

## **The Evidentiary Power of the Deed Made Electronically by the Land Deed Officials**



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**ABSTRACT:** The Indonesian government has passed Law 11 of 2020 on Job Creation to improve the investment ecosystem. The changes include the making of a deed of transfer of land rights, which has been made on the condition that the parties must appear before the Notary as land deed officials in person, to be made in electronic form. This step is not accompanied by an amendment to Article 5 paragraph 4 letter (b) of Law 11 of 2008 concerning ITE, which still determines that the provisions regarding ITE do not apply to letters and documents which according to the Law must be made in the form of notarial deeds or deeds made by PPAT. This research is conducted to provide legal solutions from the point of view of Legal Theory on the conflict between the 2 norms. This research is normative legal research. The results of this study indicate that based on the principle of *Lex Specialis Derogat Legi Generali*, the Job Creation Law must be applied over the ITE Law as far as how to make PPAT deeds made electronically are valid legal evidence if the making of electronic notarial deeds is carried out in accordance with applicable provisions.

**KEYWORDS:** Deed, Evidentiary Power, Electronically, Land Deed Official

### **1. INTRODUCTION**

In the past ten years, society has gained unprecedentedly from the Internet's technological advancements. A community can engage in conversation through a wide range of online services. The banking industry is also enthusiastic about mobile/Internet and digital development. Due to the growth of the Internet, it is now relatively simple for people to travel both domestically and internationally, as purchasing flight tickets and hotel vouchers online is highly convenient. There is international competition to boost internet speeds. Expected to begin with the 1G (1979), 2G (1991), 3G (2001), 4G (2009), and 5G (2020) networks, the progress of internet connectivity may be tracked through the supply of networks across time [1].

In several service fields, the Government of the Republic of Indonesia has also used the growth of digitalization. “At the Ministry of Law and Human Rights of the Republic of Indonesia, public services like authorizing Limited Liability Companies, Associations, Foundations, Fiduciary Registration, Registration of Civil Partnerships, Firm Partnerships, and CV Partnerships are all done electronically through the network connection” [2].

In 2017, “the Indonesian Ministry of Agrarian Affairs and Spatial Planning/National Land Agency issued Regulation of the Minister of Agrarian Affairs and Spatial Planning/National Land Agency 5 of 2017 concerning Electronic Land Information Services, to improve land information services efficiently, quickly, and cost-effectively”. The Minister of Agrarian and Spatial Planning 5 of 2017 as amended by Regulation of the Minister of Agrarian/National Land Agency 19 of 2020.

In 2019, the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency launched an electronic Mortgage registration system by issuing Ministerial Regulation 9 of 2019 on Electronic Integrated Mortgage Services. It was amended by Ministerial Regulation 5 of 2020 on Electronic Integrated Mortgage Services. The Land Affairs Office, Land Deed Officials (PPAT), and the banking community, which relied on a manual system for decades, have struggled with a backlog of Mortgage registration applications. Similarly, the method for checking certificates and applications for registration of Certificates of Land Registration, which is currently handled digitally and finished in one or two days, has facilitated bank credit agreements, boosting our economy's output [3].

Article 147 of Law 11 of 2020 concerning Job Creation states:

“Evidence of land rights, ownership rights to flat units, management rights, and mortgage rights, including Deed of transfer of land rights and other documents related to land, can be in electronic form”.

To implement Article 147 of Law 11 of 2020 on Job Creation, Government Regulation 18 of 2021 on Management Rights, Land Rights, Flat Units, and Land Registration has been published. Article 86 specifies that “the Land Deed Officials can do a Deed

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electronically". The Job Creation Law typically authorizes the "Ministry of Agrarian Affairs and Spatial Planning/National Land Agency to provide electronic Evidence of title (Certificate) for land rights, ownership rights to flat units, management rights, and mortgage rights".

