

## **Legal Certainty of the Proof Power of Notary Deeds in the Concept of Cyber Notary according to Indonesian Positive Law**

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**Abstract.** *The development of technology in the field of notary in the digital era requires notaries to provide public services in accordance with their roles and authorities based on cyber notary. Therefore, the urgency of this study is to analyze the guarantee of legal certainty over the evidentiary power of Notarial Deeds made in the concept of cyber notary along with all the legal consequences that arise, especially for agreements that are required to be in the form of Authentic Deeds. This study is a normative legal research conducted by examining library materials or secondary data which is also commonly referred to as literature study research. This study concludes that there is no legal certainty regarding the evidentiary power of notarial deeds made in the concept of cyber notary according to Indonesian positive law because there are no clear regulations regarding cyber notary based on Law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning Notary Positions and Law No. 11 of 2008 concerning Information and Electronic Transactions. There is a degradation of the evidentiary power of notarial deeds which should be authentic deeds that have perfect evidentiary power into private deeds. Such conditions will also ultimately result in the failure to fulfill the formal agreement elements required by legislation and have a further impact on the fulfillment of obligations under legislation that require the use of a notarial deed.*

**Keywords:** *Authentic; Cyber; Deed; Power; Proof.*

## 1. INTRODUCTION

The implementation of the Electronic-Based Government System (SPBE) in Indonesia has begun to move in the 4.0 era. The existence of this digitalization technology makes it easy for everything to be accessed via the internet media. The internet media is a giant world library, so that all sources of information can be accessed according to needs. In this digitalization era, there is a term that can be used to describe technological advances in the field of Notary, one of which is related to the implementation of authority, namely e-notary or what is commonly called with cyber notary.<sup>1</sup> Cyber notary requires notaries to have a role as public officials who provide public services to advance thinking and abilities in utilizing information and communication technology to the maximum, and to be responsible for its utilization effectively and efficiently.

The concept of the Indonesian legal state cannot be separated from the constitution of the 1945 Constitution of the Republic of Indonesia which has been more clearly stated in Article 1 paragraph (3) that the Indonesian state is a legal state. As a legal state, these principles must of course be upheld in all practices for the sake of the continuity of life in society, nation and state. The concept and ideals of the legal state were first put forward by Plato and then reaffirmed by Aristotle. Plato stated that good state administration is based on good legal regulations which are referred to as *nomoi*. Indonesia with the concept or with the Civil Law legal system, regulates the duties and authorities of notaries in accordance with Law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning the Position of Notary (hereinafter referred to as UUJN). The term Notary can be found in various norms or expert opinions. Notaries are referred to as public officials. Public Official is a translation of the term *openbare amtbtenaren* contained in Article 1 of the Notary Position Regulation (PJN) and Article 1868 of the Civil Code. A notary has the authority to make a deed either at the discretion of the parties or according to legal requirements that require the use of the original deed format. The making of a deed must follow the laws and regulations regarding the process of making a notarial deed, so that there is no need to give an additional title to a notary in

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<sup>1</sup> Bungdiana and Arsin Lukman, "Effectiveness of Implementation Cyber notary By Improving the Quality of Notary Services in the Digital Era," *Journal of Social Sciences and Education (JISIP)*, Vol.7, No.1 (2023), <https://ejournal.mandalanursa.org/index.php/JISIP/artide/viewFile/4216/3230>, Accessed on June 13, 2024 at 10.00 WIB.

accordance with his authority.<sup>2</sup>

By observing developments in various countries, both those adopting the common law system and civil law, many countries have implemented the functions and roles of notary public officials in electronic transactions, such as the Netherlands and Japan. So that it becomes a reference for Indonesia to implement electronic transactions in the field of notary and even to the point of organizing notary services themselves.<sup>4</sup> UUJN is one of Indonesia's modern legal products implemented by notary public officials to carry out their roles and obligations in accordance with applicable provisions, so the concept of cyber notary will later be related to the implementation of notary authority based on information technology.

The definition of cyber notary is related to the role and jurisdiction of notaries that depend on technology and information. Emma Nurita defines the definition of cyber notary as a public official who utilizes information technology in carry out the duties and responsibilities of a notary, especially in relation to the making of legal deeds.<sup>5</sup> Article 15 of the UUJN explains the authority of a notary, namely "making authentic deeds regarding acts, agreements and determinations that are required by statutory regulations and/or that are desired by the interested party to be stated in an authentic deed, guaranteeing the certainty of the date of making the deed, storing the deed, providing grosee, copies and extracts of the deed and other authorities", as regulated in Article 15 paragraph (2) of the UUJN.

Article 5 paragraph (4) of Law No. 11 of 2008 concerning Electronic Information and Transactions (hereinafter referred to as the ITE Law) states "that electronic information or electronic documents do not apply to letters which according to the law must be made in written form, and letters and documents which according to the law must be made in the form of a notarial deed or a deed made by a deed-making official. So with the explanation of this article, notarial deeds made in the context of electronic information and/or electronic

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<sup>2</sup> M. Syahrul Borman, "The Position of Notaries as Public Officials in the Perspective of the Law on Notary Positions," *Journal of Law and Notary* 3, no. 1 (2019): 76, <http://repository.unitomo.ac.id/1606/> accessed on June 13, 2024 at 09:52 WIB.

documents can give rise to legal problems for notaries, both civil, administrative, or even criminal."

