

The Validity of a Notarial Deed Created Virtually as a Supporting Facility For Economic Activities During The Covid-19 Pandemic

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Abstract. The occurrence of the Covid-19 pandemic gave birth to many changes in daily activities from what was carried out face-to-face to virtual activities. The existence of a Notary as an official who has the authority to make evidence in the form of an authentic deed is expected to accommodate these changes by making it easier to make deeds virtually. The problems that will be examined in this research is the authority of the Notary in making virtual deeds and the legal strength of Notary deeds that are made virtually. The research method used is normative legal research using a statutory approach and a conceptual approach. The results showed that the Notary Public does not have the authority to make virtual deeds because the prevailing regulations oblige tappers to meet physically with the Notary. Notary Deed which is made virtually only has the power of proof as an underhand deed.

Keywords: Notary, Notarial Deed, Virtual

1 Introduction

The latest virus spread which is known as Corona Virus Disease 2019 (Covid-19) becomes a global issue since this virus is confirmed by the World Health Organization (WHO) as a global pandemic in which Indonesia has declared Covid-19 as a non-natural disaster in form of a disease outbreak that must be handled to prevent the high number of cases. The development of this virus transmission has increased rapidly throughout 2020 and has had a tremendous impact on the economic conditions of all countries in the world including Indonesia.

Numerous regulations and policies have been issued to tackle the spread of Covid-19. In handling Covid-19, the Indonesian government adapts policies and regulations which are based on Law Number 6 of 2018 concerning Health Quarantine. The existence of Law Number 6 of 2018 then becomes the basis for the promulgation of Government Regulation Number 21 of 2020 concerning Large-Scale Social Restrictions in the Context of Accelerating Handling of Covid-19.

The policy of Large-Scale Social Restrictions (PSBB) is implemented to reduce the spread of this virus. PSBB is a restriction on certain activities of residents in an area suspected of being infected with Covid-19 in such a way as to prevent the possible spread of Covid-19. The PSBB has implemented in the form of school and workplace holidays and restrictions on religious

activities in which it is still considering various aspects concerning the needs of education, work productivity coupled with community worship. Meanwhile, the PSBB in form of restrictions toward activities in public places or facilities must pay attention to the fulfillment of the basic needs of the population.¹

As a form of supporting economic activity during the PSBB policy, the government has also issued regulations that can be used as a legal basis so that economic conditions do not deteriorate. Enactment of Law Number 2 of 2020 concerning Stipulation of Government Regulations instead of Law Number 1 of 2020 Concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease Pandemic 2019 (Covid-19) and/or in the Context of Facing Threats That Endanger the Economy National and/or Financial System Stability into Law (Law No.2 of 2020) is expected to be a solution to solving economic problems that occur due to the impact of Covid-19.

In minimizing the risk of Covid-19 transmission, a social distancing / physical distancing policy is implemented. Due to the implementation of this policy, people are asked to be able to do work activities remotely or work from home to reduce the risk of transmission through physical contact in carrying out their work. It is suggested that for a job that requires a physical presence, efforts are made to be done electronically, or using an electronic communication system (online). For legal actions that were originally carried out, face-to-face shall be carried out electronically.

In maintaining economic stability, both the government and the community are expected to be able to adapt to the new habits that occur, namely the transformation of work from face-to-face to electronic work. It is also hoped that this condition is implemented in all aspects of legal services provided by the government and other legal professionals such as lawyers and notaries.

Edmon Makarim stated that in the situation due to the Covid-19 pandemic, the Notary is still relatively behind or seems slow in responding to emergencies. The community needs the readiness and dynamism function and role of the Notary in dealing with this situation therefore notary shall be able to administer his/her services online.[2]

The existence of a notary as a public official who is authorized to make authentic deeds to provide legal certainty to the public is expected to be able to follow the changes that have occurred due to the Covid-19 pandemic as has been implemented by other legal services. In the Covid-19 situation in which face-to-face meetings cannot be held, it is hoped that the notary can publish the notarial deed virtually. Based on the problems described above, it is necessary to conduct a more in-depth study of the legal position of notary deeds which are made virtually.

2 Methodology

This study uses a normative legal research method to find solutions to problems of existing legal problems. The research approach used is a statute approach and a conceptual approach.

