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# Authentica

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## Legalization Of Cyber Notary-Based Notary Deeds As Authentic Deeds

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### Abstract

Legalizing a notarial deed based on a cyber notary as authentic deeds demands the role of notaries in using the concept of a cyber notary to create a fast, precise, and efficient service. However, in this case, the legalization of a cyber-based notary deed does not have perfect proof like authentic deeds. This is because notarial deeds using a cyber notary need to meet the requirements for the authenticity of a deed in Article 1868 of the Civil Code. The problem raised in this study is how authentic the legalization of cyber-based notary deeds is. This research used a juridical normative method. The data collection in this study employed a literature review method and a qualitative method for analyzing the data. The study results show that the legalization of notary deeds using cyber notary does not have perfect proof like authentic deeds because it does not meet the requirements for the authenticity of a deed contained in Article 1868 of the Civil Code.

**Keywords:** Legalization, Authentic Deed, Cyber Notary.

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### Introduction

Advances in technology and information are a reality of the development of world civilization that provide much access to changes in people's life patterns in various fields. Communication technology is growing and booming throughout the world, including in Indonesia (Dharmawan N. K., 2015). Among the media that can do this are computers, gadgets, and other devices. Now, everyone can easily access the internet (Sutarman, 2009). In terms of public services, there is one type of non-government service. However, it is closely related to implementing public services and is thick with regulations because its duties and functions, namely notary services, are regulated by law (Setiadewi, 2020).

So far, notary services to the public are still conventional. However, along with the development of Information Technology that inevitably forces every line of life to transmigrate from conventional systems to electronic systems, notary services are also shifting towards electronic-based services, known as cyber notary. Notaries must be able to use the concept of a cyber notary in order to create a fast, precise, and efficient service that can accelerate economic growth (Nurita, 2012). A cyber notary is a notary concept in general that carries out the function of a notary by applying it to transactions or relationships electronically via the internet as the primary medium for doing a notarial deed and leading to a form of deed that was initially valid if it is written on paper, leading to an electronic deed (electronic deed) (Merlyani, 2020). A cyber notary is intended to facilitate or accelerate the implementation of the duties and authority of Notaries in making authentic deeds regarding all deeds or agreements or provisions required by law or what interested parties want to be stated in authentic deeds (Nola, 2011). Cyber Notary's primary function is to certify and authenticate electronic transaction activities (Bahri, 2019).

Notaries as trusted third parties in the digital era of information technology can be referred to as cyber notaries submitted in the United Nations Commission on International Trade Law (UNCITRAL) which the development of notaries in UNCITRAL rolled out Model Law on E-Commerce in 1996, Model Law on E-Signatures in 2001, United Convention on the Use of Communication in

International Contracts in 2005, and the study of Promoting Confidence in E-Commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods in 2009 (Makarim, 2011).

Transactions carried out by electronic means (cyber-notary-based) in the absence of face-to-face meetings by the parties, so that the use of telecommunication media in a transaction is said to provide its effectiveness and efficiency without any space and time barriers for the parties who carry out their transactions as with transactions that are often encountered in ordinary or conventional ways (Darmaangga, 2021). In guaranteeing electronic transactions, notaries must have high credibility and freedom without being bound by making agreements or deeds that have legal legitimacy. It is said that with the UNCITRAL study Promoting Confidence in ECommerce: Legal Issues on International Use of Electronic Authentication and Signature Methods in 2009, there was a change in the world of Notaries regarding their roles and functions. The role and function of trusted third parties in the congress of The International Union of Notaries (UINL) on October 19-20, 2016, in Paris, France, with the resulting agenda is The Notary A Trusted Third Party. The objectives of UINL are:

“in a first section devoted to legal confidence, we will attempts to compile the needs which, according to the various stakeholders, justify recourse to a trusted third party. We will then be able to answers a first question: Why is the notary a trusted third party in legal matters.” “In a second section, we will examine the extent to which legal certainty strengthens and sustains economic security; this will allow us to re examine the aguments reasserting that the notary plays a pertinent role in today's economy”.