Article 16 paragraph (1) letter m UUJN states that "in carrying out his/her position, a Notary is obliged to read the deed before the person appearing in the presence of at least 2 (two) witnesses or 4 (four) witnesses specifically for making a private will deed and signed at that time by the person appearing, witnesses, and notary".<sup>6</sup> Based on this description, it is clear that there is a face-to-face meeting between the parties witnessed physically by the Notary. In addition, it is also connected with Article 1868 of the Civil Code which outlines the requirements for a deed to be considered valid. An authentic deed is a deed made in a manner determined by law or witnessed by a public official authorized to do so at the place where the deed was made.

An authentic deed as referred to in Article 1870 of the Civil Code is one of the evidences that can be accounted for in a legal process. It functions as evidence of agreements and transactions between the parties involved, as well as their successors or parties who obtain rights from them. The deed has complete evidentiary power (*volledig bewijskracht*) and has legal force (*bindende bewijskracht*) for its contents. The assessment of the validity of a notarial deed as evidence can be determined by examining its contents alone, without the need for additional assessment or interpretation beyond that which is expressly stated in the deed. A notarial deed, as an authentic deed, has the meaning of external evidence (*uitwendige bewijskracht*), formal (*Formale bewijskracht*), and material (*materiële bewijskracht*).<sup>3</sup>

The function and authority of a notary in making deeds using the idea of cyber notary has caused controversy in society, especially among the notary profession. The concept of cyber notary in Indonesia is currently still being

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<sup>3</sup> Kadek Setiadewi and I Made Hendra Wijaya, "Legality of Notarial Deeds Based on Cyber notary As an Authentic Deed," *Journal of Legal Communication (JKH) Ganesha University of Education*, nd, <https://ejournal.undiksha.ac.id/index.php/jkh/article/view/23446/14345> Accessed on June 16, 2024 at 19.56 WIB.

debated and a topic of discussion.

This allows notaries to perform their duties online and remotely, but currently there are no clear legal regulations regarding this practice. This is because the current legal framework for the Notary position is based on civil law and conventional systems.<sup>8</sup> Judging from the provisions of the UUJN, the ITE Law, and its implementing regulations, there is no clear definition related to cyber notary.

UUJN requires physical presence in making authentic deeds and cannot be done electronically and must be done on paper. In addition, Article 5 paragraph (4) of the ITE Law excludes notarial deeds in the context of electronic documents as valid evidence for notaries, so that it has the potential to cause legal problems both civilly, administratively or even criminally. As a result of these problems, it became the basis for the author to conduct research entitled "Legal Certainty of the Proving Power of Notarial Deeds in the Cyber Notary Concept According to Indonesian Positive Law" with the formulation of the problem, namely: (1) How is the guarantee of legal certainty regarding the proving power of notarial deeds made in the Cyber Notary concept?; and (2) What are the legal consequences for agreements that are required to be in the form of authentic deeds but are made in the Cyber Notary Concept?

This writing is done with the aim or has the urgency to analyze the guarantee of legal certainty regarding the evidentiary power of notarial deeds made in the concept of cyber notary along with all the legal consequences that arise, especially for agreements that are required to be in the form of authentic deeds.

As far as the researcher's research goes, there has been no other research that specifically focuses on discussing this matter. First, a journal written by Mahfuzatun Ni'mah Sona entitled "Implementation of Cyber Notary in Indonesia and the Legal Status of Cyber Notary-Based Notary Deeds" published in the *Officium Notarium Journal* No. 3 Vol. December 2, 2022. This journal discusses

the implementation of cyber notary in Indonesia according to UUJN and the legal status of notary deeds that use cyber notary in general without touching on the aspect of legal certainty. Second, a journal written by Edrick Edwardina Effendy entitled "Degradation of the Evidential Power of Notary Deeds into Private Deeds" published in the Notary Journal No. 1 Vol. April 4, 2024. This journal focuses more on discussing the process of degradation of the evidentiary power of Notary Deeds which is more technical in nature. Third, a journal written by Dewa Ayu Indra Dewi et. all entitled "Regulation of Electronic Notary Deeds as Evidence that Has Perfect Proving Power in the Digital Era" published in Kertha Semaya Journal Vol. 12 No. 2 of 2024. This journal discusses the legal certainty of electronic notary deeds according to UUJN and the evidentiary power of the deed reviewed from the ITE Law without considering the legal consequences for transactions or agreements that are required to be stated in a certain formality according to the law. Based on the search for previous studies above, it can be concluded that this study is relatively new.

## **2. RESEARCH METHODS**

This research is a normative legal research conducted by examining library materials or secondary data alone or what is also commonly called library study legal research using library materials. They consisting of 3 (three) legal materials: namely (1) primary legal materials that have binding legal force that are related to the problem being studied<sup>10</sup> in the form of UUJN along with other related laws and regulations; (2) secondary legal materials are materials that provide explanations regarding primary legal materials obtained through books, journals, opinions of legal experts, legal practitioners and research results; and (3) tertiary legal materials which are legal materials that provide instructions or explanations for primary and secondary legal materials, such as the Great Dictionary of the Indonesian Language, the Legal Dictionary, the Encyclopedia. This research is descriptive in nature with data presentation in the form of narratives and analyzed using descriptive qualitative data analysis techniques to answer the formulation of the problem in this writing.

