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The Notary's Obligation to Read Deeds Between Fiqh al-Tawthiq and Positive Law: *A Maqasid al-Shariah* Analysis of Normative Ambiguity in Article 16 of the Indonesian Law on Notary Position[1]

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Abstract:
The documentation of legal transactions occupies a distinctive place in Islamic law: Qur'an, Surah Al-Baqarah (2): 282, commands believers to record debts in writing through a just scribe (katib bi al-'adl), a command that classical fiqh literature on tawthiq (authentication) and shurut (legal formulae) developed into an elaborate doctrine of documentary certainty long before the emergence of the modern civil-law notariat. This study examines the Indonesian notary's statutory obligation to read authentic deeds under Article 16 of the Law on Notary Position (Law Number 2 of 2014) against the backdrop of the Islamic legal-documentary tradition, alongside the secular jurisprudential lenses of Hans Kelsen's hierarchy of norms and Gustav Radbruch's principle of legal certainty. Article 16 exhibits an internal disharmony: paragraph (1) letter (m) imposes a mandatory reading obligation reflecting the fiqh requirement that a just scribe ensure the parties' informed consent, paragraph (7) permits an exception based on the appearers' bare declaration, and paragraphs (8) and (9) retain sanctions, including degradation to a private deed, for procedural non-compliance. Using normative legal research combined with a maqasidi-usuli approach, this study treats the Qur'anic mudayanah verse and classical tawthiq literature as Islamic primary sources parallel to Indonesian positive legislation, and analyzes both through statutory, conceptual, and case-based approaches. The analysis shows that, viewed through usul al-fiqh, paragraph (7) functions as a nass mujmal (an ambiguous legislative text) that has never received the bayan tafsiri (explanatory clarification) needed to reconcile it with the sanction provisions in paragraphs (8) and (9) — a diagnosis that converges strikingly with Kelsen's finding of an unresolved validity conflict between a derivative exception-norm and its parent obligation. Because Indonesian notarial deeds are also the principal instrument for documenting Sharia-compliant contracts (akad syariah) such as murabahah, ijarah, and hibah, this disharmony carries direct consequences for the legal certainty of Islamic commercial

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and family-law transactions, not only for secular civil transactions. The study proposes a clause-referenced verification standard and an explicit burden-of-proof rule for Article 16 paragraph (7), justified simultaneously under maslahah mursalah and the positive-law objective of legal certainty.

Keywords: *Notary; fiqh al-tawthiq; Maqasid al-Shariah; hierarchy of norms; legal certainty; deed reading obligation*

A. INTRODUCTION

The requirement that legal transactions be documented is not a modern civil-law invention. Qur'an, Surah Al-Baqarah (2): 282 — the longest verse of the Qur'an — instructs believers to reduce debts and deferred obligations to writing through a scribe who writes with justice ('adl), and further instructs that the party bearing the obligation dictate the terms so that nothing is diminished or misrepresented. Classical jurists developed this command into the discipline of fiqh al-tawthiq (the jurisprudence of authentication) and a substantial literature on shurut (legal formulae for contracts, deeds, and instruments), exemplified by works such as al-Tahawi's Kitab al-Shurut al-Kabir, which cataloged model deed language for sales, marriage, endowment (waqf), and debt long before the emergence of the modern notarial office. The office of the katib al-'adl (the just scribe) in classical Islamic legal practice performed a function directly analogous to the modern notary: verifying the parties' identity and capacity, ensuring their informed and voluntary consent, and producing a document capable of serving as reliable evidence in the event of future dispute (Kamali, 2008).

Indonesia's modern notarial office, though structured by a civil-law statute of Dutch colonial lineage, performs precisely this function and, in practice, is the principal instrument through which Sharia-compliant contracts (akad syariah) — including murabahah and ijarah financing agreements, hibah, wasiat, and waqf instruments — are given documentary and evidentiary force recognized by Indonesian courts and by Islamic financial institutions operating under DSN-MUI fatwas. The legal certainty of the Indonesian notarial deed is therefore not merely a matter of secular civil procedure; it directly conditions the reliability of the documentary record on which Sharia-compliant transactions depend.

Central to both the classical fiqh al-tawthiq tradition and the modern UUJN is the requirement that the document be verified before the parties prior to finalization — in the classical model, through the obligated party's own dictation before witnesses; in the modern model, through the notary's reading of the deed aloud under Article 16 paragraph (1) letter (m) of the Law on Notary Position. Both mechanisms serve the same underlying purpose: ensuring that what is recorded genuinely reflects what the parties agreed to, and thereby preventing the very disputes (khusumah) that documentation is meant to forestall (dar' al-mafasid).