Based on the objectives of the UINL, development is needed to declare that it will strengthen the role and function of Notaries in ensuring the continuation of the economy that cannot be separated from the function of the notary. The roles and functions of the Notary in UINL are as follows:

1. Notary to Government

A notary to the government can be interpreted as a Notary Public whose function is to provide services to the community in building good governance towards clean government by prioritizing professional, fast, precise, efficient, cheap, and illegal levies-free services. Then, it will increase the effectiveness and efficiency of Notaries in providing certainty of service completion time to the community, thereby impacting the development of trade and the national economy to improve public welfare.

2. Notary to Business

A notary to business can be interpreted as a Notary Public, an official authorized to make an agreement or deed to provide services to the community to carry out a form of commerce in making an engagement between the parties in ensuring security in doing business.

3. Notary to Society

The notary can interpret the notary to Society as a trusted official whose function is to guarantee the community in terms of providing legal consultation or counseling and making wills and prenuptial agreements electronically.

The basis for regulating electronic Notaries can be seen by the meaning of cyber notary, which is contained in Article 15 paragraph (3) of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions (from now on referred to as UUJN), namely “In addition to the authority referred to in paragraph (1) and paragraph (2), Notaries have other authorities regulated in laws

and regulations”. The definition of Notary Public has other authorities regulated in the laws and regulations referred to in this law contained in the explanation, namely “What is meant by “other authorities regulated in laws and regulations,” among others, the authority to certify transactions carried out electronically (cyber notary), make waqf pledge deeds, and aircraft mortgages.” In terminology, certification means a process, method, manufacture, certification (Diliyanto, 2018). Certification carried out electronically means making an electronic certificate from an electronic transaction, and in making the certificate, three main characteristics are visible, namely, without having to be face-to-face between the parties, making the transaction borderless and paperless (Widiasih, 2020). In practice, Notaries certainly make their Deeds following the provisions of UUJN, but there are still several obstacles that Notaries must face in carrying out their duties to the community (Adjie, 2014)

1. Limited storage space of the deed and the number of Notaries;
2. Violation of Notary professionalism related to the requirements of appropriateness;
3. Weak evidence supporting the authenticity of the identity of legal subjects;
4. Benturan the Notaris’ interest in the making of the Act;
5. Breach of confidentiality;
6. Tax liability;
7. Weak control of tracing and coaching-related agencies

Sociologically, notaries are still deciding whether to assume the position of trusted third parties proposed by UINL in Paris, France. This is still constrained by regulations and adequate devices. In fact, empirically, electronic transactions experience many problems due to the absence of a trusted institution in witnessing that serves as evidence of engagement. One of the juridical problems regarding cyber notary barriers is the existence of Article 1 number 2 of the Law of the Republic of Indonesia Number 11 of 2008 concerning Electronic Information and Transactions (from now on referred to as the ITE Law) states “Electronic Transactions are legal acts carried out using computers, computer networks, and/or other electronic media.” Regarding evidence, it is implied in Article 5 paragraph (4), namely, “the provisions regarding electronic information and/or electronic documents as referred to in paragraph (1) do not apply to:

1. A letter that, by law, must be made in written form.
2. According to law, Securities and documents must be made in the form of a notarial deed or a deed made by the deed-making officer”.

### **Problem Statement**

Based on the background of the above problems, some problems will be the subject of discussion in this study: How is the authenticity of the legalization of a notary deed based on a cyber notary as authentic deed?

### **Research Methods**

This research approach method is prepared using a normative juridical type of research, which is research focused on examining the application of rules or norms in positive law (Obyektif). The data collection method is carried out to obtain data in a study with the literature method (library research), the studies conducted to collect primary and secondary legal materials that help develop discussions of electronic authenticity legalization arrangements based on the concept of cyber notary. The data obtained are analyzed by qualitative methods, namely the discussion and

elaboration of research data obtained systematically based on legal norms or legal rules, theories, and doctrines of legal science. With the data analysis, it is hoped that clarity on the problem to be discussed and a conclusion can be drawn at the end of the research.