## **3. RESULTS AND DISCUSSION**

Currently, the world is in an era of disruption, namely an era of massive changes that change the system as a whole, be it in the industrial, business, government sectors, or even change the way people live and other fundamental things. Technological developments are one of the factors that have a significant contribution to the era of disruption, so it is not wrong if the current

era of disruption is more specifically emphasized on technological or digital disruption. This is in line with the statement of Budi Arie Setiadi, Minister of Communication and Information of the Republic of Indonesia (Menkominfo), emphasizing that digital technology disruption has caused significant transformations in all aspects of society, including governance, business models, resources, and demands in the digital era. The global geopolitical landscape, which is currently characterized by instability<sup>4</sup>, uncertainty, complexity, and ambiguity, has been significantly impacted by the Covid-19 pandemic. As a result, there has been a large and rapid growth in the need for the application of digital technology. Such rapid technological developments can be seen since the industrial revolution era 4.0 which refers to changes in the production process of goods and services involving digital technology, automation, and connectivity as the foundation for implementing the concept of Society 5.0. The concept of Society 5.0 tends to focus on realizing a more inclusive, sustainable, and more humane society in using artificial intelligence, robotics, and other advanced technologies. Society 5.0 is an era where all technology is part of humans themselves, the internet is not only used to share information but to live various lines or aspects of life including in the field of notary which is now known as Cyber notary<sup>5</sup>.

Cyber notary comes from two words, namely Cyber and Notary. The word Cyber which was then absorbed into the Indonesian language to become Siber which according to the Great Dictionary of the Indonesian Language is interpreted as a computer and information system, cyberspace, and related to the internet. The word Notary or in Indonesian is called Notaris is a public official who is authorized to make authentic deeds and has other authorities as referred to in this law or based on other laws.<sup>16</sup> Therefore, in terms of terminology, Cyber notary can be interpreted as a notary who uses a digital system such as a computer or the internet to carry out his duties and authorities or a concept that utilizes technological advances in carrying out the duties and authorities of a notary. If we look back at the origin of the concept of Cyber notary, in principle this concept is widely used by notaries in countries with a common law legal system.<sup>6</sup> In this legal system, notaries are known as

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<sup>4</sup> Lemhannas Press Release on the National Seminar on National Resilience with the theme, "Digital Transformation Indonesia 2045," and, <https://www.lemhannas.go.id/index.php/publikasi/press-release/2025-disruption-teknologi-driving-sustainable-progress-in-indonesia> Accessed on April 14, 2024 at 13.00 WIB.

<sup>5</sup> Yonada Nancy, "The Difference Between Industrial Revolution 4.0 and Society 5.0 and the Relationship Between the Two," and, <https://tirto.id/beda-revolution-industri-40-dan-society-50-ert-kaitan-keduanya-gPip> Accessed on April 14, 2024 at 13.25 WIB.

<sup>6</sup> <https://www.hukumonline.com/news/a/government-and-this-discusses-the-concept-of-cyber-notary-i-lt4cf78b15c9e15/> accessed on April 15, 2024 at 09.00 WIB.

public notaries and are not appointed by authorized officials and there is no requirement that the form of the deed be regulated by law as in the civil law system adopted by Indonesia, in the form of an authentic deed which requires the physical presence of the parties in its making.

Differences in interpretation regarding the concept of Cyber notary are also still one a debated issue at the practical level. Currently, there are two practical definitions of the implementation of cyber notary. First, cyber notary utilizes electronic media extensively in making deeds. This shows that the notary, the submitter, and the witnesses are not physically present in one place at the same time. The term "cyber" or "cyber" is used to describe the virtual world where individuals interact through cyberspace or the internet, without any physical presence or face-to-face meeting. Second, cyber notary fulfills his responsibilities by utilizing electronic media, by being physically in one location and at the same time. The only exception is in the actual deed-making process, where traditional tools such as paper, pens, and pencils are not used.<sup>7</sup>

Meanwhile, the concept of cyber notary in Indonesian positive law, it is regulated very limitedly in the Explanation of Article 15 paragraph (3) of the UUJN which relates to other authorities of Notaries. Article 15 paragraph (3) states that "In addition to the authority as referred to in paragraph (1) and paragraph (2), a Notary has other authority as regulated in statutory regulations. "Explanation of Article 15 paragraph (3) UUJN "What is meant by " other authorities regulated in statutory regulations" includes, among other things, the authority to certify transactions which is done electronically (cyber notary), making a waqf pledge deed, and airplane mortgage." The explicit mention of the term cyber notary is considered to be the entry point for the application of the cyber notary concept in Indonesia to meet the needs and developments of the increasingly digital era. However, unfortunately, the scope of cyber notary in the UUJN is only limited to the implementation of other authorities of a notary to certify transactions carried out electronically, the mechanism of which is more technically regulated in the Regulation of the Minister of Communication and Information No. 11 of 2018 concerning the Implementation of Electronic Certification (hereinafter referred to as Perkominfo 11/2018). Meanwhile, the implementation of the Notary's authority as referred to in Article 15 paragraph (1) and paragraph (2) in the cyber notary concept does not yet

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<sup>7</sup> Fauzan Aziman Alhamidy and FX Arsin Lukman, "Legality of Using the Concept Cyber notary in Practice in Indonesia," *Justicia Sains: Journal of Legal Studies* 08, no. 01 (2023), file:///C:/Users/HP/Downloads/2304-8002-1-PB.pdf accessed on June 19, 2024 at 11.49 WIB.



have a legal basis so that there is no guarantee of legal protection for the parties, both notaries and the parties.

