

# CHAPTER I

## INTRODUCTION

### 1.1 Background

With Technology ever growing more advanced within this digital era, law must adapt to the new tools that will soon effect the daily and social lives of human beings within the community. Many legal sectors already began to adapt to this, with the most notable examples being credit cards or online purchase. In most of these online legal interactions, Electronic Certificates are the most used legal tool in said environment. Electronic Certificates are certificates that are both electronic and digital in nature; this certificate is responsible for carrying the Electronic signature.<sup>1</sup> Electronic signatures carry the importance of showing the legal status to the respective parties in an agreement.<sup>2</sup> As stated previously, the type of agreements that the Electronic Signature and Certificates are commonly used for are Electronic transactions. Which is the most common type of agreement that used this type of certificate. The main reasoning for this choice is that physical certificates especially when the parties are quite far to meet at the location or agreement to directly sign them is very much impractical. In hindsight, this is also quite impractical or excessive in our current time as we are in the middle of the pandemic era of COVID-19. To put it simply in this new age and pandemic, many sectors are facing difficulties adapting (to the new era and pandemic). One of the sectors that is suffering from those recent events is the Notary sector, the focus of this thesis.

The Notary is according to Chapter 1 of Law 30 of 2004, which has been amended by Law 2 of 2014 regarding Notary officials, are Government officials who are tasked with making

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<sup>1</sup> Article 1 Point 12, Article 1 Point 10 UU 11 2008 on EIT/Electronic Information and Transaction law of Indonesia no. 11 of 2008. <sup>2</sup> Ibid. Article 1. UU 11 of 2008.

authentic deeds in accordance to the legislation at hand.<sup>2</sup> Also in accordance to the same chapter the authentic deeds that are drawn up before a Notary in accordance to their respective procedures and legislation. There is also Minutes of Deeds, which as told by the same chapter of the law, is referring to the Authentic Notarial Deeds. Other important documents includes the copy of the deed, which is the copy of the authentic notarial deed and the excerpt of the deed which is the Excerpt on one or several section of the deed which also contain in the bottom section a statement that says “issued as an excerpt”.<sup>3</sup> This meant that the Notary are in charge on making archived government documents.

The Purpose of the Notary Deeds are stated in the preface of the Law 30 2004 which has been amended Law 2 of 2014 regarding the Notary Public. In that, preface the Notary deeds are there to provide legal certainty by defining the rights and obligation of the parties in the agreement.<sup>3</sup> This goes in line with the implementation of the Articles 1865 and 1866 of BW/Burgerlijk Wetboek/the Indonesian civil code.<sup>4</sup> In which Notary deeds fulfill the role of written evidence to prove the rights and obligations within a person’s claim. This Notary deed, also known as the authentic deed is a deed made by the notary regarding all acts, agreements, and declarations under legislature, as per Article 15 of the Law 30 of 2004 amended by Law 2 of 2014 regarding the Notary.<sup>5</sup> The significance of this deed is that any legal act will be solidified ensuring the legal certainties of the act/etc.<sup>6</sup> by acting as the perfect proof of the entire act. it’s due to this significance is that with the Industrial

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<sup>2</sup> Article 16 Point E to I ,Law No.30 of 2004 About Notary Amended by Law No.2 of 2014

<sup>3</sup> Putri Isna Vonna; Yanis Rinaldi; “The Use of the Notary protocol that is stored digitally as evidence in the court”, International Journal of Multicultural and Multireligious Understanding, Teuku Muttaqin Mansur, March 2021.

<sup>4</sup> Nadhiro, E. (2019, April 5). A Notary’s Authority In Issuing Copies of Acts From Minutes of Deeds of Other Notaries’ Protocol Parts. YURISDIKSI : Jurnal Wacana Hukum Dan Sains, 13(2).

<sup>5</sup> Ibid. Article 15. Of law 30 of 2004.

<sup>6</sup> Tegas Hari Krisyanto, Zainu Danulay, Benny Beatrix, “The Strength of Evidence of Notarial Deed in the Perspective of Cyber Notary Indonesia”, July 2019.

revolution 4.0 there has been efforts of attempting to adapt the notaries to accept the usage of E-certificates in their workplace.

The notaries must also cover the notary protocol, which is stated under Article 62 of Law 30 of 2004 that has been amended by Law 2 of 2014, which has been amended by Law 2 of 2014 regarding the Notary.<sup>7</sup> The most important part of that protocol is the fact that they all must be made by the Notary themselves on a Monthly basis. This has been very difficult to adapt for Electronic use, as the Protocol is highly systematic and strict obligation to follow the requirements and the reason to make an authentic deed. The Notary Protocol should be consists of:

- *Minuta* of deed
- Register the deed in the special book or repertorium
- A book list which consisted of names of tapers and clamps
- Protest list book
- Book list of wills
- Other Register books that must be kept by the notary based on other laws and regulations<sup>8</sup>.

