

## Juridical Study on the Legal Certainty of Notary Electronic Deeds in the Covid-19 Pandemic

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**Abstract.** *The purpose of this study was to find out that guarantees of protection of property rights are realized through the making of an authentic deed. The important position of an authentic deed is based on the function of the authentic deed. An authentic deed has 2 (two) important functions, namely the deed as a formal function which means that a legal act will be more complete if a deed is made. The function of the instrument of evidence is the deed as a means of proof in which the deed is made by the parties bound by an agreement for the purpose of proof. The method used in this writing is the normative method. Normative Law Research is legal research conducted by examining literature or secondary data. The conclusion of this study explains that the Terms are set out in Article 28 Regelemt op het Notaris-ambt in Indonesia (Ordinance 11 January 1860) and Article 16 paragraph (1) letter m of Act No. 30 of 2004 Jo. Act No. 2 of 2014 Concerning the Notary Office. The entry of Covid-19 virus in the country is a matter of its own for the implementation of these conditions. Therefore the legal certainty of the validity of the Electronic Deed must be regulated in more detail and have binding legal force.*

*Keywords: Certainty; Deed; Electronics; Pandemic.*

### 1. INTRODUCTION

Indonesia was born as a state of law, this view can be explicitly found in Article 1 paragraph (3) of the Constitution of the Republic of Indonesia in 1945. The concept of the State of Indonesia as a state of law then gives the consequence that the actions of every community are governed by applicable law .<sup>1</sup>

Economic life in its development can not give up the important position of the law, the importance of the position of the law because the law is able to protect the rights of all

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<sup>1</sup>The legal binding in all the actions of the society is basically a manifestation of the concept of restriction of power that is too excessive in the current state system. This concept was born as a form of appreciation and protection for human rights and democracy in the life of the nation and state. See: Jeffry Alexander Ch. Likadja, (2015), Memaknai "Hukum Negara (*Law Thought State*)" Dalam Bingkai "Negara Hukum (*Rechtstaat*)", *Hasasnuddin Law Review*, Vol. 1, No. 1, April 2015, p. 76.

parties in economic activities today. Legal protection needed in economic development activities can be seen in terms of property rights protection.

The title to an object is explicitly guaranteed in Article 28G paragraph (1) of the State Law of the Republic of Indonesia of 1945. While the title to land is guaranteed to have legal protection can be seen in Article 16 of Act No. 5 of 1960 on the Constitution The Agrarian Principles of the President of the Republic of Indonesia which reads:

- (1) The rights to land as referred to in article 4 paragraph (1) are:
  - a. property of,
  - b. employment rights,
  - c. building-use rights,
  - d. usage rights,
  - e. rental rights,
  - f. land clearing,
  - g. the right to harvest forest products,
  - h. other rights not included in the above rights to be determined by law as well as rights of a temporary nature as mentioned in article 53.
- (2) The rights over water and space as referred to in article 4 paragraph (3) are:
  - a. water-use rights,
  - b. custody and fishing rights,
  - c. space use rights.

The guarantee of the protection of property rights is realized through the making of an authentic deed<sup>2</sup>. The important position of an authentic deed is based on the function of the authentic deed. An authentic deed has 2 (two) important functions, namely the deed as a formal function which means that a legal act will be more complete if a deed is made. The function of the instrument of evidence is the deed as a means of proof where the deed is made by the parties bound by an agreement for the purpose of proof in the future.<sup>3</sup>

The advent of the 4.0 era of industrialization and the advancement of information and communication technology in its development has brought fundamental changes in the lives of people around the world, not least in Indonesia.<sup>4</sup>These changes have fundamentally changed the culture of society that used to be done in the traditional way through the use of tools that are not yet digital -based, now it has changed, all activities of community life have been done half in cyberspace. One of the evidence of

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<sup>2</sup> Ong Argo Victoria & Myska. (2021). Doctor's Contributions in Transportation Monitoring During COVID-19 Pandemic. *KnE Social Sciences*, Dubai-Uni Emirates Arab (UEA), 5(1), 598–618. <https://doi.org/10.18502/kss.v5i1.8317>

<sup>3</sup>Sudikno Mertokusumo, (1999), *Mengenal Hukum Suatu Pengantar*, Liberty, Yogyakarta, p. 121-122.

