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Ius Constituendum Principle of Facing Notary in Making Authentic Deed In the Perspective of Virtual Electronics (Cyber Notary)

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Abstract: In terms of making authentic deeds in Article 16 paragraph (1) letter m of Law Number 2 of 2014 concerning the Office of Notary explains that the Notary must be physically present and sign the deed in the presence of the face and witnesses, this is the case when compared to common law and civil law countries that have implemented the concept of cyber notary, so how is the legal arrangement expected in the future for the office of notary in Indonesia. This writing uses normative legal research methods with a statutory approach (statue approach) and conceptual approach (conceptual approach). The results show that the legal regulation of the concept of facing a notary in making an authentic deed is contained in Article 15 Paragraph (1), Article 15 Paragraph (3), Article 16 Paragraph (1) Letter m, Article 16 Paragraph (7), Article 16 Paragraph (9), Article 39, Article 40 of Law Number 2 of 2014 concerning the Office of Notary. The concept of facing the making of authentic deeds in the future should be held electronically, taking into account, among others: being subject to and guided by the law, using digital signatures by applying cryptographic technology, authentication of two security keys supported by electronic certification organized by a third party, being responsible for issuing digital certificates, taking responsibility and proving the validity of an electronic document to be used as valid evidence and having a burden of proof that does not conflict with the provisions stipulated in the notary office law, the notary still reads the contents of the deed to the attendees.

Keyword: Cyber Notary, Facing, Ius Constituendum.

INTRODUCTION

The In this modern era, advances in technology have a positive impact on carrying out all work. This includes the work of a notary as an official who carries out the task of making an authentic deed needed by the community in carrying out legal acts in the realm of private law. There are two terms for the use of notary services that use internet media, namely *Cyber Notary* and *Electronic Notarization*. The term *Electronic Notary (E-Notary)* was introduced by the French delegation in the Trade Electronics Data Interchange System Legal Workshop

forum in 1989 in Brussels, while *Cyber Notary* was obtained based on the idea of the American Bar Association (ABA) Information Security Committee in 1994.¹ The concept of Cyber Notary is a notary who carries out the duties or authority of his office electronically or based on Information Technology. Meanwhile, based on Law Number 2 of 2014 concerning the Position of Notary, there is only one mention of the concept of *Cyber Notary*, namely in the explanation of Article 15 paragraph (3) which reads "*what is meant by other authorities regulated in laws and regulations, among others, is the authority to certify transactions carried out electronically (Cyber Notary), make a Deed of pledge of waqf, and aircraft mortgages*".

The concept of cyber notary known in the Indonesian legal system, still raises various problems and polemics regarding the legal certainty of a notary product carried out with the concept of cyber notary, this is because the authority possessed by a notary is as a public power in the formation of a corporate legal entity, fiduciary management and other arrangements that require signatures and the role of a notary for the validity of the document. In the concept of cyber notary, namely as the utilization of electronic media by teleconference. Cyber notary is the use of electronic media in facilitating and accommodating the authority to print and legalize letters and documents or certificates printed through the system of the Directorate General of General Legal Administration (Ditjen AHU) online.

Article 1 Paragraph 7 of Law Number 2 of 2014 concerning the Office of Notary (UUJN) states "*A Notarial Deed, hereinafter referred to as a Deed, is an authentic deed made by or in the presence of a Notary according to the forms and procedures stipulated in this Law*". Furthermore, Article 16 Paragraph (1) Letter m states "*In carrying out his/her position, the Notary shall be obliged to read out the Deed in the presence of the confronter in the presence of at least 2 (two) witnesses, or 4 (four) witnesses specifically for the making of an underhand testamentary Deed, and signed at that time by the confronter, witnesses, and Notary*" and based on Article 16 Paragraph (1) Letter m explains more clearly "*That the Notary must be physically present and sign the Deed in the presence of the confronter and witnesses*" So that based on these provisions it becomes the basis that the concept of facing is requiring the notary to be physically present.