We can see that the Notary Authentic deed is in fact a government based paper. Due to the protocol, which is how the Notaries operate. Which is specifically this kind of procedure:

- Issue a Tenor, Copy, or Excerpt of the *Minuta* of deed.
- Keep information about the deed a secret in accordance to the oath of the office.

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<sup>7</sup> Op cit. Article 62. Of law 30 of 2004 which has been amended by Law 2 of 2014

<sup>8</sup> Op Cit. Article 16 law 30 of 2004 Which has been amended by Law 2 of 2014

- Binds any deeds that are drawn up into one book containing a maximum of 50 deeds. If the deeds cannot be fit into one book, the deeds can be bound to more than one book, and must record the number of minutes of deeds, month, and year of drawing up in the same envelop on each and every book.
- Create a list of deeds against non-payment or non-receipt of securities.
- Make deeds relating to the testament in accordance to the sequence of drawing up deeds per month.
- Submission of the deeds.
- Record the same repertory date of the submission list of deeds per month
  - Have a seal/stamp of Indonesia.
- Read out the deed in present of two witnesses and signed by all respective parties, which includes the notary and the witnesses.

Under that procedure, we can guess that there are inherent problems based on their respective system of operating as a legal official rather than a straight legal restriction much like the EIT law itself. While the regulation of Notaries themselves can be amended in order to apply electronic certificates, the fact remains is that other laws that has relation to the notary must be amended as well to accommodate this new change.

Notary clients are wide ranging as they can be from simple individuals to company organizations, each party needs their own Deed that is made by the notary, each with their own set requirements in order to use Electronic devices. Let us look in the company perspective for an example, where the GMS/General Meeting of shareholders must create a deed report, a *relaas* deed to be specific, which for their respective meeting. For it to be conducted electronically they abide by Article 76 and 77 (1) of law 40 of 2007 regarding

Limited Liability Companies. Under Article those Articles the requirement for allowing the use of Electronic Media are:<sup>9</sup>

- The parties must be able to see themselves directly
- Parties are able to participate in the meeting
- Meeting is held in a designated areas throughout Indonesia

This is just from one of their possible clients. In hindsight within the era of COVID-19, this type of process became much more difficult and dangerous. As a result using the general physical direct meeting was less popular and inefficient in the sense that it is not worth risking one's health for a meeting. So the prospects of using Electronic devices are in fact considered to solve the issue of people being too afraid or unable to directly meet each other for such an important event.

While two variables of the previously listed requirements can be fulfilled by using online meetings like Zoom or Microsoft teams. Whether that can be legally possible will be discussed later in this thesis. Though the main problem is the fact, the meeting is held in designated areas, whether it is possible for any legal ways to allow indirect meeting at their own respective designated domiciles (i.e. homes) will be discussed in a later chapter. However, this means there is difficulty adapting these, which means there must be ways to adapt the Notary sector just like the other sectors with the upcoming digital era and to adapt to the pandemic.

Now what is the Industrial Revolution 4.0 or the Digital Revolution of Indonesia that is commonly talked about? That is when Indonesia starts to use the Digital realm much more frequently. Which is the era we are going into currently. This stems from the fact that most

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<sup>9</sup> Article 1, BSSN Regulation of the National Cyber and Crypto Agency Number 8 of 2020 regarding the security system in Operation System.

of the Indonesian citizens (up to 50 million in 2015) are using digital devices, primarily the internet.<sup>10</sup> This is also taking into account of the fact that Indonesia has a large amount of smartphone users, with having more mobile phones than its users in total (270 million phones, and 250 million users).<sup>12</sup> This is enough to prompt the government to follow suit with the usage of electronic devices in their workplaces. Though the problem is that despite having such numbers showing the Indonesian citizens fully embracing the digital world, this is not the case for the Country itself in terms of the government and as a whole. This is because in the past, the cybersecurity had been exaggerating events in order to make the government more transparent.<sup>11</sup> Ironically, there is also the fact that cyber security is a major concern among the citizens of Indonesia, despite embracing the use of digital technology.<sup>14</sup> Besides cyber-attacks, digital fraud is among the common incidents surrounding digital devices in Indonesia. This can be rooted in the fact that Indonesia does not have secure line of method of identity verification, which especially in legal areas meant that it would not be easy for them to accept the usage of electronic devices. Not even the 2016 Ministry Regulation No. 12 on Communication and Informatics is enough. The Government itself has gone to create Electronic Identity cards/E-KTP (KTP is an Identity card in Indonesia) to solve the issue. While this is from Indonesia's take on the Cyber Security issue, let us briefly examine other countries method of cyber security particularly in a legal scope, if there is a way of legally implementing the Electronic Certificate in the Notary Field.

