

A Study of the Electronic Appearers' Presence in the Deed Making Process



Naindy Syavitra Santi¹, Burhanudin Harahap², Muhammad Rustamaji³

¹ Student of Master in Notary Study Program of Universitas Sebelas Maret

^{2,3} Lecturer in Faculty of Law Universitas Sebelas Maret

ABSTRACT: Nowadays, the rapid development of information and technology makes daily work easier and more flexible—no exception for a notary. A notary's authority is to make an authentic deed that must be attended by the appearers and witnessed by witnesses. However, the widespread use of technology and information can allow notaries to exercise their authority through electronic media or *cyber notary*. It was a normative study with statutory and conceptual approaches. This study technique used a literature study, and the analysis technique used a deductive reasoning pattern. The conclusion was that the laws and regulations in Indonesia did not regulate electronic deeds, so electronic deeds were not valid. Therefore, if the appearers can appear electronically, then supporting tools and systems are needed to minimize the falsification of the electronic appearers' presence.

KEYWORDS: Electronic Deed, Electronic Notary, Appearers, Notary, Technology.

I. INTRODUCTION

The development of information and technology in the era of 4.0 and 5.0 has made daily work easier. With the development of technology and information, changes in human lifestyles are increasingly visible. One of the changes that can be seen in the field of the legal profession is that notaries have started to use digital devices in carrying out their work. Currently, the rapid development of technology and information also impacts making deeds, which can be done through electronic media, namely a computer or laptop. The utilization and use of information technology are clearly stated in Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions, hereinafter referred to as the Information and Electronic Transaction (ITE) Law. Article 1 Number 2 of the ITE Law states that electronic transactions are legal acts carried out using computers, computer networks, and/or other electronic media. Suppose it is associated with a notarial deed, then with the existence of information technology. In that case, a notary can make an electronic deed and can use and attach an item electronically to the deed he made. Therefore, notaries can also conduct teleconferences or video conferences to make a deed by utilizing information technology.

In carrying out their duties and positions, notaries must be in line with the provision stated in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Notary Position, hereinafter referred to as UUJN-P. Although the use and utilization of information media and technology are not limited, notaries in using and utilizing information technology must also comply with the corridors that have been determined in the UUJN-P. Article 1 number 1 in UUJN-P states that a notary is a public official authorized to make an authentic deed and has other authorities as referred to in this Law or based on other laws. Therefore, it can be seen that the notary's authority is to make a deed. The deed made by a notary is an authentic deed that has legal force with legal certainty as perfect written evidence.

The notary's authority in making a deed is stated in Article 15 of the UUJN-P. Article 15 paragraph (3) UUJN-P regulates the authority to certify electronic transactions. However, it is only contained in the Elucidation of Article 15 paragraph (3) explaining what is meant by "other authorities regulated in-laws and regulations", including the authority to certify transactions. It is done electronically (*cyber notary*), making waqf pledge deeds and aircraft mortgages. The development of information technology and the ease of internet access does not deny that a deed can be made electronically where the appearers do not appear physically to the notary at the notary's domicile but face electronically through internet applications such as video calls, *Zoom*, *Skype*, *Google Meet* or other applications. The reason is that the UUJN-P does not emphasize the authority of a notary in making a deed electronically, where the appearers who appear electronically have different residences from the authorized official. Only Article 16 paragraph (1) letter m states that the notary is obliged to read the deed in front of the appearer with the presence of at least two witnesses, or four witnesses specifically for making a private inheritance distribution deed, and signed at the same time by the appearer, witness, and notary. Technically, "physical presence/real presence" is not impossible to do electronically. By looking at the development of communication, everyone can make call communications and embed his signature on the phone

A Study of the Electronic Appearers' Presence in the Deed Making Process

card *chip* or the relevant *handset*. Furthermore, the facts can be known where the person concerned is located with satellite facilities via GPS or the map utility provided (Makarim, 2013). Then, suppose the *cyber notary* is implemented in making the deed where the appearer who appears before the notary appears electronically. In that case, there is a need for certainty that the person facing the deed is indeed the party who wants to make the deed or who is given the power to appear before a notary. In this case, there is no falsity in facing electronically. Usually, the appearers who appear physically present to the notary will show their identities as the party who will carry out the legal action. Therefore, if the presence of the appearer electronically can be implemented, then an information system and technology are needed to provide evidence and match the identity of the appearer with the appearer who has committed the legal action to ensure that the appearer who appears electronically is indeed the person who will commit legal action.