<sup>4</sup>Edi Setiadi, (2002), Pengaruh Globalisasi Terhadap Subtansi & Penegakan Hukum, *Syjar Hukum*, Volume XVIII No. 4, 2002, p. 446.

this can be seen in the bureaucracy of deed making through the means of advancement of information and communication technology.<sup>5</sup>

Authentic acts that were previously made manually, this dwasa has metamorphosed into an electronic act which in every stage of manufacturing until its enactment has involved a lot of digital technology.<sup>6</sup>

Existing progress then created a new legal issue, namely the issue of the validity of an authentic electronic deed made by a Notary. The validity of one of the deeds must first be read by a Notary in front of two witnesses and the witnesses or parties who want to make an authentic deed. This is regulated in Article 28 of the *Regelemt op het Notaris-ambt* in Indonesia (Ordinance 11 January 1860). This provision is also later accommodated in Article 16 paragraph (1) letter m of Act No. 30 of 2004 Jo. Act No. 2 of 2014 Concerning the Notary Office.<sup>7</sup>

The above provisions require the presence of the Notary as the general official<sup>8</sup> of the deed maker and the parties who want to make an authentic deed. The making of an electronic authentic deed is often not physically attended by the parties who want to make the authentic deed. The absence of the presenter in the making of the authentic deed when referring to the two Articles above will clearly result in the authentic deed being questioned.<sup>9</sup>This becomes more complicated because the subject of authentic deeds made by Notaries has not been regulated either in Act No. 19 of 2016 on Information and Electronic Transactions and in Act No. 30 of 2004 Jo. Act No. 2 of 2014 Concerning the Notary Office. Such a situation clearly results in the issue of non-compliance in terms of all issues related to the electronic deed of the Notary, both in terms of resolving legal issues of the Notary if later the electronic deed of the Notary contains various problems in terms of protection of parties who guarantee protection of rights through the electronic deed of the Notary. Therefore, it is necessary to study more in relation to the urgency of setting up electronic Notary deeds in the current digital era.

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<sup>5</sup>Yudha Prio Kuspratomo, (2019), Lailatul Nur Hasanah, & Sri Endah Wahyuningsih, Making Implementation Deed Electronically Based on Law of Notary, *Jurnal Akta*, Volume 6 Issue 4, December 2019, p. 693-695.

<sup>6</sup>Adrian Raka Wiranata, (2021), Analisis Pembuatan Akta Notaris Secara Elektronik, *Al Qodiri: Jurnal Pendidikan, Sosial & Keagamaan* Terakreditasi Kemenristekdikti No. 85/M/KPT/2020 Vol 19 No 1 April 2021, p. 413-416.

<sup>7</sup>Kadek Setiadewi & I Made Hendra Wijaya, (2020), Legalitas Akta Notaris Berbasis Cyber Notary Sebagai Akta Otentik, *Jurnal Komunikasi Hukum (JKH) Universitas Pendidikan Ganesha*, Vol. 6 No 1, February 2020, p. 128-129.

<sup>8</sup> Deen, Thaufiq., Ong Argo Victoria & Sumain. (2018). *Public Notary Services In Malaysia*. *JURNAL AKTA*: Vol. 5, No. 4, 1017-1026. Retrieved from <http://jurnal.unissula.ac.id/index.php/akta/article/view/4135> and Ong Argo Victoria, Ade Riusma Ariyana, Devina Arifani. (2020). Code of Ethics and Position of Notary in Indonesia. *Sultan Agung Notary Law Review* 2 (4), 397-407, <http://lppm-unissula.com/jurnal.unissula.ac.id/index.php/SANLaR/article/view/13536>

<sup>9</sup> Lyta Berthalina Sihombing, (2020), Keabsahan Tanda Tangan Elektronik Dalam Akta Notaris, *Jurnal Education and development*, Institut Pendidikan Tapanuli Selatan, Vol.8 No.1 February 2020, p. 135-137.

## 2. RESEARCH METHOD

The method used in this writing is the normative method. Normative Law Research is legal research conducted by examining literature or secondary data.<sup>10</sup>

## 3. RESULTS AND DISCUSSION

### 3.1. Existence of Electronic Notary Deed in National Land Law

Related to the meaning of an authentic act is set out in Article 1868 of the Civil Code. While the meaning of a Notary deed is explained in Article 1 Paragraph (7) of Act No. 30 of 2004 Jo. Act No. 2 of 2014 Concerning the Notary Office. Article 1868 of the Civil Code states that "an authentic deed is a deed made in the form prescribed by law by or in the presence of a public official authorized for it at the place where the deed was made."

