedure for making a Notarial Deed, it will be subject to which law will be used.

The disharmony of these laws and regulations can lead to different interpretations in their implementation, leading to legal uncertainty, legislation that is not efficiently implemented, and the occurrence of legal dysfunction, meaning that the law cannot function to provide guidelines for behaving to the public <http://ditjenpp.kemenkumham.go.id>. To analyse the disharmony of laws and regulations, it can be analysed using legal principles. For the problem in this study, considering the Notarial Law, Limited Liability Company Law and Information and Electronic Transaction Law are in the same level of statutory regulation, namely the law, the writer will analyse using *lex specialis derogate principle legi generali* and based on the principle of *lex posterior derogat priori legi*.

Based on the principle of *lex posterior derogat legi priori*, the new rule of law can override the older rule of law, so according to this principle if there are two regulations in the same position conflicting in regulating the same object, then the latest rule is used. The Notarial Law and the Limited Liability Company Law are in the same position, but in this matter, Article 16 Paragraph (1) letter c and m of the Notarial Law and Article 77 Paragraph (1) of the Limited Liability Company Law. Article 77 Paragraph (4) of Limited Liability Company Law cannot be said to clearly regulate the same object, even if it has a connection. Based on that, this principle is not felt to be able to be used to answer the problem of the disharmony of this law.

Based on the *lex specialis derogate legi generali* principle, this principle can be used to overcome conflicts between laws that have a broader substance in regulation against laws that have a narrower substance. Structural analysis of this principle shows that the hierarchy of laws (*lex*) must be parallel. If it is not parallel, then this principle cannot be used

<https://business-law.binus.ac.id/>. If the provisions of Article 16 Paragraph (1) letters c and m of the Notarial Law are constructed as *lex generalists*, then Article 77 Paragraph (1) of the Limited Liability Company Law. Article 77 Paragraph (4) of the Limited Liability Company Law as *lex specialist*, it is necessary to remember that the provisions of Article 16 Paragraph (1) letters c and m of the Notarial Law are provisions regarding obligations followed by threats of sanctions and legal consequences if the obligations are violated. Violation of Article 16 Paragraph (1) letter c concerning the attachment of letters, documents and fingerprints on the Minutes of Deed, may result in a Notary being subjected to sanctions in the form of written violations, temporary dismissals, dismissals with respect, or dismissals with disrespect. Violation of Article 16 Paragraph 9 of the Notarial Law will result in the deed concerned only having the power of proof as a deed under the hand.

Based on the description, it means that the provisions of Article 16 Paragraph (1) letters c and m of the Notarial Law are legal provisions that are coercive or known as *dwingend recht*. Legal force (*dwingend recht*) is a legal provision against the parties concerned that can not deviate from it, cannot determine otherwise and must be subject to these provisions. Criminal law is usually coercive, whereas civil law is usually regulating although there are also provisions of civil law that are coercive. Forcing laws are legal provisions or provisions that contain strict sanctions if the legal provisions are violated. That way everyone is forced to comply with the provisions or provisions of the law. By legal construction, Article 16 Paragraph (1) letters c and m of the Notarial Law are *lex generalists*, then Article 77 Paragraph (1). Elucidation of Article 77 Paragraph (4) of the Limited Liability Company Law as *lex specialist*, of course the provisions of sanctions due to violations of the obligation become invalid.

The Deed of General Meeting of Shareholders is the implementation of Article 77 Paragraph (1). Elucidation of Article 77 Paragraph (4) of the Law on Limited Liability Companies will be made in the form of copies that have often been made by Notaries, which need to be given a clear position, namely regarding the procedures or procedures for the electronic GMS, whether it can be used as evidence in the Court. In the latest developments, in certain cases, evidence held electronically can be accepted as valid evidence in a court hearing (Habib, 2014). However, regarding the strength of the evidence there is no clear legal certainty because there are no rules stating that it also acts as a perfect strength proof; because the Electronic Information and Transaction Law has provided a limitation that a notarial deed cannot be defined as an Electronic Document. If it can be declared as an Electronic Document, Article 5 Paragraph (1) of the Information and Electronic Transaction Law has provided confirmation that Electronic Information and / or Electronic Documents and / or printouts are valid legal evidence, and this is an extension of legal evidence that applies in Indonesian procedural law.

Another thing that also needs to be considered to implement Article 77 Paragraph (1) is elucidation of Article 77 Paragraph (4) of Limited Liability Company Law concerning the beginning of the deed and the end of the notarial deed. The substance of Article 38 of the Law of Notary Position for the parties, witnesses and Notaries are in the same place, at the same time and physically together at that time and place. In this connection it is necessary to make explicit mention of the General Meeting of Shareholders held through electronic media (Habib, 2014).

In subsequent developments the use of electronic media is not only for the provisions of Article 77 Paragraph (1). Elucidation of Article 77 Paragraph (4) of the Limited Liability Company Law is also for other legal actions, because the important thing is that there is a legal basis for implementing it (Habib, 2014). The existence of strict provisions will be the basis for legal certainty and this is in accordance with the view that legal certainty can be achieved if the availability is of clear, consistent and easily obtained legal rules (Jan, 2003).

Conclusion

Based on the Civil Law, the Notarial Law, and the Electronic Transaction and Information Law, making electronic deeds is still difficult or impossible to implement because there is no legal basis that can provide clear legal certainty. However, opportunities for electronic deed remain open with the regulation of electronic deed making. Article 77 Paragraph (1) elucidation of Article 77 Paragraph (4) of the Limited Liability Company Law is a legal sign which provides an opportunity for Notary to be able to make an electronic deed; even though this opportunity is limited by the Information and Electronic Transaction Law. A more concrete and clear rule regarding the position of the electronic notary deed, which includes the process of making the deed, is the position of the deed as evidence of the strength of proof in the judicial process.

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