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## CYBER-NOTARIES FROM A CONTEMPORARY LEGAL PERSPECTIVE: A PARADOX IN INDONESIAN LAWS AND THE MARGINAL COMPROMISES TO FIND EQUILIBRIUM

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# CYBER NOTARIES FROM A CONTEMPORARY LEGAL PERSPECTIVE: A PARADOX IN INDONESIAN LAWS AND THE MARGINAL COMPROMISES TO FIND EQUILIBRIUM

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## Abstract

*Notaries in Indonesia have existed since the colonial period. Changes in technology and the continuous evolution of information bring a flow of change in all aspects of life, including the legal sector. However, the position of notaries in Indonesia has not undergone significant changes despite ongoing advancements. The promulgation of Law No. 2 of 2014 formally introduced the term "cyber notary" to Indonesian law. However, the idea of cyber notary is not practical because of legal obstacles that seem to form a legal paradox. This work analyzes the position of cyber notaries in Indonesia's positive legal order and the challenges, adaptations, and compromises actually made to implement cyber notaries in Indonesia. Normative-juridical legal research is adopted as a research method by examining various legal theories and performing comparisons of related laws. This work also presents examples of successful cyber notary implementations from several countries. Results reveal that the implementation of cyber notaries in Indonesia has yet to meet expectations because interrelated laws still create legal paradoxes. This condition results in the inability of notaries in Indonesia to fully evolve into cyber notaries. Recommendations for stakeholders are presented as valuable insights.*

**Keywords:** *cyber notary, legal paradox, Indonesia*

## Abstrak

*Notaris di Indonesia telah eksis sejak masa kolonial hingga saat ini. Perubahan teknologi dan informasi yang terus berkembang membawa arus perubahan terhadap semua aspek kehidupan, termasuk pula terhadap sektor hukum. Namun jabatan notaris di Indonesia tidak banyak mengalami perubahan yang signifikan kendati perubahan yang terjadi. Diundangkannya Undang-Undang No. 2 Tahun 2014 juga memperkenalkan istilah cyber-notary secara formal dalam konstelasi hukum Indonesia. Namun faktanya, gagasan cyber-notary ini tidak praktikal karena hambatan-hambatan hukum yang seolah-olah membentuk paradoks. Tulisan ini melakukan analisa mengenai kedudukan cyber-notary dalam tatanan hukum positif Indonesia, tantangan dan adaptasi serta kompromi yang secara riil dilakukan untuk mengimplementasikan cyber-notary. Penelitian hukum normatif-yuridis dipilih sebagai metode penelitian dengan cara meneliti berbagai teori hukum dan perbandingan antar hukum yang terkait. Disajikan pula contoh-contoh implementasi cyber-notary yang sukses dari beberapa negara. Dari hasil penelitian didapati bahwa pelaksanaan cyber-notary di Indonesia masih jauh dari harapan. Kondisi ini terjadi dikarenakan antar hukum yang terkait masih menciptakan paradoks hukum, sehingga mengakibatkan ketidakmampuan notaris di Indonesia untuk berkembang menjadi cyber-notary. Rekomendasi juga diberikan untuk para penerima manfaat sebagai masukan yang berharga.*

**Kata kunci:** *cyber-notary, paradoks hukum, Indonesia*

## I. INTRODUCTION

The preeminent inevitability of human progress, development, modernization, and globalization has exposed every sector that involves technology, including the laws. Similar to other sectors, laws are also affected by technological advancements. Through modern technology, such as the internet, our lives today have become increasingly simplified. We are now so familiar with technology that it has become an inseparable part of lives. Hence, all sectors need to keep up with the latest technologies to survive and stay relevant within the society. The technological development that has changed our way of life may have been contributed by the industrial revolution. The first industrial revolution was marked by the invention of the steam powered engine and mechanization in Great Britain. Manual labor was essentially replaced by mechanics. The second industrial revolution was marked by the electrification of industries and production lines, which influenced the way people worked, lived, interacted with others, and impacted the environment. These two influential events brought significant changes to the laws. The dawn of the third industrial revolution introduced automation, information technology, and computers that can perform tasks without human assistance and intervention. The final industrial revolution, that is, the fourth industrial revolution, has been marked by digitalization and the fusion of production and information and communication technologies.<sup>1</sup>