### **3.1. Guarantee of Legal Certainty for the Evidential Power of Notarial Deeds Made in the Cyber Notary Concept**

According to Sudikno Mertokusumo in his book entitled *Mengenal Hukum*, he said, "In enforcing the law, there are three elements that must be considered, namely legal certainty, benefit and justice." Sudikno defines "Legal certainty is protection for justice seekers against arbitrary actions which means that someone will be able to obtain something that is expected in certain circumstances. Society expects legal certainty because with legal certainty society will be more orderly." Legal certainty requires efforts to regulate law in legislation made by authorized and authoritative parties, so that these regulations have a legal aspect that can guarantee the certainty that the law functions as a regulation that must be obeyed. In addition, based on Jan M. Otto's thoughts, it shows that legal certainty can be achieved if the substance of the law is in accordance with the needs of society. Laws that originate from and reflect the culture of society are legal regulations that can create legal certainty. Therefore, this form of legal certainty is called true legal certainty (pragmatic legal certainty), so that harmonious alignment is needed between the government and society in the orientation and understanding of the legal framework. Considering the theory of legal certainty, the state should provide a guarantee of legal certainty to every citizen in various aspects regulated in a law. One aspect that requires legal certainty in the development of the notary field is the evidentiary power of a notary deed made in the concept of cyber notary.<sup>8</sup>

Article 1 number 7 of the UUJN states that "a notarial deed is an authentic deed

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<sup>8</sup> Zulfahmi Nur, "Justice and Legal Certainty (Reflections on the Study of Legal Philosophy in the Legal Thought of Imam Syatibi)," *Misykat Al Anwar Journal of Islamic and Community Studies* Vol. 6, no. 2 (2023), file:///C:/Users/HP/Downloads/18397-48512-1-SM.pdf accessed on June 19, 2024 at 11.56 WIB.

made by or before a notary according to the form and procedures stipulated in this law". Based on these provisions, it can be understood that a notarial deed in this study is a deed made with the intention of being an authentic deed. The authority of a notary in making an authentic deed is clearly regulated in Article 15 paragraph (1) of the UUJN, namely making an authentic deed regarding all acts, agreements and stipulations required by laws and/or desired by the interested party to be stated in an authentic deed, guaranteeing the certainty of the date of making the deed, storing the deed, providing grosse, copies and extracts of the deed, all of which are throughout the making. However, apart from that, a notary has other authority as regulated in Article 15 paragraph (2) such as validating signatures and determining the certainty of the date of a private letter by registering it in a special book, recording a private letter by registering it in a special book, making a photocopy of the original private letter in the form of a copy containing a description as written and described in the letter in question, validating the suitability of the photocopy with the original letter, providing legal advice in connection with making a deed, making a deed related to land, or making a deed of auction minutes. Article 15 paragraph (3) UUJN also provides other authorities besides those regulated in paragraph (1) and paragraph (2) which basically provide freedom to Notaries to do other things as long as they are regulated in statutory regulations. The explanation of Article 15 paragraph (3) is what explicitly mentions the term Cyber notary and is the only term cyber notary that exists in legislation.

Due to the conditions for a deed made by a notary to be an authentic deed is made based on the procedures regulated by UUJN, then the fulfillment of obligations related to the making of deeds as regulated in Article 16 must be fulfilled by a notary. In relation to the concept of cyber notary, Article 16 paragraph (1) letter m UUJN is one of the issues that needs to be emphasized in this problem because it requires the physical presence of the parties in order to make a notarial deed. In addition, Article 1 number 13 of the UUJN states that the Notary Protocol is a collection of documents that are state archives that

must be stored and maintained by a notary in accordance with the provisions of laws and regulations. If referring to Article 16 paragraph (1) letter b, a Notary has an obligation to make a deed in the form of a deed minute and store it as part of the notary protocol. In addition, Article 63 of the UUJN also regulates the provisions for submitting notary protocols for certain conditions. The provisions related to notary protocols do not provide an explanation regarding the form of the collection of documents that are state archives, in the form of physical or electronic documents. However, if we look at the concept of making an authentic deed in the UUJN which still requires physical presence, it can be interpreted that the notary protocol is entirely in the form of a physical document. Therefore, if it is associated with cyber notary which is currently not regulated explicitly and clearly in the UUJN, then the form and procedures for storing notary protocols including the minutes of deeds and other documents need to be one of the materials that must be considered if changes are to be made to the UUJN provisions to accommodate the concept of Cyber notary.

