

## Legal consequences of making of electronic notary deeds on the authenticity of the deed

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### Abstract

The rapid development of technology and information requires that various human activities be carried out electronically. Likewise, there are arrangements regarding notaries in making electronic deeds, but the arrangements are still unclear. This creates legal uncertainty regarding the legal consequences of making an electronic notarial deed on the authenticity of the deed. The problem of this research is how the legal consequences of making a notarial deed on the authenticity of the deed. The research method used is normative juridical by conducting library and field research to obtain secondary and primary data related to the arrangement and implementation of making authentic deeds and the legal consequences for the authenticity of deeds. The results of the study show that there are still different interpretations of the authenticity of notarial deeds made electronically, especially regarding the obligation of the parties to appear before a notary. In this case, there is something that means you have to face conventionally. If it is done electronically, it will result in a violation, so that the deed made is not an authentic deed. On the other hand, there are those who argue that parties dealing with a notary can be done electronically. This difference in views creates legal uncertainty, so that notaries do not yet have the courage to make deeds electronically.

**Keywords:** Authentic Deed; Notary; Electronic

### 1. Introduction

Notary deed is one of the authentic deeds. "Notary deed is the strongest and most perfect written proof (volledig) in the field of civil law. It is similar to the deed made by or before a notary. In this case, the existence of the deed no longer requires other evidence to prove something else (Siranggi, Husin, and Azheri 2019)." Society views a notary as an official, a place to gain trust on legal advice, and a place to make important legal papers (Pamelani, Setyo, and Widagdo 2023). The deed made by a notary is an authentic deed (Syahyu 2022). Article 15 paragraph (1) of Law Number 2 of 2014 concerning Amendments to Law number 30 of 2004 concerning the Position of Notary Public states that "The Notary has the authority to make authentic Deeds regarding all actions, agreements and stipulations required by laws and regulations and / or what is desired by the interested party to be stated in an authentic deed, guarantee the certainty of the date of making the deed, keep the deed, provide grosse, copies and quotations of the deed, all of that as long as the making of the deed is not also assigned or excluded to other officials or other people determined by Constitution."

"In accordance with the notary mahzab embraced in Indonesia, namely the Latin notary mahzab. In Latin notary mahzab, notaries have a pattern as a functional notary (Notariat Fonctionnel) with the following characteristics or characteristics: 1. The delegation of authority (gedelegeerd) by the state; 2. Notary deed has formal evidentiary power; 3. Notary deed has power or execution power." (Bachrudin 2021)

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Article 1868 of the Civil Code states that "an authentic deed is a deed made in a form determined by law by/or before a public official authorized for that purpose, at the place where the deed was made".

Along with the development of human needs in the 4.0 era, various electronic-based activities began to emerge. Advances in information technology have a major influence on the activities of human life. "Technological advances can increase the national registration system so that it can be accessed easily and can be set at a minimum cost" (Ntsoane 2018). "The rapid progress of the development of information technology has made many changes in human life on earth. Jobs and activities that used to be done manually are now shifting to using a technological approach. This has been applied in assisting tasks in government and business such as banking, and commerce in cyberspace. Rapid technological advances in this informatics era can provide speed, accuracy and certainty is a solution to solve various problems while providing benefits to its users. Notarial Deed plays a very important role in facilitating business transactions in the form of trade contracts and other deeds in banking. But unfortunately, in the midst of advances in information technology, it turns out that the current notary deed does not support the rapid advancement of technology." (Donald 2022)

In making a notarial deed that can be done by means of video conferencing or through a virtual application. Based on Law Number 11 of 2008 concerning Electronic Information and Transactions (hereinafter referred to as the Electronic Information and Transaction Law), the use of online technology does have benefits that benefit Notaries because the process of making Deeds is faster, easier and more efficient. One of the electronic concepts that can be used in legal services to make notarial deeds is the cyber notary concept.

The concept of cyber notary is only mentioned in the Elucidation of Article 15 Paragraph (3) of the Notary Office Law. There is no more clear regulation regarding cyber notary. Therefore, notaries are still hesitant to use the cyber notary concept. This also has an impact on the obstacles to the development of the notary profession in serving the needs of the community. This service with the cyber notary concept causes problems in not fulfilling the formal requirements to support the validity of a notarial deed based on the Notary Office Law.

