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CYBER NOTARY AND THE PRINCIPLE OF TABLETIONIST OFFICIUM FIDELITER EXERCEBO¹

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Abstract

The development of technology forces humans to keep updated with the digital technology. At first the buying and selling transactions have been affected the digital technology and then continuous to service provisions in the notarial field. A cyber notary is a new service that creates electronic deeds on behalf of a notary and serves as an authentic deed. However, there are difficulties in putting it into action because of the Civil Code's Law No.2 of 2014 jo. Law no.30 of 2004 regarding the Notary Position and Law No.11 of 2008 regarding conflicting information and electronic transactions. As the authority of the notary to make authentic deeds is viewed from the perspective of the Civil Code, Law no. 1, it is necessary to investigate this issue so that, in the future, the application of the cyber notary does not conflict with the principle of the tabletionis officium fideliter exercebo. Law No. 11 of 2008 regarding Electronic Transactions and Information and Law No.2 of 2014 regarding the Notary Position. This study is important because it shows that a cyber notary can help notaries carry out their responsibilities more effectively. Considering the current technology developments have developed rapidly, synchronization of relevant laws and regulations is also needed.

Keywords : Authentic Deed, Cyber Notary, tabletionis officium fideliter exercebo, notary

Abstrak

Pada saat ini perkembangan teknologi sangat pesat, manusia dituntut atau dipaksa untuk mengikuti perkembangan zaman. Awalnya dari transaksi jual beli hingga aspek penyelenggaraan jasa di bidang kenotariatan. Dengan adanya cyber notary, akta elektronik yang dibuat oleh notaris sebagai pejabat umum yang berwenang tetap memiliki nilai autentik. Tetapi dalam pelaksanaannya mengalami hambatan karena KUHPerdata, UU No. 2 Tahun 2014 jo. UU No. 30 Tahun 2004 tentang Jabatan Notaris, dan UU No. 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik yang saling bertentangan satu sama lain. Maka dari itu perlu suatu tindakan agar di masa depan penerapan cyber notary tidak bertentangan dengan asas tabellionis officium fideliter exercebo Sebagai kewenangan notaris untuk membuat akta otentik ditinjau dari KUHPerdata, UU No. 1, hal ini perlu diteliti agar kedepannya penerapan cyber notary tidak bertentangan dengan asas tabletionis officium fideliter exercebo. Undang-Undang Nomor 11 Tahun 2008 tentang Transaksi dan

¹ Patricia Jessica, et.al : Cyber Notary And The Principle Of Tabellionist Officium Fideliter Exercebo



Informasi Elektronik dan Undang-Undang Nomor 2 Tahun 2014 tentang Jabatan Notaris. Hal ini sangat penting karena dengan adanya cyber notary memberikan keefektifan untuk notaris dalam menjalankan tugasnya mengingat perkembangan teknologi saat ini telah berkembang dengan pesat maka diperlukan sinkronisasi peraturan perundang-undangan terkait.

Kata kunci : Akta Autentik, Cyber Notary, tabellionis officium fideliter exercebo, notaris

I. Introduction

In accordance with the 1945 Constitution According to paragraph 3 of Article I, Indonesia is a nation governed by theoretically related to law enforcement and is subject to the principles of applicable law.² The principle of law is not a rule of law, but no law can be understood without the legal principles in it. In the notary field itself, there is a principle used by notaries in the course of their work of authority. Eddy O.S. Hiarij called the principle the *tablelionis officium fideliter exercebo*.³ There is a principle which states that notaries must work traditionally. That is, the notary must come, see, hear in every deed and be signed by the notary himself and in front of the directly present at the location of the deed is read by the notary. Then the signature that is done is the original signature, not through an electronic signature. The purpose of the *tablelionis officium fideliter exercebo* principle is that the notary can still maintain the formal truth which is the responsibility of his position.⁴

A notary is a public official who has the authority to execute an authentic deed. There are two types of deed: those executed "by" the notary (deed relaas) and those executed "in front of" the notary (deed partij). A deed executed "by" a public employee is one executed by a notary public at the parties' request, requiring the notary public to record or write down everything discussed by the parties regarding legal or other actions taken by the parties so that the action is

² Satjipto Rahardjo, *Ilmu Hukum*, (Bandung : Citra Aditya Bakti, 2000), p. 47

³ Eddy O.S. Hiarij, Makalah "Telaah Kritis Konsep Cybernotary Dalam Sudut Pandang Hukum Pembuktian", Disampaikan dalam Seminar Nasional "Membangun Hukum Kenotariatan Di Indonesia", yang diselenggarakan Magister Kenotariatan Fakultas Hukum Universitas Gadjah Mada, Yogyakarta, Kamis 27 Februari 2014.