From a legal point of view, the digital era is a kind of space without borders and without barriers (*real time*). In the field of notaries, the digital era has enormous opportunities and potential in the opportunity to provide services to be easier and more efficient but also has other threats. such as the potential for abuse of office that must be considered. For example, changes occur when making notarial deeds. The process of facing in making a deed is carried out virtually, it becomes a question of how authenticity and legal and technical nature are appropriately used and whether the making uses an electronic signature and what is the evidentiary power outwardly (notarial deed), formally (events / facts) and materially (information when facing).² The unavailability of rules in the UUJN that legalize the reading or signing of notarial deeds through *video converence / virtual*, verification of identity, notary office area, as well as storage / deed records made and stored digitally, is interesting for the author to examine how the legal arrangements regarding the concept of facing notary officials in making authentic deeds at this time and the legal arrangements for the concept of facing notaries in making authentic deeds in the future.

1. How is the legal arrangement of the concept of overlooking the making of authentic deeds in the national legal system.
2. *Ius constituendum* the concept of facing notaries in making authentic deeds.

¹ R.A. Emma Nurita. 2012. *Cyber Notary, Initial Understanding in Conceptual Thinking*, Bandung, Refika Aditama, p.17.

² Christine Willyam, et al. The Concept of Facing Notary in Deed Making Based on the Development of Cyber Notary, *Collegium Studiosum Journal*, Vol.6 No.1 , 2021, p. 134

METHOD

This research uses a typical legal research method / *sui generis*, which is a process of finding legal rules, legal principles, and legal doctrines to answer the legal issues at hand. This research uses several approaches, namely a statutory approach and a conceptual approach, a statutory approach, namely an approach carried out by examining all laws and regulations related to this research, namely the rights and authority of notaries in making authentic deeds and a conceptual approach oriented to principles, views and doctrines, concepts, or principles that develop in law and are related to this research, namely the concept of facing notaries with the confronters. The legal materials used are divided into two types, namely primary legal materials and secondary legal materials. Then the legal material is then managed and analyzed based on the subject matter so that the final conclusion is drawn to answer the problem in this study.

RESULTS AND DISCUSSION

Legal Arrangement of the Concept of Facing in Making an Authentic Deed in the Legislation

A notary in carrying out his/her position is bound by Law Number 2 of 2014 on the Amendment to Law Number 30 of 2004 on Notary Position (UUJN). In the preamble of the UUJN, it is stated that the function of a notary is to make authentic deeds to ensure certainty, order and legal protection.³ *Ius Constitutum* UUJN gives the main authority of a notary to make authentic deeds. The parties when making a notarial deed, the main goal is to obtain authentic evidence. Sudikno mertokusumo also explained that a deed is made for the purpose of evidence.⁴ This is reinforced by the consideration of the UUJN which states that there needs to be a certain position mandated to make written evidence that is authentic. Article 15 Paragraph (1) of Law Number 2 of 2014 concerning Notary Position (UUJN) stipulates that *"Notaries are authorized to make authentic Deeds regarding all deeds, agreements, and stipulations required by laws and regulations and / or desired by those concerned to be stated in an authentic Deed, guarantee the certainty of the date of making the Deed, store the Deed, provide a grosse, copy and quotation of the Deed, all of which are insofar as the making of the Deed is not also assigned or excluded to other officials or other persons stipulated by law "*.

Article 16 paragraph (1) letter m (UUJN) regulates the obligation of 'facing' between the party making the deed and the Notary. The 'facing' in question is carried out in order to read out the deed in front of the confronter in the presence of at least 2 (two) witnesses, or 4 (four) witnesses specifically for the making of a deed of will under hand, and signed at that time by the confronter, witnesses, and Notary. The explanation of Article 16 paragraph (1) letter m (UUJN) above specifies that the Notary must be physically present and sign the deed in the presence of the proponent and witnesses. The word physically present, if explained word by word, namely present and physically, present means to exist or come, while the word physical means body or physical, so that the meaning of physically present is physically present in other words physically tangible or visible. Furthermore, in Article 16 paragraph 7 *"the reading of the deed as referred to in paragraph (1) letter m is not mandatory, if the confronter wishes that the deed not be read out because the confronter has read it himself, knows, and understands its contents, provided that this is stated in the closing of the deed and on each page of the deed minutes is initialed by the confronter, witnesses, and Notary."* In

³ Concerning Letter b of Law Number 2 Year 2014 on the Amendment to Law Number 30 Year 2004 on the Position of Notary.

