

## BARRIERS TO THE IMPLEMENTATION OF THE CYBER NOTARY CONCEPT IN INDONESIA

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### ABSTRACT

*This study aims to investigate, examine, and describe legal studies related to the barriers to the implementation of the cyber notary concept in Indonesia. In this article, the author examines the factors affecting the implementation of the cyber notary concept in Indonesia which has not been fully implemented. This study used a normative method. The results of this study showed that the barrier in the implementation of the cyber notary concept in Indonesia covered [1] legal barriers (juridical): [a] dogmatic, [b] political; and [2] non-legal barriers (non-juridical): [a] parties, [b] notary privacy, [c] economics; and socio-culture.*

Keywords: cyber notary, legal barriers, non-legal barriers.

### INTRODUCTION

The term cyberspace explains the existence of the online world and the existence of an internet network that can be easily accessed results in the absence of spatial dimension limitations. Changes in human activities in various aspects cannot be separated from the development of information technology which can result in new legal actions. Thus, the notary has opportunities and challenges in the globalization era which requires them to shift their services from manual (traditional) to technological-based services (R.A. Emma Nurita, 2015).

Concerning the use of technology by a notary, there is a concept of e-notary (electronic notary) and cyber notary. Based on the existing literature, the terms cyber notary and e-notary come from two different concepts, namely the term electronic notary/"e-notary" which was introduced by legal experts in countries who inherited the Continental Europe tradition and "cyber notary" which was introduced by legal experts who inherited the Common Law tradition (Emmon Makarmi, 2013). On the other hand, based on the meaning, e-notary and cyber notary have the same meaning of the media used, namely from printed documents (tangible) to electronic media (intangible) as media of delivery. However, the Information Security Committee of the American Bar Association defines the term cyber notary more specific, namely, as a new legal profession which can be interpreted almost the same as the existence of a Public Notary, but in the implementation, cyber notary means using documents in electronic form not printed form (Emmon Makarmi, 2013).

Cyber Notary is a notary concept by uses technology to perform the notary's daily duties like digitalizing documents, signing the electronic deed, conducting GMS by teleconference, and others. In short, the main benefit of the cyber notary concept is to facilitate transactions between parties who live far away so that there is no distance barrier in making transactions (Nola, 2011). The cyber notary concept is performing notary duties or authority in public services by utilizing information and technological developments related to the duties and functions of a notary, especially making a deed (R.A Emma Nurita, 2012). In other words, the cyber notary concept can be interpreted as a method/way of working by utilizing existing technological developments (Nurita, 2017). This changes the conventional (face-to-face) way of work to a modern way by utilizing existing technological developments (Alwajdi, 2020). States that no explanation regulates the cyber notary concept explicitly. However, the cyber notary concept can be interpreted as a notary who is obliged to carry out his/her duties or authority electronically by utilizing technological development. It can be said that the cyber notary is a concept commonly used in various scientific writings that explain the function of a notary in transactions or contractual relationships using electronics with the help of internet access (Prastyo, 2009).

The main function of the cyber notary concept is to perform the certification and authentication process for electronic transaction cooperation. In this case, certification means that in performing its obligations, the notary has the authority to act as a third party/Certification Authority (trusted third party) and has the special power to issue digital certificates to interested parties. The authentication function is the same as a legal aspect to be fulfilled in the implementation of electronic transactions (Matra, 2012: 58). Here, the legal aspects include certainty about the date and time of the transaction agreement which is correct and notarized by a cyber notary with an electronic notary seal to be stored and archived in the form of a notary protocol as the status of a notary deed according to the civil law notary procedures. Thus, the legal aspect provides legal guarantees in the form of security for transactions in technical form. Therefore, it can be concluded that there are different things between a cyber notary and a certification author (Matra, 2012).

