

LEGALITY OF AUTHENTIC DEED WITH CYBER NOTARY BASIS ACCORDING TO LEGAL ASSURANCE PRINCIPLES

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ABSTRACT

Cyber Notary is a concept that uses technological advancements to allow notaries to perform their daily duties by creating authentic deeds in cyberspace. Notaries require legal certainty in order to complete the electronic deed with the goal of serving as a guide. This study aims to determine the shape of the legality of making an authentic deed with a cyber notary basis according to legal certainty principles. The type of research used in this research is normative juridical, namely the approach method that uses the positivist legislative conception. The results of this study are Cyber notary does not meet criteria number five of the principle of legal certainty and in fact the cyber notary is still contrary to the legality of the proof of law.

Keywords: *legality; authentic deed; cyber notary; legal certainty.*

INTRODUCTION

Notary services in globalization era have moved towards electronic-based services known as Cyber Notary so that they should be further regulated in the laws and regulations in force in Indonesia. It aims to ensure certainty, order, and legal protection to the parties and Notary related to the Deed made. Indonesia, which is in the era of globalization, is marked by the era of information and communication technology (ICT) which introduces cyberspace (cyberspace, virtual world) through internet network, communication with electronic media without paper. A person will enter a virtual world that is abstract, universal, independent of the circumstances of place and time through this electronic media.¹¹

By observing developments in several countries, both in the form of Common Law and Civil Law, many countries have empowered the function and role of Notaries in electronic transactions. Therefore, Indonesia must also stimulate the implementation of its Notary services in electronic transactions, even to the point of providing notary services themselves electronically.²

The rapid development of technology makes people have to be able to adapt to these changes. To adjust the ongoing developments, the law must always balance it by making changes in its positive law. Although the field of law continues to experience changes due to these developments, the reality is that law continues to lag behind. This backwardness also has an impact on the legal profession, especially the notarial field. One of them is the absence of legal certainty in an authentic deed made by a notary electronically. It is because no laws and regulations that specifically regulate the making of authentic deeds by a Notary electronically exist.

Legal certainty is an important aspect in making an authentic deed by a notary. It is because it will be a problem for the parties if the losses are experienced because of no legal protection

for the parties; even possible for the Notary to be caught in a legal case because there are no clear legal rules related to the electronically made deed. Notaries need legal certainty in making the deed electronically, meaning that the notary needs a measure that becomes a guide in making the deed electronically. This measure is called a rule made by a party who has the authority to do so, because in legal certainty, there are clear norms so that it can be used as a guide for Notaries who are subject to this regulation.

One of the powers of a Notary in the Elucidation of Article 15 Paragraph (3) of the new Notary Office Law (UUJN) is to certify transactions conducted electronically (Cyber Notary). But unfortunately, there is no further regulation regarding the authority of the Notary in terms of Cyber Notary. Thus, it can be said that the word Cyber Notary is only mentioned in the Elucidation of Article 15 Paragraph (3) of the new UUJN, but does not explain what is meant by Cyber Notary. Cyber Notary is a concept that utilizes technological advances for Notaries to make authentic Deeds in cyberspace and carry out their daily duties; for example, signing of Deeds electronically and General Meeting of Shareholders by teleconference. Thus, it can be said that the concept of Cyber Notary is related to the implementation of the authority of a Notary based on information technology.³³

There are two aspects that are emphasized in Cyber Notary, which are authority and technology. The definition of certification is a procedure where a third party provides a written guarantee that a product, process, or service have met certain standards based on an audit carried out with an agreed procedure.⁴ The development of the Cyber Notary discourse makes a Notary able to carry out the functions and authorities of their position based on technology, such as making an electronic deed. The concept of an electronic deed is intended to simplify and speed up the duties and authorities of a notary in making an authentic deed, regarding all actions, agreements, and provisions required by law or that are desired by interested parties to be stated in an authentic deed.

