

## THE AUTHORITY OF A NOTARY IN MAKING AUTHENTIC DEEDS ELECTRONICALLY ACCORDING INDONESIAN POSITIVE LAW

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### Abstract

The Notary Law provides an opportunity to create authentic deeds electronically, but how to do this is not fully explained, so there is a gap in the norms in the Law. This study aims to discuss regarding the philosophy of making authentic deeds electronically in Indonesia, the authority of notaries in making authentic deeds electronically according to Indonesian positive law, and the concept of a model for regulating authentic deeds electronically by Notaries in law according to Indonesian positive law. This research is a normative legal research or also called library legal research using the Statute Approach, Conceptual Approach, Comparative Approach, Historical Approach and Philosophical Approach. The results of this study indicate that the philosophy of making authentic deeds electronically in Indonesia must essentially be in accordance with the objectives of the law, namely to guarantee legal certainty, create order, and guarantee benefits. Because there is no prohibition in the Law on making deeds electronically, notaries are authorized to make deeds electronically, because the task of a notary is to make legal discoveries. To align perceptions about the authority of notaries in making notarial deeds electronically, it must be stated in the law by amending/improving Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notaries, by adding one paragraph whose contents are to carry out its authority, the making of notarial deeds can be done electronically.

**Keywords:** Notary, Authentic Deed, Electronic.

### INTRODUCTION

Notaries have a very important position and role in the life of the nation and state, because they have the authority or authority that has been determined in the laws and regulations. (Ridwan, 2008) The authority of a notary which in English is called the notary of authority, while in Dutch it is called de notaris autoriteit, which is related to the power inherent in a notary. (Salim HS, 2015) The authority of a notary in the current development still uses a manual, the Notary Law is built with a conventional mechanism, the physical presence of the legal subject is prioritized from the party making the authentic deed, because by Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Notary Position, it is required to know the parties. Knowing the parties must be stated in the authentic deed, in addition the notary is required to read, explain and validate the authentic deed must be in the presence of a notary at the place of his office or work area, therefore the parties must appear physically before the notary.

In the Notary Law, there is no prohibition on whether a notary can use electronics or not in carrying out his/her authority, according to Makarim Edmon:

It is a fact that notaries have used computers in their respective offices and cannot be separated from the existence of telecommunications (for example: Telephone and mobile-callular) in their lives. All of these technological products and the electronic information as their output

have been accepted in everyday life as information that has executive power. It cannot be denied that physics and electronics are part of physical science so that electronic communication relationships should also be perceived as having fulfilled a person's physical presence, therefore it seems naive if the law eliminates the existence of technology in the life of society, nation and state. (Edmon, 2020)

The concept of cybernotary seems to be in debate in Indonesia and is only felt as a discourse, not yet felt as a necessity, although technology allows the role of notaries online and remotely, but legally it seems that this cannot be done because the paradigm underlying the Notary Law is built with conventional mechanisms. Therefore, the function and role of notaries in the context of electronic transactions are very important to be studied in depth, so that notaries in Indonesia can play a global role. (Edmon, 2020)

The Notary Law provides the opportunity to create authentic deeds electronically, but how to do this is not fully explained, so there is a gap in the norms in the Law.

On the other hand, what if there is an epidemic, which causes someone to be unable to come to the notary's office between the parties in full to make an authentic deed, because a ban is imposed on leaving the house.

In the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2019, concerning Electronic Administration of Cases and Trials in Court, it is clear that administration, case registration and trials can be carried out electronically, as referred to in Article 5, Paragraph (1) 8 and 20 of the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2019, concerning Electronic Administration of Cases and Trials in Court.

According to Sudikno Mertokusumo, notaries also have the authority to make legal discoveries.