⁴ Fidwal Indrajab, "Akta Elektronik Sebagai Bagian Cyber Notary Ditinjau Dari Asas Tabellionis Officium Fideliter Exercebo", Tesis Magister Kenotariatan, Universitas Gadjah Mada, 2014, p. 5

made or stated in a notarial deed.⁵ For examples include a notarial deed made at a meeting of a limited liability company, a deed made during a public auction, a police lawsuit process, a court report from a clerk, a confiscation process from a bailiff. It can be said that "by" means the initiative of the contents of the deed that does not come from the person who is reported about the contents of the deed. So the notary explains what the participants saw and did in the meeting. While the deed made "in the presence of" a notary is a report regarding an act or event but from the request from those who are interested.⁶

Furthermore, the Civil Code's definition of an authentic deed, as stated in Article 1868 and according to Article 165 HIR or Article 285 RDS is "an authentic deed is a deed in the form determined by law, made by or in the presence of a public official authorized to do so at the place where was the deed made."⁷

Currently, technological progress is developing very rapidly because it is caused by a lot of innovations and creative ideas that appear. Technology provides people with ease in communicating to help human relations become faster, easier and more practical. So to cope with and respond to rapid technological developments, the government has issued Law no.11 of 2008 regarding Electronic Transactions and Information currently undergoing changes. The IET Law (*Indonesian : Informasi dan Transaksi Elektronik [ITE]*) is expected to guarantee technological progress in the effectiveness and efficiency of public services. In addition to developing in the field of social media, technology is also developing through legal practice.⁸

It is clear that the perception of the function and role of a public notary is built with a paradigm or framework of thought that maintains traditional principles so that it deserves to be recognized as a party that has quality results, namely guaranteed authenticity, then the result is an authentic deed. Honesty and prudence are the highest principles that are mandated by a notary in carrying

⁵ Habib Adjie, *Hukum Notaris Indonesia : Tafsir Tematik Terhadap UUI No. 30 Tahun 2004 tentang Jabatan Notaris*, (Bandung : 2018), p. 45

⁶ Teguh Samudera, *Hukum Pembuktian dalam Acara Perdata* (Bandung : Penerbit Alumni, 1992), Cet. 1, p. 41-42

⁷ R. Subekti, *Hukum Pembuktian* (Jakarta : PT Pradnya Paramita, 1999), Cet. 12, p. 26

⁸ Zainatun Rossalina, dkk, "Keabsahan Akta Notaris yang Menggunakan Cyber Notary Sebagai Akta Autentik", <https://media.neliti.com/media/publications/115310-ID-keabsahan-akta-notaris-yang-menggunakan.pdf> diakses pada tanggal 20 September 2019, p. 2.

out his duties. If we look at today, electronic transactions have become part of human life in everyday life, especially in terms of communication using the internet. In the work of notaries who mainly make deeds, notaries have indeed used a computer system in their offices, but the paradigm related to the authenticity of a deed is still seen from the final result, which is printed and signed and sealed by a notary, not in electronic form as is the case today. But by looking at the times, there needs to be a change, especially in the notary field.⁹

Roscoe Pound states the concept of Social Engineering which is also recognized by other legal experts as the dominant central idea of all Roscoe Pound's thinking on law. This thinking is a logical consequence of the roots of Roscoe Pound's thinking which is based on sociology. Therefore, Roscoe Pound uses sociology as the main foundation in order to create his legal theory with the main idea being to transform law in the order of ideas to become law in the order of reality. Law cannot be isolated and isolated from dynamic social conditions. According to Roscoe Pound, a legal expert must have a role like an engineer when constructing a building, bridge and so on. An engineer can make and prepare a plan which can then be followed by gathering the required materials. The engineer works on and prepares a plan which can then be followed by gathering the required materials. Then the engineer makes adjustments regarding the plans that will be prepared with the collected materials to suit the needs used. Roscoe Pound makes an analogy between a legal expert and an engineer when making a legal product. Legal experts must have a mature plan, be able to record and collect data related to the needs needed by the community and the legal expert must be capable make adjustments and balances of various kinds of interests in order to create a strong and functional legal building. The concept of "social engineering" thought was created in order to create balance and harmony arising from conflicts of interest of individuals in society. Based on Roscoe Pound's concept of thought, law is a means used to shape and regulate people's behavior. So Roscoe Pound said that the law is like a tool of social engineering.¹⁰

⁹ Edmon Makarim, *Notaris dan Transaksi Elektronik : Kajian Hukum Tentang Cyber Notary atau Elektronik Notary* (Jakarta : PT RajaGrafindo Persada, 2016), Cet. 3, p. 137

¹⁰ Atip Laatipul Hayat, Khazanah, *Roscoe Pound*, Vol. 1, No. 2, *Jurnal Ilmu Hukum Universitas Padjajaran*, 2014, p. 418 - 419

However, with the existence of a cyber notary, the duties and authority of a notary as a public official cannot be in accordance with this principle. Cyber notary is a concept that already exists but, in its application, it cannot be done because of existing regulations, especially the Civil Code, Law no. 11 of 2008 concerning Information and Electronic Transactions and Law no. 2 of 2014 jo. UU no. 30 of 2004 concerning Notary Positions are not in sync with each other related to technological developments so that the application of cyber notaries is experiencing obstacles. This article will examine the legal aspects of electronic deeds that are signed electronically without being before a Notary and the factors that become difficulties in implementing electronic notary deeds in Indonesia, which will be discussed in the discussion section.