Cyber Notary indeed it has been mentioned in the Elucidation of Article 15 Paragraph (3) of the new UUJN and is not contained in the regulation because. However, the absence of regulation regarding Cyber Notary further causes Notaries to be hesitant to use the concept of Cyber Notary; thus, hampering the development of the notary profession in serving the needs of the community. Although the Cyber Notary concept is contained in the new UUJN, this regulation cannot guarantee that the Cyber Notary concept can be applied in practice and provides legal certainty.

Literature Review

Authentic Deed

An authentic deed, in Dutch it is called *authentieke akte van*, which is in Indonesia is regulated in Article 1868 of the Civil Code stating the meaning of an authentic deed is “a deed in the form determined by law by or before an official public authorized for where the deed was made”. Meanwhile, Article 1 point 7 UUJN also mentions the meaning of authentic deed as “a notarial deed, referred to as a deed, is an authentic deed made by or before a notary according to the form and procedure stipulated in this law”.⁵

Meanwhile, A. Kohar gives characteristics to be called an authentic deed as follows (a) a notarial deed is a deed made in the presence of the authorized person for it, (b) there is certainty of the date, (c) there is certainty of who signs (legality of identity of the parties), (d) the notary has advised before the deed was made regarding the contents of the deed (prohibited and

³³ Nurita, E., (2012), *Cyber Notary: Pemahaman Awal dalam Konsep Pemikiran*. Surabaya : Refika Aditama. p. 53

⁴ Salim HS. (2015). *Teknik Pembuatan Akta Satu “Konsep Teoritis, Kewenangan Notaris Bentuk dan Minuta Akta”*. Depok : Raja Grafindo Perasada. p. 48-49

⁵ *Ibid.* p. 52-54

allowed to do), (e) if there is a denial of the contents of the deed, the denial must be proven, and (f) the notary deed must be kept confidential by the notary.⁵

An authentic deed must meet the elements of the authenticity of a deed, these elements are (1) the deed is made in the form determined by law, (2) the deed must be made by or before a public official, and (3) the public official has the authority to make a deed. Regarding authentic deeds, it is also regulated in Article 165 HIR, which reads the same as Article 285 Rbg, stating “an authentic deed is a deed made by or before an official authorized to do so, a complete evidence between the parties from those who have rights from it about what is contained therein and even as a mere notification, but the latter is only notified that it is directly related to the matter in the deed “.⁶

Authentic deeds made before a Notary are divided into two types which are: 1) Deeds made by a Notary (Relaas) can be a deed that authentically describes an action taken or a situation seen or witnessed by a Notary. The notary in carrying out their position as a notary. The deed made contains a description of what is seen and witnessed and experienced. The examples include Minutes of the General Meeting of Shareholders in a Limited Liability Company, Deed of Registration of Budel, and other deeds; 2) Deed made before a Notary (Partij) confirmed by a Notary in an authentic deed. The examples are: the final will of the will maker, power, etc.⁷

Cyber Notary

Before discussing further about Cyber Notary, the author will explain the definition of Cyber Notary. The essence of Cyber Notary is a general concept that is often used in various scientific writings that mention the function of a Notary that is applied in transactions or relationships electronically, via internet. In other words, Cyber Notary is a concept that utilizes technological advances for Notaries to make authentic Deeds in cyberspace and carry out their daily duties, for example, signing of Deeds electronically and General Meeting of Shareholders by teleconference.⁸

Actually, a cyber notary has appeared since 1995, but it was hampered because there was no related legal basis. However, since the promulgation of Law No. 11 Year 2008 concerning Electronic Information and Transactions, the cyber notary discourse has been rolling again. Cyber Notary is intended to facilitate or accelerate the implementation of the duties and authorities of a Notary in making an authentic deed regarding all acts or agreements or provisions required by law or what interested parties want to be stated in an authentic deed.⁹