II. METHOD

The design of this study was a doctrinal or normative legal study. A normative study examines library materials or secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. The characteristic of this study was prescriptive, meaning that the science of law studies the law objective, the justice values, the validity of the rule of law, and legal norms. Peter Mahmud Marzuki state that legal study carried out by practitioners and academics did not start with a hypothesis (Marzuki, 2015). The approaches used in this paper included the *statutory* and the *conceptual approaches*. The legal materials used in writing this law consisted of primary, secondary, and tertiary legal materials. Primary legal materials were in the form of legislation, official records, or judge's decisions. Secondary legal materials were from publications on the law that were not official documents, namely textbooks, legal dictionaries, legal journals, and expert comments on judge decisions. Meanwhile, tertiary legal materials were materials that provided instructions for the explanation of primary and secondary legal materials. The technique used in collecting legal materials in writing this law was literature study or document study. This legal study used the technique of analyzing legal materials with the syllogism method through a deductive mindset.

III. DISCUSSION

The Invalidity of Electronic Deed

Indonesia is a follower of the *civil law* system, in which the law is one of the primary sources of law that must be the benchmark. Therefore, electronic notarial deeds in *civil law* countries, especially Indonesia, have not been fully implemented. UUJN and UUJN-P are a form of *lex specialis derogate legi generalis* of a regulation that regulates the duties and authorities of a notary as a public official. Meanwhile, the Civil Code is a general regulation. Suppose a more in-depth study is carried out. In that case, several problems will arise in the making of an electronic notarial deed related to the obligations of a notary as regulated in Article 16 paragraph (1) letter m of the UUJN-P, namely reading the deed before an audience in the presence of at least two witnesses, or four witnesses specifically for the making of an underhand will, and signed at the same time by the appearers, witnesses, and notaries. Based on this obligation, it is impossible to make a deed electronically. The appearer and the notary who made the deed are not in the same area but use technology to connect.

Electronic deeds which are currently known are only limited to changing *paper-based* forms into *digital-based* forms, such as storing notary documents into electronic storage media. However, if what is done is the opposite, namely changing the *digital-based* to a *paper-based* form, which means that the process of making the deed from beginning to end, reading the deed until the deed is signed, is done digitally, then it affects the authenticity of a deed. Based on the conditions for the agreement's validity in Article 1320 of the Civil Code, it is not stated that the parties who will bind themselves must be present at the same place in front of the official authorized to create the agreement. Besides, there is no requirement that an agreement should not be made electronically. Therefore, if only four conditions in the Civil Code can be seen in making an electronic agreement, then the electronic agreement is valid. However, Article 1 point 7 UUJN-P states that a notarial deed, hereinafter referred to as a deed, is an authentic deed made by or before a notary according to the form and procedure stipulated in this law.

Article 1868 of the Civil Code states that "a deed can be said to be an authentic deed if the deed is made in the form determined by law by or before a public official at the place where the deed was made". It means that a deed can be authentic if it is made by a person authorized to make a deed. An employee or public official can carry it out, and the person must make a deed where the deed is made. Article 1 point 1 UUJN-P states that a Notary is a public official authorized to make an authentic deed and has other authorities as referred to in this law or based on other laws. An authentic deed has the power of proof that can be seen outwardly, formally, and materially (Adjie, 2011). A notary deed can prove its validity as an authentic deed. Therefore, its validity does not need to be questioned again with other evidence. The notary deed must provide certainty about what happened in the facts, and what is written in the deed is carried out by the appearers to prove the truth regarding the time, place, initials, and signatures, as well as to prove what is seen and heard by the appearers, witnesses. The notary is accurate so that what is recorded by the notary is the appearers' true statement. The obligation to sign the deed carried out by the parties, witnesses, and notaries is also regulated in Article 44 paragraph (1) UUJN-P, which states, "as soon as the deed is read, the deed is signed by every

A Study of the Electronic Appearers' Presence in the Deed Making Process

appearer, witness, and notary unless there is an appearer who is unable to sign by stating the reasons". If it is not implemented or violated, then the power of the deed becomes a private deed.