1. The Overview of the Cyber Notary Concept

Cyber notary originally emerged from the concept of the American Bar Association's Committee on Information Security (1994). Cyber notary is a concept that has been practiced in Common Law countries. In Common Law countries, a notary is known as a Public Notary and is not appointed by an authorized official and is also not bound by the mandatory form or format of the deed regulated by law. Meanwhile, the concept of Electronic Notary which was originated from the French Delegation at the Legal Workshop for the EU in Brussels in 1989 for TEDIS (Trade Electronics Data Interchange System) states that A party who presents an independent record of an electronic transaction between the parties is known as a notary. According to Article 1870 of the Civil Code, a deed executed by and/or in front of a notary public is considered authentic in Indonesia, which adheres to the Civil Law system of law. Then, in paragraph (3) of Article 15 of Law No.2 of 2014, which made changes to Law No. According to Section 30 of 2004 on the Position of a Notary, a notary has other powers outlined in laws and regulations, one of which is the authority to certify electronic transactions (cyber notary). However, the authority to certify the transaction is not the same as signing an authentic deed in accordance with Civil Code Article 1868.¹¹

¹¹ Patricia Jessica, "Tinjauan Yuridis Mengenai Cyber Notary Dalam Kaitannya Dengan Asas Tabellionis Officium Fideliter Exercebo Serta Penerapan Tanda Tangan Elektronik Di Era Digitalisasi", Skripsi Univeristas Atma Jaya Jakarta, 2021, p. 12

Although notary services to the public are still provided in a traditional manner, notary services have begun to transition to electronic-based services, also known as cyber notaries, in tandem with the growth of information technology, which has an effect on notaries and inevitably forces every life to become electronic. The idea of a cyber notary has actually existed since 1995. However, the lack of a legal foundation has hampered the development of these efforts.¹²

The authority which is the starting point of the cyber notary concept in Indonesia is contained in Article 15 Paragraph (3) of Law no. 2 of 2014 concerning the Position of a Notary, which states that other authorities regulated in paragraphs (1) and (2), notaries have other powers as regulated in laws and regulations. Other authorities include certifying electronic transactions (cyber notary), making Waqf pledge deeds and mortgages on aircraft. The Law no. 2 of 2014 does not provide a clear understanding regarding the authority to certify.¹³ In simple terms, cyber notary is often used for notary authority which is applied in electronic transactions.

2. The Overview of The Conventional Notaries

The *tablelionis officium fideliter exercebo* principle is the principle used by notaries to carry out their duties and authorities in serving the community who commits a legal act. Notary appeared in Italy in the XII century. At that time, notary was a very honorable position because it was chosen by the Emperor or the Pope and became the person who was trusted by the pope in making land deeds and other deeds in the vast Roman area. Notaries work in cities that have large ports such as Genoa, Pisa, and Milan. Notaries are also called *instrumenta publica* or public tools because they are in charge of making deeds. The Pope stipulates that the deed made by a notary is *probatio plena* (has a full and perfect burden of proof). Notaries are considered as *officium nobile* (noble and honorable

¹² Kadek Setiadewi dan I Made Hendra Wijaya, "Legalitas Akta Notaris Berbasis Cyber Notary Sebagai Akta Otentik", Jurnal Komunikasi Hukum (JKH) Universitas Pendidikan Ganesha, Februari 2020, p. 127-128

¹³ Indonesia, Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris, Lembaran Negara Republik Indonesia (LNRI) Tahun 2014 Nomor 3, Tambahan Lembaran Negara (TLN) Nomor 5491, Pasal 15 ayat (3)

profession) because they have the full and perfect burden of proof given by the Pope.¹⁴

According to Article 1868 of the Civil Code, an authentic deed is a deed in the form determined by law made by or in the presence of public officials in power for that purpose at the place where the deed was made.¹⁵ The duty of a notary is to make a legitimate deed so that it can be used as legal evidence when a dispute arises. Notaries are also prohibited from sending deed to the parties to be signed. In carrying out his work, the notary provides legal direction to the appearer regarding the deed to be made.¹⁶ Since ancient times, notaries must meet the requirements of a good name, authority, thoroughness, honesty and integrity in carrying out their duties of authority. The notary public is a respected and legal profession. or honorable position (*officium nobile*) because the position of a notary has a relationship with humanity. The A notarized deed can be legal reference for a person's property status, rights, and responsibilities. Notaries as respected officials (*officium nobile*) have an important role in people's lives, especially people who want documentation of legal events or actions committed by legal subjects. Notaries in carrying out some of the functions of the state in providing legal protection for the community, have the authority to perform genuine acts as perfect evidence, herein lies the "glory" of the position of a notary, who through his authority makes authentic deeds into other authorities to provide legal certainty, order and legal protection to people in need so that notaries are required to adhere to all regulations and laws codes of ethics related to their positions and professions.¹⁷

3. The Overview of Notary Authority in Law no. 2 of 2014 jo. Law No. 30 of 2004 concerning the Position of Notary

The notary in making the deed has the authority as in Article 15 of Law no. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning the Position of a Notary: Article 15 Section 1 reads "A Notary has the authority to make an authentic Deed regarding all acts, agreements, and stipulations required by

¹⁴ Eddy O.S. Hiariej, Makalah "Telaah Kritis...", p. 5-6

¹⁵ R. Subekti dan R. Tjitrosudibio, Kitab Undang-Undang Hukum Perdata, (Jakarta : PT. Balai Pustaka, 2013), Pasal 1868

¹⁶ Rusdianto Sesung, *et.al*, *Hukum dan Politik Hukum Jabatan Notaris*, (Surabaya : R.A.De.Rozarie, 2017), p. 137