In the Elucidation of Article 15 Paragraph (3) of the new UUJN, it is stated about the authority of a Notary to certify transactions conducted electronically (Cyber Notary), but the Elucidation of the Article conflicts with the norms of another Article, namely Article 1 Number 7 of new UUJN which states that the Notary Deed is a Authentic deed made by or before a Notary according to the forms and procedures stipulated in the Notary Position Act. It means that, legally, the use of the words of “*menghadap*”, “*berhadapan*”, and “*hadapan*” in Article 1 Number 7 of the new UUJN is real presence. The purpose of real presence is physically the person concerned comes before a Notary of their own free will.¹⁰

In the concept of Cyber Notary, facing physically or directly facing each other is not required, but it can be used as visual media such as Teleconference or Skype without borders or city/

⁶ Soerojo, H. (2003), *Kepastian Hukum Hak Atas Tanah di Indonesia*. Surabaya : Arkola. p. 78-79

⁷ Adjie, H. (2008), *Meneropong Khazanah Notaris dan PPAT Indonesia, Kumpulan Tulisan Tentang Notaris dan PPAT*. Bandung : Citra Adhya Bakti. p. 92

⁸ Nurita, E. (2012), *Cyber Notary: Pemahaman Awal dalam Konsep Pemikiran*. Surabaya : Refika Aditama. p. 28-29

⁹ Indonesia. Undang-Undang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris, UU No. 2 Tahun 2014, LN No. 3 Tahun 2014, TLN No. 5491, Ps. 16 Ayat (1) Huruf c.

¹⁰ Chastra, D. F. (2021) “Kepastian Hukum Cyber Notary Dalam Kaidah Pembuatan Akta Autentik Oleh Notaris Berdasarkan Undang-Undang Jabatan Notaris”. *Indones. Notary* 3, 249, 5

provincial boundaries. Thus, the Notary carries out their position by applying it to transactions or relationships electronically via the internet as the main medium in their performance to make a Deed and leads to the form of a Deed which is initially legal if it is written on paper, to electronic Deed or in the form of an electronic document. In further development, the identity of the appearer does not need to be shown physically, but a Notary can download it from the agency authorized to make/issue the identity, for example is an Identity Card (KTP), Family Card (KK), Deed/Marriage Certificate or other identities that are allowed to be downloaded using certain access codes.

Likewise, the documents required for making the deed are simply downloaded by a Notary from a certain agency. On the other hand, the appearers, witnesses, and notaries simply use digital signatures, seals and stamps.¹¹ In addition, digital fingerprints are also required as stipulated in Article 16 Paragraph (1) Letter c of the new UUJN which states that in carrying out their positions, the Notary is obliged to attach letters and documents as well as the fingerprints of the appearers on the Minutes of Deed.¹² In terms of storage media, the storage of Minutes, grosses, copies, and quotations of Deeds does not need to be in paper form, but stored in a Microchip or Microfilm or other electronic media that can be printed as needed. If this can be done, the Notary's office does not require a large room.

Legal Certainty Theory

Law is a collection of rules or rules in a common life, the overall rules of behavior that apply in a common life, which can be enforced with a sanction. In carrying out its functions fairly, the law is carried out with legal certainty. An uncertain and unfair law is not a law.¹⁰

Law without the value of certainty will lose its identity and meaning because it can no longer be used as a guide for someone's behavior. Certainty is an inseparable feature of law, especially for written legal norms. Talking about the issue of legal certainty in relation to the implementation of the law itself, it cannot be separated from human behavior at all. Law without the value of certainty will lose its meaning because it can no longer be used as a behavioral guide for everyone. Certainty is referred to as one of the goals of law which is part of realizing justice. The implementation and enforcement of laws against acts against the law is a real form of legal certainty.¹³

The ideals of the law are one unit, they cannot be separated; thus, all three must be in every legal rule. Furthermore, on another occasion, Gustav Radbruch stated that there are 4 (four) basic things about the meaning of legal certainty. First, law is positive which is constitution. Second, the law is based on facts or established laws. Third, the facts must be clearly formulated to avoid mistakes in meaning, as well as being easy to implement. Fourth, positive law should not be easily changed. Then, the legal principle contains characteristics of (1) the legal principle is the basic thought or basic norm, (2) the legal principle is not a concrete legal regulation but the background of a concrete legal regulation, (3) the legal principle contains an assessment of decency; thus, it has an ethical dimension, and 4) the legal principle can be found in the legislation and the judge's decision.¹⁴