The conventional notary practice of using paper seems to have turned into a form of transaction that uses an electronic system. This is in accordance with the global agreement in the UNCITRAL forum which has long supported the importance of recognizing the legal value of information and/or electronic documents. UNCITRAL has published the Model Law on E-Commerce (1996), and the Model Law on E-Signatures (2001), which can be used by all countries in developing their national legal systems to accommodate the dynamics of electronic commerce and regulation of electronic signatures. (Edmon Makarim, 2013)

The need for the function and role of a notary electronically has become a hot issue at the International Congress XXIV of Latin Notaries in 2004 which was discussed in the Working Group for Theme II (The Notary and Electronic Contracts), which in essence opened itself up to accommodate all developments and open opportunities. making authentic deeds electronically.

Electronic transactions in Indonesia are regulated in Article 1 number (2) of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (hereinafter referred to as UU ITE). The existence of the ITE Law is expected to provide an opportunity for the implementation of the cyber notary concept in Indonesia. Notaries are expected to carry out their duties and function with the remote method (online), without the need for physical meetings by utilizing technological advances (internet) to certify electronic transactions according to their authority.

Referring to Law Number 2 of 2014 Amendments to Law Number 30 of 2004 concerning Positions (hereinafter referred to as UUJN), the notary is a public official who has the task and plays an important role to provide in the legality of transactions in Indonesia. In other words, a notary can also be interpreted as a party who is entrusted with an agreement for legalization. Notary services become the main need of the community including making and as a mediator to mediate a civil dispute or as a witness to a transaction (for example, auction witness) (Matra, 2012). In the authority to make a deed, in this case, a notarial/authentic deed as mandated by the regulations in the UUJN, it is mandatory to have written evidence as regulated in Article 1868 of the Civil Code that written evidence should have perfect evidentiary power. Therefore, a statutory regulation has to strictly regulate the main requirement for the authenticity of an authentic deed, namely the presence of interested parties before a Notary/PPAT.

Some previous studies found that the use of technology in the cyber notary concept is expected to make a notary more dynamic in providing services, but it will be an obstacle if there are formal requirements that cannot be fulfilled in terms of the validity of a notarial deed based on UUJN, namely:

1. The deed has to be made before an officer who has the authority (notary) (Article 15 paragraph (1) UUJN);
2. Both parties have to present in making the deed (Article 16 paragraph (1) letter I UUJN);
3. The presence of both parties must be known and introduced to the notary (Article 39 UUJN); and
4. At least two witnesses in making the deed from both parties (Article 40 UUJN).

These requirements are mandatory and if some cannot be fulfilled, the notarial deed will be degraded to become a private deed status and consequently cannot be used as evidence.

On the other hand, it is important to find new laws to regulate the application of the cyber notary concept by revising the notary position law. Now, notaries are required to be able to work with solid principles and ideals. Globalization which leads to openness to information, communication, and technology, and the increasingly complex needs of the community, requires notaries to innovate and adapt to technological development. The increasingly pro-service demands encourage notaries to learn to serve clients better, establish a better self-image, and learn to utilize modern information technology tools to improve their work ethic in providing services. In Chinese philosophy, the term *wei ji* means that there is always an opportunity in threat. In this case, one of the threats is in the form of time development ((INI), 2009).

It can be concluded that the implementation of a cyber notary concept is the best answer and cannot be postponed anymore due to its benefits for efficient work and more practical. The implementation of the cyber notary concept in Indonesia is affected by two factors, legal (juridical) and non-legal (non-juridical) factors. One of the legal factors is related to the format of writing a notary deed as regulated in Article 1 number 7 of the UUJN, namely:

*"Notary deed is an authentic deed made by or before a notary based on the forms and procedures stipulated in this law".*

Besides, based on Article 1868 of the Civil Code, a deed has to be made before an official according to the will, intent, and purpose at the request of the appearer. It can be interpreted that in the implementation, electronic signatures cannot be applied in making a deed because it must be done before an official or a notary.

This study is a normative legal study. The normative legal study is defined as a process of finding a rule of law, principles in law, and legal doctrines in providing answers to legal issues that are currently happening (Marzuki, 2010). This study aims to determine whether the law can be interpreted as what is written in a statutory regulation or norms as the basis for good human behavior in general.