¹⁷ Rusdianto Sesung, *et.al*, *Hukum dan Politik...*,p. 139-140

legislation and/or desired by the interested parties to be stated in an authentic Deed, guaranteeing the certainty of the date of making the deed, keeping the deed, providing grosse, copies and quotations of the deed, all of this as long as the making of the deed is not assigned or excluded to other officials or other people stipulated by law. Then in paragraph (2) it is stated that "in addition to the authority as referred to in paragraph (1), the Notary is also authorized":¹⁸

- a. validate the signature and determine the certainty of the date of the underhand deed by registering in a special book;
- b. book the underhand deed by registering in a special book;
- c. make a copy of the original underhand deed in the form of a copy containing the description as written and described in the letter in question;
- d. validate the compatibility of the photocopy with the original letter;
- e. provide legal counseling in connection with the making of the Deed;
- f. make a deed related to land; or
- g. make a deed of auction minutes."

And then in paragraph (3) As stated, that "in addition to the authority as referred to in paragraph (1) and paragraph (2), a Notary has other authorities as regulated in the legislation."¹⁹

4. The Overview of Notary Deeds as Authentic Deeds

If a notary deed meets the requirements of the law, particularly Article 1868 of the Civil Code, it can be considered an authentic deed. There are three requirements for an authentic deed in Civil Code Article 1868, namely:²⁰

- a) The deed must be executed in accordance with the legal format and procedure;
- b) the act done behind a door or in the presence of a public official;
- c) The official in question needs to be able to perform the act.

In addition, there are civil sanctions against the deed if the notary commits an act of violating certain articles, specifically, the power of proof the notary deed becomes the power of evidence of the underhand deed or in other words the deed has been degraded. A notary deed can be limited as an illegal deed under Article

¹⁸ Indonesia, Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris, Lembaran Negara Republik Indonesia (LNRI) Tahun 2014 Nomor 3, Tambahan Lembaran Negara (TLN) Nomor 5491, Pasal 15 Ayat (1) dan (2)

¹⁹ *Ibid*, Pasal 15 Ayat (3)

²⁰ R. Subekti dan R. Tjitrosudibio, Kitab Undang..., Pasal 1868

1869 of the Civil Code if it does not meet the following criteria: 1) The public official in question lacks authority; 2) the incompetence of the concerned official; 3) irregular shapes. In Article 16 Paragraph (9) of Law no. 2 of 2014 confirms that if the conditions if the requirements outlined in paragraph (1), letter M, and paragraph (7) of Article 16 are not met, the notarial deed has the same power of proof as a fraudulent deed.²¹

II. METHODOLOGY

The method of research in writing this article is a standard juridical approach because it examines the relationship between one law and another. This research is descriptive analytical research with the aim of describing the regulations and laws that apply, associated with legal concepts and the implementation of favorable law. The primary legal material used is the Civil Code, Law Number 2 of 2014 jo. Law No. 30 of 2004 on the Notary Public Position and Law No. 11 of 2008 on Electronic Transactions and Information, and its derivative rules. The secondary data used are books, scientific articles, theses or dissertations. In this research, data collection technique is the study of documents or library materials related to this article. The method of data analysis used is analyses of qualitative data in the form of descriptive (narrative) data.

III. DISCUSSION

The position of a notary is a position that carries out a portion of the state's authority, especially in the private sphere so that It has a lot in common with aspects of public service and the economy, therefore a notary should not be seen as a rigid and static position, but must follow the flow of technological developments, actual phenomena and continue to support the government in order to achieve orderly, safe, and legally secure development. The existence of a foreign legal product, namely the 1961 *Hague Agreement concerning The Convention Eliminating the Legalization Requirement for Public Documents from Other Countries*, which contains every public authority that has the competence, including a notary, to simplify and standardize the format in certifying the

²¹ Indonesia, Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris, Lembaran Negara Republik Indonesia (LNRI) Tahun 2014 Nomor 3, Tambahan Lembaran Negara (TLN) Nomor 5491, Pasal 16 ayat (9)

authenticity of a public document. The convention raises two concepts in the notary field, namely, the concept of cyber notary and electronic notary.²²

1. The Aspects of the Legality of Electronic Deeds Signed Electronically Without Before a Notary

In addition to having problems with signing the deed, the concept of a cybernotary has issues with proof. In resolving civil cases in court, evidence is an important part because a truth about an event can be proven or not proven in a trial. However, if the UUJN has been revised, the proof value of the electronic deed will have the same position as the authentic deed. The value of the power of proof possessed by a notarial deed/authentic deed is outward, formal, and material proof.²³

Outward proof concerns the authenticity of the deed as a whole. The emergence of an authentic deed, if in accordance with the applicable legal rules regarding the terms of the authentic deed itself, the deed is valid as an authentic deed until there is evidence showing that the deed is not outwardly authentic. Formal proof, namely the notary deed must provide legal certainty in which the events and facts in the deed were actually carried out by a notary or statements from the parties who appeared when they were listed in the deed as in accordance with the procedures specified in the making of the deed. The formal provisions are carried out to prove the truth and certainty regarding the day, date, month, year, time to appear, the parties appearing, the initials and signatures of the parties, witnesses and notaries, and to prove what was seen, witnessed and heard by a notary (official deed / official report), together with recording the statements of the parties (deed of parties).²⁴