Legal discovery is the process of law formation by judges, or other legal apparatuses assigned to apply general law to concrete legal events. Furthermore, it can be said that legal discovery is the process of concretization or individualization of general legal regulations (das Sollen) by considering certain concrete events (das Sein). (Sudikno, 2007)

Judges are always faced with concrete events, conflicts or cases that must be resolved or solved and for that it is necessary to find the law, so what is important in the discovery is how to find or find the law for the concrete event. According to the functional legal teachings of Ter Heide, what is important is the statement of how in a certain situation the best solution can be found that is in accordance with the needs of life together and with the hopes that live among the citizens of society towards the "social game" which is controlled by the "rules of the game". (Sudikno, 2007)

Why do notaries make legal discoveries? because the notary faces legal problems submitted by his client to make the deed. The notary must find out the law from concrete events submitted by the client and then make the deed. The result of a legal discovery by a notary is law because it is in the form of a deed which contains legal rules and has binding force and is also a source of law. (Sudikno, 2007)

Based on the description above, this research is very worthy of further research, because there is a gap in the norms in Law Number 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary, which is referred to as the Notary Position Law (UUJN), especially regarding the authority of notaries in making authentic deeds electronically according to positive Indonesian law.

## RESEARCH METHODS

This type of research is normative legal research or also called library legal research, namely legal research conducted by examining library materials or secondary data only. (Soekanto, 2001) Another name for normative law is doctrinal legal research, also known as library research or document study. (Soemitro, 1999) In order to answer the problems in this study, approaches are used including the Statute Approach, Conceptual Approach, Comparative Approach, Historical Approach and Philosophical Approach. (Muhaimin, 2020) The types and sources of legal materials used in this study are Primary Legal Materials, Secondary Legal Materials and Tertiary Legal Materials. The technique of collecting legal materials in this study was obtained through Library Research. Analysis of legal materials is carried out qualitatively; the method or method of concluding legal materials is carried out deductively.

## DISCUSSION

### 1. Philosophy of Electronic Authentic Deed Making in Indonesia

The philosophy of making authentic deeds electronically in Indonesia is essentially that it must be in accordance with the objectives of the law. In essence, every statutory regulation, whether in the form of a law, Perpu, government regulation or lower-level regulation or law that lives in society, certainly has the purpose of establishing and enforcing the regulation. The purpose of establishing the regulation is called the purpose of the law. (Salim HS & Erlies, 2023)

According to Roscoe Pound, the purpose of law is to "protect human interests (law as a tool of social engineering)". The essence of the purpose of law in Roscoe Pound's view is to protect human interests. Human interests are demands that are protected and fulfilled by humans in the legal field. (Salim HS & Erlies, 2023) The essence of a country is a country as a container of a nation created by the country itself. The country as a container of the nation to achieve the ideals or goals of its nation. The purpose of the country is that the purpose of the country is to organize the welfare and happiness of its people, or to organize a just and prosperous society. (Soehino, 2013)

This is in line with the objectives of the Republic of Indonesia as stated in Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, namely that the earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people. Based on the above considerations, the government, in this case the Minister of Law, must appoint a notary to serve the population as many as above. Appointment of a notary, which in English is called appointment of a notary, while in Dutch it is called *beneoeming van notarissen* is the process or act of appointing. Appointing a notary is

conceptualized as an action taken by the Government to determine or appoint a notary to serve the population in each province in Indonesia. The philosophy of appointing a notary is in the context of equalizing and distributing notaries throughout Indonesia, so that they can provide legal services to the Indonesian population. (Salim HS, 2019)

In order to provide legal services to create authentic deeds, it is necessary for the government to appoint a notary, as stipulated in Article 2 of the Notary Law, that a Notary is appointed and dismissed by the Minister. The validity of the Notary Law is intended to include:

- a. "That the Republic of Indonesia as a state based on law based on Pancasila and the 1945 Constitution of the Republic of Indonesia guarantees legal certainty, order and protection, which is based on truth and justice;
- b. That in order to guarantee certainty, order and legal protection, authentic written evidence is required regarding circumstances, events or legal acts carried out through certain positions;
- c. That a notary is a specific position that carries out a profession in providing legal services to the community, and needs to receive protection and guarantees in order to achieve legal certainty;
- d. That notary services in the development process are increasing as one of the legal needs of society;