Based on all the explanations above, the implementation of the cyber notary concept can be a new step in the current notary service, but in practice, some pros and cons hinder its implementation. Thus, this article aims to describe "**Barriers to the Implementation of the Cyber Notary Concept in Indonesia.**"

## RESULTS AND DISCUSSION

The legal system adopted by a country affects the method of using and making a notarial deed either manually or electronically. In general, the legal system covers 2 types, the Anglo-Saxon legal system which is known as the Common Law System, and the Continental European legal system which is known as Roman law or the Civil Law System. The Anglo-Saxon legal system prioritizes an unwritten law and develops in people's lives. In consideration for judges to give decisions, a jury system requires to have witnesses and written evidence from witness testimony in court. The Continental European legal system is made in writing and codified as the form of law which prioritizes written evidence in terms of proving (Wasis, 2002).

Recently, the rule of law in the implementation of the position of a notary can not be fully based on modern national law in Indonesia. The Explanation of Part I General states that some of the regulations in the UUJN are based on the laws and regulations of the Dutch. Indonesia was a former colonial colony of the Dutch East Indies and at that time there was no development of information and technology. However, now the readiness of facilities and infrastructure can support notary services digitally. As a developing country supported by the legacy of a legal system that has a pluralistic and unification nature, Indonesia is in the development of science and technology in this globalization era. The previous legal arrangement will also show a saturation point or lagging behind the development of science and technology (Wasis, 2002).

The notary is a public official or a person who is given the authority based on laws and regulations in making an authentic deed. Based on the laws and regulations of UUJN concerning the duties and authorities, notaries have the task to make authentic deeds to provide legal protection and legal certainty. In its implementation, notary services in Indonesia are still conventional which means that the service is carried out face-to-face. In the globalization era, the notaries are required to keep up with the times

in their daily lives, either through conventional communication methods or global communication channels using computer systems (internet) (Nurita, R A E., 2015).

The implementation of the cyber notary concept in Indonesia faces many barriers so the provision of a legal umbrella for the implementation has not been realized. The barriers covered:

### Legal Barriers to the Implementation of the Cyber Notary Concept in Indonesia

#### a. Legal Aspect

Law functions as a tool of renewal in society is a theoretical idea from An Introduction to the Philosophy of Law (1954), a book by Roscoe Pound which means the main thing in the Pragmatic Legal Realism school which later developed by Mochtar Kusumaatmaja into Legal Development Theory (Salim, 2010).

Indonesia has been in the process of developing a law to meet the needs of the community. However, there are many challenges in the reform of the old to the new law. As explained previously, the existence of information technology provides both benefits and obstacles in terms of legal aspects and non-legal aspects that should be considered by the government.

Jusuf Patrick Tjahjono, a notary from Surabaya, states that the implementation of the cyber notary concept in Indonesia can only be limited to the application in the form of "legalization" of electronic deed signatures in electronic documents to interested parties and the rest will be dangerous if cannot identify documents electronically against authentic deeds (Matra, 2012). Some articles in UUJN that hinder:

- a. Article 1 point 7, an authentic deed must be made by and/or before a notary.
- b. Article 1 point 8 and number 9, the minutes of the deed and the copy of the deed must not contain a difference.
- c. Article 16 paragraph (1), after the deed is read in front of two witnesses, then the signature is directly affixed.

The reading of the deed must be done in each activity of making an authentic deed because it is a part of the verification (reading and then signing). Thus, a deed made by a notary must be read by the notary concerned/authorized and may not be represented by other people (for example, assistants or notary employees) (Setiadewi, 2020). The article implies the necessity of physical presence among the appearers, witnesses, and notaries. The term "physical" makes the concept of cyber notary difficult to carry out in making electronic deeds using technological developments. Thus, there is a conflict of norms in the authority possessed (conflict of norms). The obligation of physical presence eliminates the main essential elements of the cyber notary concept (Abdul, 2019)

- d. Article 18 states that [1] Notaries have their domicile in the District or City area; [2] Notaries have an area of office covering the entire province of their domicile.

The legal problem is in Article 2 of the ITE Law which stipulates that electronic transactions can be performed cross-regionally. There are no boundaries in space and time (borderless). Based on the principle of *lex specialis derogate legi generali*, special regulations will override general regulations. In other words, the special regulation in question is the ITE Law, so a notary can make a deed based on a cyber notary by providing services in his/her working areas. Thus, the legal position of a deed made by a notary based on the concept of a cyber notary is the same as an authentic deed made conventionally (Wijaya, 2021).