However, the amendment introduced by Law Number 2 of 2014 added Article 16 paragraph (7), permitting the deed not to be read where the appearers merely declare, in the deed's closing section, that they have read, understood, and approved its contents — a bare declaration standing in marked contrast to the classical fiqh requirement that the obligated party actively dictate the terms to the scribe. Paragraphs (8) and (9), meanwhile, continue to attach the sanction of degradation to a private deed for non-compliance with formal requirements including the reading obligation. This creates the disharmony examined in this article: paragraph (7) offers no objective standard for verifying genuine understanding, and no rule clarifying its relationship to the sanction in paragraph (9).

Existing scholarship on unread deeds in the Indonesian notarial law literature addresses this problem almost entirely from within positive civil-law doctrine, without reference to the Islamic documentary tradition from which the notion of a trustworthy, impartial scribe of legal instruments historically derives, and without examining what the disharmony in Article 16 means for the certainty of Sharia-compliant transactions specifically. This article addresses that gap. It aims to (1) analyze the Article 16 disharmony through fiqh al-tawthiq and Maqasid al-Shariah, read alongside Kelsen's hierarchy of norms and Radbruch's legal certainty principle; (2) assess the implications of this disharmony for the documentary certainty of Sharia-compliant transactions recorded through Indonesian notarial deeds; and (3) propose concrete amendments consistent with both maslahah mursalah and positive-law legal certainty.

B. METHODE

This study employs normative (doctrinal) legal research combined with a maqasidi-usuli approach suited to a journal of Islamic law (Marzuki, 2021; Auda, 2008). Four approaches are used. The statutory approach examines Article 16, paragraphs (1), (7), (8), and (9), and letter (m) of Law Number 2 of 2014. The conceptual approach draws on Kelsen's hierarchy of norms and Radbruch's triad of legal certainty, justice, and expediency. The Islamic legal (maqasidi-usuli) approach applies usul al-fiqh categories — specifically the distinction between nass mujmal (an ambiguous text requiring further clarification) and nass mubayyan (a clarified, operative text) — together with the Maqasid al-Shariah categories of hifzh al-mal and 'adl, to the same statutory text. The case approach examines published judicial decisions addressing procedural defects in authentic deeds.

Legal materials are classified along two parallel primary tracks, reflecting the study's dual normative frame. On the positive-law side, primary materials comprise the 1945 Constitution, the Civil Code, Law Number 2 of 2014, and the judicial decisions discussed in Section C.4. On the Islamic-law side, primary materials comprise the Qur'anic mudayanah verse (Al-Baqarah 2:282) and the classical tawthiq/shurut literature exemplified by al-Tahawi. Secondary materials comprise legal textbooks, peer-reviewed articles, prior case commentary, and contemporary Maqasid al-Shariah and usul al-fiqh scholarship (Auda, 2008; Kamali, 2008); tertiary materials comprise legal and fiqh dictionaries.

Data are analyzed in four steps: (1) reduction, breaking Article 16 down paragraph by paragraph; (2) categorization, classifying each paragraph simultaneously as an obligation/exception/sanction-norm (Kelsenian frame) and, where applicable, as nass mujmal or mubayyan (usul al-fiqh frame); (3) interpretation, applying grammatical-systematic statutory interpretation and Radbruch's certainty criterion on the positive-law side, and applying the requirement of bayan (clarification) for an ambiguous legislative text on the Islamic-law side; and (4) synthesis, cross-checking the two frames against each other and against judicial reasoning in the decisions reviewed, and assessing the specific implications for Sharia-compliant transactions documented via notarial deeds.

This study has three limitations. First, as in the preceding secular-law draft of this analysis, the case discussion in Section C.4 relies on published academic commentary on the decisions concerned rather than the researchers' independent reading of complete case files. Second, the classical tawthiq literature is engaged at the level of its general doctrine and organizing principles rather than through an exhaustive survey of the shurut genre. Third, no specific DSN-MUI fatwa is analyzed in detail; the study's claim that notarial deeds document Sharia-compliant transactions rests on the general, well-established institutional practice of notarizing Islamic financial and family-law instruments in Indonesia, and a focused study of relevant fatwa positions is identified as a direction for further research.