## **Discussion**

### **1. Cyber Notary Concept In Securing Immunity Against Legalization of the Notaris Act Electronically**

In its development, the notary history rooted in “Latin Notary” Rome experienced a different reception in countries that adhered to the standard law legal system. When the notary profession is in a country’s civil law, it is generally an honorable and valued position by the people. In some countries, familiar law notaries are known by the *mana notary public*; otherwise, they never occupy a prominent position in law practice. This, among other things, led to the slight ignorance of the study of the history and development of notaries in countries’ common law, as evidenced by the need for more literature that discusses the subject. However, notary public as a profession has existed in practice for centuries. Using the term cyber notary in Indonesia, a country that inherited the tradition of Continental Europe, is felt inappropriate. Based on the literature that explains its history, the terms cyber notary and electronic notary were born from two different concepts, namely the term e-notary, popularized by jurists from countries that inherited the tradition civil law, while the term cyber notary popularized by jurists who inherited the tradition common law (Makarim, 2013).

Thus, using the term e-notary in Indonesia, which inherits traditional civil law, felt more appropriate. This was stated in the forum Trade Electronics Data Interchange System (TEDIS) legal workshop at the TEDIS Conference organized by the European Union in 1989 in Brussels.

Its essence is the existence of a party that presents an independent record of an electronic transaction carried out by the parties. In contrast, the term cyber notary, according to Stephen Mason, was originally the brainchild of the American Bar Association Information Security Committee in 1994. Concerning the implementation of cyber notaries, the provisions regarding electronic notarial services are expected to be included in one of the articles in the UUJN initially. Nevertheless, this cannot be fulfilled. However, Article 15 paragraph (3) of the UUJN stipulates that notaries have other authorities regulated in laws and regulations. In the explanation of Article 15 paragraph (3), other authorities are also authorized to certify transactions carried out electronically or cyber-notary. This authority is not very appropriate when referred to as certification because the intended meaning is strengthening or strengthening the electronic transaction to be considered legally (legal).

One form of electronic strengthening or legalization is in the form of a timestamp or authorizing the occurrence of a transaction at a particular time carried out between the parties. Conventional forms of legalization include attestation of signatures in a document, which is also regulated as one of the notary authorities under UUJN. Notaries can make regulations on any act or contract established by law to be documented into an authentic deed only if demanded by the interested party and not by a notary request. Notaries are also given the authority to ensure behavior that does not follow the law (Yunitasari, 2017).

Moving from the philosophical value in Article 1, number 1 of the UUJN is “A general official who is authorized to do authentic deeds and has other authorities as referred to in this law or under other laws.” The deed of release is made by a Notary whose validity can still be ascertained even though the preparation is carried out using teleconference media so that the deed of proof power remains perfect as long as the notary’s obligation to sign the deed is fulfilled (Dharmawan, 2015).

Philosophically regarding the word authenticity, namely: “To be authentic, one must truly be in harmony with his freedom. In existentialism, the notion of authenticity means really coming to terms with oneself, and then living accordingly. One must be able to come to terms with his identity while also not letting his background and history play a part in his decision making process. Making choices should be done based on one’s values, so that there is a responsibility that come with the decision making process. If one does not live within a balance of his freedom, he is inauthentic. It is in the inauthentic experience that people allow ideas like determinism, believing choices are meaningless, and acting as one should to persuade their choice making” (Klienman, 2013).

In Derrida’s theory, deconstruction is a philosophical strategy regarding authenticity, and in Paul Klienman, it can be dominated by interpreting what is connected. Article 1 number 1 UUJN interprets are:

- a. One must be able to come to terms with his identity while also not letting his background and history be interpreted as a notary is a public official;
- b. To be authentic, one must indeed be in harmony with his freedom. In existentialism, the notion of authenticity means coming to terms with oneself and then living accordingly, which is interpreted as notary in an official authorized to make authentic deeds;
- c. Making choices should be based on one’s values so that there is a responsibility that comes with the decision-making process, which is interpreted as against the making of deeds that are not also assigned deeds exempted to other officials of other persons stimulated by law.

It further explained that electronic data transfer can only function as a backup, not as a copy with binding legal force. There has been an opportunity to do deeds by utilizing technological developments. However, the problem of the concept of a cyber notary is contained in the obligation of Notaries to do deeds, as stated in Article 16 paragraph (1) letter m, which states that Notaries should “read the Deed in front of the face in the presence of at least 2 (two) witnesses, or 4 (four) special witnesses for the preparation of the Deed the will underhand, and signed at the same time by the face, witnesses and Notary.”. The article is further explained in the explanation that the Notary Public must be physically present and sign the deed in the presence of the face and witnesses. The phrase “physically” is what causes the concept of cyber notary or deed making by utilizing technological developments is not appropriate. According to the Author, the obligation and authority of the Notary Public has a clash in this case. It is impossible for the implementation of the Deed making, which in concept is carried out remotely and practically, to be charged with the obligation to attend physically. This obligation removes an essential element from the concept of cyber notary.

