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# IMPLEMENTATION OF THE ROLE OF NOTARY THROUGH CAPITAL MARKET IN THE ERA OF ASEAN ECONOMIC COMMUNITY

**Faisal Santiago**

Department of Law, Universitas Borobudur, Jakarta, Indonesia

## ABSTRACT

*Law has evolved as an order and system, from limited functions as an instrument to meet the needs of local communities, to the new function as a controller of community life order on both national and global scale. One of the government effort in the field of economic is to pursue development in capital market, which required support mainly by parties related to the capital market. Therefore, the institutional performance of capital market is sustained by various professional device regulated by legislation, in order to provide legal certainty to all parties involved in capital market activities. Herein is notary registered in the institutional capital market. Notary is a public official who is responsible to make authentic deed which could be the evidence of certain legal actions. The notary deed is an authentic document and the legal proof for parties in a variety of business relationships. The need of legal certainty in a variety of economic and social relations, both nationally, regionally and globally, given the role and functions of notary proficiency level. Similarly, to meet the Asean Economic Community goals, the notary has the strategic function to provide protection and legal certainty through deeds, as well as part of the legal system in business contract establishment.*

**Key words:** Notary, Role And Function, Deed, Capital Market, Legal Certainty.

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## 1. INTRODUCTION

The era of globalization has broad and multi-faceted impact in the economic, legal, social, political and security beings. This condition implies to the growth and development of the society regarding the fulfillment of the needs in the global, regional and national level in terms of togetherness, sustainability and inclusiveness. These dimensions are related to the interaction of society, especially the business behavior which influence each other (Santiago, 2012: 8). Moreover, the contemporary development in economic and business aspects demands the existence of legal guarantee as well as cross-border legal protection for business people having

business contracts internationally. A legal standard thus is required to serve the needs and interests of the business community (Harahap, 1995: 1-10). The legal and business aspects are simultaneously growing in parallel with complementary relationships. Law has evolved as an order and system, from limited functions as an instrument to meet the needs of local communities, to the new functions as a controller of social order both in national and global scale. Meanwhile, the conduct of business has also grown from patterns of activity which was originally developed from real sector of the economy, such as manufacture and labor-intensive industries, to the patterns of financial sector activity. Nowadays, the capital market has a strategic function because of its potential to raise capital and funds, that are purposively used to increase the volume of development activities (Nasarudin, 2004:1)

Changes in behavior in the field of law and business also have the effect on the growing demand in many countries to legislate some business laws and regulations. Furthermore, these changes are also driven by changes in the economic structure from agrarian-based society to industry and service-based society. In essence, this structural changes will replace the old patterns with the new ones to ensure legal certainty targeted based on contracts made by and for the citizens. The changes also enables the changes in organizational life of the citizens in which they are able to decide freely the position of their rights and obligations. This freedom has only been limited by confirmation of other citizens through official contracts evidenced by the deed that legitimacy can be accounted for. (Santiago, 2010: 11)

Legal certainty in the field of business will be firmly based on the *ad hoc* and inter-party agreements. Contemporarily, the business contracts are no longer determined by the habits that rely on trust. So, if there at certain condition is a conflict can be solved by contextual and legal framing as stipulated in the contract deed made by a legitimate authority. Hence, the notary has important functions to make legal contracts. Especially in Indonesia, according to Law No. 30 of 2004, the notary is referred to as public official. Therefore, a deed made by the notary is considered to have the legal force. This paper aims to analyse the functions of notary in the face of ASEAN Economic Community. The scope of the problems in this study is how the role and function of the notary in the face of the ASEAN Economic Community. This study especially analyzes the the role of notary in capital market operation.

## 2. THE MEANING AND FUNCTION OF CAPITAL MARKET

The development of modern society was also entering the area of economic activity broadly includes funding strategically conducted by many countries in the world. One of the tools that are considered effective in Indonesia is the existence of Capital Market institution that is governed by the constitution No. 8 of 1995 about Capital Market (Capital Market Law).

According to Article 1 point 13, the Capital Market is an activity that is concerned with the public offering and trading of securities, the Public Company relating to the issuance of securities, as well as institutions and professions related to securities. (UUPM)

The capital market is basically a market that trades securities in the form of long-term financial instruments in the form of capital (equity) and debt. Term capital market is used as the translation of the capital market, which means a place or system of how to meet the needs of funds for capital of a company. The stock market is the place to buy or sell newly issued securities. (Simatupang, Richart Burton, 2003: case 169). Another popular term used is *securities market*.

Thus, the Indonesian capital market trading in securities in the form of capital instruments and debt, derivative instruments such as letter of replacement or tentative evidence of an effect, evidence of the advantages and warranties, rights to order or buy stocks or bonds, warrants, and options.

Capital market instruments can be distinguished on debt securities (bonds) and ownership securities (stock or equity). Bond is an evidence of debt recognition from a company. Meanwhile, stock is an evidence of capital investment in the company. On exchanges around the world, both effects are heavily trafficked. It is also happen in Indonesia's stock exchange. Specifically, in Indonesia, there are also securities named as credit securities, which is an evidence of the recognition of short-term debt (less than 3 years).