C. RESULTS AND DISCUSSION

1. Fiqh al-Tawthiq: The Qur'anic Foundation of Documentary Certainty

The mudayanah verse (Al-Baqarah 2:282) establishes three requirements directly relevant to the modern reading obligation. First, the scribe must write with justice ('adl), establishing impartiality as a condition of valid documentation — the direct conceptual ancestor of the notary's duty of impartiality under the UUJN. Second, the party bearing the obligation must dictate the terms, and must not diminish or misrepresent them — a mechanism that guarantees the recorded terms genuinely originate from, and are understood by, the party they bind, functionally equivalent to the modern requirement that the deed be read back and confirmed before the appearers. Third, the verse contemplates witnesses to the transaction, paralleling the UUJN's requirement of instrumentary witnesses at execution.

Classical fiqh elaborated this Qur'anic foundation into the discipline of tawthiq, concerned with the conditions under which a written instrument may be relied upon as evidence, and the discipline of shurut, concerned with the precise formulae by which contracts, endowments, and other instruments should be drafted to avoid future dispute. Works such as al-Tahawi's Kitab al-Shurut al-Kabir cataloged standard clauses precisely because ambiguous or incomplete documentation was recognized, over a thousand years ago, as a direct cause of litigation — the same concern that motivates the modern reading obligation in Article 16 paragraph (1) letter (m). The office of the katib al-'adl, like the modern notary, existed to discharge this documentary function on behalf of the community rather than on behalf of either party alone.

Read against this tradition, the reading-back mechanism in Article 16 paragraph (1) letter (m) is not a peculiarly secular procedural formality but a modern institutional substitute for the dictation mechanism the mudayanah verse itself prescribes: where the classical model secures genuine understanding by having the obligated party dictate the terms, the modern model secures it by having the notary read the terms back for confirmation. Both mechanisms share the same underlying 'illat: preventing an instrument from binding a party to terms they did not genuinely understand or agree to.

2. *Nass Mujmal and the Hierarchy of Norms: A Convergent Diagnosis of Article 16*

Usul al-fiqh distinguishes between nass qat'i (a text of definite, singular meaning) and nass zanni (a text open to more than one meaning), and further distinguishes nass mujmal (a text whose application remains ambiguous until clarified by further textual or contextual bayan) from nass mubayyan (a text whose meaning has been settled by such clarification). Article 16 paragraph (7), read in isolation, appears to state a straightforward exception; read together with paragraphs (8) and (9), it becomes a nass mujmal, because the legislation never supplies the bayan tafsiri needed to determine whether reliance on paragraph (7) forecloses the sanction in paragraph (9), or under what conditions it does so. Until such clarification is supplied — whether by amendment or by authoritative implementing regulation — the paragraph cannot be treated as mubayyan, and its practical application will necessarily vary according to the interpreter.

This usul al-fiqh diagnosis converges strikingly with the secular jurisprudential analysis available from Kelsen's hierarchy-of-norms theory, under which a lower, derivative norm (paragraph 7) must be reconciled with the higher norm from which it draws its authority (paragraph 1 letter m) and with the sanction structure attached to that higher norm (paragraphs 8-9); where no such reconciliation exists, the derivative norm suffers a defect of validity rather than a mere difficulty of interpretation (Kelsen, 1967). Radbruch's principle of legal certainty (Rechtssicherheit) supplies the same conclusion from a third angle: a norm open to two contradictory readings fails the predictability that legal certainty requires, regardless of the value — justice or administrative expediency — the legislature intended to prioritize when introducing the exception (Radbruch, 1950). That three independent analytical traditions — Qur'anic-fiqh, Kelsenian, and Radbruchian — converge on the same diagnosis of Article 16 paragraph (7) as an unresolved, ambiguous derivative provision considerably strengthens the claim that the disharmony is a genuine structural defect rather than an artifact of any single interpretive method.

3. Maqasid al-Shariah and the Stakes for Sharia-Compliant Transactions

Assessed against Maqasid al-Shariah, the reading obligation engages hifzh al-mal (protection of wealth), since a deed recording a financial or property transaction that is not genuinely understood by a party exposes that party to potential loss through terms they did not truly consent to; it engages 'adl (justice), since the katib/notary's impartiality depends on ensuring both parties, not merely the stronger or better-informed party, understand the instrument; and it engages dar' al-mafasid (prevention of harm), since the entire rationale for documentation under the mudayanah verse is dispute prevention, a rationale defeated if the reading obligation can be discharged by a bare, unverifiable declaration.