The validity of a deed can be seen from four aspects, namely: First, the deed is drawn up before an authorized official {Article 16 paragraph (1) of the Notary Office Law}; Second, the making of the deed must be attended by the parties, both the client and the Notary making the deed {Article 16 paragraph (1) of the Notary Office Law}; Third, both parties are known and introduced to the Notary (Article 39 of the Notary Office Law); and Fourth, the deed must be attended by two witnesses (Article 40 of the Notary Office Law). Thus, in making a notarial deed online, this is not fulfilled, so legally it can be said that there has been a violation. (Faulina, Halim Barkatullah, and Gozali 2022) This can lead to the degradation of the deed so that it has the power of proof as an underhand deed and there is a possibility that it can be an excuse for some parties who feel aggrieved to demand reimbursement of costs, compensation and interest from the Notary if the implementation of the Notary deed agreement is not in accordance with the applicable legal procedures. Therefore legal certainty and legal protection for Notaries to avoid disputes in making deeds when using the concept of cyber notary is urgently needed. On the other hand, the regulations for implementing the cyber notary concept for notaries are inadequate. Therefore research on the legal consequences of making electronic notarial deeds on the authenticity of the deed.

The problem that arises in this study is what are the legal consequences of making an electronic notary deed on the authenticity of the deed?

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## 2. Material and method

### 2.1. Material

The deed is very important in proof. Based on Article 1867 of the Civil Code "Evidence in writing is done by authentic writing or by handwriting".

Article 1868 of the Civil Code states that "an authentic deed is a deed made in a form determined by law by/or before a public official who is authorized for that purpose, at the place where the deed was made." Notary is a public official who has the authority to make authentic deeds and other authorities as referred to in the Law on Notary Position and other laws (Edward, Afiezan, and Tarigan 2022). An authentic deed as a legal product made by a Notary has perfect evidentiary power, meaning that the deed can prove its truth so that it does not need to be proven or supplemented with other evidence (Anand 2018). One of the authentic deeds is a deed made by a Notary. One of the things that is very closely related to the position of a notary is related to an authentic deed. Authentic deed is a term that is attached and synonymous with the notary's position, although what is referred to as an authentic deed is not only a product issued

by a notary, but also produced by other public officials, including civil registry officials, bailiffs, auction officials, and etc. In this paper, the discussion of authentic deeds will only be limited to notarial deeds.

The rapid developments in technology and information have also resulted in demands for notaries to make deeds electronically. Authentic deed is always considered true, unless proven otherwise in court. (Lovita Gamelia Kimbal, Tunggul Anshari Setia Negara 2021)

Electronic deed is defined as an agreement or legal relationship that is carried out electronically. This is done by integrating the network (networking) of computer-based information systems with communication systems on networks and telecommunication services (telecommunicated based), which are facilitated by internet networks (Serfiyani, Hariyani, & Purnomo, 2013). Making notarial deeds electronically has long been discussed with the idea of cyber notary, which is a concept that a notary in carrying out his functions must apply in electronic transactions or relationships via the internet. Notaries in their performance to make deeds must lead to the form of electronic deeds, with the hope of making it easier for the public to obtain legal services more easily and flexibly.

## 2.2. Method

The approach method used in this study is a normative juridical approach because research will be carried out by library research to understand and analyze the regulation and legal consequences of making electronic notarial deeds on the authenticity of the deed. The specification of this research is an analytical descriptive. In accordance with the empirical juridical research approach, in this case library research was carried out to obtain secondary data and field research to obtain primary data relating to the legal consequences of electronic notarial deeds on the authenticity of the deed. The data that has been collected, both from primary legal materials and secondary legal materials will be analyzed using qualitative descriptive analysis techniques, in which the results of the research are put together with data analysis in the form of descriptions. The results of this analysis will be presented in the form of a systematic description by connecting one legal material to another in accordance with the problems raised in this study regarding both the regulation and the legal consequences of making electronic notarial deeds on the authenticity of the deed.

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## 3. Result and discussion

Habib Adji explained that "a notary referred to as a public official does not mean the same as a public official in the field of Government who is categorized as a State Administrative Agency or Officer. This can be distinguished from the products of each of these public officials. As a public official," (Adji 2009) Notaries have the authority to make various deeds as long as they are not under the authority of other officials. The making of the deed is a direct result of the existence of several provisions in national legislation which emphasize that in order to carry out certain legal actions, it is required to make an authentic deed as a means of proof. Even so, the making of an authentic deed is not only desired by positive legal provisions, but also caused by the will of the interested parties in a particular legal act to be formalized in an authentic deed as a means of proof.

Article 1869 of the Civil Code states that "A deed which cannot be treated as an authentic deed, either due to the incompetence or incompetence of the public official concerned or because of defects in its form, has the power of underhand writing if it is signed by the parties".