In practice, stocks and bonds can be multiplied manifold. That is, stocks and bonds derived in some kind of classification that can be determined according to the criteria inherent in each stock and bond itself. (Sound Son, Anom, 2000)

In most developing countries, economic development is one that is often used as a development priority scale along with its various dynamics. Reality faced today, Indonesia needs a very large fund, so that various attempts were made including fund raising efforts, including through syndicated loans from donor countries. But for the Indonesian government, foreign borrowing is not the way of the strategic efforts for development. So the solution, as the other strategic efforts, is to raise the potential that exist in Indonesian society optimally. Thus alternatively, capital market is made that is intended as a vehicle to meet the needs of development financing.

Strategic function and importance of capital markets makes the government is very concerned over the development and advancement of capital markets, because of the potential to raise funds massively, so it can be used to increase the volume of development activities. (Irsan Nasarudin 2004, p 1)

It is expected the society moved to invest in the stock market by buying a number of securities of the companies. Ownership of securities firms by communities provide hope and opportunities to improve the welfare if the positive performance of resources made by the company.

One of the efforts of the direction of government policy in the field of economics has always strived to support and stimulate the development of capital markets, which required support shared mainly by related parties of the capital market itself. Therefore, the performance of the institutional capital market sustained various professional device regulated by legislation, in order to provide assurance to all parties involved in capital market activities, which of them as supporting the notary enrolled at institutions in the capital market institutions.

### **3. THE ROLE AND FUNCTION OF NOTARY**

In many countries in the world, the role of institutions that have legitimate authority to make the notary deed is notary agencies. Deed of notary is generally recognized as evidence; even though the position is often depend on the legal system in each country.

Notary in Indonesia is categorized as Latin notaries (Soedjendro, 2001: 28), which according to Black was the one who recorded what was said by another person or people who copy what has been written by others. Latin notaries characteristic is that he is carrying out the task of serving the needs of the community within the scope of private law / civil law. Essentially, the main theme of the civil law is property rights and agreements. This means that one aspect of the duties and authority of the Notary in serving the needs of the community is making the deed of agreement with a view to gaining legal certainty concerning the implementation of the agreement and deliver justice in the sense of equal distribution of rights and obligations or responsibilities to the parties.

Notary is a public official (*openbaarambtenaar*) which is responsible for making authentic deed which can be as evidence of certain legal acts. The legal basis of the regulation notary in Indonesia was initially set at *Reglement op het-ambt Notary is Indonesie, Ordinance* dated

January 11th 1860, Stb. 1860 number 3. Since October 6, 2004 that provision was replaced by the law of *Undang-Undang Jabatan Notaris* No. 30 of 2004 concerning notary (hereinafter abbreviated *UUJN*). *Article 15* according to paragraph (1) *UUJN*, an authorized notary to make the deeds authentic of all deeds, agreements, and determination required by a general regulation or by the concerned desired to be declared in an authentic deed.

Notary deed as authentic deed is a perfect evidence for the parties in the traffic law relationship. In a variety of business relationships, banking and others, will need written evidence in the form of an authentic deed is increasing in line with its development, the demands of legal certainty in a variety of economic and social relations, either nationally, regionally and globally. Through the authentic deed clearly define the rights and obligations, ensure legal certainty and at the same time is expected to avoid disputes.

Manufactures of official contracts are usually carried out by officials who have official authority. Authentic deed required by legislation, desired by the parties concerned to ensure the rights and obligations of the parties for the sake of certainty, order and protection of the law.

"Product" notaries have formal proof strength, material and to certain legal actions also have the power executorial. The public officials need to be given special attributes: an independent position (*onafhankelijkheid-independence*) and impartial (*onpartijdigheid-impartiality*) in order to run his produce certificates that have the power of perfect evidence. (Santiago, 2010: 104)

Therefore, the position of Notary as a public official (as Notary) and "work" must be regulated by law (or laws on par with the Act), that official notary in running the office assured that its deed has a position and weight as well as nature "as the strength of evidence that is perfect". In Indonesia, this time related to the position and authority of the Notary governed by Law No. 30 Year 2004 on Notary.

In carrying out the notary profession impartially (*onpartijdigheid-impartiality*) and has an independent position (*onafhankelijkheid-independence*), is not supervised by anyone. Thus the nature and characteristics possessed only by the notary, as well as the position of an independent and impartial must be adhered to as well as absolute or mandatory run by a notary. (Radjaguguk, 1998: 49)

In the field of legal proof authentic deed made by and / or in the presence of a public official has a significant meaning that differentiate it with deed under the hand.