The Job Creation Act also established the new standard, by permitting Land Deed Officials (PPAT) to process land transfer deeds electronically. Land Deed Officials (PPAT) have the authority to make not only the Deed of transfer of rights but also the Deed of Encumbrance of Mortgage. It investigates that Article 147 of the Job Creation Law which states that Land Deed Officials (PPAT) can make a deed of transfer of land rights, is narrower than the authority outlined in Government Regulation 37 of 1998 concerning Land Deed Officials (PPAT) Position Regulations, which authorizes PPATs to not only make deeds of transfer of rights but also include Deeds of Encumbrance of Mortgage Rights.

Other provisions related to electronic evidence, namely Article 5 of Law 11 of 2008 concerning Electronic Information and Transactions (ITE Law) as amended by Law 19 of 2016, stipulate that Electronic Information and Electronic Documents and their printouts are valid legal evidence. Electronic Information and Electronic Documents are declared valid if they use Electronic Systems in accordance with the provisions stipulated in this Law. According to the provisions of Article 5, Electronic Information and Electronic Documents do not apply to:

- a. Letters which according to the Law must be made in written form and
- b. letters and documents which according to the Law must be made in the form of a notarial deed or a deed made by a Land Deed Official.

There is a legal conflict here. On the one hand, according to Article 147 of the Job Creation Law in conjunction with Article 86 of Government Regulation 18 of 2021 concerning Management Rights, Land Rights, Flat Units, and Land Registration, PPATs are authorized to make deeds of transfer of rights electronically. On the other hand, Article 5 paragraph 4 (b) of the ITE Law does not allow it.

Studies that focus on the aspect of the evidentiary power of Notarial deeds of electronic transfer of land rights have not been carried out much. Baharudin [4] and Gaol [5], in their research, conclude that a Deed of sale and purchase is one of the authentic deeds. While Sunday [6] in his study states that it is impossible to make a notarial deed by utilizing information technology because the presence of a notary in front of the parties is a must. Kharisma & Kurniawan [7] in their opinion support Sunday by stating that electronic PPAT Deed in practices still experiencing normative blurring because it is not yet clear what PPAT deeds can be made electronically so that it does not provide legal certainty about its evidentiary power. Even, Setiadewi [8] concludes that a cyber notary does not have perfect proof like an authentic deed. Atmaja [9] in his thesis examines the validity of electronic notarial deeds in e-commerce. Sundani [10] examines the legal basis of electronic notarial deeds, the use and making of electronic notarial deeds, obstacles, and government efforts to overcome problems in making electronic notarial deeds. Wiranata [11] focuses on analyzing the certification of transactions carried out by cyber notaries but has not yet reached the study of the evidentiary power of electronic notarial deeds.

## **2. RESEARCH PROBLEMS**

The purpose of this research is to analyse the legal principles that can be applied to overcome the conflict of norms regarding the making of PPAT deeds electronically in the Job Creation Law and the ITE Law, as well as to analyse the evidentiary power of PPAT deeds of transfer of land rights made electronically.

## **3. RESEARCH METHOD**

This study uses normative and doctrinal legal research [12] with a regulatory approach and conceptual approach. The data is in the form of secondary data consisting of primary and secondary legal materials. Primary legal materials are in the form of legislation on notarial deeds and their evidentiary power, namely Law 11 of 2020 concerning Job Creation and its implementing regulations, Law 11 of 2008 as amended by Law 19 of 2016 concerning Amendments to Law 11 of 2008 concerning Electronic Information and Transactions and its implementing regulations, Regulations on the Position of PPAT, Regulation of the Minister of Law and Human Rights of the Republic of Indonesia 2 of 2019 concerning Resolution of Disharmony of Legislation through mediation, and legal principles to resolve conflicts between two regulations at the level of the Law. Meanwhile, secondary legal materials are concepts, theories, and expert opinions on electronic deeds.

## **4. RESULT AND DISCUSSION**

This section will begin by explaining the law principles used to overcome the conflict between two regulations controlling the same issue. In addition, it will specify the strength of proof for the electronic notarial Deed.