In Article 1870 of the Civil Code it is stated that "For interested parties and their heirs or for people who get rights from them, an authentic deed provides perfect proof of what is contained therein". Article 1871 of the Civil Code states that "However, an authentic deed does not provide perfect evidence about what is contained in it as mere narrative, unless what is said has a direct relationship with the main contents of the deed. If what is contained in the deed is only a narrative that has no direct relationship with the main contents of the deed, then this can only be used as a starting point for proof in writing.

Along with the changing times, science and technology continues to develop, so that there are facilities such as internet networks and electronic media that can be used for two-way communication and make it possible to see each other, such as chatting, teleconferences and video-conferences. (Florenshia, n.d.)

Law Number 11 of 2008 concerning Information and Electronic Transactions regulates the development of computer technology and communication technology. Various computers can be connected to form a computer network that leads to the development of the internet. In general, "a computer network is a combination of computers and their devices connected by communication channels that facilitate communication between users and allow users to exchange data and information". (Florenshia, n.d.)

"Notary is a legal profession that is needed in making authentic deeds. An authentic deed is a strong piece of evidence and if a case or dispute occurs in court, the Notary deed and the Land Deed Making Officer provide a perfect proof as stated in Article 1870 of the Civil Code. The deed made by a notary can be the legal basis for the status of one's property, rights and obligations. For this reason, in carrying out their duties and obligations, notaries are limited by various types of rules, including the rules governing the professional ethics of notaries". (Sesung and Mayasari 1870)

"Authentic deed is always considered true, unless proven otherwise in court" (Lovita Gamelia Kimbal, Tunggul Anshari Setia Negara 2021). Electronic deed is defined as an agreement or legal relationship that is carried out electronically. "This is done by integrating the network (networking) of computer-based information systems with communication systems on networks and telecommunication services (telecommunicated based), facilitated by the internet network" (Serfiyani, Hariyani, & Purnomo, 2013). Making notarial deeds electronically has long been discussed with the idea of cyber notary. Cyber notary is a concept that a notary in carrying out its functions must apply in electronic transactions or relationships via the internet. In making a deed, the notary must refer to the electronic form of the deed. This is intended to make it easier for the public to obtain legal services more easily and flexibly.

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In addition to the authority of the notary in making electronic authentic deeds, the Notary also has other authorities, namely certifying transactions electronically. Explanation of Article 15 paragraph (3) of the Notary Office Law has emphasized that what is meant by other authorities in the phrase "other authorities regulated in laws and regulations, namely the authority to certify transactions carried out electronically, make deed of waqf pledges, and aircraft mortgages".

The implementation of cyber notary creates a clash of conflicts between the provisions of Article 15 and Article 16 paragraph (1) of the Notary Office Law. Article 15 of the Law on Notary Position explains that the other authority referred to is the authority of a notary to certify transactions using a cyber notary, while Article 16 paragraph (1) of the Law on Notary Position explains the elements of authenticity of a deed as stated in Article 1868 Civil Code (Din, 2019). Article 15 paragraph (3) of the Notary Office Law explains that another authority in question is the authority to certify electronic transactions or is called a cyber notary. This authority is considered inappropriate if it is called a certification, because its real meaning is to strengthen electronic transactions so that they can be considered legal (legal). Electronic legalization is carried out in the form of a time stamp or validating the occurrence of a transaction at a certain time carried out by the parties. Conventional forms of legalization include ratification in the form of signatures in a document, which is one of the notary's powers as stipulated in the Law on Notary Positions.

Cyber notary is very useful for notaries. The process of making an electronic deed is not much different from making a conventional deed, namely drafting a deed, reading the contents of the deed, digitally signing by the appearers, then the appearers can read the contents of the draft deed on a computer screen or other electronic media used. Additions or corrections to the deed can be made at the time of signing the deed. Making an electronic deed is intended so that people are no longer face to face to physically go to the notary's office to complete the legal actions they have experienced.

The obstacle in making the deed electronically is related to the authenticity of the deed. Deeds made conventionally already have clear rules regarding their making or the system of evidence. The legal basis of notarial deeds made electronically is contained in the Civil Code, the Law on Notary Positions, and the Law on Information and Electronic Transactions. Article 1868 of the Civil Code explains that an authentic deed is a deed drawn up in a form determined by law, made by or before public officials in power at the place where the deed was made. The public official in question is a notary as explained in Article 1 paragraph (1) of the Notary Office Law that "a notary is a public official authorized to make authentic deeds and other authorities". The Civil Code is a general provision of the legal rules governing the authority of a notary as a public official. The Electronic Information and Transaction Law is a special rule or commonly referred to as a *lex specialis* of the Civil Code which regulates the application of information and communication technology.