⁴ Sudikno Mertokusumo in Irfan Iryadi, "The Position of Authentic Deeds in Relation to Citizens' Constitutional Rights", *Constitutional Journal*, Vol. 15, No. 4 (2018), p.796-815.

Article 1 point 7 (UUJN), the use of the words facing, confronting, facing, and hadapan is a translation of the word *verschijnen* which means coming to face, which in a juridical sense is real presence.

The reading of the deed by a notary is an obligation in making an authentic deed. This has been regulated in the provisions of Article 16 paragraph 1 letter m of the UUJN so that the reading of the deed is part of the *verlijden* or inauguration of the deed. According to G.H.S Lumban Tobing, if the notary himself reads the deed, the confronters on the one hand have a guarantee that they have signed what they heard before (the reading done by the notary) and on the other hand the confronters and the notary get confidence that the deed really contains what the confronters want. If the reading of the deed is not done by a notary, the deed will have the same evidentiary power as a deed under hand or in other words, the deed has lost its authenticity. This is as stipulated in Article 16 paragraph 9 of the UUJN which reads, if one of the conditions referred to in Article 16 paragraph 1 letter m and paragraph 7 is not fulfilled, the deed concerned only has evidentiary power as a deed under the hand.

The meaning of an authentic deed has perfect evidentiary power, it can also be determined that anyone is bound by the deed, as long as it cannot be proven based on a court decision that has permanent legal force. An authentic deed is a valid document and can be perfect evidence. Perfect here means that the judge considers everything stated in the deed to be true, unless there is another deed that can prove the contents of the first deed wrong. Therefore, making an authentic deed is important. Having an authentic deed means that we have evidence or a strong foundation in the eyes of the law.⁵ Looking at Article 1868 of the Civil Code, it is stated as follows: "*An authentic deed is a deed made in the form prescribed by law by or before public servants authorized to do so, at the place where the deed is made*". From this explanation, it can be understood that a deed is called authentic if it is made in the form prescribed by law and must be before public servants who are authorized to do so, in this case if the deed is a notary product, the deed must be made in accordance with the provisions of notaries in force in Indonesia and must be made before a notary.

Ius Constituendum The Concept of Facing a Notary in Making an Authentic Deed

Notaries play a very important role in encouraging the realization of legal certainty and protection for the community. This is due to the strategic authority possessed by Notaries in the realm of civil law, namely proving and defending a right. Given the importance of the Notary profession, the role, function and existence of Notaries are regulated in legislation, which is not only intended for legal certainty, but also legal protection for Notaries in carrying out their duties and responsibilities. Regulations regarding the position of Notary are mentioned in Law Number 30 of 2004 concerning the Position of Notary jo. Law Number 2 of 2014 on the Amendment to Law Number 30 of 2004 on the Position of Notary (UUJN).

Legal certainty is an important aspect and the main thing in the implementation of an act and legal relationship. In making an authentic deed by a notary, legal certainty is the main thing that must be guaranteed. The aim is to provide protection to the parties concerned in the making of an authentic deed by a notary.⁶ In the elucidation of Article 15 paragraph (3) of the UUJN, it is stated what authority a notary has, including the authority to certify transactions conducted electronically. Although it has been mentioned in the elucidation of Article 15 paragraph (3) of the UUJN regarding the concept of cyber notary, there is no detailed explanation explaining how the form of implementation and what consequences can

⁵ Irwansyah Lubis, Anhar Syahnel, and Muhammad Zuhdi Lubis, *The Profession of Notary and Land Deed Maker (Practical and Easy Guide to Obeying the Law) Book 2*, (Jakarta: Mitra Wacana Media, 2018), pp. 55-56

⁶ Edmon Makarim, *Notary and Electronic Transactions: A Legal Study of Cyber Notary or Electronic Notary*, Raja Grafindo, Jakarta, 2013, p. 133

potentially occur. Legal services for notarial services based on the cyber notary concept certainly require a clear legal basis / legal umbrella so that it can be used as a reference for a notary in exercising his authority and providing services to the general public, so that notarial deed making services have a guarantee of legal certainty for notaries.