In essence, there are two types of notarial deeds, namely deeds made by a Notary and a deed made before a Notary, taking into account the authority to make authentic deeds. A deed made by a Notary in his position as a public official containing authentic information about all events or incidents observed, experienced, and witnessed by the Notary itself, known as minutes of meeting, deed of release, or deed made by a notary. The form of the document can vary, such as minutes of the general meeting of shareholders (GMS) of a limited liability company, deed of company registration, and others. A deed of party, deed of partij, or ten overstaan is a deed made before a notary at the request of the parties. In this case, the Notary is obliged to listen to the statements of the parties, as well as all statements made or explained by the parties before the Notary. In the deed of party, the notary pours or formulates the statements or wishes of the parties into the notarial deed. When associated with cyber notary, Article 12 of the Financial Services Authority Regulation Number 16/POJK.04/2020 concerning the Implementation of Electronic General

Meetings of Shareholders of Public Companies (hereinafter referred to as POJK 16/2020) indirectly provides a guarantee that the deed of release in the context of making electronic GMS Minutes in a public company is an authentic deed as long as the electronic GMS provider submits a printed copy containing at least: a. a list of shareholders who attend electronically; b. a list of shareholders who grant power of attorney electronically; c. recapitulation of attendance quorum and decision quorum; and d. transcript of recordings of all interactions in the GMS electronically to be attached to the minutes of the GMS minutes.<sup>23</sup> This provision emerged as a follow-up to the state financial policy and the stability of the financial system for handling the Covid-19 pandemic. On the one hand, the presence of this POJK is a significant advancement for Notaries in exercising their electronic authority. However, in a higher regulatory system, UUJN still prohibits this because personal presence is still a basic criterion for a notarial deed to be considered valid. These factors raise doubts about the guarantee of legal certainty regarding the validity of the proof of notarial deeds created in the sense of cyber notary. Therefore, it is important to first understand the authority of proof inherent in a notarial deed.

Proving in law has a juridical meaning, namely that the proof carried out only applies to the parties to the case who allow for opposing evidence, proof is carried out not only against certain events or incidents, but also against the existence of a right that can be proven.<sup>9</sup> Thus, such proof does not need to be carried out if there is no dispute. Article 1865 of the Civil Code to Article 1945 of the Civil Code mentions the law of material proof, namely regarding certain evidence and their evidentiary power, so that in a civil case, written evidence is the main evidence. So it can be said that the special feature of an authentic deed lies in its evidentiary power. An authentic deed has such evidentiary power that it is considered inherent in the deed itself or in other words an

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<sup>9</sup> Deddy Pramono, "The Evidential Power of Deeds Made by Notaries as Public Officials According to Civil Procedure Law in Indonesia," *Lex Journal* 12, no. 3 (2024), <https://media.neliti.com/media/publications/147736-ID-kuat-pembuktian-akta-yang-dibuat-ole.pdf> accessed on June 19, 2024 at 12.56 WIB.

authentic deed has binding and perfect power.

The evidentiary power of a notarial deed, according to Herlin Dudiono in the International Seminar in Bali, stated that there is a difference in the authority of a notary in the common law and civil law legal systems, it is stated that the authority of a notary in the civil law legal system is a public official who has the right to make an authentic deed, as long as it is not excluded by law. While the authority of a notary in the common law legal system is limited to stating the truth of the signature in the case of a bill of exchange protest, preparing documents, especially documents for the purposes of agreements with foreign countries, and only limited to a legalization or determination of the certainty of the date and signature of the person who affixed it. This has an impact on the proof of a notarial deed, in a country with a civil law legal system such as Indonesia, it is known that the type of written proof can be an authentic deed or underhand. Proof of an authentic deed means that the deed gives the opponent an obligation to prove the opposite of the contents of a deed without proving the truth or falsity of the signature and information made by the notary or the parties involved in it. Authentic deeds made by a notary have the nature of compelling evidence (een dwingende bewijskracht), notarial deeds have formal and material evidential power and even in certain legal acts also have executory power. This is different from the power of common law deeds, authentic deeds with this legal system pay a lot of attention to writing as evidence, so there is no such thing as authentic deeds with private deeds. The product of legalization of common law documents is the same as that meant by legalization according to Article 15 paragraph (2) letter a UUJN rather than as strong written evidence.<sup>10</sup>

Legal certainty regarding the evidentiary power of a notarial deed is an

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<sup>10</sup> Norman Edwin Elnizar, "Come on, Understand the Concept of Notaries in Civil Law and Common Law," Hukumonline.com, 2017, <https://www.hukumonline.com/://www.hukumonline.cuncle/news/a/let's--understand-the-concept- notary-in-civil-law-and-common-law-lt59d9f5002c20c/> accessed on June 19, 2024 at 13.15 WIB.