Article 15 paragraph (1) of the Notary Office Law explains that "a notary has the authority to make authentic deeds regarding all actions, agreements and stipulations that are required by laws and regulations and/or that are desired by interested parties to be stated in authentic deeds". "The notary's duty is to guarantee the certainty of the date of making the deed, as long as the making of the deed is not assigned or excluded to other officials or other people determined by law" (Sundah, 2014).

Authentic deed must meet all the requirements as described in Article 1868 of the Civil Code, which are cumulative in nature and must be fulfilled in all so that the authenticity is not degraded into a deed under the hand (Halim, 2015). The notary has the authority to make a deed related to a legal action by taking into account the cumulative conditions contained in the laws and regulations. Article 15 paragraph (1) UUJN explains that a notary has the authority to make authentic deeds regarding all actions, agreements and stipulations that are required by laws and regulations and/or that are desired by interested parties to be stated in an authentic deed. "The notary has the authority to guarantee the certainty of the date of making the deed, as long as it is not assigned or excluded from other officials determined by law" (Makarim, 2011).

The provisions of Article 1 number 7 of the Notary Law contain a phrase explaining that an authentic deed is "made by or before a Notary". This is an obstacle for notaries or parties who wish that the parties in making a notary deed have to deal with the notary directly. The notary has the authority to make deeds relating to a legal act by taking into account the cumulative requirements contained in the laws and regulations.

Article 15 paragraph (1) of the Notary Office Law explains that a notary has the authority to make authentic deeds regarding all actions, agreements and stipulations that are required by law and/or that are desired by interested parties to be included in an authentic deed. "The notary has the authority to guarantee the certainty of the date of making the deed, as long as it is not delegated or excluded from other officials determined by law" electronic deed, because in making it the parties convey information virtually about the legal events experienced without physically facing the notary.

The elucidation of Article 1 point 7 of the Notary Office Law has not yet explained in detail the meaning of the phrase "made by or before a Notary" as meant by the law. The phrase "made by or in the presence of a Notary" can lead to multiple interpretations because physical presence can be carried out virtually through electronic media such as video teleconferences, video calls or other electronic media that allow the parties to meet face to face. Thus, a notary cannot make a deed electronically because there are no definite instructions which confirm that the parties must be physically present at the notary's office in the process of making an authentic deed.

Furthermore, in Article 16 paragraph (1) letter m of the Position Law, it is stated that what is meant by the legal basis of a notarial deed made electronically is contained in the Civil Code, the Law on Notary Positions, and the Law on Information and Electronic Transactions. Article 1868 of the Civil Code states that "an authentic deed is a deed drawn up in a form determined by law, made by or before public officials in power at the place where the deed was made. The public official referred to in the regulation above is a notary as described in Article 1 point 1 of the Notary Office Law. In that article it is stated that a notary is a public official authorized to make authentic deeds and other authorities.

The Civil Code is a general provision of the legal rules governing the authority of a notary as a public official. The Electronic Information and Transaction Law is a special rule or commonly referred to as *lex specialis* of the Civil Code which regulates the application of information and communication technology. Article 15 paragraph (1) of the Notary Office Law explains that a notary has the authority to make authentic deeds regarding all actions, agreements and stipulations that are required by laws and regulations and/or that are desired by interested parties to be stated in an authentic deed. The notary's duty is to guarantee the certainty of the date of making the deed, as long as the making of the deed is not assigned or excluded to other officials or other people determined by law (Sundah 2014).

The notary has the authority to guarantee the certainty of the date of making the deed, as long as it is not assigned or excluded from other officials determined by law. The provisions of Article 1 number 7 UUJNP contain a phrase which explains that an authentic deed is "made by or before a Notary". This is an obstacle for the notary or the parties who want an electronic deed, because in making it the parties convey virtually information regarding the legal events they are experiencing without physically facing the notary.

In practice, notaries generally do not have the courage to make these electronic deeds, the signing of the deed is still done manually. This is because there is still no certainty regarding the validity of the deed made electronically and to anticipate the occurrence of legal issues including disputes between the parties.

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#### 4. Conclusion

The legal consequences of notarial deeds made electronically are that there are still multiple interpretations because the arrangements regarding this matter are unclear. There are those who are of the view that making a notarial deed electronically violates the Law on Notary Office which requires that in making a deed the parties must appear before them. This can result in the deed being made not as an authentic deed. On the other hand, there are those who argue

that facing this does not have to be offline, but dealing online, a deed made electronically remains an authentic deed, for example by video conferencing. This creates legal uncertainty, so that in practice there is still no notary courage to make deeds electronically.

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## Compliance with ethical standards

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