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<sup>10</sup> Edwin Jurriens , “*Digital Indonesia: Connectivity and Divergence*”, ISEAS Publishing, 2017 <sup>12</sup> Ji Jing, Song Ximiao, “Electronic Certificate based Interaction methods and apparatus and electronic devices”, Published by Advanced New Technology co.ltd, April 28 2021.

<sup>11</sup> Op cit. Article 1.

So with that in mind, it brings us the question, can the Electronic Certificate be considered an authentic deed in the eyes of the Notary? That question will be given its answer in this thesis.

With the Digital Era or Industrial Era 4.0 coming closer to Indonesia, and it is being rushed due to the effects of the Pandemic of COVID-19 the need of Electronic certificates is growing. Since there is another dangerous risk currently which is the COVID-19 virus, which adds more procedures into the making of physical deeds, contracts, and receipts. As it meant it is easier to get contact with the virus and it is a lot more complicated in the process. While the technical process of Electronic Certificates or E-certificates as they are also called, the parties procedure is far more convenient and simple. The parties can also know the security of their information within the Electronic Certificate thanks to using devices like a computer storage media,<sup>12</sup> which is to an extent far safer than the physical list. Details on the usage of these devices in Electronic certificates is explained in a later chapter.

E-certificates or Electronic certificates are widely used in the banking sector for the reason. As stated in above, along with the fact that they had gave the guaranteed security of the Electronic operating system. This type of guaranteed Security uses the method of inputting the information or confirming said information using Electronic Certificate tool, then encrypting them and attaching the party's signature to authenticate the information in question.<sup>12</sup>

To put this into an example is through Electronic Transaction.<sup>13</sup> Which going by the Electronic Transaction system, it starts by one party acting as the issuer of the object of

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<sup>12</sup> Op cit. p2. "Electronic Certificate based Interaction methods and apparatus and electronic devices"

<sup>13</sup> Chen Gigi, Chao Ko Li, Hsueh Kuo Sen, "*Electronic Transaction capable of Improving Transaction Security and Electronic Transaction Method*", US Patent and Trademark Office, November 9 2006

transaction or the object that is issued and already obtaining the personal Radio frequency of the receiving or other party of the agreement. Then said Electronic certificate is going to be transferred to the receiving party's device and is displayed. The Radio Frequency used in this act is kept personally by the respective parties of the Electronic transaction, in this context at the very least. In a more practical context, the receiving party, which is the sale end of the operation device, receives the Electronic certificate and the Radio Frequency Identification and the party in question reads it, which is then connected to the certified management unit through the telecommunication device. From there on, the certified management unit will decide on whether to follow up on the Electronic Transaction or not. While it may seem complex given the terms used here, but it is actually more simple in practice.

Now as to why Electronic Certificates are specifically chosen to be the tool help Notaries adapt to the new era and the pandemic at hand. First is that they are widely used as a verification tool during Electronic transactions (further details of this will be explained in the next chapter), just like the Notary deed itself when it comes to legal actions. However it is not an easy implementation with several obstacles, particularly legal obstacles in the way, this is especially urgent due to what is coming next in Indonesia.

With the fore coming of the Industrial Revolution 4.0 in Indonesia, more activities will be conducted digitally besides a simple transaction. As even the legal sectors will soon have to apply the Electronic device much more heavily in their respective daily lives. As there is also an E-Government/Electronic Government in the works. E-Governments are IT/Information Technology Systems that is operated by the Government. This is for the implementation of the Good Governance in an efficient manner through the improvement of Public Service. To further show the adaption the government took in order to partake in the Industrial revolution 4.0 they even made a law to regulate this. This law is the

Presidential Regulation No. 3 of 2003, which concerns the national policies, and the Strategies of Indonesia. This will lead to more legal sectors into being adapted for the use of electronic devices. With many attempts to Bering Notaries to use such devices within their legal field.

Most of the attempts were in fact to create the concept known as a Cyber notary. Which in concept is a Notary who conducts the creation of Authentic Notary Deeds through Electronic devices. This type of profession has been raised in urgency due to the COVID19 pandemic crisis. This is raised in spire the fact the concept of a cyber-notary has existed since 1994.<sup>14</sup> Not to mention for this profession specifically there functions within this subprofession to increase trust and security with the clients, citizens, and government. This shows the urgency of the situation of having Notaries being able to use digital devices, hence this thesis's purpose.