Despite these technological advancements, the legal profession, including the civil law notary, does not appear to have undergone significant changes. In Indonesia, civil law notary was introduced long ago by the Dutch at the time when the majority of Indonesia was still a colony under the name of the Dutch East Indies (Netherlands East-Indies). The country's notarial system continues to follow that of the Dutch. The first notary in Indonesia was, in fact, a Dutch called Melchior Kerchem.<sup>2</sup> The existence and presence of a notarial system in Indonesia is important.<sup>3</sup> A notary in Indonesia is viewed as an independent and impartial individual. The position of notaries, as a functionary in the community, is considered official, with individuals able to obtain reliable legal advice from them. Everything a notary writes is true and right. The

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<sup>1</sup> Desoutter Industrial Tools, "Industrial Revolution-From Industry 1.0 to Industry 4.0," <https://www.desouttertools.com/industry-4-0/news/503/industrial-revolution-from-industry-1-0-to-industry-4-0>, accessed 20 December 2019.

<sup>2</sup> The notary in Indonesia emerges almost at the same time of the establishment of VOC (Vereenigde Oostindische Compagnie) in March 20, 1602. The first notary was a Dutch who was appointed by the Governor General Jan Pieterszoon Coen. The appointment of Melchior Kerchem as notarium publicum in Jacatra (now Jakarta) in 27 August 1620 was based on the loyalty of office with the promise of not conducting any fraud in doing his duties as a trusted notary. Hence, all people are ordered to accept and respect Mr. Melchior Kerchem for his position. Kerchem, who was in office only until November 12, was instructed to exercise the notary's office within the jurisdiction of Jaccatra by drawing up deeds and contracts for the people. At that time, the position of notary should be seen as an additional provision to the work of the secretaries of the Council of Justice (Raad van Justitie) and the *Schepencollege*. G. Louisa Balk et al., *The Archives of the Dutch East India Company (VOC) and the Local Institutions in Batavia (Jakarta)*, (The Hague: Brill, 2007), p. 128.

<sup>3</sup> As a country that acknowledges the rule of law (the law supremacy), civil law notaries are considered to be an essential element of the rule of law. Because of the particular role they operate in order "to ensure regard for the rule of law in individual relations of private law" by preventing the court decision necessity. In the scope of legal certainty principle, they represent a privileged function (and thus became a critical component) in the preventive legal certainty. HAL Archives, "The Legitimation of Civil Law Notaries by the Law of the European Convention on Human Rights (Translation by A. Swords-Mc Donnell & C. Dauchez)," <https://hal.archives-ouvertes.fr/hal-01483911/>, accessed 14 July 2020.

notary is a strong document maker in the legal process.<sup>4</sup>

The convenience provided by technology has facilitated human interaction while eliminating time and space constraints. Meanwhile, notaries, as public officials<sup>5</sup> in charge of serving public interest, are expected to keep up with these developments.<sup>6</sup> Civil law notaries in Indonesia are regulated under the Indonesian Notary Law.<sup>7</sup> Long before the Indonesian Notary Law was promulgated, the notarial system in the Dutch East Indies (Netherlands East-Indies) was based on *Reglement op het Notaris-Ambt in Indonesië* (Ordinance 11 January 1860, *Staatsblad* 1860–3). In accordance with the provision of Article 2 of the Transitional Rules of the Indonesian Constitution of 1945,<sup>8</sup> which marked Indonesia's independence, the existing position of the civil law notary as a public official (*openbaar ambtenaar*) from the colonial era remains the same, that is, to provide legal services to the people of the newly formed republic.

From the first notary in the Dutch East Indies (Netherlands East-Indies) to the Indonesian civil law notary now, no significant changes have been made to the notary's main task, authority, and function. Prior to the emergence of the term "cyber notary," the French delegation at the Trade Electronics Data Interchange System Legal Workshop organized by the European Union introduced the term "electronic notary."<sup>9</sup> Cyber notary<sup>10</sup> was introduced formally to the Indonesian positive law only after the promulgation of Law No. 2 of 2014 regarding Amendment of Notary Law.<sup>11</sup> Roughly about 68 years after the Indonesian independence and about 154 years after

<sup>4</sup> Tan Thong Kie, *Studi Notariat & Serba-serbi Praktek Notaris* (Jakarta: PT Ichtiar Baru Van Hoeve, 2013), p. 444.

<sup>5</sup> Notary as a public official does not directly mean that they are government officials. Therefore, notaries as a public official mean that they are an organ of the state, which also includes the government as a state's organ as well. The difference is only in the fields where notary as public official specifically in the civil and private field while other government officials, in this case the executive branch in the field of public law. What needs to be emphasized here is the very principle of national law, especially in the state administration law, that if a public official is to be appointed, which according to our legal system also means to delegate part of his power or authority to the appointed public official. Agus Pandoman, *Teori & Praktek Akta Perikatan Publisitas & Non Publisitas* (Jakarta: PT Raga Utama Kreasi, 2017), p. 94.