According to the Chairman of the MPR RI Bambang Soesatyo, encouraging notaries to always adapt and follow technological developments in the era of globalization in carrying out their duties. "Especially related to matters concerning civil matters, such as transactions through electronic and online or digital means, this was conveyed when giving a speech at the international seminar of the Indonesian Notary Association, virtually in front of seminar participants at the Keran Ballroom Hotel JW Mariot. (Notarynews, 2023) This is in line with the improvement of the Law on Information and Electronic Transactions, namely with the issuance of Law Number 1 of 2024 concerning the second amendment to Law Number 11 of 2008 concerning Information and Electronic Transactions, referred to as UUIITE. The law was created and improved with the aim of:

- a. That in order to maintain a clean, healthy, ethical, productive and just digital space in Indonesia, it is necessary to regulate the use of Information Technology and Electronic Transactions that provide legal certainty, justice and protect the public interest from all types of disturbances resulting from the misuse of Electronic Information, Electronic Documents, Information Technology and/or Electronic Transactions that disrupt public order;
- b. That several provisions in Law Number 11 of 2008 concerning Electronic Information and Transactions as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions, in their implementation, still give rise to multiple interpretations and controversy in society, so that changes need to be made to realize a sense of justice in society and legal certainty.

Why notarial deeds can be made electronically, either by using a remote notary (remote online notary) or by using an electronic notary (Cyber notary) is in order to advance, serve and protect the public or community interests. Advancing in the sense of to modernize the law governing notary public is an effort by lawmakers to modernize or renew the notary public law that is not in accordance with current technological developments. To integrate laws for traditional and electronic notarial acts is an effort to unify laws related to notarial deeds that are traditional in nature with electronic notarial deeds.

Remote notary (remote online notary) is one solution to overcome the situation in Indonesia due to the extraordinary state of the country, the country is in a state of unsafe conditions, in a state of war, in a state of Force Majeure, in certain circumstances and for an undetermined length of time, citizens are prohibited from leaving the house, so how does a notary carry out his authority in making an authentic deed, even though the deed is highly desired and is expected to be done quickly.

The philosophy of remote online notary is to make it easier for notaries to provide services to parties even though the parties are in different districts in the state. This system is beneficial for remote notaries because they can simply work from home and do not need to spend transportation costs in providing services to their clients.

## **2. Notary's Authority in Making Authentic Deeds Electronically According to Indonesian Law**

The main authority of a notary is to make authentic deeds, while the method of making authentic deeds, including the tools used to make authentic deeds, is another authority, in order to achieve the state's goal of improving the welfare of its people.

Law Number 19 of 2016 which removes the provisions of Article 5 Paragraph (4) letter b, Law Number 11 of 2008 concerning the prohibition that letters and documents which according to the Law must be made in the form of a notary deed or a deed made by a deed-making official are no longer valid. This means that there is no prohibition on notaries making deeds electronically, while the Notary Law does not clearly determine how to make deeds electronically. Therefore, according to the author, there is a legal vacuum that needs to be answered.

According to Sudikno Mertokusumo, notaries also have the authority to make legal discoveries. Legal discovery is the process of forming laws by judges, or other legal officials assigned to apply general laws to concrete legal events. Furthermore, it can be said that legal discovery is the process of concretizing or individualizing general legal regulations (das Sollen) by considering certain concrete events (das Sein). (Mertokusumo, 2007)

Legal discovery is basically an activity in legal practice (judges, legislators, etc.). However, legal discovery cannot be separated from legal science (theory). Even though historically the theoretical practice of law was born before legal science, but from its development the practice of legal science is the material of legal practice. So in practice, legal practice and legal science often need each other. (Mertokusumo, 2007)

It is a fact that conventional transactions using paper seem to have changed into a form of transaction using an electronic system. (Edmon, 2020) This is in line with the global agreement in the United Nations Commission on International Trade Law (UNCITRAL) forum which has long provided recommendations on the need to recognize the legal value of electronic information and/or documents.