Cyber notary as a form of technology utilization carried out by notaries in carrying out their profession and exercising their authority. The concept focuses on the implementation of deeds made electronically starting from the face of the parties to digital signing. Cyber notary as a form of demands for the development and progress of the times that require flexibility in the time and place of signing a deed made by a notary. Basically, the work of a notary is divided into 3 stages: first pre-making a deed, second making a deed, third post-making a deed. In the pre-deed making part, it is carried out by analyzing legal documents by examining the subject, object and completeness of the documents provided. In the deed making stage, it must be carried out with the procedures stipulated in the UUJN as a. Notaries are required to be present at the time of making the deed to hear and see every process in making the deed and the presence of the relevant faces, b. The parties carry out signatures in front of a notary, C. A notary is obliged to read out the deed in front of the faces and witnesses.

Notaries in exercising their authority must prioritize the principle of prudence, this is because legal documents issued by a notary must have a valid burden of proof and be recognized as legal evidence. Notaries who have utilized the facilities of technological advances and information systems are known as modern notaries. Law must be able to adapt to the development and progress of the times, therefore the Indonesian government has also planned the utilization and regulation of the concept of cyber notary to be regulated in detail in Indonesia for the convenience and effectiveness of notaries in carrying out their duties and functions. The function and role of notaries in utilizing the concept of cyber notary is very important so that the services performed by notaries can be maximized and flexible.⁷ Law Wrence Leff, explains cyber notary as "someone who has the ability to specialize in the field of law and computers where cyber notary is a concept that can utilize existing technological advances in terms of carrying out the duties and authority of a Notary".⁸ Transactions that will be carried out are no longer with a face-to-face meeting by the parties, but by being carried out electronically through the institution of cyber notary, the use of *telecommunication platforms* in the creation of transactions is said to lead to efficiency and effectiveness without recognizing space and time barriers for parties who carry out their transactions naturally with transactions that occur in the usual or conventional way.⁹

The implementation of the cyber notary concept has differences between countries that adhere to the common law and civil law legal systems. Indonesia as a country that adheres to a civil law legal system views deeds made before a notary as authentic deeds. So that the burden of an authentic deed is as evidence in a proof and legal legality.¹⁰ In the field of notary in common law and civil law countries already have laws or rules governing e notary / cyber notary. This shows that notary activities follow technological developments that can facilitate their work. In this e notary activity, a notary does not have to meet directly with the client who wants to make a word, they can make a deed by using a zoom meeting or other application to meet virtually with the client. Countries that use common law or civil law

⁷ Fauzan Aziman, Legality of the Use of the Concept of Cyber Notary in Practice in Indonesia *Justicia Sains: Journal of Legal Science* vol. 08, No.1, 2023, p. 92

⁸ Rositawati, D., Utama, A., Made, I., & Dewi Kasih, D. P. (2017). *Electronic Storage of Notary Protocols in Relation to Cyber Notary* (Doctoral dissertation, Udayana University), p.172-182.

⁹ Gunawan, B. M. (2021). *Notary authority in certifying transactions conducted electronically* (Doctoral dissertation, Universitas Pelita Harapan), pp.150-160.

¹⁰ Habib Adjie, "The Concept of Mayantara Notary Facing Global Challenges", *Respublica Law Journal* 2, 2017, p. 214

legal systems such as the United States, Estonia, South Korea, and Japan have special rules in the use of electronic media in the notary profession.

The United States has special rules when it comes to online/cyber notary. The United States is able to use the online notary/E-notary system because it has a Uniform Electronic Transactions Act ("UETA") law whose purpose is to harmonize state laws on the retention of paper records (especially checks) and the validity of electronic signatures. Currently, electronic notarization is legally authorized in all states by E-SIGN and/or UETA. However, as of October 2020, only 29 states have laws that allow notaries to notarize remotely. States that have utilized Remote Online Notarization ("RON") laws include: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin.¹¹

In the 29 states that have adopted RON laws, documents executed and notarized remotely and electronically are valid and binding. Among the 29 states, some states, including the two Ballard states of Nevada and Minnesota, provide that the notary need not be physically present in the party's state of execution. The regulations specifically governing E-Notary / Cyber Notary in the United States are regulated in Bill S. 1625 passed by the United States Legislature / United States Congress, this rule makes the federal minimum standard for all notaries in the United States to carry out remote online notarization (RON). Bill S. 1625 is based on the rule that notaries in states that have passed rules on Remote Online Notarization can carry out their duties using electronic media.