The civil evidence law in Indonesia has not accommodated electronic deeds as legal evidence that can be used to resolve disputes through litigation. It is clarified in Article 5 paragraph (4) of the ITE Law, which states that:

(4) Provisions regarding electronic information and/or documents as referred to in paragraph (1) do not apply to:

- a) Letters which, according to the law, must be in written form; and
- b) According to the law, the letter and its documents must be made in a notarial deed or a deed made by the official making the deed.

With the limitation in Article 5 paragraph (4) of the ITE Law, an authentic deed made electronically is not valid evidence that can be used to resolve litigation disputes due to the deed's authenticity cannot be fulfilled.

Proving that the Electronic Appearer is the Real Appearer

According to Habib Adjie, a progressive notary means progressive in a mindset that always acts not only to adhere to positive legal norms but also to constantly explore various forms of legal action that can be poured or formulated in the form of an authentic deed (Adjie, 2009). When it is associated with making a notary deed, a notary must think progressively, if one day perhaps, a notarial deed can be made electronically, in which the face of the notary faces electronically. Therefore, a notary must think of a way to guarantee and provide legal certainty that the appearer who appears electronically is indeed the person who has an interest or is appointed according to his/her identity. Generally, when the appearer faces a notary, he must meet the requirements as stated in Article 39 of the UJUN-P, namely:

(1) The appearer must meet the following requirements:

- a. At least 18 years old or married; and
- b. Capable of doing legal actions.

(2) The appearer must be known by a notary or introduced to him by two identification witnesses who are at least 18 years old or have been married and capable of carrying out legal actions or introduced by two others.

(3) The introduction, as referred to in paragraph (2), is expressly stated in the deed.

Based on article 39 of the UJUN-P, the notary is at least 18 years old or married. It can be proven by showing the person's identity card to the notary. In addition, the appearer must be known by the notary or introduced to the notary by two identifying witnesses. This provision is challenging to implement regarding which electronic deed the appearer faces electronically.

Article 15 UJUN-P regulates a notary's authority, namely:

(1) A notary has the authority to make an authentic deed regarding all acts, agreements, and stipulations required by laws and regulations and/or which are desired by the interested parties to be stated in an authentic deed guarantees the certainty of the date of making the deed, keeping the deed, providing gross deed, copying and deed quotations. All of them are as long as the making of the deed is not assigned or excluded to other officials or other people stipulated by law.

(2) In addition to the authority as referred to in paragraph (1), a Notary is also authorized to:

- a. Validating the signature and determining the certainty of the date of the letter under the hand by registering it in a special book;
- b. Booking letters under the hand by registering in a special book;
- c. Making a copy of the original underhand letter in the form of a copy containing the description as written and described in the letter concerned;
- d. Validating the compatibility of the photocopy with the original letter;
- e. Providing legal counseling in connection with the making of the deed;
- f. Making a deed related to land; or
- g. Making a deed of auction minutes.

(3) In addition to the authority as referred to in paragraphs (1) and (2), a Notary has other powers as regulated in the laws and regulations.

The elucidation of Article 15 paragraph (3) UJUN-P states that what is meant by "other authorities regulated in-laws and regulations", among others, are the authority to certify transactions made electronically (*cyber notary*), make waqf pledge deeds, and aircraft mortgages. From this explanation, there is a gap in the notary's authority to enable the implementation of a *cyber notary*. It means that the law in Indonesia does not only apply *ius constitutum* but also applies *ius constituendum*, meaning legal ideals that apply to the future. Soerjono Soekanto and Purnadi Purbacaraka explain that (Ulya, 2017):

- a) *Ius constitutum* is a law formed and applied in a state society at a time. *Ius constitutum* is a positive law.
- b) *Ius constituendum* is a law aspired to in the state's social life but has not been formed into law or other provisions.

Soerjono Soekanto and Purnadi Purbacaraka also explained that *ius constituendum* could be changed to *ius constitutum* in the following ways (Ulya, 2017):

A Study of the Electronic Appearers' Presence in the Deed Making Process

- a. The replacement of law with a new law (a new law has initially been an *ius constituendum* draft).
- b. Changes to existing laws by incorporating new elements (the new elements were initially in the form of *ius constituendum*).
- c. Interpretation of laws and regulations. The interpretation that exists today may not be the same as the interpretation in the past. The interpretation in the present is *ius constituendum*.