UNCITRAL has rolled out the Model Law on E-Commerce (1997), and the Model Law on E-Signatures (2021), which can be used by all countries in developing their national legal systems to accommodate the dynamics of electronic commerce and regulations on electronic signatures. (Edmon, 2020)

According to Progressive Legal Theory, the law should be able to follow the development of the times in order to be able to serve the interests of society based on the moral aspects of the resources of law enforcers. (Mahrus Ali, 2013) Meanwhile, if progressive law is linked to legal interpretation, this means that progressive interpretation understands the legal process as a process of liberation from an ancient concept that cannot be used to serve today's life. (Rahardjo, 2020)

Currently, national law is experiencing growth and development, marked by, among other things,

- a. With the amendment of Law Number 11 of 2008 concerning Information and Electronic Transactions, known as the ITE Law, to Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions. One of the essentials is to remove/change the provisions of Article 5, which previously contained a prohibition on making authentic deeds using electronic transactions, with the issuance of the amendment to the ITE Law there is no prohibition on making authentic deeds electronically.
- b. The issuance of the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2019 concerning Electronic Case Administration and Trials.
- c. The issuance of Government Regulation of the Republic of Indonesia Number 18 of 2021 concerning Management Rights, Land Rights, Apartment Units, and Land Registration.

Remote notary law or commonly called Remote Online Notary Law is one of the legal norms that is currently developing. This development is due to the advancement of science and technology, especially digital technology. Digital technology will make it easier for humans to carry out transactions, both moral and legal. (Salim HS, 2023)

One of the areas of law that is currently experiencing development is in the field of notary. In the field of notary, various laws and regulations have been established relating to remote notaries (Remote Online Notary). The laws and regulations that analyze remote notaries are called remote notary law or Remote Online Notary Law. (Salim HS, 2023)

Because there is no prohibition in the Notary Law on making authentic deeds using electronics, it can be said that it is the notary's authority to make deeds electronically.

### **3. Model of Electronic Authentic Deed Arrangement by Notary in Law According to Indonesian Positive Law**

In order to align perceptions regarding the authority of notaries to make deeds electronically, the provisions of Article 15 Notary Law must be improved by adding one paragraph which states that in order to carry out its authority, the making of notarial deeds can be done electronically.

The notary's authority in making authentic deeds electronically in Indonesia is so important and to guarantee legal certainty as stated by Roscoe Pound, the purpose of law is to "protect human interests (law as a tool of social engineering)". (Salim HS & Erlies, 2023) The essence of the purpose of law in Roscoe Pound's view is to protect human interests. Human interests are demands that are protected and fulfilled by humans in the legal field. (Salim HS & Erlies, 2023)

The purpose of law according to Prof. Mr. J van Kan, is of the opinion that the law aims to protect the interests of each human being so that those interests cannot be disturbed. Here it is clear that the law has the duty to guarantee legal certainty in society and also to protect and prevent everyone from becoming their own judge (*eigenrichting is verboden*). But every case must be resolved through a judicial process based on applicable law. (Soeroso R., 2021)

The era is always developing, currently in the era of 4.0 so that notarial law can follow the development of the era, in order to be in accordance with the theory of progressive law that progressive law starts from the basic assumption that law is for humans and in order not to cause multiple interpretations among notaries, academics and experts, then the authority of notaries in making authentic deeds electronically really needs to be clearly stated in the notary office law.

## **CONCLUSIONS AND SUGGESTIONS**

### **1. Conclusions**

- a. The philosophy of creating authentic deeds electronically in Indonesia is essentially that it must be in accordance with legal objectives, namely:
  - 1) To protect human interests "law as a tool for social engineering" Human interests are demands that are protected and fulfilled in the legal field.
  - 2) To protect the interests of each human being so that those interests cannot be disturbed. Here the law serves to guarantee legal certainty in society and also to protect and prevent everyone from becoming their own judge "*eigenrichting is verboden*".
  - 3) To create order. Order is seen as the main goal that must be created by law. Protecting all Indonesian people and all Indonesian blood and to advance public welfare.
  - 4) To ensure the greatest possible benefit or happiness for people. That the law aims to realize solely what is beneficial/useful for people.