- e. Article 40 paragraph (1), the deed must be attended by two witnesses from both parties.  
In Indonesia, electronic signatures have not been fully used because there is a burden of proof regarding the validity of the deed in the ratification stage which must be signed directly so that electronic documents cannot be equated with authentic deeds. Otherwise, if forced to do so, the electronic document will be degraded as an underhand deed. (Yulia, 2019).
- f. Article 48 paragraph (1), after reading the contents of the deed, it is prohibited to change or add or reduce, either in the writing of overlapping words, inserting words, deleting words and writing the names of the party under the name of the other party.
- g. Article 50, changes with the deletion in the part that is deemed necessary to be deleted, the change can still be read according to the original stated purpose.

The legal barriers above result in a legal uncertainty gap against a deed. This is because there is no written legal regulation to regulate the validity of the deed. The examples of the causes of the imperfection of the deed are:

- a. A Case Analysis on Supreme Court Decision Number 3641 K/Pdt/2001

In this decision, one party appears when the signing of the deed in the detention house (rutan). This case is a form of the unlawful act even though in an agreement there is the principle of freedom of contract as stated in Article 1338 of the Civil Code. Hovered, due to the unbalanced position of the parties in an agreement, one party is considered not free to express his will.

- b. One of the parties passed away when the minutes of the deed had not been completed circularly signed, then the deed could not be continued and became null and void. If there is a default in the future and the deed is used as evidence in court, an advocate from the opposing party can refute the deed because the deed does not have perfect evidentiary power because it is not made in direct contact and is contrary to the Article 16 paragraph (1) letter (m) UUJN.

Based on the examples above, there are no laws and regulations regulating the deed by dealing with the parties online or virtual (Ully and Winanto, 2022).

Legal certainty needs regulation in the law in the form of legislation made by parties who are authorized and have authority. Thus, a regulation must have a juridical aspect and be able to provide guarantees and provide legal certainty so that the law has a function to become a regulation that must be implemented (Obrolan Ringan Seputar Hukum, 2013). The legal certainty concept by Gustav Radburch is as follows:

1. Legal certainty because of the existence of the law, this concept requires that a law must be able to succeed in guaranteeing certainties to the community so that the law has benefits;
2. Legal certainty in or from the law, in this concept, the new law will be implemented if the law is in line with the constitution and the constitution should not conflict with other legal rules. (Rahmat Ramadhani, 2017).

If the UUJN has been revised, the position in the evidentiary value can be equalized so that it becomes perfect proof of the authentic deed and the deed in the cyber notary concept. Based on the theory of authenticity of electronic information, the determinant is based on the accountability of the electronic system. This is in line with Prof. Smith, a Computer Security expert, who stated that *"where information is recorded using mechanical means without human intervention, the records produced by machines can be accepted as evidence with the condition that the machine is reliable"*.

This can be reviewed based on the evidentiary aspect when it is associated with the cyber notary concept as follows:

a. Physical concept

An electronic deed can be equated with a notarial/authentic deed because it is also made by a notary who has the authority as a public official and the external conditions are in an authentic deed based on the size of the authentic deed, including the signature of the notary in the minutes or the copy of the deed. All of these conditions have been fulfilled by the "electronic deed" as an authentic deed.

b. Formal Aspect

In this case, formal standards include certainty of the time when the deed is made including the day, date, month, and year when the appearer is in different areas so that there is a time difference. The existence of electronic signatures by the appearers, witnesses, and notaries can prove what is seen and heard and can be witnessed by the notary so that the electronic deed is declared to have met the formal requirements which are equal to the authentic deed (Adjie, 2011).

c. Material Aspect

Notaries only listen to the information on the purposes and objectives of the appearers in order to put it in the form of a deed and the truth has been acknowledged to be used as valid proof.

When linked to the cyber notary concept, renewal in the law of evidence is a new thing for efforts to legalize remote inspection procedures because there are some laws and regulations that have provided many opportunities such as entering electronic documents as evidence (Nurita, R A E., 2012).