These stakes are not confined to conventional civil transactions. Indonesian notaries routinely execute deeds recording Sharia-compliant contracts — murabahah and ijarah financing agreements used by Islamic banks, hibah (gift) and wasiat (bequest) instruments, and waqf declarations — where the underlying akad must satisfy Sharia conditions of valid consent (ridha) independently of, and prior to, its civil-law documentation. If the notarial deed itself is executed under the ambiguous paragraph (7) exception without adequate verification of genuine understanding, the documentary record of the akad may fail to reliably evidence the ridha that Islamic contract law requires as a condition of the underlying transaction's own validity, compounding a civil-law evidentiary problem with a fiqh muamalat validity problem. Resolving the Article 16 disharmony therefore serves an interest specific to Islamic law and Islamic finance practice, not only the general interest of secular civil certainty.

4. Judicial Treatment of Procedurally Defective Deeds

Published judicial commentary indicates that Indonesian courts generally treat compliance with the reading obligation as material to a deed's evidentiary status, but differ in characterizing non-compliance. Commentary on District Court Decision Number 762/Pid.B/2021/PN.Jkt.Sel reports that a deed executed without fulfilling the reading requirement and without proper attendance of witnesses was treated by the court as relevant to both the deed's legality and its role in facilitating subsequent unlawful conduct (Muhammad, 2025). Commentary on Supreme Court Decision Number 3466 K/Pdt/2016 similarly reports that procedural non-compliance was found to degrade the deed's evidentiary status to that of a private deed, without automatically voiding the underlying transaction (Wanura, 2022). Commentary on District Court Decision Number 10/Pdt.G/2019/PN.Dps reports a more permissive judicial approach upholding the deed's authentic status despite alleged procedural irregularities, a result the commentary itself criticizes (Moersano, 2023). As in the general-law analysis this study builds upon, this inconsistency is best read as the judicial symptom of the unresolved paragraph (7)/(9) relationship rather than as inconsistent judicial reasoning as such; the case analysis here again relies on secondary commentary rather than independent review of the complete case files, a limitation noted in Section B.

5. Toward Harmonization: A Reform Proposal Grounded in Maslahah Mursalah

This study proposes that Article 16 paragraph (7) be amended to require a clause-referenced declaration — specifying, at minimum, the object, price or consideration, and the rights and obligations of each party — rather than a general statement of having read and understood the deed, together with an explicit rule allocating the burden of proof where the declaration is later disputed, under which the deed presumptively retains authentic status unless the challenging party demonstrates the declaration was not genuinely informed. This proposal is justified doctrinally on two independent grounds that reinforce one another: under maslahah mursalah, it serves the unlegislated but clearly beneficial interest of preventing exactly the kind of documentary uncertainty the mudayanah verse was revealed to forestall; and under positive legal-certainty doctrine, it supplies the bayan/reconciliation needed to convert paragraph (7) from a nass mujmal into a nass mubayyan, resolving the Kelsenian validity conflict identified in Section C.2.

For deeds recording Sharia-compliant contracts specifically, this study further recommends that implementing regulation require notaries to record, in the deed itself, an explicit confirmation that the parties understood the Sharia-relevant terms of the akad (such as the profit-sharing ratio in a murabahah or ijarah agreement) in addition to the general civil-law terms, so that the documentary record can serve as reliable evidence of ridha for purposes of both civil evidentiary law and fiqh muamalat validity.

CONCLUSIONS

This study concludes that the disharmony in Article 16 of the Law on Notary Position, when examined through fiqh al-tawthiq and Maqasid al-Shariah alongside Kelsen's hierarchy of norms and Radbruch's principle of legal certainty, is best understood as an unresolved conflict between an ambiguous derivative provision (paragraph 7, a nass mujmal in usul al-fiqh terms) and the sanction structure that remains attached to the obligation it purports to qualify (paragraphs 8-9). The convergence of the Qur'anic-fiqh, Kelsenian, and Radbruchian diagnoses across three independent analytical traditions considerably strengthens the claim that this is a genuine structural defect in the legislation itself. Because Indonesian notarial deeds are also the principal instrument documenting Sharia-compliant transactions, this disharmony carries consequences for Islamic commercial and family-law certainty that existing scholarship, framed solely within secular civil-law doctrine, has not addressed.

Accordingly, this study recommends amending Article 16 paragraph (7) to require a clause-referenced declaration and an explicit burden-of-proof rule, a reform justified simultaneously by maslahah mursalah and by positive legal-certainty doctrine, together with implementing regulation requiring explicit confirmation of Sharia-relevant terms for deeds recording akad syariah. Future research should extend this analysis through direct examination of complete case files, a focused study of relevant DSN-MUI fatwa positions on documentation of Islamic financial contracts, and an empirical study of notarial practice under paragraph (7) in transactions involving Sharia-compliant instruments specifically.

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