important thing to study because the making of a deed by a notary is indeed intended to obtain an Authentic Deed that has perfect and irrefutable evidentiary power. In the case of a Notarial Deed made in the concept of cyber notary which currently does not have sufficient legality, there will be a degradation of the evidentiary power of the deed. As previously explained, the regulation regarding cyber notary is only stated in the Explanation of Article 15 paragraph (3) of the UUJN, where the Explanation of a statutory regulation is not a binding norm. According to Law No. 12 of 2011 concerning the Formation of Legislation (hereinafter referred to as Law 12/2011), the Explanation is an authoritative interpretation for the formation of Legislation regarding certain norms in the organization. Therefore, the explanation is only a description of words, phrases, sentences, or equivalents of foreign words/terms in standard form which can be supplemented with examples. The use of explanations to clarify the norms contained in the body must not cause ambiguity regarding the norms being discussed. The presence of an explanation of Article 15 paragraph (3) which explicitly mentions the term cyber notary is only an explanation of the norm in the form of an example of other authorities regulated in Article 15 paragraph (3). Therefore, This explanation cannot be used as a basis for implementing the cyber notary concept, especially for implementing the notary's authority in making Authentic Deeds.

Based on Article 1868 of the Civil Code, it is stated that "An authentic deed is a deed made in the form determined by law by or before a public official who is authorized for that purpose at the place where the deed was made." Thus, there are 3 requirements for a deed to be declared an authentic deed according to Article 1868 of the Civil Code, namely: (1) "The deed must be made in the form and procedure determined by law. This means that its making must meet the provisions in accordance with the law. The deed will lose its authenticity if the requirements are not met"; (2) "The requirement to make it before or by a public official The purpose of making it before indicates that the deed is made at the request of someone, while making it by a public official is due to an

incident, examination, decision and so on. (3) The public official by or before whom the deed is made must have authority at the place where the deed is made".<sup>11</sup>

The requirement for an authentic deed to be made by and before a public official according to Article 1868 of the Civil Code is related to the power of an authentic deed as evidence. M. Yahya Harahap explains that the evidentiary power inherent in an authentic deed is perfect (*volledig bewijskracht*) and binding (*bindende bewijskracht*) as referred to in Article 1870 of the Civil Code compared to a private deed. Therefore, if an authentic deed meets the requirements for its creation, then the truth of the information and statements contained therein are absolute and legally binding for all parties involved. Also included are judges, who are required to consider the deed as irrefutable and strong evidence in making decisions regarding the settlement of disputed cases. The evidentiary force inherent in an authentic deed is a perfect force and means that the proof is sufficient with the deed itself unless there is opposing evidence (*tegen bewijs*) that proves otherwise from the contents of the deed and an authentic deed is a binding deed, in other words an authentic deed means that the judge is bound by the deed itself as long as the deed made is in accordance with the provisions of laws and regulations and the provisions regarding the validity of an authentic deed. If it is not made before an authorized official, according to Article 1869 of the Civil Code, it is emphasized that the deed is only valuable as a private deed, even so long as the parties sign it.

Based on the provisions of Article 16 paragraph (1) letter m of the UUJN, in carrying out his/her position, a Notary is required to read the deed before the person appearing in the presence of at least 2 (two) witnesses, or 4 (four) witnesses specifically for making a will under hand, and signed at that time by

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<sup>11</sup> Kadek Setiadewi and I Made Hendra Wijaya, "Legality of Cyber Notary-Based Notarial Deeds as Authentic Deeds," *Undiksha E-Journal*, vol. 6, no. 1 (2020): 130, <https://ejournal.undiksha.ac.id/index.php/jkh/artide/download/23446/14345> accessed on June 24, 2024 at 09.51 WIB.

the person appearing, witnesses, and notary. This norm explicitly does not mention the definition of the phrase "before". In terms of terminology, the word "before" according to KBBI means face; front, so "before" means in face or in front which can be meant face to face. In the current context, "before" can be interpreted not only as meeting face to face directly but also virtually, appearing or being present using computer software, for example on the internet with video conference media. However, if we look at the explanation of Article 16 paragraph (1) letter m of the UUJN, in fact the notary is required to be physically present and sign the deed in the presence of the person appearing and witnesses. Another provision in the UUJN that implicitly requires physical presence is the obligation to attach fingerprints in the minutes of the deed which is also supporting evidence of the presence of a person appearing. So it can be said that attaching fingerprints based on Article 16 paragraph (1) letter c is the same as evidence of the physical presence of a person appearing. With the obligation to attach fingerprints, the evidentiary power of an authentic deed can be more perfect because no human being has the same fingerprints.

The requirement for a notary to be physically present is in line with the concept of a notary regulated in the civil law system. An original deed made by a notary has perfect evidentiary authority. The strong evidentiary power of notaries in civil law countries stems from their formal obligation to faithfully carry out notarial duties, as regulated in the principle of *Tabellionis officium fideliter exercebo*. This means that notaries work traditionally, carrying out real actions without relying on other means such as the internet.<sup>12</sup>

The consequences if the provisions of Article 16 paragraph (1) letter m UUJN are not fulfilled, in this case not physically attended, then the deed in question

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<sup>12</sup> Dwi Kusumo Wardhani, "The Relevance of the Principle of *Tabellionis Officium Fideliter Exercebo* to the Authority of Electronic Transaction Certification (Cyber notary) In the Digital Era," *Relevance of the *Tabellionis Officium Fideliter Exercebo* Principle to the Authority of Electronic Transaction Certification (Cyber Notary) in the Digital Era* 5, no. 2 (2022), <https://openjournal.unpam.ac.id/index.php/rjih/article/view/27683> accessed on June 19, 2024 at 16.25.