Furthermore, notaries in Japan can carry out their work using electronic media due to the existence of a special system in the use of electronic media in the notary profession. The system used in Japan is e-Notarization which allows 5 kinds of aka notarization, namely: authentication of electronic documents, which includes authentication of company articles of incorporation prepared in digital form, attaching an officially attached date to e-documents, preservation of notarized electronic documents, providing certified duplicate copies of electronic documents, certifying that e-notarized documents that have been under the possession of someone other than the notary are unaltered and identical to the stored electronic documents. The e-Notarization activity is carried out through a system called the e-Notarization Center. The Notarization Center uses a Virtual Private Network (VPN) service. The Japan National Notary Association "JNNA" owns and maintains this Center at its own expense. The system is built on a Public Key Infrastructure.¹²

South Korea has an E-notarization system where an electronic notarization system has been implemented since 2010, which allows users to authenticate (notarize) through a computer or smartphone. This system is useful when the notarization applicant lives in a place where there is no notary or outside South Korea and helps to reduce costs. However, in the past, since there was no regulation allowing notary requests through images, even when using the electronic notary system, the applicant still had to go to a notary practice organization at least once to meet the notary in person. As of June 20, 2018, the new South Korean law allows notary applicants to meet a notary via video conference and receive notarized documents online, instead of going to a notary practice organization. However, not all notaries in practice are allowed to do this process, and only some licensed notaries can do so, so the South Korean Ministry of Justice has to deal with some issues regarding technology

¹¹<https://www.ballardspahr.com/insights/alerts-and-articles/2021/03/updated-e-signatures-and-remote-online-notarization> accessed on 06/15/2024

¹² Nippon Koshonin Rengokai (Japan National Notaries Association), How to make good use of Japanese Notaries, p.13-14.

to be able to check and verify users (notaries) and must have close coordination with the Ministry of the Interior.¹³

Based on the data, these countries can be seen that the use of electronic media in the notary profession has been organized due to technological developments. In implementing the concept of cyber notary in Indonesia with legal provisions as limits and norms for notaries in carrying out their profession in the future, the concept of facing can be held electronically, taking into account also the importance of identification and recognition of the parties in order to fulfill the requirements of legal capacity and authority owned as subjective and objective conditions of the validity of a legal relationship.¹⁴ Then the need to regulate the guidelines for the implementation of the cyber notary concept can be described as follows:

1. A notary official is subject to and guided by the notary office law which has regulated the duties, obligations, authorities and functions, this aims to avoid the position of a deed that has been made not an authentic deed but an underhand deed so that it does not have strong strength and validity.
2. Against the physical presence of a notary at the time of making an authentic deed in order to hear and see every process in making a deed with the relevant contributor can be held by virtual electronic / teleconference provided that the contributor guarantees the truth, the authenticity of his real presence.
3. For *digital signatures* or the use of electronic signatures, a notary can be guided by the law on information and electronic transactions using the principle of asymmetric cryptography technology, using two security keys authentication, namely private keys and public keys, supported by electronic certification organized by a third party. a security system for electronic information and communication. With the use of electronic signature technology, electronic information / documents have met the rules of security and authenticity of information (*Confidentiality, Integrity, Availability, Authorization, Authenticity and Non-Repudiation*), since the electronic information is created, stored, processed, sent and received by other parties electronically. With the use of certified electronic signatures, the existence of electronically signed electronic documents cannot be denied by the parties to the transaction as equivalent to authentic evidence. In other words, the authentication process is technically guaranteed, and automatically the output is authentic evidence.¹⁵
4. In carrying out its duties and functions in terms of certification, when a notary acts as a *certification authority (trusted third party)*, the notary must be responsible for issuing a *digital certificate*. The certification is limited to matters relating to digital certificates issued by a notary.¹⁶
5. In the implementation and utilization of the cyber notary concept, a notary must be able to account for and prove the validity of an electronic document that has been electronically legalized and certified to be used as valid evidence and has a burden of proof in the eyes of the law and does not conflict with the provisions stipulated in the Notary Law, this goal is to provide legal certainty and clarity on the identity and authority possessed by the party performing the legal act.¹⁷