***Lex Specialis Derogat Legi Generali* Principle to overcome the conflict between the ITE Law and the Job Creation Law.**

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In developing laws and regulations, opposing legal norms frequently regulate a specific issue. This norm dispute might occur between lower and higher rules (vertical conflict) or between regulations with identical requirements (horizontal strife). In the event of conflicts or contradictions in laws and regulations at the level of Ministerial Regulations, Regulations of Non-Ministerial Government Institutions, Regulations of Non-structural Institutions, and Regulations in the Regions, there are legal provisions created to resolve namely Regulation of the Minister of Law and Human Rights of the Republic of Indonesia 2 of 2019 concerning Settlement of Disharmony of Legislation through mediation.

Normatively, according to Ministerial Regulation 2 of 2019, conflicts between two regulations under the Law in the form of Ministerial Regulations, Regulations of Non-Ministerial Government Institutions, Regulations of Nonstructural Institutions, and Regulations in the Regions can be resolved by mediation. The results of which can be in the form of an agreement, or recommendations if there are parties who are not present in the mediation and are open.

This norm contradicts other norms, including Law 30 of 1999 and mediation principles [13]. Article 12 of Ministerial Regulation No. 2 of 2019 stipulates that the nature of mediation is open, while Article 6 (6) of Law 30 of 1999 and the mediation principle define that the nature of mediation is secret or closed [14]. Following Article 13 (2) of Ministerial Regulation 2 of 2019, it may conduct a mediation even though the opposing party does not present. There will still be a conclusion, the mediator's advice. In the meantime, according to Article 6 of Law 30 of 1999 and the principles of mediation, both parties must participate. According to its nature, which includes voluntary participation, it is regarded as a failure if they disagree. Because the Ministerial Regulation contradicts the Law, based on the principle of *lex superior derogat legi inferiori*, the provisions of Article 12 of Ministerial Regulation 2 of 2019 do not pertain because they contradict a higher regulation, particularly regarding Article 6(6) of Law 30 of 1999 [15], because of Ministerial Regulations.

A conflict between two or more regulations is a conflict of public interest regulation. For instance, a conflict between two products of public officials' regulations, which both of all are binding. In that situation, the resolution may not be based on an agreement but on the legal principle. Among them are *lex specialis derogat legi generalis*, *lex superior derogat legi inferiori*, or *lex posteriori derogat legi priori*.

The law principle is the foundation, basis, and truth on which give the reasoning of Law. Law principles can also refer to knowledge, ideals, and fundamental issues, which are the starting point for legal thought. The principle of Law, or *rechts beginselen*, is not a specific legal regulation but a general basic concept underlying and embodied in every legal system's Law and regulation [15]. The Law adheres to a principle of Law that is susceptible to change. Because changes in law principles correspond to the evolution of society, it is influenced by place and time [16].

Hans Kelsen's lecture on *Stufenbau des Rech*, in which he emphasized that the law system is hierarchical, inspired the existence of principles of Law as the basis of particular legal norms. In other words, a legal provision derives from a higher provision. The lower provisions are the implementation of the higher ones. *Grundnorm* or fundamental norms are the most stringent requirements [17].

There is the risk of controversy regarding the substance of legal regulations. As cited by Nurafaqih, Hans Kelsen stated that a conflict of norms could develop when two opposing norms apply to the same problem. According to Hans Kelsen, only one rule applies and trumps the other to settle the issue [18].

Law distinguishes between general law principles that apply to all fields of Law and particular law principles that apply to specific special fields. The general law principles include *restitutio in integrum*, *lex posteriori legi priori*, *lex superiori derogat legi inferiori*, *lex specialis derogat legi generali*. The principle of freedom of contract and *pacta sun servanda* includes unique or narrow law principles [19].

In contrast to hierarchical laws and regulations, law principles do not acknowledge hierarchy. Therefore, if there are levels in laws and regulations, law principles do not recognize levels since they do not recognize hierarchy. There is no law principle that is superior to other law principles. Hence there are no recognized conflicts between law principles [19].

Following Article 7 paragraph 1 of Law 12 of 2011 on the Formation of Laws and Regulations, the hierarchy of laws and regulations in Indonesia consists of the 1945 Constitution of the Republic of Indonesia, the Decree of the People's Consultative Assembly, Government Regulations in substituting Laws, Government Regulations, Presidential Regulations, Provincial Regulations, and Regency/Municipal Regulations. In the Indonesian law system, a hierarchy of Law forms the authority of Law and regulations.