Unless it can be demonstrated otherwise, material proof pertaining to the certainty of the material of the deed, what is written in the deed, is valid evidence against the parties who made the deed or those who have rights. The information or statements in the official deed or report, as well as statements made by the parties in front of a notary public, must be evaluated accurately. The words stated in the deed apply correctly or are judged to be true. If the statement of the parties is deemed untrue then it can be the responsibility of the parties themselves. The

²² Patricia Jessica, "Tinjauan Yuridis....", p. 11

²³ *Ibid*

²⁴ *Ibid*

notary deed's authenticity, who is bound by it, and the above-mentioned perfection are the three aspects. However, if it is demonstrated in court that one of the three aspects is false, then the deed only has the power of underhand evidence, and as a result, the deed loses its proving power. If the UUJN has been revised, then the position of the proof value of the electronic deed in the cyber notary concept can be equated with the position of the proof value of the authentic deed.

Cyber notary in this case uses an electronic or digital signature, It is essential to pay close attention to what "electronic" means. or digital signature according to Law no. 11 of 2008 on government regulation of Information and Electronic Transactions no. 71 of 2019 regarding the Minister of Communication and Information's Regulation of the Implementation of Electronic Systems and Transactions No. 11 of 2018 regarding the Implementation of Electronic Certification, namely :²⁵

"Electronic Signature is a signature consisting of Electronic Information that is attached, associated or related to other Electronic Information used as a means of verification and authentication."

In terms of 'originality' or the authenticity of the signature, it can be seen through documents that store examples of previous signatures. For example, the identity card contains the signature of the person concerned and can then be used as a basis for verifying the use of signatures for other documents. In this case, it can be seen that the electronic signature has the same function as the signature on paper. The signing of an electronic information using an electronic signature must seek approval from the signer. This approval must be carried out using an affirmation mechanism and/or other mechanism that can indicate the intent and purpose of the signatory to engage in an electronic transaction. Electronic signatures are generally used for electronic transactions so that they are included in the category of legal actions that use computers, networks of computers or other electronic media.²⁶

²⁵ Kementerian Komunikasi dan Informatika, Peraturan Menteri Komunikasi dan Informatika Nomor 11 Tahun 2018 tentang Penyelenggaraan Sertifikasi Elektronik, Berita Negara Republik Indonesia tahun 2018, Nomor 1238, Pasal 1 angka 2.

²⁶ Fennieka Kristianto, "Legalitas Tandatangan Elektronik", yang disampaikan dalam Webinar Refreshing & Up Grading pada tanggal 15 Oktober 2020, Kerja sama antara PENGDA Kabupaten Bekasi IPPAT-Jababeka Residence-BPN Kabupaten Bekasi, bahan presentasi slide 6

The ITE Law lists the legal requirements for an electronic signature, which are as follows. The legal requirements for an electronic signature are listed in The Information and Electronic Transactions Law (*Indonesian : Informasi dan Transaksi Elektronik [ITE Law]*) , namely:²⁷

- a. Signature creation and signature data are private and can only be done by the owner of the signature.
- b. The power of use in making a signature can only be owned by the original owner
- c. Changes in information related to the signature can be detected and tracked.
- d. A special way is used to find out the owner of the signature
- e. A special way is used to prove that the owner of the signature legally consents to the electronic information

In electronic signatures there are 2 (two) categories of signatures, namely as follows:²⁸

- a. Certified Electronic Signatures ⁷ must meet the requirements following conditions :
 - As stated in paragraph 3 of Article 59, ensure that the Electronic Signature's legal force and consequences are valid;
 - Using Electronic Certificates made by the services of the ²⁹ Indonesian Electronic Certification Provider; and
 - Created utilizing a certified generator of electronic signatures.
- b. Electronic Signature Without Certification: can be achieved without the use of an Indonesian electronic certification service. Operator. For example, QR Code, Barcode, scanned wet ink signature, pencil scanner and so on

Along with the times, a notary must be ready when the making of an electronic deed is allowed. The impact of changes with the concept of cyber notary does not only occur in the Notary Position Act, but also in the Civil Code, especially Articles 1867-1870. With the renewal of legal knowledge in the Civil Code, it will add to the diversity of the history of making electronic deeds,

²⁷ *Ibid*, bahan presentasi slide 8

²⁸ Indonesia, Peraturan Pemerintah Nomor 71 Tahun 2019 tentang Penyelenggaraan Sistem dan Transaksi Elektronik, Lembaran Negara Republik Indonesia (LNRI) Tahun 2019 Nomor 185, Tambahan Lembaran Negara (TLN) Nomor 6400, Pasal 60 Ayat (2).

because the Civil Code itself has not changed since the Dutch colonial era until now.²⁹

The concept of cyber notary or also called notary by digital is about to enter Indonesia, therefore notaries must prepare themselves when entering the digital era. In the context of e-notary, Indonesia is far behind other countries, especially Common Law countries which have allowed their notaries to make deeds electronically. For example, the United States has regulations regarding e-notary (among them the US Federal E-Sign Act 2000 and the Model Notary Act 2002), the UK has implemented the cyber notary concept in 2001, while the Latin countries that apply the cyber notary concept are France. In the Asian region, the countries that have implemented the concept of cyber notary are Japan (J-notary issued in 2000) and Hong Kong. Notaries in Japan are adherents of the Civil Law legal system called an electronic notary. An electronic notary is a system in which the making of a notary deed is carried out using electronic media.³⁰