Though in most cases it will very focus much on the evidence and the validity of the Cyber Notary in terms of the implementation of that profession, with one case stating it is only possible but due to a legal loophole that is present in the Law 30 of 2004 which has been amended by Law 2 of 2014 on Notary law. The loophole relies on how vague both the EIT law and the Notary laws are. By specifically asking questions regarding the clarification of what's meant in those laws like asking "what does it mean by Transaction conducted electronically?" or "is it referring to the transaction or the document?". However, this is not accounting the new regulation the Government is trying to apply starting at 2021 regarding the implementation of E-certificates in the Notary field.

One of the attempts made by the Indonesian Government for this is through the

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<sup>14</sup> Meike Binsneyder, "Reliability of Notary Deals Issuing Authentic Assets Using Electronic Networks ", International Journal of Multicultural and Multireligious Understanding, 2021. <sup>18</sup> Op cit. Article 1 of BSSN Regulation no. 8 of 2020.

BSSN/National Cyber and Crypto Agency with the establishment of BSRE/Electronic Certification Center.<sup>18</sup> The creation of this law is reliance on the *lex posteriori derogat lex priori*, a principle that meant that new laws are much more powerful or relevant compared to the older laws. This law is meant to solve the general issue of the security of Electronic Certificates compared to physical certificates. This general issue is the one commonly raised by both the Notaries and the general citizens, although this does not solve the actual reason, which is the article present in the EIT law, which is what the Indonesian Government tried to amend with the new regulation, specifically BSSN Regulation No. 8 of 2020.

That Article in question is Article 5 point 4 of the Law No. 11 of 2008 of the EIT/Electronic Information and Transaction Law.<sup>15</sup> In that Article, it specifically says that the Electronic Certificates cannot apply to the Notaries. This meant that Electronic Certificates could not apply to them at all. Though funnily though, they do provide exceptions though it is still quite vague in the same law. That Article is Article 6 of Law No.11 of 2008 of the EIT law, which states that Electronic Certificates are allowed if the Documents in question are in fact lawful where the information in question is accessible, displayable, a reassured integrity, and accountable so the information in question is displayable.<sup>16</sup> This is still vague though, so it creates a legal vacuum; it is also the possible reason why the new BSSN regulation was created in the first place. This is also, where it is possible to a find a legal way to implement the Electronic Certificate in the Notary field

Which Brought up another issue that Indonesia has in regards their law, they do not have laws that are adapted for the topic of Personal data protection. This is spite of having many

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<sup>15</sup> Article 5 Point 4. Law of 11 of 2008 on EIT/Electronic Information and Transaction.

<sup>16</sup> Op cit. Article 1. Of law 11 of 2008.

laws and regulation about privacy.<sup>17</sup> Well at least until now they tried to add a cyber-security law but so far, it did not look to be broad and specific enough to be connected to other laws and legal professions that is going to require the use of electronic devices. One of the major legal basis for Private Data Protection in Indonesia is Article 26 of the EIT law. Wherein the only protection given is that there is consent. This is a huge issue and there is no systematic legal regulation to protect the private data of its users. The suggestion of creating a law regulating the private data of users in a systematic matter will be discussed in another chapter. As this importance is for the economic value in Indonesia's International business relation<sup>21</sup> and other material benefits that can be discussed in a later section of this chapter. Either way the most important take away from this is the fact that many people are trying to adapt the Notary deed digitally despite the legal difficulties. From focusing on how to make a digital notary deed to not conflict with the Notary law.<sup>18</sup> One case even visibly takes account to the notary protocol and procedure mentioned earlier. They suggest that there is a leeway in the process of the Notary protocol and procedure along with other relative laws, because it does not any set regulation specifically prohibiting the use of Electronic certificates in the Notary field.<sup>23</sup>

As such, the Thesis will propose a new way of implementing the Electronic Certificate in the Notary field. Specifically by making, they be considered an authentic deed in the eyes of the notary. This will be made with the support of other researcher's works and of course, the legal materials like the law itself.

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<sup>17</sup> Burhannudin; Juajir Surmandi; Maskun, Hasannudin , "Notary Responsibility on Electronic Client Data: Challenges and Developments", International Journal of Multicultural and Multireligious understanding, University Indonesia, September 2020.

<sup>18</sup> Yoga Andriyanto, Rusdianto Sesung, "Digitalization of Notary Deeds In The Era of Industrial Revolution 4.0 In Facing The Covid-19 Pandemic", Yurisdiksi: Jurnal Wacana Hukum dan Sains, Vol 17, Iss 2, Pg1. <sup>23</sup> Op cit. Article 5.