Article 1 Paragraph (7) of Act No. 30 of 2004 Jo. Act No. 2 of 2014 on the Notary Office states that "A Notary Deed hereinafter referred to as a Deed is an authentic deed made by or in the presence of a Notary in accordance with the form and procedures prescribed in this Law."

The making of a Notary deed in its development requires the party who wants to make the deed to be present in the reading of the deed by the Notary.<sup>11</sup> This is in accordance with Article 28 of the *Regelemt op het Notaris-ambt* in Indonesia (Ordinance 11 January 1860) which states that:

The notary must read the deed in front of witnesses and witnesses. If a person present or more does not understand the language used in the deed, then the deed will be translated by a notary, and if the notary is unable to do so, it will be translated by a translator. Immediately thereafter, the deed must be signed by all attendees, unless it is determined that they are unable to sign or are barred from doing so; in this case, their evidence and the reasons for the obstruction should be explicitly mentioned in the deed. (Nos. 23, 25, 29; KUHPerd. 932, 939.) In the event that a person or more has an interest in a certain part or participates in only a part of the deed, then only that part is read before him, to the extent necessary to be translated and signed by him or by them and explicitly state the reading, interpretation and signing of this! in that section. In addition, witnesses must sign the deed, except those mentioned in article 24; also by a notary, and in the case referred to in paragraph 2 of this article, by an interpreter. In the event of a violation of one or more of the provisions of this article, the deed shall only have force as a letter under hand, if signed by the attendees. (KUHPerd. 1869, 1874 etc.) The reading, translation and signing must be explicitly mentioned in the closing section, with the threat of a fine of 25 guilders.

A similar idea is also recognized by Article 16 paragraph (1) letter m of Act No. 30 of 2004 Jo. Act No. 2 of 2014 on the Notary Office which states:

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<sup>10</sup>Soerjono Soekanto & Sri Mamudji, (2003), *Penelitian Hukum Normatif : Suatu Tinjauan Singkat*, PT. Raja Grafindo Persada, Jakarta, p. 13.

<sup>11</sup>Ibid.

In carrying out his office, the Notary must read the Deed in front of an audience in the presence of at least 2 (two) witnesses, or 4 (four) special witnesses for the making of the Deed will under hand, and signed at the same time by witnesses, witnesses, and Notaries.

The various provisions above indicate the necessity of the presence of Notaries, parties and witnesses. The non-arrangement of provisions regarding teleconference as a new alternative regarding the presence of Notaries,<sup>12</sup> the parties and also the witnesses in the making of an authentic deed have resulted in a conflict related to the arrangement of the presence of notaries, the parties and also the witnesses in the making of an authentic deed.

### **3.2. The Urgency of Regulating Notary Electronic Deeds in the Era of the Covid-19 Pandemic and Its Legal Certainty**

Since the spread of Covid-19 cases in Indonesia, the country has implemented various policies by the central and local governments related to solutions in dealing with the Covid-19 virus. This is shown, among others, by the call for physical distancing, social distancing and the implementation of Large-Scale Social Restrictions (called PSBB) to suppress the spread of this virus movement.<sup>13</sup>

Based on the provisions related to the restriction of community activities to prevent Covid-19 required by the government, the policies that have been implemented are the beginning of changes in various patterns of interaction and social life of communities in various regions in Indonesia where Covid-19 spread.

The enactment of the physical distancing rule in PSBB also provides restrictions and even temporary suspension of the implementation of duties and positions of public officials, namely, Notaries and PPAT. On the other hand, the existence of such a policy more or less gives rise to various legal uncertainties and empty legal space for legal action that should be taken by interested parties.<sup>14</sup>

Such a situation clearly presents its own questions, including in terms of the validity of the Notary's authentic deed. Provisions of legislation governing the making of authentic deeds both contained in the Law of the Republic of Indonesia Number 2 of 2014 on Amendments to Act No. 30 of 2004 on the Notary Office and Government Regulation of the Republic of Indonesia Number 24 of 2016 on Changes to Government Regulations Number 37 of 1998 on the Regulation of the Department of the Land Deed Making Office explicitly puts forward the condition of face to face and the presence of the parties who wish with the notary.<sup>15</sup>

Such provisions can be seen in Article 1868 *Burgelijk Wetboek* (hereinafter referred to as BW) or the Book of Civil Law which states that a deed is called an authentic deed if

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<sup>12</sup>Habib Adjie, (2017), Konsep Notaris Mayantara Menghadapi Tantangan Persaingan Global, *Jurnal Hukum Respublica*, Vol. 16, No. 2, 2017, p. 202-205.