only has the power of proof as a private deed. This is a challenge in the concept of cyber notary, the making of deeds that will later be made online electronically can be hampered because it is caused by formal requirements that require the parties to meet face to face so that this shows that the formal requirements in making a Notary deed are cumulative and not alternative so that they must be fulfilled<sup>13</sup> by carrying the concept of cyber notary in making authentic deeds, it causes the authenticity requirements of a deed to not be fulfilled and can cause the notary in question to be considered incompetent, causing the deed to be defective in its form. Then the deed is only an authentic deed which in fact only has the power as far as a private deed in the form of writing by the parties that have been signed. Therefore, this cyber notary-based notary deed is in practice, it is very vulnerable to loopholes by parties who do not have good intentions to commit fraud against the deed.

Furthermore, in the provisions of Article 5 paragraph (1) of Law No. 11 of 2008 concerning Electronic Information and Transactions (UU ITE) it is stated that Electronic Information and/or Electronic Documents and/or printouts are valid legal evidence as an extension of valid evidence in accordance with the applicable Procedural Law in Indonesia. However, there is an exception in Article 5 paragraph (4) where the provisions of Electronic Information and/or Electronic Documents and/or printouts are valid legal evidence and do not apply to: a. letters that according to the Law must be made in written form; and b. letters and documents that according to the Law must be made in the form of a notarial deed or a deed made by a deed-making official. The article does not provide further explanation in Law 19/2016 ITE. However, it can be interpreted that letters and documents that according to the Law must be made in the form of a notarial deed or a deed made by a deed-making official, must still be made in the form of a notarial deed or a deed made by a deed-making official. In

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<sup>13</sup> Rezky Febrani Sembiring and Made Gde Subha Karma Resen, "The Validity of Notarial Deeds Based on Cyber Notary in Making Authentic Deeds," *Kertha Village Journal* 10, no. 2 (2023): 58–59, <https://ojs.unud.ac.id/index.php/kerthadesa/article/download/79019/43947> accessed on June 19, 2024 at 15.56.

other words, the information and/or documents must be written down on paper physically, which is then signed directly by the parties, witnesses, notaries or deed-making officials directly in accordance with the provisions and requirements for making authentic deeds according to Article 1868 of the Civil Code and UUJN. If an electronic deed is to be declared as valid evidence, it must be ensured that the transaction evidenced by the deed is not a transaction that must be made in an authentic deed, because the status of the electronic deed is a private deed.

Based on the explanation above, according to the author, there is no guarantee of legal certainty regarding the evidentiary power of notarial deeds made in the current cyber notary concept because there is no strong legal basis or legality to guarantee that deeds made in cyberspace can still be considered authentic deeds. There needs to be regulation at the level of laws and implementing regulations and harmonization of laws and regulations so that one provision does not conflict with other provisions.

### **3.2. Legal Consequences of Agreements Required to be in the Form of an Authentic Deed but Made in the Cyber Notary Concept**

Given that the concept of cyber notary has not been fully recognized in Indonesian law, the result is that deeds made by notaries that were previously considered authentic are now considered private deeds. This is a situation that must be recognized and addressed. A private agreement is a contract made directly by the parties involved, without any specific standards that have been previously set, and is made only to meet the needs of the parties. However, the power of proof depends on whether or not the parties accept their signatures in the agreement, without denying or acknowledging its existence. This means that one party has the ability to question the authenticity of his signature in the agreement. Personal actions are sometimes used to achieve goals certain

individuals, which may differ from their original intentions.<sup>14</sup> Therefore, there are legal acts or transactions that need to be stated or agreed upon in an authentic deed to guarantee perfection and strength at the time of proof in the event of a dispute, as regulated regarding one type of agreement, namely a formal agreement.

A formal agreement is an agreement that is bound by certain formalities, in this case in accordance with the provisions of applicable laws. A formal agreement can be interpreted as an agreement that requires certain formalities, such as being made in writing and made with a notarial deed or PPAT, as mandated by law. In conducting land transactions, it is legally mandatory to use a PPAT deed for land sales and purchases, while for making a marriage agreement, a notarial deed must be used. Based on the definition, the provisions regarding the formalities or forms of the agreement refer to each provision of the laws that regulate the need for certain forms of agreements.

One example of a provision that requires a certain form of deed is Law No. 42 of 1999 concerning Fiduciary Guarantees (UUJF) Article 5 paragraph (1) of the UUJF states that "The burden of goods with Fiduciary Guarantee is made with a notarial deed in Indonesian and is a Fiduciary Guarantee deed." A fiduciary guarantee deed is a party deed, namely a deed made before (ten overstaan) a Notary, in Notary practice it is called a party deed. The contents of the party deed are descriptions or information, statements of the parties given or told before the notary. The parties wish that their descriptions or information be stated in the form of a notarial deed.<sup>15</sup> Therefore, the notary in this case reads and witnesses the signing carried out before him. Appearing means that the deed is read and signed before the notary, as a public official. Furthermore, in accordance with the provisions of Article 13 of the UUJF<sup>16</sup>, an application for

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<sup>14</sup> Ayu Riskiana Dinaryanti, "Legal Review of Legalization of Deeds Under Hand by Notaries," *Unsrat E-Journal* 1, no. 3 (2013): pp. 2-3, <https://media.neliti.com/media/publications/150428-ID-none.pdf> accessed on June 19, 2024 at 19:16 WIB.