<sup>6</sup> Zainatun Rossalina, "Keabsahan Akta Notaris yang Menggunakan Cyber Notary sebagai Akta Otentik," *Jurnal Hukum 2016* (2016): 2, accessed 20 December 2019, url: <http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/1554>.

<sup>7</sup> Indonesia, *Undang-Undang tentang Jabatan Notaris* (Law regarding the Notary Position), UU No. 30 Tahun 2004, LN No. 117 Tahun 2004 (Law Number 30 Year 2004, SG No. 117 Year 2004), art. 1.

<sup>8</sup> Article 2 of the Transitional Rules of the Indonesian Constitution of 1945 states that all existing state agencies and regulations still apply immediately, as long as new ones are not yet promulgated according to the Constitution.

<sup>9</sup> Electronic notary to provide an independent record of electronic transactions between parties. Cyn-diarnis Cahyaning Putri and Abdul Rachmad Budiono, "Konseptualisasi dan Peluang Cyber Notary dalam Hukum," *Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan Vol. 4 Issue 1* (2019): 31, accessed 23 December 2019, url: <http://journal2.um.ac.id/index.php/jppk/article/view/10482>.

<sup>10</sup> Prof. Hikmahanto Juwana explained that the definition of cyber-notary appeared in 1994 issued by the Information Security Committee of the American Bar Association, this committee illustrates that there is a profession that is similar to a notary public but the documents are made electronic based, this profession has a function to increase the level of trust in the electronic documents. Within this scope, notary has a role for electronic based document authentication which from the document authentication can be printed out wherever and whenever needed. Cyber-notary also has a role to provide certainty to parties from different countries, whether the transactions in a certain country was made according to the free will and without coercion or threat to sign the electronic-based documents. Rossalina, *op.cit.*, p. 9.

<sup>11</sup> Masrud Ridwan, "Reconstruction of Notary Position Authority and Implementation of Basic Concepts of Cyber Notary," *Jurnal Akta Vol. 7 Issue 1* (2020): 66, accessed 14 July 2020, doi: <http://dx.doi.org/10.30659/akta.7.1.61%20%E2%80%93%2068>.

implementation of the first notary law<sup>12</sup> in the Dutch East Indies. The term “cyber notary” itself is a concept that harnesses technological advancements for notaries to make authentic deeds in cyberspace and perform their daily duties, including signing electronic deeds and recording the minutes of the general meetings of shareholders via teleconferencing.<sup>13</sup> As a result of the promulgation of Law No. 11 of 2008 regarding Information and Electronic Transactions and Law No. 2 of 2014 regarding the Amendment of Notary Law, the discourse about cyber notary has become active again. Law No. 2 of 2014 regarding the Amendment of Notary Law, which is deemed as the entry point and legal basis of cyber notary regulation, only regulates cyber notary in an unwilling and unclear manner and with a narrow scope. We found that the word “cyber notary” and the Indonesian word for “electronic” only appear once, specifically in the elucidation of the provision of Article 15 paragraph (3) of Law No. 2 of 2014 regarding the Amendment of Notary Law.<sup>14</sup>

The introduction of Law No. 11 of 2008 regarding Information and Electronic Transactions, which was later amended by Law No. 19 of 2016, has strengthened the position of electronic documents as a valid instrument for evidence in the eyes of the Indonesian court of law, as elucidated in the provision of Article 5 paragraph (1) and paragraph (2) of Law No. 19 of 2016.<sup>15</sup> The law clearly states that electronic information and/or electronic documents as evidence should be emphasized in the elucidation of Article 5 of the Information and Electronic Transactions Law to ensure the legal certainty of the existence of such evidence. As the law focusing on electronic evidence, Law No. 19 of 2016 is also regarded as the entry point of cyber notary because of the nature of Indonesian notaries, the main task of which is to make authentic deeds that may serve as strong proof/evidence before a court of law.

In recent years, many electronic systems and applications have been developed to help notaries in Indonesia, but none of them has emphasized the main task of notaries as cyber notaries tasked with making authentic deeds electronically. Despite the changing times and technology, the task of notaries in Indonesia remains unchanged. This symptom is quite unique because the position of civil law notary in Indonesia appears to be a strong monument standing firm and resisting the enormous changes in its environment. Current cyber notary laws still seem resistant and unwilling to adopt to changes.