Indonesia currently does not have special rules governing e-notary because most of the contents of the Law on Notary Positions have not been updated since the colonial era. In the UUJN there are still many ancient rules that are not in accordance with the current situation. In this case, the drafters of the law have not thought about it for an extended amount of time related to the development of technology for information and communication, which is developing very rapidly in Indonesia, greatly affecting economic growth and development, information and technology advancements can encourage the creation of services using information technology.³¹

The use of digital signatures provides a guarantee if at any time the electronic information signed is changed/modified by an irresponsible party. Based on the four elements above, a cyber notary has a reliable security system in terms of electronic transaction activities. Notaries are also expected to take part in electronic transactions in order to provide strong legality if there is an ongoing electronic transaction. The role of the Notary in this legality is to identify the

²⁹ R.A. Emma Nurita, *Cyber Notary Pemahaman Awal Dalam Konsep Pemikiran*, (Bandung : PT. Refika Aditama, 2012), p. 8

³⁰ Indra Pranajaya, "Studi Komparatif Terhadap Jabatan dan Kode Etik Notaris Di Indonesia dan Jepang", *Tesis Universitas Indonesia*, 2012, p. 64

³¹ R.A. Emma Nurita, *Cyber Notary...*, halaman 17

electronic signature and the signer, and also to verify the electronic document/electronic information that is signed.³²

A Notary Deed can become an authentic deed if it meets the requirements in the legislation, especially Article 1868 of the Civil Code. The Civil Code's Article 1868 stipulates three requirements for an authentic deed: first, the deed must be prepared in accordance with the law, implying that the provisions of the law must be followed in order to complete the deed. Second, the deed must have been made before or by a public official. This means that the deed must have been made on the basis of someone's request. The deed of meeting minutes, for example, must have been made on the basis of an incident, examination, or other decision. Thirdly, the official responsible for signing the deed must possess authority over the following three things: his position, the kind of deed, the day and time it was signed, and the place it was signed. Given the aforementioned requirements, the idea of a cyber notary in Indonesia becomes difficult to practice.³³

Technological developments are growing rapidly making enormous changes to human life, the society that was originally conventional into an information society that can access anything they want to know without any restrictions. If the concept of cyber notary will be applied later, then there are several factors that can encourage the establishment of regulations regarding cyber notary itself:³⁴

- a. Based on the current state of facts, humans in their lives cannot be separated from technological advances so that humans can take advantage of information technology.
- b. Indonesia is a very broad country in terms of its reach because it is part of the global community, so it is required to make improvements in terms of legal facilities, specifically regarding the use and utilization of information technology.
- c. Currently, Indonesian Notaries should become cyber notaries to improve services, especially in the notary field and participate in promoting public welfare, educating the nation's population, and contributing to the

³² *Ibid*, p. 28-29

³³ *Ibid*, p. 37

³⁴ *Ibid*

maintenance of world order the basis of the Preamble of the 1945 Constitution, paragraph 4, if the Notary does not make changes to the UUJN especially related to the Notary's authority, it can result in the Notary being confined to himself in his world. The current state of the modern and cyber-paced world makes all activities carried out in a practical, fast and efficient time (affordable cost) but do not forget that Notaries must uphold philosophical values, especially those related to credibility, prestige and dignity that are prioritized in every action taken by a Notary.

- d. Deeds must be stored in a room, documents and other supporting documents are currently still stored conventionally but can actually be stored electronically such as stored in a system or data so as to reduce the amount of costs incurred.

The author argues that the work of a notary, as a public official authorized to make authentic deeds, becomes more effective, practical, and efficient, as well as reduces unused costs, in relation to the concept of a cyber notary. Cyber notary in question is related to the reading of deeds and electronic signatures. In everyday life, a small example that can be seen is in the banking sector, every customer who conducts banking transactions such as money transfers, paying for water and electricity, paying taxes and others, must come to a bank branch office.³⁵

With the existence of a cyber notary, it makes the work of a notary easier :

- a. The presenters no longer need to meet in person but can be by means of electronic media (for example zoom meeting, google meet, skype, video call);
- b. Save time and costs from both parties, both from the notary and the appearance or client (transport costs and time wasted because they have to attend face to face with a notary and other appearers)
- c. Save on document storage, which currently requires prints or print outs that cost more.