According to the principle of *lex superiori derogat legi inferiori*, higher legal norms preclude the adoption of lower legal norms. The settling conflict between lower and higher Law may use the hierarchy of laws and regulations and vice versa by referencing Article 7 of Law 12 of 2011. The position is that the lower norms are valid or derive from the higher norms. Therefore, implementing higher regulations cannot be negated by implementing lower regulations, even if the lower regulations exist afterward.

The notion of *lex posterior derogat legi priori* states that new legal norms surpass the preceding legal norms. This principle can only be utilized when the new legal norms have an equal or more excellent status than the previous legal norms.

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The principle of *lex specialis derogat legi generali* states that specialized legal norms contradict the implementation of general legal norms. Manan argued [20], there are numerous criteria for adopting the *lex specialis derogat legi generalis* principle. First, general legal norms' provisions continue to apply until expressly overridden by specific legal norms. Second, the legal provisions of the *lex specialis* must be equivalent to the legal requirements of the *lex generalis*. For instance, Law by Law. Third, the provisions of the electronic way to make the *lex specialis* must pertain to the same area of Law as those of the *lex generalis*. The Commercial Law Code, for instance, is a *lex specialis* of the Civil Law Code. Both are private or civil law subjects.

Since there is a conflict of Law relating to rules of making notarial or land-Official' Deeds electronically between ITE Law and Job Creation Law, only one of these laws may work. It may use *lex specialis derogat legi generali* principle to resolve the conflict. Based on the principle, if there are two regulations with the same position in the dispute, where the one is more specific than the other, the more specific Law should be applied. In this case, the Job Creation Law of 2020, which permits Land Deed Officials (PPAT) to issue the deeds electronically, applies.

Article 147 of the Job Creation Law must work and overrides Article 5, paragraph 4(b) of the ITE Law. The granting of authority to PPAT to do deeds electronically through the Job Creation Law is a new law to form responsive laws following the dynamics of community needs development. Electronic transactions to serve the community's needs are a necessity needed by the community to respond to the development and progress of the Internet. Electronic transaction evidence, including transactions in writing, is appropriate if it also follows the electronic transaction. The parties must make a transaction in the business world in a notarial deed with no legal rules. So, Article 147 of the Job Creation Law accommodates these needs.

### The Evidentiary Power of electronic PPAT Deeds.

In conventional land rights sale and purchase transactions, the parties must come to the Notary's office face-to-face and make the proof of the transaction in print [21]. In an electronic transaction that takes place using electronic media, they carry out the transaction face-to-face between the parties and make the Evidence electronically. Electronic transactions of sale and purchase of land rights before a Notary, along with the making of electronic Notarial deeds, are made possible by the provisions of Article 147 of Law 11 of 2020 on Job Creation. The article stipulates that [Deeds of transfer of land rights and other documents relating to land can be in electronic form]. In the future, the parties carrying out land rights transactions do not need to face the Notary directly, and the notarial Deed also does not have to be made in print.

Government Regulation No. 18 of 2021 on Management Rights, Land Rights, Flat Units, and Land Registration also supports electronic transactions for transferring rights to flats. It appears from the provisions of Article 86, which stipulates that the Parties may make the Deed of a Land Deed Official electronically. PPAT will store deeds made electronically in the form of documents or electronic data recorded in a document storage system on a computer.

In Indonesian evidentiary law, Evidence is divided into two fields, namely Evidence in the civil field and in the criminal field [22]. In the civil field, the types of Evidence based on the provisions of Article 164 HIR or Article 1866 of the Civil Code consist of written Evidence, Evidence by witnesses, suspicions, confessions, and oaths.