Lon Fuller in his book *The Morality of Law* proposes 8 (eight) principles that must be met by law, which if not fulfilled, then the law will fail to be called a law, or in other words there must be

¹¹ Makarim, E. , *Op.Cit.*

¹² Indonesia. Undang-Undang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris, UU No. 2 Tahun 2014, LN No. 3 Tahun 2014, TLN No. 5491, Ps. 16 Ayat (1) Huruf c. in.

¹³ Warman, (2010), K. *Hukum agraria dalam masyarakat majemuk: dinamika interaksi hukum adat dan hukum negara di Sumatra Barat*. Jakarta : HuMa. p. 210

¹⁴ R. Toni Prayogo. (2016), "Penerapan Asas Kepastian Hukum Dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 Tentang Hak Uji Materiil Dan Dalam Peraturan Mahkamah Konstitusi Nomor 06/Pmk/2005 Tentang Pedoman Beracara Dalam Pengujian Undang-Undang". *J. Legis. Indones.* 13, 193, 5-6

legal certainty. The eight principles are as follows: 1) A legal system consisting of regulations, not based on misguided decisions for certain matters; 2) The regulation is announced to the public; 3) Not retroactive, because it will damage the integrity of the system; 4) Made in a formula that is understood by the public; 5) There should be no conflicting regulations; 6) Must not demand an action that exceeds what can be done; 7) Should not be changed frequently; 8) There must be conformity between regulations and daily implementation.¹⁵ According to the description above, the author formulates a problem of how is the legality of making an authentic deed based on cyber notary based on the principle of legal certainty?

METHOD

The type of research used in this research is normative juridical, namely the approach method that uses the positivist legislative conception.¹⁶ Normative juridical research is focused on examining the application of rules or norms in positive law,¹⁷ while the approach that the author uses is the statutory approach which is carried out by examining all laws and regulations related to the legal issue being discussed, and the case approach which is carried out by examining cases related to the issue.

Sources of legal materials used in this study are primary legal materials which include the Civil Code, Authoritarian Law, and Legislation relating to this matter. In addition, the authors use secondary materials which include books, journals, and articles, as well as tertiary legal materials, materials that provide instructions and explanations for primary and secondary legal materials.¹⁸ The technique of collecting legal materials uses library research. The analytical method used is descriptive qualitative analysis, which is presenting a study on the data obtained from the object of research. A descriptive study is intended to provide data that is as accurate as possible about humans, conditions, or other symptoms.¹⁹ The point is that the legal material obtained in the research is described and linked in such a way so that it is presented in a more systematic writing in order to answer the problems that have been formulated.

ANALYSIS AND DISCUSSION

Cyber Notary is a concept that utilizes technological advances for Notaries to make authentic Deeds in cyberspace and carry out their daily duties; for example, signing of Deeds electronically and General Meeting of Shareholders by teleconference.²⁰ In the concept of Cyber Notary, facing physically or face to face is not required, but it can be seen visual media such as Teleconference or Skype without borders or city/province boundaries. Thus., the Notary carries out thier position by applying it to transactions or relationships electronically via the internet as the main medium in his performance to make a Deed and leads to the form of a Deed which is initially legal if it is written on paper, to electronic deed or in the form of electronic document of a Deed. In further development, the identity of the appearer does not need to be shown physically, but a Notary can download it from the agency authorized to make/issue the identity, for example an Identity Card (KTP), Family Card (KK), Deed/Marriage Certificate or other identities that are allowed to be downloaded using certain access

¹⁵ Sari, W., Ayu, D., Retno Murni, R. A. & Udiana, I. M., (2018), Kewenangan Notaris di Bidang Cyber Notary Berdasarkan Pasal 15 ayat (3) Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris. Udayana University, 3-4