3 Finding and Discussion

The existence of the Notary public cannot be separated from the provision of Article 1868 of the Civil Code which states that "an authentic deed is a deed which is in the form determined

by law, made by or in front of a public official authorized for it at the place where the deed is made". The public officials referred to the Article is a Notary. From these provisions, it can be understood that the existence of a notary is as an official authorized to make authentic deed. An authentic deed as a product of a notary is used as evidence as stipulated in the Civil Procedure Code. Authentic deeds hold significant meaning today since they are capable of being evidence that has perfect proving power.[4]

Notary public plays a role in carrying out the legal profession which cannot be separated from the fundamental issues related to the function and role of the law itself, that law is defined as the rules that govern all community life. Notarial institution is an institution that exists in society and arise due to the need for members of the public who commit a legal act, who require written evidence if there is a dispute or issues, so that it can be used as the strongest evidence in court. That is the reason the community needs the services of a notary to make an authentic deed.[13] Notary is a form or embodiment and is a personification of the law of justice, truth, and even guarantees legal certainty for the community. The position of a notary as a functionary in society is still respected today. A notary is usually considered an official from whom one can get reliable advice. Everything written and defined can be determined as valid. Notary public is a substantial document maker in a legal process.[7]

In Indonesia, the existence of a Notary public holds essential role in the development of the country's economy. Business activities always require evidence that has legal certainty, so in this case, the role of a notary as an official who is authorized to make authentic deeds is required. It can be concluded that the existence of notary public is closely related to services regarding public interest.[4] According to Paulus Effendi Lotulung, public interest services are the essence of governmental duties based on the principle of providing and ensuring legal certainty for members of the public. In certain fields, this task is given and entrusted to a notary by law, so that, therefore the public must also believe that the notary deed issued provides legal certainty for its citizens. The existence of authority given by law and the trust of the people being served are the basis for the duties and functions of the notary in legal traffic.[13]

Moch. Isnaeni argued that notary public is an essential profession that holds central role within economic activities, therefore it is not excessive when the state-appointed Notary public as a General Official who is entrusted in making and issuing authentic deeds. The legal position of a Notary is specifically regulated in law to determine the extent to which authority is held. Notary public, apart from having a position as General Officials, as well as a profession, are required to be qualified both in terms of academics and skills in assembling deeds. As aforementioned in front of the deed that assembly and frame as the parties' business in which it is a string of clauses that ultimately leads to the benefit of the parties. Certainly, this profession requires a sharp and careful vision, considering that the business is always growing at a fast pace. Therefore, Notary public is demanded to be professional in performing their duty.[9]

Economic activities have shifted from manual transactions to electronic, mainly during this pandemic period. As an action to accelerate the response to Covid-19 in Indonesia, it is appropriate for the sake of more significant legal interests for Notary public to adapt to the needs of the community. During an emergency that due to pandemic of *Covid-19* nowadays, the Notary public is urged to improve changes due to latest policy and regulations by providing virtual service through various forms of social media instead of physical meetings with clients. This improvement is expected to facilitate people demands regarding notary services in making written evidence which provides legal certainty.

Information and technology (IT) are experiencing significant progress and development in which both can be a boomerang coupled with challenge concerning the existence within Notary public environment. Thus situation makes all transactions change in a paperless form for

efficiency and economic value, besides that there are also several conditions that cannot be eliminated in their entirety in using paper as a form / means of written evidence that a legal act has occurred, namely in the form of making deed made before a notary which turns the written evidence into an authentic deed.[1]

The problem that occurs in the implementation of making virtual notary deeds is the regulation that regulates the position of Notary public in Indonesia, namely Law Number 30 of 2004 concerning the Position of Notary Public as amended by Law Number 2 of 2014 concerning Amendments to Law Number 30 of Years 2004 Concerning the Position of Notary (UUJN). In Article 16 paragraph (1) letter m UUJN which states that in carrying out his / her position a Notary is obliged to read the Deed in front of the audience in the presence of at least 2 (two) witnesses, or 4 (four) special witnesses for making a will under hand, and signed on the spot by the parties, witnesses and notaries. In the section on the Elucidation of Article 16 paragraph (1) letter m of the UUJN, it is stated "That the Notary must be physically present and sign the Deed before the audience and witnesses". [4]The provisions contained in Article 16 paragraph (1) letter m of the UUJN serve as legal reasons why up to now the making of deeds by Notaries cannot be done virtually and requires that they meet physically.

For violations of the provisions in Article 16 paragraph (1) letter m of the UUJN, the deed made by a Notary is only limited to having the power of proof as an underhand deed as stated in Article 16 paragraph (9) of the UUJN: "If one of the conditions referred to in paragraph (1) letter m and paragraph (7) are not fulfilled, the Deed concerned only has the power of proof as an underhand deed ". In addition, Notary public who violates these provisions may be subject to administrative sanctions in the form of written warnings, temporary dismissal, respectful dismissal, or dishonorable dismissal.

Based on the philosophical point of view in regard to the promulgation of the UUJN contained in the preamble to consider the UUJN, the Notary Position is presented by the State to guarantee legal certainty, order and protection through authentic written evidence regarding actions, agreements, stipulations, and legal events made before or by an authorized official, in this case a Notary Public, it is the obligation of the Notary to always be able to provide legal certainty.