## 1.2 Formulation of Issues

With the Thesis Topic in mind, the author will then discuss and answer the following questions:

- Can the Electronic Certificate be an authentic deed under the eyes of the Notary?

## 1.3 Research Purposes

The Main purpose of this research analysis is to answer and discuss the questions listed above, most prominently:

- To know if Electronic Certificates can be considered an authentic deed by the Notaries

## 1.4 Benefits of the Research

This research will give insights of the benefits of this research under two main categories. The Theoretical benefits and the practical benefits.

### Theoretical benefits

The main legal benefit of this research is to allow long distance authentication of deeds, or to put it more specifically, making Electronic certificates a valid form of verification.<sup>19</sup>

Along with the fact that it allows Indonesia to further develop its legal sector to use

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<sup>19</sup> Mallal Rizwan, Negm Walid , “*Electronic notary system and method for long-term digital signature authentication*”, June 9 2005.

Electronic devices. The most important part though is legally speaking, further developing and adapting the Notary protocol into the Digital era.

#### Practical benefits

It will bring forth Indonesia to an era of E-commerce.<sup>20</sup> Since it allows the further the development of the Security of the State Secrets. It will also allow Notaries to take a step into the field of Electronic devices for the creation of authentic deeds for agreements. Thereby, making it much more efficient as one does not need physical contact to make the deed/agreement as well as making people be able to interact with their respective Notary deed/authentic deed in a crisis like the COVID-19 pandemic.<sup>25</sup> It will also allow the use of a Public Key Infrastructure known as SiVion, which has passed the ISO 27001/ISMS Certification to be put into application with the Notaries being able to use Electronic Certificates.

### 1.5 Framework of Writing

This research thesis are divided into five chapters, which will help readers to clearly understand the analysis present within this thesis:

#### CHAPTER I: THE INTRODUCTION

The first chapter is the introduction to this research thesis, its consisted of the Background, the Research Question, the Purpose of the Research, and the Benefits of the research.

#### CHAPTER II: THE LITERATURE REVIEW

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<sup>20</sup> Swante Adi Krisna, Hari Purwadi, "Utilization of Public Key Infrastructure to Facilitates the Role of Certification Authority in Cyber Notary Context in Indonesia", international Journal of Multicultural and Multireligious Understanding, Vol 5, Iss 2, Pp 345-355 (2018)

In this chapter, the Author will define the concepts and the subjects that are used of this thesis. First, the author will fully explain the Electronic Systems used for the Electronic Certificate. The explanation will elaborate on how the EIT/Electronic Information and Transaction law will function; next, the author will elaborate on the concept of Electronic Transaction, Electronic Certificate, and the Electronic Signature itself. Secondly, the Author will elaborate on the Notary itself on the systematic method that they use to create the Notarial deed. This will consist of the elaboration on the Notary law itself based on how the law set the systematic method to create the notary deed and the explanation of the concepts of the Notary itself as a legal profession and government official, the Notary Protocol, and the Notary deed itself.

### CHAPTER III: THE RESEARCH METHODOLOGY

This chapter generally discusses the methods used in this research. Therefore, this section will discuss about the types of data used in the research, the types of research used within this thesis, the data analysis techniques used to analyze the data, and the research approach that the author uses in the discussion of this thesis.

### CHAPTER IV: THE DISCUSSION AND ANALYSIS

Next under this chapter will focus on the analysis of the issue that is brought up by the research question of this thesis. The analysis that is applied within this chapter is a comparison and contrast with an analysis from the comparison and contrast style analysis. As such, this chapter will be divided into 3 sub sections. This first section will be focusing on the comparison between the Notarial and the Electronic Certificate, while the second section will focus on the contrast between the Electronic

Certificate and the Notarial Deed. This chapter will then end with an analysis because of comparing and contrasting the Electronic Certificate and the Notarial Deed. As a result, it will give a recommendation based on the results of said analysis and find the answer to the question of this very thesis.

#### CHAPTER V: THE CONCLUSION

The final chapter will be used to explain the analytical conclusion in chapter 4 that is used to answer the main question of this thesis. Aside from providing a summarized conclusion that is stated under the fourth chapter, the Author will then use that conclusion to provide a method to the legal way of implementing the Electronic Certificate in the Notary field through giving new laws and regulations. these new laws and regulations will be drafted in order to be legal basis for these new legal acts along with the fact that under these new regulations, readers can easily understand Government's new system on Notarial deeds created within an Electronic Environment using the Electronic Certificate.