It can be concluded that in the implementation of the cyber notary concept, it is necessary to have legal certainty that specifically regulates the cyber notary concept, including electronic evidence.

## **b. Legal Political Aspect**

Politics and law can be described as two sides of a coin which means that they have a very strong influence. The meaning of law here is positive law, namely the law that is implemented in Indonesia established by the state through state institutions or officials who have the authority to determine it (Nurita, R A E., 2012).

UUJN can be interpreted as the current legal system. But in the globalization era and due to the impact of the Covid-19 pandemic the rules in the law are no longer relevant and there is a need for a new legal overhaul. In this case, the existence of legal politics is to provide answers on how the law acts with the rules of updating regulations to innovate in providing digital notary services.

## **Non-Legal Barriers in the Implementation of the Cyber Notary Concept in Indonesia**

### **1. Client/stakeholders protection aspect**

With the presence of the cyber notary concept, the notary services are higher. However, the closeness of the clients will be reduced as they cannot recognize each other characteristics closely. This allows for breaches of default in the future.

### **2. Privacy aspect**

Privacy is human dignity and other values, for example, freedom of association and freedom of speech. This is one of the most important issues of human rights. Concerning privacy, there are provisions regarding the individual's right to be inviolable at home and confidentiality regarding personal communications (Davis, 1999). Legal guarantees for privacy in Indonesia are not yet optimal because there is no legal protection for it.

### **3. Notary aspect**

In implementing the cyber notary concept, notaries have to be able to actively participate in technological renewal. Besides, it will also change the regulations regarding the notary's office area if a cyber notary is implemented.

### **4. Economic aspect**

Technological developments affect all aspects of human life, especially in the economic field. Thus, the economy depends on the existence of knowledge, access to information, and services with the development of digital networks so that physical links using printed media or materials decrease (Nurita, R A E., 2012). Concerning technology, there is a Certification Authority (CA) system, which is the most complete application that a notary can use to find out the content/intent of a message whose description is encrypted (Key Escrow System). Thus, it can be arranged by a notary of a party who can watch the adjusted transaction record (time of message sent and received).

### **5. Socio-cultural aspect**

Some non-legal barriers in the implementation of the cyber notary concept in the study of socio-cultural aspects cover:

- a. Information facilities have not been maximized in utilizing information technology.
- b. It is difficult to change from a very traditional society attitude.
- c. Many considerations for privacy security so that there is fear in the use of electronic media.

- d. There is no guarantee for the confidentiality and accountability of electronic documents to the parties in conducting transaction activities against the Certificate Authority (CA) or trusted third party or a party that has legal legitimacy in this case a notary for storing and securing notary protocols in the form of electronic documents resulting from electronic transactions between the seller (vendor) and the buyer (consumers).
- e. Notaries are not ready in mastering information technology in applying the cyber notary system in providing services to appearers (Nurita, R A E., 2012).

## CONCLUSION

In several European countries with the Civil Law legal system, they have been able to apply the concept of cyber notary), the notary has opportunities and challenges in the globalization era which requires them to shift their services from manual (traditional) to technological-based services. But the cyber notary concept in Indonesia has not been implemented as a whole due to the inhibiting factors of legal barriers including dogmatic aspects and legal political aspects and non-legal barriers including the protection of clients/parties, notary privacy, notary aspects, economic aspects, and socio-cultural aspects. Now, the prospect of implementing the cyber notary concept is appropriate considering the development of information technology and communications. This can be seen from the development of modern law in encouraging the cyber notary concept to balance a system so that it can be applied by notaries with the conventional system switching to the digital for creating the deed.

Although there are several obstacles that become obstacles in the application of cyber notary in Indonesia, there are gaps that make of cyber notary can be implemented. The application of cyber notary in UUJN is also supported in Article 1 number (2) of the ITE Law which stipulates that: "Electronic transactions are legal acts carried out using computers, computer networks, and/or other electronic media." Therefore, it is necessary to revise the UUJN as a basic material for the creation of legal rules specifically in regulating the cyber notary concept and providing legal certainty in the community.

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