The verification means that: The word imposes obligations opposed to disprove the notion is not necessary to prove that the signature of a notary is true. That information is made a notary in his or her deed considered true; other than that, the deed of guarantee date made, who made them and the truth of the information given by the parties (Santiago, 2010: 106)

In the development of social transformative from the local to the national and global (which in the early days better known as word system) of the last century it was the demands of the business world industrial This leads to cause the changes in the legal world (which reflect changes structural of the world from the normative status to contracts) it, or vice versa; that changes in the legal institutions that allowed mobilization capital funds and manpower in order to support business activities that is safe and conducive.

Furthermore, the concept of law as well as the institution responsible for the appropriate portion defined by the role as legal products including Notary institutions, to carry out its role in a professional manner for the benefit of the legal community. Legal authority owned notary on his designated State as a public official that has the legitimacy to make a variety of deed, including making contracts (law in *concreto*) recognized a magnitude equivalent legislation (law in *abstracto*) for the parties, (originally made on the basis of freedom of the parties, to the extent not contrary to the legislation, free from any form of coercion, digression, and swindle).

Given the role and function of the notary, to meet Asean-Economic trade activity, the Notary will be the strategic institution that can provide protection and legal certainty through deeds were made, as well as part of the legal system in the contract manufacturing business.

The legal system that was developed around the concept of contract in any private relationship between community law (subjects of law, various legal events), can be done in the interests of ensuring legal certainty and legal protection, and can be developed as an idea conceived as the result of a social contract to respect the individual rights of the legal community, which is done in the presence of a legitimate institution and has the authority, the notary. (Santiago, 2010: 12)

Here the laws are likely to be used as a conduit of powers new to the parties concerned, including to recognize the authority of the government (and the whole apparatus), or as well as giving legitimacy (as notary to make the deed and etc).

In the behavior of the global community (in this case the Asean Economic Community), requires legal protection to legal certainty, providing a strong influence on patterns of legal legitimacy implemented by institutions that have the authority (including the notary) and public law in resolving possible conflicts of a legal event. Therefore, if the law requires the completion of a conflict, the principle of the rule of law gives a major role to judges to escort him, including the nature of the position to reinforce the legitimacy of the deed made on the authority possessed Notary.

The importance of the rule of law in a country that supports economic development, is linked to the fact the habit that the ability to build in a developing country is in need of substantial funds from investors, which principally sometimes absorbed in the industry, which includes many involve aspects binding fully in support the activities of contract law became increasingly important, in a business transaction.

"The important role which is based on contract law, caused by the legislation are not able to pursue the changes in society which so rapidly due to development plans. So that people will look for themselves to organize their interests, until legislators set the new developments." (Nugroho, 1990: 23)

The existence of substantial aspects of contract law may provide the legal regulation of business behavior that is mutually beneficial for all parties, in the sense there is no injured party. Along with development-oriented industrialization, that to produce a product, an indicator that requires binding business contracts, among others; contract binding business relationships between business entities such as the sale and purchase of stocks and securities on capital markets especially for companies willing to go public and will conduct Initial Public Offering (IPO), the overall need of protection and legal certainty, guided by the Notary as a supporting institution capital market in order to gain public legitimacy.

Thus, business contracts are getting legal protection for parties, as well as the rights and obligations to be implemented. Contracts of business in capital markets activities will have the force of law if according to the capital markets act executed before notary registered in from Indonesia Capital Market Supervisory Board (Bapepam-LK).

#### **4. CONCLUSION**

The role and function of the notary in the face of the ASEAN Economic Community is very important. Its position as a public official, has a strategic role and function in providing legal protection and legal certainty for business entities requiring the legitimacy of international cooperation as well as binding and contained in an authentic act, especially for businesses whose activities in the capital market. In the scope of business conduct ASEAN capital markets in the region, all business entities requiring businesses that have legitimate business contract

law, and the certainty and provide legal protection. Business contracts in question, in the form of a deed before a notary according notary deed made their jurisdiction, as well as the corresponding desire of the parties who want to make business contracts. Based on the growth dynamics of business activities that use capital market as a means for the Asean Economic Community, the role and function of strategic Notaries in a deed by a business contract to be relevant and strategic to businesses, so that contract is made in the form of a deed be legally valid, and ensuring legal certainty and legal protection of the parties' business entities in his capacity as a business in the capital market. Thus each business contract in capital markets by the business must be made before a notary public in the form of authentic act, so that it has a legitimate binding law approved at the will of the parties.

Role and functions of notaries in capital markets activity is supporting professional institutions at the behest of law No. 8 of 1995 concerning capital market, intended to provide legal certainty for the businesses, which are fastened through a business contract deed. To give an aspect of legal certainty and fairness as well as security validation requirements in the activities of the capital market as in the Indonesia Stock Exchange, as well as the binding of business transactions for companies that will undertake to implement an Initial Public Offering (IPO), institutional institutions that have public authority legitimized by the state in terms of making a deed binding in business transactions, especially in business transactions in the capital market institutions, the notary listed on supporting activities in the capital market. Overall, notaries in capital market activities contribute greatly to be able to provide certainty and legal protection for the ASEAN Economic Community.

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