The ITE Law adds new Evidence, namely electronic documents, and data. Under the ITE Law, electronic documents or data are valid Evidence, but their evidentiary power is not regulated. Although the ITE Law does not regulate, The form of the document determines the evidentiary power of electronic documents, namely whether it is an authentic deed, a deed under hand, or not a deed. Articles 1867-1894 of the Civil Code regulate the strength of the written Evidence. Nevertheless, it does not provide the evidentiary power of electronic documents. However, based on Article 5 of ITE Law which recognizes electronic documents as legal Evidence, electronic documents, from their form and content, namely in the form of punctuation marks that are the outpouring of a person's heart [23], can be included as Evidence of letters or writings. It is just that the form is electronic, not printed. Because it is a piece of letter evidence, its evidentiary power is subject to the strength of letter evidence as stipulated in Articles 1867-1894 of the Civil Code.

Deeds made by PPATs conventionally in the form of hard copies can be equated with authentic deeds as stipulated in Article 1868 of the Civil Code so that they have perfect evidentiary power [24]. Based on the provisions of Article 1868 of the Civil Code, the parties must do an authentic deed in the form prescribed by Law and by or before an authorized public official. They also must meet the requirements for an authentic deed in Article 1868 of the Civil Code when making it electronically. Namely, it is made in the form Law prescribes before a Notary.

To fulfill the first requirement of an electronic authentic deed as mentioned earlier, there must be a statutory provision governing the creation of deeds in electronic form. A statutory provision must regulate the making of deeds in electronic form. It will fulfill the first requirement, as mentioned earlier. Based on the provisions of Article 38 of Law No. 30 of 2004 as amended by Law No. 2 of 2014, the main difference between hard copy and electronic forms lies in the signatures of the confronts, witnesses, and notaries, as well as the stamps and stamps, namely manual and electronic signatures, stamps, or seals. The Law must regulate electronic signatures, seals, and stamps in such a way that they are valid and legally valid. Provisions regarding the criteria for electronic signatures, validity, and procedures for making them as well as those stipulated in Amendment 7 of Law 2 of 2014 concerning Amendments to Law 30 of 2004 concerning Notary Positions, Article 16 Article 1(12) of Law 19 of 2016 concerning

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Amendments to Law 11 of 2008 concerning Electronic Information and Transactions, Article 1(22) of Government Regulation 71 of 2019 concerning the Implementation of Electronic Systems and Transactions, Article 1(11) of Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency of the Republic of Indonesia 9 of 2019 concerning Electronically Integrated Mortgage Rights Services, must be fulfilled. With the fulfillment of the certified electronic signature requirement, for example, it produces valid Evidence, so according to Makarim [20], it fulfills its authenticity.

To fulfill the first requirement of an electronic authentic deed, it is necessary to make an extension interpretation of the term 'in the presence of', which includes 'in the presence electronically' in it. In conventional notarial deeds, the meaning of 'in the presence of' is to appear directly before the Notary. Conversely, in electronic deed-making, the term 'attendance' can be extended to online attendance via video conference or other means. In the ITE Law, electronic transactions are possible. Based on these provisions, in conducting a land sale and purchase transaction or a transfer of rights to another land, the parties do not need to appear face-to-face before a PPAT. They may conduct transactions electronically under the standards of the UITE and its implementing regulations. If the means of information technology as a substitute for 'facing face-to-face' still raises pros and cons, making a Notarial deed can be done using the old concept, namely the parties facing the PPAT. While the registration of legal acts made before the PPAT takes place electronically, as is currently done in the electronic registration of Mortgage Rights as stipulated in the Regulation of the Minister of Agrarian and Spatial Planning / Head of the National Land Agency of the Republic of Indonesia 9 of 2019 [25]. The regulation of these two conditions is necessary so electronic notarial deeds can be equated with authentic deeds and have perfect evidentiary power.

The change in the regulation of electronic notarial Deed making is also part of the national legal development strategy 2025-2045. The change is strengthening electronic government services (e-government) to improve access and quality of public services and implementing information and communication technology to protect national economic interests [26].

Making a PPAT Deed has been made possible by legislation through Article 147 of the Job Creation Law, for which the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency is preparing the implementing regulations. Meanwhile, Article 147 of the Job Creation Law does not regulate other Notarial Deeds outside the Land Deed made by and before a Notary.