In realizing legal ideals related to implementing *cyber notary*, as a form of prevention that the appearers who appear electronically are fake, the notary must have a system that can identify and verify that the electronic appearer is the same person as the one in the office—in the identity card shown. This verification can provide legal certainty to the notary that the appearer who appears before him is indeed the person who is authorized to the deed, in line with the theory of legal certainty, that the theory of legal certainty wants legal regulation efforts in the laws and regulations made by the competent authorities to be able to guarantee certainty that the law functions as a rule that must be obeyed. As a form of *cyber notary* embodiment, a system will provide benefits to prevent the presence of fake faces. One of them is a *facial recognition system*. Biometric technology analyzes and identifies two types of human characteristics, i.e., physical (recognition through facial structures, retina, iris, fingerprints, palms, DNA) and physiological (recognition through signatures, writing, voice, steps/walking movements). One of the popular biometric technologies is a *facial recognition system*. *Facial recognition* is a technology that can detect, locate locations regardless of background, and identify human faces through digital images and videos. The *face recognition* principle is to quote unique face information, then *encode* and compare it with the *decoded* results that were previously carried out (Naim, 2021).

The identity of the appearers must be written on a deed, namely on the body of the deed, under Article 38 UUJN-P paragraph (2):

The body of the deed contains the following:

- Full name, place, date of birth, nationality, occupation, position, standing, living to a place of appearers, and/or the person they represent.
- Information regarding the position of acting against;
- The contents of the deed are the will and desire of the interested parties, the full name, place, date of birth, and the occupation, position, standing, and residence of each identifying witness.

Then, at that time, the notary also wrote down the appearer's identity in accordance with the resident's identity card brought by the appearer, generally e-KTP. It is in line with Article 84 of the Population Administration Law, which states:

(1) Resident's Personal Data that must be protected includes:

- a. Information on physical and/or mental disabilities;
- b. Fingerprint;
- c. Iris of the eye;
- d. Signature;
- e. Another data element is someone's disgrace.

(2) Further provisions regarding other data elements that constitute a person's disgrace, as referred to in paragraph (1) letter e, are regulated in a Government Regulation.

Therefore, it is necessary to create an identity card reader system connected to the notary service application system, which is also connected to the population administration system and has priority levels that the population system must serve. In addition to *face recognition*, an integrated system is also needed to match the detected faces with the identity stored in a database. The fact that is currently happening in the electronic world is that every legal subject who will access electronic services is required to register first to access these services by filling in some personal data to obtain a personal identity on the electronic service. It is one of the obstacles because with the large number of self-identifying accounts created by legal subjects requires a relatively complicated integration of access and inefficient management. Suppose it is only made with one identity, namely e-ID using an e-KTP resident identity card. In that case, it is enough with only one electronic service door, making it easier to provide notary services electronically. Legal certainty will be created if a system that functions as electronic storage of personal identity data is implemented. Suppose someone who appears in a video conference has matched his appearance with the photo in the personal data ID in his authentic data source (*e-ID resources*) that can be accessed online by a notary. In that case, it is difficult to say that there is room to reject the validity of the data (Makarim, 2020).

Furthermore, the QR Code is possible as a population data storage that can store personal data such as name, place of birth date, blood type, occupation, address, and some resident's data. Currently, population data that already has a QR Code is a Family Card. It is a form of implementation of the Minister of Home Affairs Regulation Number 104 of 2019 concerning Population Administration Documentation, hereinafter referred to as *Permendagri* Number 104 of 2019. The QR Code symbol on population administration documents is valid evidence as official evidence of population administration documents issued by the Directorate General of Civil Registration (Mubarok & Fitria, 2021). With the QR Code on several important demographic documents that can

A Study of the Electronic Appearers' Presence in the Deed Making Process

be used during making a notarial deed, it can make it easier for the notary to check through the QR Code to ensure that the appearer is the real one.