In terms of the concept of a cyber notary, which some legal experts developed by the use of electronic media by teleconference, it turns out that, as stated by Edmon Makarim, so far, there has been a little misunderstanding in interpreting the phrase before according to Article 1868 of the Civil Code which is associated with cyber notary (Makarim, 2015), this is identified with making deeds done by



teleconference, but it is not. Working principle cyber notary is not much different from notaries in the real world. The parties still come and confront the notaries. It is just that the parties immediately read the draft deed on their respective computers, and after agreeing, they immediately sign the deed electronically at the Notary Office. In the concept of Cyber notary, facing physically or directly is not necessary. However, one can use auditory viewing media such as Teleconference or Skype without state borders (borderless) or city/provincial boundaries (Chastra, 2021).

## **2. Notary Regulation in the Legalization of Notary-Based Notary Deeds as Authentic Deeds**

Based on the Staatsblad Ordinance 1916 No. 43 and 46, officials authorized to legalize include Notaries. With legalization by a Notary, the legal force of legalized deeds juridically does not change the status of evidence. In addition to the legalization of authentic deeds, watermarking can also be done. Waarmerking can be interpreted as attestation, which is the ratification of a deed under the hand of an authorized official appointed by another law or regulation. Juridically, actually, in waarmerking notary is to record the agreement made by the parties in the list that has been provided for it in accordance with the existing order. So the waarmerking does not state the truth of the signature, date, and place of the deed and the truth of the contents of the deed as is the case in legalization. Both the evidence of the deed under hand and the authentic deed must meet the formulation regarding the validity of an agreement based on Article 1320 of the Civil Code: 1. Agree those who bind themselves; 2. Ability to make an engagement; 3. A specific thing; 4. A halal cause (Wijanarko, 2015).

In information technology, business transactions are understood as an agreement or legal relationship between parties by exchanging information to conduct trade. In its development, contracts carried out electronically are called online contracts or electronic contracts (e-contracts), namely engagements or legal relationships carried out electronically by combining networks (networking) from computer-based information systems (computer-based information systems) with communication systems based on telecommunications networks and services (telecommunication based) Which is further facilitated by the existence of a global computer network internet (Network of Network).

Transactions that occur through e-commerce are also similar to conventional agreements that are usually done in general. It is just that there are differences in the media used. In transactions e-commerce, electronic media, namely the internet, is used so that the agreement or agreement that occurs will give birth to an electronic contract (e-contras). An electronic contract is a standard contract that is designed, created, assigned, duplicated, and disseminated digitally through an internet site (website) unilaterally by the contract maker (in this case, the business actor), to be closed digitally also by the contract cover (in this case the consumer) in practice is known several types e-commerce, that is: (Gunawan, 2017)

- a. Business to Business (B to B) is a transaction between companies (buyers and sellers are companies). Usually, these companies know each other and have established relationships for a long time. Information exchange occurs only between them and is based on need and trust.
- b. Business to Customer (B to C) is transactions between companies and consumers/individuals. In this e-commerce type, transactions are generally

disseminated, and consumers take the initiative to make transactions. Business actors must be ready to receive a response from these consumers. Usually, the system used is the Website system because the public commonly uses this system.

- c. Customer to Customer (C to C) is a trade transaction in goods or services between consumers or between individuals.
- d. Customer to Business (C to B) is a transaction that allows individuals to sell goods or services to companies.
- e. Customer to Government (C to G) is a system where individuals can make transactions with the government, for example, in terms of paying taxes.

The types of e-commerce that are well known to the general public and most widely used are business-to-business and business-to-customer. Transactions through e-commerce have the following characteristics:

- a. E-commerce transactions allow parties to enter the global market quickly without being hindered by national borders.
- b. E-commerce transactions allow parties to deal without knowing each other.
- c. Transactions through e-commerce depend on means (technology) whose reliability is less guaranteed. Therefore, the security of transactions in e-commerce has yet to be so reliable.