¹³ Bui Nguyen Khanh, Phan Xuan Linh, "Electronic Notarization in the Context of Digital Transformation in Vietnam: Challenges and Recommendations", *International Transaction Journal of Engineering, Management, & Applied Sciences & Technologies*, 2022, p. 4. <https://tuengr.com/A13/13A9/13A9U.html>

¹⁴ Shinta Pangesti, Grace I Darmawan, Cynthia P. Limantara, "The Concept of Cyber Notary Regulation in Indonesia", *Rechtsidee Notarial Journal*, Vol. 7, 2020, p. 105

¹⁵ Priscillia Virgina, Analysis of Notarial Deed in the Era of Cyber Notary in View of the Principle of Tabellionis Officium Fideliter Exercebo, *Journal Indonesian Notary*, Vol. 03, No.16, 2021 , p.398

¹⁶ Efa Laela Fakhriah, *Electronic Evidence in the Civil Evidence System*, PT Alumni, Bandung, 2011 , p.29

¹⁷ Irfan Iryadi, "The Position of Authentic Deeds in Relation to Citizens' Constitutional Rights", *Constitutional Journal* Vol. 15 No. 4 2018, p. 122

6. A notary still reads the contents of the deed to the parties so that the parties are clear about the contents of the deed and all information related to the deed is also known to the parties. So that the decision to agree or disagree with the contents of the authentic deed is determined by the parties who will later sign it.

The authentic value of a deed does not only depend on the form determined by law but also on the official authorized to make the deed. This means that *de facto* notarial deed making by utilizing the cyber notary concept does not reduce the authenticity of the deed as long as the subjective and objective elements of the deed making provisions can be fulfilled by meeting *face to face* so that the notary can face the parties concerned and if an electronic signature is used, then the use of the electronic signature must meet the terms and conditions that have been regulated in a statutory regulation. The utilization and implementation of this concept is a form of development and progress in the field of notary profession. Cyber Notary will be successfully and seamlessly implemented if there is an integration of population data registered in the E-KTP data, cooperation between departments including the Ministry of Law and Human Rights, Ministry of Communication and Information, Ministry of Trade, Ministry of Home Affairs, Ministry of Cooperatives and various other related departments. So that various bureaucracies can be carried out online where Notary as a trusted party conducts attestation, from parties who carry out legal actions or transactions and there is a clear legal umbrella that protects these legal actions.¹⁸

CONCLUSION

The legal regulation of the concept of facing the making of an authentic deed in the legislation is contained in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Notary Offices including Article 15 Paragraph (1), Article 15 Paragraph (3), Article 16 Paragraph (1) Letter m, Article 16 Paragraph (7), Article 16 Paragraph (9), Article 39, Article 40. Where if in the making of an authentic deed the notary and the confronters do not face, face, are physically present then the deed will not have legal evidentiary power and will become an underhand deed.

Ius Constituendum The concept of facing in the making of authentic deeds in the future should be held electronically, taking into account, among others: subject to and guided by laws governing the rights and authority of the office of notary, the concept of facing a notary that can be held electronically virtual / teleconference with a guarantee of the authenticity of the presence of the facing parties, using digital signatures by applying cryptographic technology, authentication of two security keys supported by electronic certification organized by a third party, responsible for issuing digital certificates, accountable and proving the validity of an electronic document to be used as valid evidence and has a burden of proof that does not conflict with the provisions stipulated in the notary office law, the notary still reads the contents of the deed to the faces so that the parties are clear about the contents of the deed and all information related to the deed is also known to the parties. So that the decision to agree or disagree with the contents of the authentic deed is determined by the parties who will later sign it.

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