<sup>13</sup><https://www.kemenkopmk.go.id/pembatasan-sosial-berskala-besar>, Accessed July 12, 2021.

<sup>14</sup><https://jateng.sindonews.com/berita/24784/1/dilarangberhadapan-stop-akta-notarisppat>, Dilarang berhadapan, Stop Akta Notaris/PPAT, accessed on 12 July 2021.

<sup>15</sup> Loc, cit.

it meets the requirements, that is, the form of deed specified in legislation, made by or before a public official. the authority and the place of making the deed is the area of authority of the official. The physical presence of the parties before a notary or an official deed maker is a necessity if faced with government provisions on PSBB.

The government's efforts in overcoming this Corona then developed into the Enforcement of Restrictions on Community Activities or PPKM. The current implementation of PPKM has reached level 4 (four). This is in accordance with the Instruction of the Minister of Home Affairs Number 27 of 2021 on the Enforcement of Restrictions on Community Activities Level 2, Level 3, and Level 4 in Java and Bali.<sup>16</sup> The implementation of PPKM also gives an impression in the form of ineffectiveness and intense interaction between the parties with the Notary in terms of making the deed. So it is clear that the regulation of electronic Notary deeds is specifically regulated. Given the various operational requirements of civil law in this country only related to the field of electronic transactions alone. Such a situation clearly leads to legal uncertainty in the making of Notarial deeds in the current pandemic, if using the theory of Hans Nawiasky, the issue of legal disharmonization can be seen with the disharmony between the mandate of Article 28H of the Constitution of the Republic of Indonesia 1945 *asstaatsgrundgesetz*<sup>17</sup> with implementation Article 28 Regulation on the Notary Service<sup>18</sup> in Indonesia (Ordinance 11 January 1860) and Article 16 paragraph (1) letter m of Act No. 30 of 2004 Jo. Act No. 2 of 2014 on the Office of Notaries in the current pandemic era, this situation is automatically also contrary to the mandate of Pancasila and the Fourth Paragraph of the Opening The Constitution of the Republic of Indonesia in 1945 as follows State fundamental norms or *staatsfundamentalnorm*.<sup>19</sup>

#### 4. CONCLUSION

The need for legal protection of property rights to an immovable object is primarily very high. This makes the Notary deed a separate need for the community. One of the absolute conditions in the making of an authentic act is the presence of the parties. These requirements are set out in Article 28 of the *Regelemt op het Notaris-ambt* in Indonesia (Ordinance 11 January 1860) and Article 16 paragraph (1) letter m of Act No. 30 of 2004 Jo. Act No. 2 of 2014 Concerning the Notary Office. The entry of Covid-19 virus in the country is a matter of its own for the implementation of these conditions. Therefore the legal certainty of the validity of the Electronic Deed must be regulated in more detail and have binding legal force.

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<sup>16</sup><https://nasional.kompas.com/read/2021/08/03/08005681/berlaku-hingga-9-agustus-ini-daftar-wilayah-ppkm-level-4-di-pulau-jawa-bali?page=all>, Valid Until August 9, This is a List of PPKM Level 4 Areas in Java-Bali Island, Accessed on July 12, 2021.

<sup>17</sup>Sofyan Apendi, (2021), Ketiadaan Peraturan Menteri Dalam Hierarki Peraturan Perundang-Undangan Nasional & Implikasinya Terhadap Penataan Regulasi Dalam Sistem Hukum Nasional, *Jurnal Pakuan Law Review*, Volume 07, No. 01, January-June 2021, p. 116-118.

<sup>18</sup>Yaya Kareng, Ong Argo Victoria, R. Juli Moertiyono. (2019). How Notary's Service in Thailand. *Sultan Agung Notary Law Review*, 1 (1), 46-56, <http://jurnal.unissula.ac.id/index.php/SANLaR/article/view/4435>

<sup>19</sup>Isnawati, (2019), Pelaksanaan Hierarki Peraturan Perundang-Undangan Menurut Undang-Undang No. 12 Tahun 2011 Di Indonesia Saat Ini, *Jurnal Responsif*, Vol 7 No 2, 2019, p. 69-70.

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