Normative legal certainty is applied when a regulation is made and promulgated because it can provide clear and logical arrangements. Certain means it does not cause doubts or multiple interpretations, and logically in the sense that the law becomes a system of norms with other norms so that it does not clash or cause conflict of norms or there is a vague and void of norms. According to Peter Mahmud Marzuki, legal certainty can be determined by general rules that make individuals aware of what actions can or cannot be done and there is legal security for individuals from government abuse because with these general rules individuals can know what the state may impose or do against individuals.[11]

Challenge inside the business world, which is always moving according to the demands of the times, requires that the frame of the contract and the act be made by a notary in order to have the power as perfect evidence, is really a fairly heavy but noble central profession intent. It is not surprising that the position of notary public requires conditions of a wise character coupled with smart nuance.[11] It means that the Notary is obliged to follow all procedures in making deeds by the provisions of the Law and is not carried away by digitalization as long as there are no regulations as the legal basis for it.[5]

Notary public holds the authority to make a document in the form of a deed.[5] It can be said that it is only a part of all legal actions in the private realm that occur in society which functions as proof that has perfect legal force. When viewed through the provisions of Article 5 paragraph (4) Letter b of Law Number 11 of 2008 concerning Electronic Information and

Transactions as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions (UU ITE), provides an explanation regarding the requirements for making deeds in the form of documents by the form of deeds that are authentic and by the provisions imposed in this law which are written and contained in the form of notary deeds.

UUJN through the Elucidation of Article 15 paragraph (3) it has indeed determined that there are other powers of a Notary that are regulated in-laws and regulations, one of which is the authority to certify transactions conducted electronically (*cyber notary*). Edmon Makarim stated that “*certified*” means Notary public can provide trusted services due to the authentication of a deed, through online system/transaction. This can be reconciled with the provisions concerning Electronic System Operation and Electronic Transactions.² However, the context of the Notary's authority as stated in Article 15 paragraph (3) of the UUJN is a rule determined by another Law, which in this case can be interpreted as limited to legal acts specifically regulated in the other Laws and Regulations; therefore it does not generally apply in the context of the notary's authority to make authentic deeds.

Although it is stated that a physical meeting is actually considered contrary to the more considerable and main public interest, so that it should not have any impact on the implementation of his services electronically, the provisions in UUJN which require that making deeds by a Notary must be done physically and cannot be violated by a Notary Public. because, the existence of a notary is to guarantee legal certainty. Tan Thong Kie argued that society needs a person (figure) whose statements are reliable, trustworthy whose signature and all (his stamp) provide assurance and strong evidence, an impartial expert and an advisor without defects (onkreukbaar or unimpeachable) who shut up and make a covenant that can protect in the days to come. If an advocate defends someone's rights when a difficulty arises, then a notary must try to prevent that difficulty.[15]

The legal consequence of making a virtual Notary deed is that the status of the authentic deed will become an underhand deed. Although Article 1875 of the Civil Code states that an underhanded deed which the parties does not deny has the power of proof like an authentic deed, this applies only to the extent that the parties do not deny it. Different conditions will occur when the parties deny in the future, The enactment of the deed as an underhand deed will be detrimental to the parties because even the right party is ultimately obliged to prove their rights, something that is contrary to the power of perfect proof attached to the authentic deed.

When related to the condition of Covid-19 that occurred in Indonesia, then making a virtual deed can cause problems in the future because it does not rule out the possibility of denial by the parties. If such conditions occur, the Notary is administratively responsible and is also liable for the losses suffered by the parties. In normal conditions before the pandemic, problems regarding the denial of the authenticity of Notary's deeds had occurred a lot even though the Notary had carried out his position by the provisions of the legislation, so it was hazardous for the Notary and the parties if they carried out making deeds virtually. In this condition what needs to be underlined is that there is no pandemic that does not end, but the responsibility of the Notary in making deeds will be binding forever.

In regard with the community's need for making deeds virtually in the Covid-19 pandemic, Notaries do not obstruct and complicate economic activities, but have become a mandate given by UUJN that Notaries must be able to provide legal certainty and in the notary's oath of office it has been stated that Notary Public will be obedient and loyal to the State of the Republic of Indonesia, Pancasila and the 1945 Constitution of the Republic of Indonesia, the Law regarding

the Position of Notary and other laws and regulations. The implementation of making virtual Notary deeds cannot be done based on discretion of authority from the Notary and is only possible if there is a change in UUJN which authorizes the Notary to make virtual deeds.

4 Conclusion

Notaries are not authorized to issue deeds virtually because the prevailing regulations require Notaries, and the party making the deed must meet physically. Notary deeds made virtually do not apply as authentic deeds and only have the power of proof as underhand deeds. The implementation of making virtual notary deeds is only possible if there is a change in UUJN which authorizes Notaries to make virtual deeds. During the Covid-19 pandemic, the Notary's real form of support for economic activity was to guarantee that the deed he made had binding power to prevent future conflicts. This can be obtained if the notary does not do things that are beyond his authority.

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