- b. As regulated in Article 15 of the Notary Law, because there is no prohibition in the law to make deeds done electronically, therefore a notary is authorized to make deeds electronically, because the notary's task is to make legal discoveries, find the main problems faced by the parties in concrete events and find solutions to the problems faced by the parties. A notary is an official or legal professional who is sworn in to act according to the law so that it can be said that a notary is very necessary for the certainty of the legality of any act to prevent unlawful acts.
- c. In order to align perceptions regarding the authority of notaries in making notarial deeds carried out electronically, it must be stated in the law by amending/improving Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, by adding one paragraph to article 15, the contents of which are that in order to carry out its authority, the making of notarial deeds can be done electronically.

## 2. Suggestions

To the Government and the People's Representative Council of the Republic of Indonesia in amending Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, they should pay attention to guarantees of certainty, order and legal protection for the community who carry out legal acts in the field of civil law and should pay attention to and always adjust and follow technological developments in the era of globalization.

## References

- 1) Bryan A. Garner, *Black' Law Dictionary*, ST. Paul Minn, West Group, 1999.
- 2) Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, 1991.
- 3) Ali Mahrus, *Membumikan Hukum Progresif*, Aswaja Pressindo, Yogyakarta, 2013,
- 4) Amiruddin dan Asikin Zainal. 2016, *Pengantar Metode Penelitian Hukum, edisi revisi*, Rajawali Pers, Depok.
- 5) Makarim Edmon, *Notaris & Transaksi Elektronok Kajian Hukum Tetntang Cybernotary atau Elektronik Notary*, Cet 2, PT. Raja Grafindo Persada, Jakarta. 2013.
- 6) Makarim Edmon, *Notaris & Transaksi Elektronok Kajian Hukum Tetntang Cybernotary atau Elektronik Notary*, Cet 4, PT. Raja Grafindo Persada, Jakarta. 2020.
- 7) Mertokusumo Sudikno, *Penemuan Hukum Suatu Pengantar*, Cet 6, Liberty, Yogyakarta. 2007.
- 8) Muhaimin, *Metode Penelitian Hukum*, Mataram University Press, Mataram, 2020.
- 9) Miru Ahmadi, *Hukum Kontrak Perancangan Kontrak*, Rajagrafindo Persada, Jakarta. 2017.
- 10) Rahardjo Satjipto, *Ilmu Hukum*, Cet 8, PT. Citra Aditya Bakti, Bandung. 2014.
- 11) Rahardjo Satjipto, *Hukum Progresif Sebuah Sintesa Hukum Indonesia*, Genta Publising, 2020.
- 12) Ridwan HR, *Hukum Administrasi Negara*, Jakarta Rajawali Grafindo Persada, 2008.
- 13) Rony Hanitijo Soemitro, *Metode Penelitian Hukum, Metodologi Ilmu Sisial, (Dengan Orientasi Penelitian Bidang Hukum), Penelitian Metodologi Ilmu Sosial*, Bagian Hukum atau Masyarakat FH Undip, 1999.



- 14) Salim HS, *Teknik Pembuatan Akta suatu Konsep Teoritis, Kewenangan Notaris, Bentuk dan Minuta Akta*, Jakarta, Radja Grafindo, 2015.
- 15) Salim HS. *Peraturan Jabatan Notaris*, Jakarta Timur; Sinar Grafika, 2019.
- 16) Salim H.S dan Nurbani Erlies Septiana, *Pengantar Ilmu Hukum, Introduction to Legal Science*, Cet 3, Raja Grafindo Persada, Depok, 2023.
- 17) Salim HS, *Pengantar Hukum Notaris Online Jarak Jauh (Introduction to Remote Online Notary Law)*, Cet 1, Reka Cipta, Bandung, 2023.
- 18) Soehino, H., *Ilmu Negara*, Liberti, Yogyakarta, 2013.
- 19) Soekanto Soerjono, *Penelitian Hukum Normatif*, Raja Grafindo Persada, Jakarta, 2001.
- 20) Soeroso R., *Pengantar Ilmu Hukum*, Cet 22, Sinar Grafika, Jakarta Timur. 2021.
- 21) Soesatyo Bambang, *Notarynews, Bambang Soesatyo Dorong Notaris Adaptasi Dengan Teknologi*, Jogjakarta. 2023.