In addition, to ensure that the electronic appearer is indeed authorized, it can be proven through the appearer's signature, i.e., by matching the signature contained in the e-KTP and the signature on the closing of the deed. In line with Article 16 paragraph (1) letter m UUJN-P which states "that a notary is obliged to read the deed before an appearer in the presence of at least two witnesses, or four witnesses specifically for making an underhand will and signed at the same time by the appearers, witnesses, and notaries." As well as Article 44 paragraph (1) UUJN-P states that "as soon as the deed is read, the deed is signed by every appearer, witness, and notary, unless there are appearers who are unable to sign by stating the reasons". Therefore, we need a signature whose electronically implemented implementation through a system. Technically, the existence of a 'signature' represents an act of verification from the signer to what he is signing because the signer should first read and examine the information and then affix his identity as the legal subject responsible for the information. The act of signing also shows an intention or agreement from the signatory to something, both the substance of the information contained in it is appropriate and following the realization of the purpose of using the signature (Makarim, 2020). Furthermore, the physical presence of an observer can be done via GPS. Activation of GPS by the appearer is necessary to ensure that the appearer electronically is within the range of the notary's office authorized to make the deed. Legal certainty is guaranteed that the electronic appearer is the person in question. Thus, the notary will not violate the provisions of UUJN-P Article 17 paragraph (1) letter a, namely carrying out a position outside his office area. Sudikno Mertokusumo argues that law enforcement usually has three elements that must be considered: legal certainty, expediency, and justice.

The use of technology in the deed-making process benefits both the public and the notary because it makes it easier to make more flexible agreements. Therefore, legal certainty is needed from the existence of this event because it is feared that the appearer who appears electronically is not the real one. If all the systems mentioned above are created, then the authenticity of a notarial deed does not need to be questioned anymore. Then, the appearers who face electronically will be more secure in their identities. By providing a sense of trust, it will provide legal certainty and protection to the notary who makes the deed as well as to the electronic appearer.

CONCLUSIONS

The conclusion obtained from the discussion above is that a deed made by a notary is an authentic deed. In making the deed, it must be witnessed directly by the appearers and witnesses and signed by the appearers, witnesses, and notaries. An authentic deed has permanent legal force. Therefore, it can be used as legal evidence. Suppose the process of making the deed is done electronically. In that case, the deed becomes an invalid deed because the Notary Position Law does not yet regulate electronic deeds. The ITE Law provides an exception for notarial deeds made electronically that can be used as legal evidence in court. Suppose the appearers can have different positions with the notary making the deed; the process of making the deed is done electronically or virtually. In that case, we need some electronic media and systems that can support its implementation to minimize the occurrence of appearers' falsification, make the deed, and provide legal certainty to the notary.

REFERENCES

- 1) Adjie, H. (2009). Observing the Treasures of Notaries & PPAT Indonesia (A collection of writings about Notaries and Land Deed Making Officials (PPAT)). Bandung: Citra Aditya Bakti.
- 2) Adjie, H. (2011). Canceled and Cancellation of Notary Deed. Bandung: Refika Aditama.
- 3) Budiono, H. (2016). A Collection of Civil Law Writings. Bandung: PT. Citra Aditya Bakti
- 4) Makarim, E. (2013). Notary and Electronic Transaction, A Legal Study about Cyber Notary and Electronic Notary. Jakarta: Rajawali Pers.
- 5) Makarim, E. (2020). Notary and Electronic Transaction. Depok: Raja Grafindo Persada.
- 6) Marzuki, P.M. (2015). A Legal Study: Revised Edition. Jakarta: PT. Adhitya Andrebina Agung.
- 7) Mubarak H & Nurul J.L.F. (2021). Code Innovation in Printing Population Data Documents as a Form of Implementation of Government Administration Principles (A Case Study: Independent Document Printing in Probolinggo City). Jurnal Ilmu Pemerintahan Widya Praja. 47 (2), 215.
- 8) Ulya, Z. (2017) Legal Politics Formation of the Aceh Truth and Reconciliation Commission: Re-formulation of the Legality of Aceh's Truth and Reconciliation Commission. JURNAL PETITA, 2 (2), 97.
- 9) Naim, M.M. 2021. Designing and Building an Automatic Presence Detection System for Online Video Learning Media using Face Recognition Method (Published Thesis). Makassar: Universitas Hasanuddin.



There is an Open Access article, distributed under the term of the Creative Commons Attribution – Non Commercial 4.0 International (CC BY-NC 4.0) (<https://creativecommons.org/licenses/by-nc/4.0/>), which permits remixing, adapting and building upon the work for non-commercial use, provided the original work is properly cited.