Land deed officials (PPAT) are appointed and dismissed by the Minister of Agrarian Affairs and Spatial Planning/National Land Agency. Notary authority as amended by "Article 15 Law Number 2 of 2014 concerning the Change of Law Number 30 of 2004 concerning the position of a Notary includes: In contrast, Notaries are appointed and dismissed by the Minister of Law and Human Rights. The authority of a Notary, as stipulated in Article 15 of Law 2 of 2014 on the Amendment to Law 30 of 2004 on the Office of Notary, includes: (1) to make authentic deeds regarding all agreements, acts, and stipulations required by laws and regulations or desired by those concerned to be stated in a notarial deed; (2) to certify signatures and determine the certainty of the date of letters under the hand by registering in a particular book; to record letters under the hand by registering in a unique book; (3) other authorities stipulated in laws and regulations;

The Notarial Deed only has evidentiary power as a deed under hand if the laws do not govern the terms, form, and method. It should also be the case in doing an electronic Notarial deed. If the electronic notarial Deed is not under the requirements, its evidentiary power is the same as a deed under the hand. It should follow the provision in making signatures, stamps, and seals, as well as the electronic communication or meetings as a substitute for the requirement of 'in the presence of' face-to-face, to make the process valid.

Electronic transactions, as regulated in the provisions of Article 1 Point 2 of the ITE Law, are defined as legal actions carried out using computers, computer networks, and other electronic media. People generally outline these electronic transactions in documents that are also electronic. According to the provisions of Article 1 Point 4 of the ITE Law, electronic documents are any Electronic Information that is created, sent, or stored in analog, digital, or the like, which can be displayed, seen, and heard through an Electronic System, that has meaning.

Relating to the implementation of Article 147 of the Job Creation Law and the definition of Electronic Transactions and Electronic Documents in the ITE Law, it may make the land sale and purchase agreements through electronic media, such as teleconference, and includes electronic transactions. The proof, in the form of a deed of sale and purchase of land rights, can also be made electronically and is called an electronic document.

Electronic transactions of sale and purchase of land rights before of Land Deed Officials (PPAT) and its electronic documents, namely the Deed of sale and purchase of land rights, must meet the requirements as stipulated in Article 4 of Government Regulation 71 of 2019 which stipulates that every Electronic System Operator must operate an Electronic System that meets the requirements: (1) be able to retrieve Electronic Information and/or Electronic Documents intact in accordance with the retention period stipulated by laws and regulations; (2) be able to protect the availability, integrity, authenticity, confidentiality, and accessibility of Electronic Information in the operation of the Electronic System; (3) can operate in accordance with the procedures or instructions in the implementation of the Electronic System; (4) is equipped with procedures or instructions that are announced with language, information, or symbols that can be understood by the parties concerned with the implementation of the

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Electronic System; and (5) has an ongoing mechanism to maintain the novelty, clarity, and accountability of procedures or instructions.

The PPAT deed made electronically can be classified as an electronic document and still fulfill the authentic Deed referred to in Article 1868 of the Civil Code if the PPAT has received certification from the Government and meets the requirements as a valid electronic contract, including the parties. If the electronic system used has yet to receive certification from the Government, any electronic document made by a PPAT will lose its authenticity. The Deed then will be relegated to a deed under the hand, and there is a possibility that the PPAT can be sued by his client because he feels disadvantaged.

### 5. CONCLUSIONS

Based on the problem analysis, it concludes two things. First, the authority of PPAT to make a deed of transfer of rights, including a deed of the encumbrance of rights, is an authority that originates from Article 147 of the Job Creation Law as *Lex Specialis* by overriding the enactment of Article 5 paragraph 4 (b) of the ITE Law as *Lex Generali*. The granting of this authority is a responsive legal formation to meet the development and needs of the times. Second, the electronic PPAT Deed that meets the requirements as an electronic document determined by the ITE Law and its implementing regulations is authentic in electronic form. Hence, its evidentiary power is perfect as long as the terms, form, and method of electronically making a Notarial Deed of transfer of land rights follow the provisions of laws and regulations. To avoid claims, it needs to immediately design technical regulations on the procedures for making electronic deeds of transfer rights that guarantee legal certainty and protection to PPATs.

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