The legal system in Indonesia has a unique nature because it does not adhere to the Continental European system (Civil Law), but is also influenced by the implementation of the Islamic Law system and the Customary Law system. However, during its development, the Indonesian legal system underwent a shift

³⁵ Patricia Jessica, "Tinjauan Yuridis...", p. 56-57

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due to the influence of the Common Law legal system. Common Law is a legal system that contains a series of wisdom and experience that comes from the past. The Common Law legal system at that time was also a simple rule, but underwent developments or changes so that it became better and more perfect in keeping up with the times. The common law legal system must adapt to the conditions and situations of the community, so that the common law legal system is getting better and in line with community conditions.³⁶

2. The Factors That Become Barriers to the Implementation of Electronic Notary Deeds in Indonesia

On July 1, 1860, for the first time the legal regulation regarding the Regulation of the Position of Notary, namely Staatblad 1860 Number 3 was enacted. So the age of the law is hundreds of years. The effectiveness of these regulations should be considered in this digital era. The concept of cyber notary is contrary to the existing laws and regulations in Indonesia. Law No.2 of 2014 jo. Law No. 30 of 2004 the regulation governing the issuance of an electronic deed as an authentic deed is not explained regarding the Position of a Notary..³⁷

The implementation of the concept of cyber notary is currently experiencing obstacles in the UUJN, because this law states that the making of the deed must be done before a notary and the deed being read out loud must be read before the public by a notary and signed immediately by the appearer, notary and witnesses. In cyber notary physical meeting is not the main requirement, but it eliminates the physical meeting between the parties and the notary but is still in the realm of law. The Civil Code, UUJN and ITE Law which currently do not cover the implementation of cyber notary. However, if the electronic deed or cyber notary concept is applied now, then the deed possesses legal force as an illegal act because it is not in accordance with Civil Code Article 1869. The principle of the *tablelionis officium fideliter exercebo* (conventional principle) is contrary to cyber notary because on the conventional principle the appearers are physically (corporal) who face each other directly at the place of making the deed. This principle provides an understanding that the appearers who are present are actually present in the identification and signed directly or wet ink signatures in

³⁶ RA. Emma Nurita, *Cyber Notary*..., p. 43-44

³⁷ Patricia Jessica, "Tinjauan Yuridis...", p. 60

front of a notary. While cyber notary, the appearers are physically present through electronic media intermediaries and the signature is used as a digital signature.³⁸

The duties and authorities of a notary in the practice of the cyber notary concept, especially in making authentic deeds, have several problems as follows; (a) there is a necessity for the appearers to face physically, there is a necessity to sign a notarial deed in the form of a deed of the parties, if the appearers are unable to sign then they must state the reasons as stated in the Notary Position Law Article 44 paragraph (2).³⁹

In the era of globalization and advances in information technology, there are more and more demands from society about justice. So there needs to be a change in the system of proof of dispute resolution in court, which was originally closed to be replaced with an open one. Related matters that regulate evidence should be made openly so that it is possible to accommodate when evidence appears that has not been regulated by the law. The conclusions obtained when connecting the regulations regarding written evidence in the Civil Code with cyber notaries are as follows:⁴⁰

- a. Article 1868 of the Civil Code states that "an authentic deed is a deed whose form has been determined by law, made by or in the presence of a public official who is authorized for that at the place where the deed was made" therefore if the UUJN is successfully revised then the notarization authority in the cyber world it is allowed and against Article 1868 of the Civil Code in the future it will not be a problem because the position of the electronic deed has a position that is equal to or equal to the authentic deed. However, in terms of its form, it has been stipulated in the law and authorized officials including notaries have fulfilled the requirements contained in the Civil Code's Article 1868. Next, we look at Law no. 11 of 2008 concerning Information and Electronic Transactions, in particular Article 5 paragraphs (1) and (2), the position of an electronic deed can be included as part of an electronic document/certificate that may be utilized as legal evidence.

³⁸ Patricia Jessica, "Tinjauan Yuridis....", p. 61

³⁹ *Ibid*, p. 62

⁴⁰ *Ibid*

- b. Civil Code Article 1869 states that "a deed which because of the inability or incompetence of the employee referred to above, or because of a defect in its form, cannot be treated as an authentic deed, but has the power as a handwritten note if it is signed by the parties." Insofar as the electronic deed is done by an authorized public official and the form is not defective, the electronic deed has the same proving authority as the proof value of an authentic deed.
- c. Civil Code Article 1870 states that "an authentic deed provides between the parties and their heirs or persons who have rights from them a perfect proof of what is contained therein." This means that the interested parties, including those who inherit the heir's rights, an authentic deed becomes perfect documentation of the deed's contents. Therefore Article 1870 if the parties have a legal relationship with the deed and they acknowledge the truth that has been contained in the deed, then the position of the electronic deed has a position equivalent to an authentic deed.

It can be seen that technically, Indonesia is ready to implement the concept of cyber notary. However, in the notary world, notary work cannot be explicitly done in electronic form because the idea of a cyber notary is not specifically covered by any law. With the ease of conducting transactions, the provision of services in the field of notary through electronic media is feasible to be carried out by being balanced with the revision of the UUJN. Electronic documents and electronic signatures are widely used in cross-border trade transactions either through the real world or in the virtual world, the greater the opportunity for a notary to take part in the trade transaction.⁴¹

Civil Code, Law no. 2 of 2014 jo. UU no. 30 of 2004 regarding the Notary Position and the ITE Law must be synchronized regarding qualifications and Special Education for cyber notary/electronic notaries is needed for service effectiveness. So that in its implementation, the three regulations do not conflict with each other, instead they must support each other between one regulation and another.