Nevertheless, considering that global arrangements are still far from reality, what needs to be sought is the creation of harmonization and uniformity as wide as possible regarding the arrangements needed.

Achieving harmonization and uniformity requires extensive comparative legal studies, which include a discussion of the rule of law and legal practice of foreign countries, Model Laws available in foreign legal forums and international organizations, and an analysis of how far these can be accepted by national law. A prominent global harmonization effort is the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996), which was supplemented by several articles in 1998 and has influenced the establishment of e-commerce regulations in several countries.

This Model Law aims to advocate the modernization of generally accepted contract law regulations to include electronic contracts. In essence, the content of the UNCITRAL Model Law contains the following general provisions:

- a. Electronic data, like any other legal document, must be legally binding.
- b. Electronic data can contain information that can be used as a reference.
- c. Electronic data is written for legal purposes if it can be accessed as a reference in the future.
- d. Electronic data includes a signature if it can be identified by the person sending the message and an indication that the person has consented to the information in the data.
- e. Electronic data is an original document if the information contained can be reliably preserved in its original form.
- f. An electronic exchange of data can give rise to an offer and acceptance and, therefore, form a valid contract.

Until now, there is no legal instrument that regulates the legalization of electronic deeds or contracts by notaries electronically because signing and attestation of electronic signatures requires special rules, and the role of notaries in this case in Indonesia is carried out by CA (Certification Authority) or electronic certification organizing bodies, namely institutions that certify digital signatures as independent third parties that have authority to issue digital certificates containing

the identity of the user. With the existence of this digital certificate, parties related to digital certificate holders in electronic transactions become confident that the certificate's authenticity is guaranteed.

Business actors in electronic transactions can be certified by reliability certification bodies. In electronic transactions, it is also known as Reliability Certification (SK), proof that business actors trade correctly, and is a certification logo (trust mark). Electronic Certification Providers or CA Institutions are the same as notaries in the real world who validate electronic signatures so that they have perfect evidentiary power. In today's time, the possibility of Notaries being asked by their clients to be involved in an agreement that is a product of an electronic transaction is relatively large. This is a challenge for the notary profession in responding to globalization in information technology. Here it means that the notaries' duties as public officials developed along with the times.

The authority to certify transactions carried out electronically is the same as the notary's authority in legalizing. In line with this authority, the form of notary responsibility in conducting certification is also the same as the form of notary responsibility in legalizing, so that in certifying, notary responsibility lies in the truth contained in the electronic certificate. The truth in question is the signature contained in the certificate so that the certificate is not signed by another person or person who is not authorized parties to give signatures (Lombogia, 2019).

Electronic Certificate through Electronic Certification Providers in the ITE Law is very irrelevant because Article 5 paragraph (4) letter, namely "provisions regarding electronic information and / or electronic documents as referred to in paragraph (1) states that it is valid legal evidence and does not apply to securities and documents which according to the law must be made in the form of a notarial deed or deed made by the deed making official. In making a deed, a situation or event witnessed or everything that a notary sees or does can be used as a basis for making the Deed (Wijaya, 2018). This is contrary to Article 1868 of the Civil Code states, "An authentic deed is a deed made in the form prescribed by law by or before public officials authorized for it, at the place where the deed is done", and Article 1 point (1) of the Notary Office Law states "Notary Public is a General Officer authorized to make authentic deeds and other authorities as referred to in this law." An authentic deed has perfect evidentiary power.

## **Conclusion**

The legalization of notary deeds that use cyber notary based on Law Noomor 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions and positive law in Indonesia does not have perfect proof like an authentic deed. This is because the legalization of a notary deed using a cyber notary does not meet the requirements for the authenticity of a deed contained in Article 1868 of the Civil Code. In addition, Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Positions and Law Number 11 of 2008 concerning Electronic Information and Transactions have not expressly accommodated it.

## **Suggestion**

In order for the legalization of Notary Deeds made based on cyber notaries to have legal certainty, harmonization of regulations related to cyber notaries is needed so that Notaries no longer experience legal problems regarding their authority in cyber notary because in the explanation of Article 15 paragraph (3) of the Notary



Position Law limits the authority of Notaries in cyber notary Only authentication and certification electronically. Starting with formulating the definition of cyber notary, to those who help, supervise even those who provide sanctions and formulate sanctions for violations in cyber notary.

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