¹⁶ Soemitro, R. H. (1999), *Metode Penelitian dan Jurimetri*. Surabaya : Ghalia Indonesia. p. 36-37

¹⁷ Ibrahim, J. (2006), *Teori & Metodologi Penelitian Hukum Normatif*. Malang : Penerbit Bayumedia. p. 62-64

¹⁸ Soekanto, S. & Mamudji, S. (2011), *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*. Jakarta : Raja Grafindo Persada. p. 83-84

¹⁹ *Ibid.* p.87-89

²⁰ Nurita, E. (2012), *Cyber Notary: Pemahaman Awal dalam Konsep Pemikiran*. Bandung : Refika Aditama. p. 33-34

codes. Likewise, the documents required for making the deed are simply downloaded by a Notary from a certain agency.

On the other hand, the appearers, witnesses, and notaries simply use digital signatures, seals, and stamps. In addition, digital fingerprints are also required as stipulated in Article 16 Paragraph (1) Letter c of the new UUJN which states that in carrying out their positions, the Notary is obliged to attach letters and documents as well as the fingerprints of the appearers on the Minutes of Deed. In terms of storage media, the storage of Minutes, grosses, copies, and quotations of Deeds does not need to be in paper form, but stored in a Microchip or Microfilm or other electronic media that can be printed as needed. If it can be done, the Notary's office does not require a large room.²¹

Observing the development of Cyber Notaries, several countries such as Virginia and Montana have empowered the function and role of notaries in electronic transactions. These various advantages over technological sophistication do not necessarily make notaries in Indonesia able to apply the concept of a cyber notary for all transactions conducted electronically. If traced, several provisions that limit the application of the cyber notary concept in electronic transactions exist. It includes the provisions of Article 5 paragraph (4) of the Electronic Information and Transaction (ITE) Law, while in full the provisions of Article 5 of the ITE Law are: Article 5: (1) Electronic information and/or or electronic documents and/or their printouts are valid legal evidence; (2) Electronic information and/or electronic documents and/or their printouts as referred to in paragraph (1) are extensions of valid evidence in accordance with procedural law in force in Indonesia; (3) Electronic information and/or electronic documents are declared valid if they use an electronic system in accordance with the provisions stipulated in this law; (4) Provisions regarding electronic information and/or electronic documents as referred to in paragraph (1) do not apply to (a) Letters which according to the law must be made in written form, and (b) Letters and their documents which according to the law must be made in the form of a Notary Deed or a deed made by the Land Deed Making Officer; (3) Electronic information and/or electronic documents are declared valid if they use an electronic system in accordance with the provisions stipulated in this law; (4) Provisions regarding electronic information and/or electronic documents as referred to in paragraph (1) do not apply to (a) Letters which according to the law must be made in written form, and (b) Letters and their documents which according to the law must be made in the form of a Notary Deed or a deed made by the Land Deed Making Officer; (3) Electronic information and/or electronic documents are declared valid if they use an electronic system in accordance with the provisions stipulated in this law; (4) Provisions regarding electronic information and/or electronic documents as referred to in paragraph (1) do not apply to (a) Letters which according to the law must be made in written form, and (b) Letters and their documents which according to the law must be made in the form of a Notary Deed or a deed made by the Land Deed Making Officer.²²

According to Article 5 paragraph (4) letters a and b of the UUJN it is stated that strength as legal evidence is excluded from letters which according to the law must be made in written form and letters and documents which according to the law must be made in the form of a Notary Deed or the deed made by the official of the Government for the Land Deed. From the passage of the article, it appears that all deeds made by a notary made in the form of electronic documents and/or their printed results are not valid legal evidence. This, of course, is considered unfair, given the current technological advances which of course also demand the development of a notary's authority to respond to the public's need for notary services.²³

²¹ Adjie, H. (2017), "Konsep Notaris Mayantara Menghadapi Tantangan Persaingan Global". *J. Huk. Respublica* 2 214, 4-5