It was found that two countries were the original sources of the Indonesian Civil Code, namely France and the Netherlands. In both countries, they have

⁴¹ *Ibid*, p. 66

revised the provisions regarding the law of evidence, particularly regarding the criteria for written evidence (private instrument for normal transactions and authentic deeds). The two countries have clearly explained that the evidentiary power of Electronic Information evidence is functionally aligned with written evidence, including electronic signatures contained in Electronic Information and aligned with a wet ink signature as long as it still meets the specified conditions. The ITE Law has explained the same thing as well, especially explains in Article 5 that an Electronic Information/Electronic Document is legal evidence. However, in the ITE Law there is an exception which states that a law requires a notary or deed official to provide a written format on paper. Historically, the exception article was rejected when it was discussed in the DPR at that time. This is because the article is nullified and has another meaning when it is read by stakeholders. However, during the first stage, the people's representatives argued that there needed to be a strict exception.⁴²

The proposal for a revision of Article 5 Paragraph (2) with the aim of emphasizing that electronic evidence is the evidence that is independent of the previous proof paradigm and also emerges as a lex-specialist from endless debates. The progression of the proposal occurs in Article 5 Section (4) where the exception is not only for notarial deeds but for all deeds made before the authorized official. Examining the articles in the Civil Code, especially Article 1868, which only states that an authentic deed is one whose form has been determined by law and was signed by or in front of public officials in power at the location where it was signed, is all that is required to be considered authentic. More detailed provisions pertaining to the formal and material requirements of an authentic deed (such as the obligation to read the deed) are more clearly regulated in the Law of Civil Procedure and the Notary Law. So there is a need for regulatory revisions to support Electronic Information including Electronic Signatures and Notaries, where several countries have included them in the Civil Code including Procedural Law and Electronic Signature Law. The ITE Law and the Notary Law should be the basis for functioning as RA (Registration Authority

⁴² Edmon Makarim, *Notaris dan Transaksi...*, p. 154-155

as an examiner and identification of a person in the registration process and certificate acquisition).⁴³

One of the ways that digital signatures can be used in conjunction with cyber notaries is that there needs to be a revision in the ITE Law, especially Article 5 Paragraph (4) concerning the exclusion of electronic documents so that digital signatures and cyber notaries can be used simultaneously and make notaries able to carry out their duties and authority in line with the times. In addition, the The Ministry of Human Rights and Law Ministry of Communication and Informatics need to work together regarding big data storage, which contains the identities of all citizens (such as full name, place of birth date, gender, full address, religion, marital status, occupation, nationality, fingerprint, and signature). As a public official, a notary is also entitled to have an organization that oversees the notaries themselves. The organization was named the Indonesian Notary Association (INA); in Indonesian abbreviation is INI (Ikatan Notaris Indonesia). Under the supervision of the Ministry of Human Rights and Law, INI plays an important role in fighting for electronic deeds so that new programs, facilities, and regulations regarding cyber notary can be properly discussed by both parties.

IV. CONCLUSION

An electronic deed that is signed electronically without being in front of a notary causes the the force of the deed's evidence to become an underhand deed because the proof element of an authentic deed is not fulfilled, both outwardly, formally and materially. As stated in Civil Code Article 1869 which states that the form is defective, it cannot be treated as an authentic deed, and it has the power to be written under the hand if signed by the parties if the deed in question is made by an incompetent official or employee. The factors that hinder the implementation of electronic deeds in Indonesia are related regulations, namely Law no. 2 of 2014, Law no. 11 of 2008 concerning Information and Electronic Transactions, and the Civil Code have not further regulated the cyber notary so that revisions must be made so that the articles that are related to each other, especially regarding the strength of authentic deed proof, the The notary's authority over deed reading, signing, and storage can be synchronized, allowing

⁴³ *Ibid*, p. 157

Indonesia to implement a cybernotary so that notary work can be done online in serving the community in an efficient, effective and cost-effective manner can be guaranteed by legal protection.

V. SUGGESTION

In making a new law that regulates cyber notaries, there must be improvements by adding the authority of a notary in implementing the system of providing services in the field of electronic notary (cyber notary), namely:

- 1) In the revision of the UUJN and the Amendment to the Civil Code, it should be formulated about the product of an electronic notarial service system, namely an electronic deed as electronic evidence that can be accepted and identified as written/authentic evidence.
 - a) Adding the notary's authority regarding the electronic The deed is read, signed, and the authority of the notary's position in granting legitimacy to electronic transactions so that the position of the electronic deed is equivalent to an authentic deed.
 - b) The Indonesian Notary Association is authorized as the holder of the highest data archive or Hub (data center) must have big data such as QR Code which contains notary data located throughout Indonesia
- 2) Regarding the ITE Law regarding the provisions in paragraph 4 of Article 5 of Law No.11 of 2008, stating that letters, which are required by law to be written, are exempt from the provisions of paragraph (1) pertaining to electronic information and/or electronic documents. Regarding this matter, the ITE Law only approves Electronic Information and/or documents and/or their printouts as legal evidence as long as the letter made is not in written/notarial form. Therefore, it must be studied further by the regulators, namely the DPR regarding Article 5 Paragraph (4) which gives the impression of being indecisive and does not provide legal certainty.
- 3) There should be an addition regarding the notary's office area. In addition to his domicile which covers the area of office in all provinces, the notary must also be allowed to have authority in the scope of cyber. So the government (in this case the DPR as the party making the law) must anticipate if there is abuse or cybercrime in the application of cyber notary.

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