<sup>15</sup> Oktavira, SH Bernadetha Aurelia Oktavira, "Types of Agreements and Their Valid Conditions," *Hukumonline.com*, nd, <https://www.hukumonline.com/dinic/a/various-agreement-and-terms-of-validity-lt4c3d1e98bb1bc/> accessed on June 19, 2024 at 19:30 WIB.

<sup>16</sup> SH Retno Prabandari, "Types of Agreement as a Legal Basis for the Transfer of Building Use Rights of Mortgage Objects," *Undip E-Print*,

registration of a fiduciary guarantee is made by the recipient of the fiduciary guarantee, the recipient of the fiduciary guarantee, his attorney or representative by attaching a statement of registration of the fiduciary guarantee which contains one of the following, namely the date, number of the fiduciary guarantee deed, name and domicile of the notary who made the fiduciary guarantee deed<sup>17</sup>.

If the cyber notary concept is currently applied in the context of manufacturing formal agreement like a fiduciary guarantee deed, then the legal consequences for the resulting fiduciary guarantee deed can be said to not meet the provisions as intended in Article 5 paragraph (1) of the UUJF. According to the provisions of the UUJN, a fiduciary guarantee deed made using the cyber notary concept can be stated as no longer having the status of an authentic deed but rather a private deed. This is as regulated in Article 16 paragraph (9), which in full reads "If one of the requirements as referred to in paragraph (1) letter m and paragraph (7) is not met, the deed in question only has the power of proof as a private deed". So that it will then have implications for the fulfillment of further obligations in the context of registering a Fiduciary Guarantee which requires the inclusion of information regarding the notarial deed which in this case is intended to be an authentic deed. In the end, the creation of a notarial deed in the cyber notary concept, especially for formal agreements, can be said to violate the rights of the parties, both the giver and the recipient of the fiduciary. Of course, this would be different if the concept of cyber notary was clearly regulated and there were changes to the provisions of the UUJN which regulate the degradation of the evidentiary power of notarial deeds if they do not fulfill certain terms and conditions such as Article 16 paragraph (1) letter m.

#### **4. CONCLUSION**

The requirement for an authentic deed to be made by and before a public official according to Article 1868 of the Civil Code is related to the power of an authentic deed as evidence with inherent and perfect evidentiary power so that it means that the proof is sufficient with the deed itself unless there is opposing evidence.(received)which proves otherwise from the contents of the deed and an authentic deed is a binding deed, in other words an authentic deed means

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2007,[http://eprints.undip.ac.id/18808/1/RETNO\\_PRABANDARI.pdf](http://eprints.undip.ac.id/18808/1/RETNO_PRABANDARI.pdf) accessed on June 24, 2024 at 09.55 WIB.

<sup>17</sup> Sudiharto, "Authenticity of Fiduciary Guarantee Deeds Not Signed Before a Notary," *Journal of Legal Reform* 2, no. 3 (2015), <https://jurnal.unissula.ac.id/index.php/PH/article/view/1504/1171> accessed on June 24, 2024 at 10.11 WIB.

that the judge is bound by the deed itself as long as the deed made is in accordance with the provisions of laws and regulations and provisions regarding the validity of an authentic deed. If it is not made before an authorized official, according to Article 1869 of the Civil Code, it is stated that the deed only has value as a private deed, even so long as the parties sign it. Explanation of Article 16 paragraph (1) letter m UUJN, in fact the Notary is required to be physically present and sign the Deed in front of the person appearing and witnesses. Another provision in the UUJN which implicitly requires physical presence, namely the obligation to attach fingerprints to the minutes of the deed, is also supporting evidence of the presence of a person appearing. This is the challenge in the concept of cyber notary, making of a deed later it will be made online electronically, it can be hampered because it is caused by formal requirements that require the parties to meet face to face, so that this shows that the formal requirements in making a notarial deed are cumulative and not alternative, so they must be fulfilled. Understanding that the concept of cyber notary not fully accommodated in positive law of Indonesia, then the consequence is the degradation of the status of the deed made notary which was originally an authentic deed into a deed underhand is a reality that must be faced. the concept of cyber notary is currently applied in the context of making formal agreements such as fiduciary guarantee deeds, then the legal consequences for the resulting fiduciary guarantee deed can be said to not meet the provisions as intended in Article 5 paragraph (1) UUJF. According to the provisions of UUJN, a fiduciary guarantee deed made in the concept of cyber notary can be stated as no longer having the status of an authentic deed but rather a deed underhand. So that it will then have implications for the fulfillment of further obligations in the context of registering fiduciary guarantees which require the inclusion of information regarding the notarial deed which in this case is intended to be an authentic deed. In the end, the making of a notarial deed in the concept of cyber notary especially for formal agreements can be said to harm the rights of the parties, both the giver and the recipient of the fiduciary.

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