²² Sari, W., Ayu, D., Retno Murni, R. A. & Udiana, I. M. *Op.Cit.*

²³ Mertokusumo, M. S. & Pitlo, (1993), *A. Bab-bab tentang penemuan hukum*. Bandung : Citra Aditya Bakti. p 47-48

The meaning of the provisions of the article must be done flexibly so that a more flexible meaning is obtained. Article 5 paragraph (4) of the ITE Law can at least be interpreted that the deed made by a notary in the form of an electronic document and/or its printout is legal evidence but is limited in nature, namely only for legal actions which according to law are not required to be made in a legal document or in a form of a notarial deed or a deed made by the Land Deed Making Official. For example, Article 77 paragraph 1 of Law number 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as UUPJ) states that in addition to holding a GMS as referred to in Article 76 of a GMS, a GMS can also be held through teleconferencing media, video conference or other electronic media facilities that allow all GMS participants to see and hear each other directly, as well as participate in meetings. If GMS is conducted through electronic media, it is possible for the notary to make a deed of minutes of the GMS in electronic form as well. Thus, the Company Law has provided an opportunity for notaries in Indonesia to provide electronic services in the preparation of the minutes of the general meeting of shareholders.

In several statutory provisions, both in the Notary Position Act itself, Law no. 2 Year 2014 Article 15 paragraph (3) in its explanation, Law no. 40 Year 2007 concerning Limited Liability Companies Article 77 paragraphs (1) and (4) as well as the explanation of Article 6 of Law no. 11 Year 2008 concerning Information and Electronic Transactions, have opened up opportunities for the application of the concept of Cyber Notary for Notaries in order to carry out their duties and authorities. Therefore, it is necessary to review it with the theory of legal certainty so that the regulations that have been set can run as they should in order to achieve certainty, benefit, and justice for the applicable law.

According to the legal basis and facts mentioned above, this cyber notary-based authentic deed when viewed from the point of view of legal certainty theory must meet the criteria of (1) a legal system consisting of regulations, not based on misguided decisions for certain matters, (2) the regulation is announced to the public, (3) not retroactive because it will damage the integrity of the system, (4) made in a formula that is understood by the public, (5) there should be no conflicting regulations, (6) must not demand an action that exceeds what can be done, (7) should not be changed frequently, (8) there must be conformity between regulations and daily implementation.²⁴ Based on the above principles, cyber notary does not meet the criteria number five. Due to the fact that cyber notaries are still in conflict with the legality of the evidence.

Indeed, in the Elucidation of Article 15 Paragraph (3) the new UUPJ has presented the concept of Cyber Notary within the authority of a Notary, but the new UUPJ still does not provide legal certainty. because the UUPJ does not explain the procedure for making a cyber notary. Therefore, in future arrangements so that an authentic deed by a Notary with the Cyber Notary concept provides legal certainty, it is necessary to harmonize the regulations related to the Notary's authority in making the Deed electronically as stated in the new UUPJ and UU ITE. It can be done by adjusting the contents of articles related to the authority of the Notary in making the Deed electronically, one of which is Article 5 and Article 6 of the ITE Law with the new UUPJ.

²⁴ Sari, W., Ayu, D., Retno Murni, R. A. & Udiana, I. M. Kewenangan Notaris di Bidang Cyber Notary Berdasarkan Pasal 15 ayat (3) Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris. (Udayana University, 2018). 3-4

CONCLUSION

Authentic deeds in cyberspace (Cyber Notary) are made possible by Notaries in Indonesia based on the Elucidation of Article 15 Paragraph (3) of the new UUJN; but, the implementation of Cyber Notary is still a lot of conflict between one law and another so that it does not provide a guarantee of legal certainty. Legal certainty can be achieved if there are no conflicting provisions between one law and another. Notary Deeds made electronically (Cyber Notary) do not have legal certainty because no harmonization of regulations related to the authority of a Notary in making the Deed electronically as stated in the UUJN in conjunction with the new UUJN and the ITE Law exist.

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