The issue of cyber notary is worth exploring because according to the criteria from Volokh,<sup>16</sup> a good research work should at least emphasize the existence of a statement

<sup>12</sup> By “first law” the author means the first formally promulgated, introduced and implemented positive law regarding notary at the time of the Dutch occupation in the Dutch East Indies (Netherlands East-Indies), which is *Reglement op het Notaris-Ambt in Indonesië* (Ordinance 11 January 1860) Staatsblad 1860-3, mb. 1 July 1860 (T. XVIII-25). Andasasmita, *op.cit.*, p. 93.

<sup>13</sup> Emma Nurita, *Cyber Notary Pemahaman Awal dalam Konsep Pemikiran* (Bandung: Refika Aditama, 2012), p. 53.

<sup>14</sup> Indonesia, *Undang-Undang tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris* (Law regarding the Amendment of Law Number 30 Year 2004 regarding the Notary Position), UU No. 2 Tahun 2014, LN No. 3 Tahun 2014 (Law Number 2 Year 2014, SG No. 3 Year 2014), art. 15 para. (3).

<sup>15</sup> Indonesia, *Undang-Undang tentang Perubahan atas Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik* (Law regarding the Amendment of Law Number 11 Year 2008 regarding the Information and Electronic Transaction), UU No. 19 Tahun 2016, LN No. 251 Tahun 2016 (Law Number 19 Year 2016, SG No. 251 Year 2016), art. 5 para. (1) and para. (2).

<sup>16</sup> Andri Gunawan Wibisana, “Menulis di Jurnal Hukum: Gagasan, Struktur, dan Gaya,” *Jurnal Hukum & Pembangunan Vol. 49 Issue 2* (2019): 474, accessed 22 December 2019, doi: <http://dx.doi.org/10.21143/jhp.vol49.no2.2014>.

or novelty and not simply tackle something that is generally known (non-obvious) and useful. Novelty and originality requirements make scientific articles difficult to work on. Novelty is a guarantee that an article is an original work.<sup>17</sup> The issue of cyber notary in Indonesia is a statement of the law that needs to cope with technological advancements and global needs. The contemporary problem is the enactment of the law that is not aligned with and is contrary to other laws and regulations. We attempt to perform our research from a paradoxical perspective to emphasize clearly and pragmatically the imbalances occurring in the laws in reality. In doing so, we can compare the cyber notary in Indonesia, particularly the compromises made, with the cyber notaries abroad to achieve a holistic understanding. This method underlines the novelty of this research. This work also attempts to answer the questions that require in-depth research to address. The results of this study will benefit the development of laws in Indonesia, especially those related to cyber notaries.

In accordance with the topic raised in this research, the main issues serving as the objectives of this work are as follows: 1) understanding the regulation of cyber notaries in the context of Indonesia's positive law, 2) analyzing the challenges involved in implementing a cyber notary system in Indonesia, and 3) identifying the ways in which cyber notaries can be implemented in Indonesia. The rest of the paper is organized into six sections. Section I provides the introduction. Section II examines the laws and regulations regarding cyber notaries and how the paradox in the law can occur. Section III establishes the challenges involved in implementing a cyber notary system in Indonesia and compares the cyber notary system with those implemented in other countries. Section IV points out the adaptations and compromises that have been made toward implementing cyber notaries in Indonesia. Section V summarizes the overall research, including the recommendations given on the basis of the analysis and legal theories. Section VI concludes the research to provide a comprehensive understanding of the contemporary problems in implementing cyber notaries in Indonesia.

## II. LAWS AND REGULATIONS CONCERNING CYBER NOTARIES AND THE LEGAL PARADOX

In Indonesia, which is a country that upholds the rule of law, everything must have a legal basis. The position of notaries legally originated from the provision of Article 1868 *Burgerlijk Wetboek voor Indonesië*,<sup>18</sup> a Dutch legacy of private law codification that has been applied since the colonial era. Article 1868 of the *Burgerlijk Wetboek voor Indonesië*<sup>19</sup> defines what is known as "authentic deed" in Indonesian legal terminology. An authentic deed is a deed that is formed according to the form prescribed by the law<sup>20</sup> and made out or carried out by the public official authorized at the place where

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<sup>17</sup> *Ibid.*

<sup>18</sup> Indonesia, *Burgerlijk Wetboek voor Indonesië* (The Indonesian Civil Code), Stbld. No. 23 Tahun 1847 (SG No. 23 Year 1847), art. 1868.

<sup>19</sup> *Ibid.*

<sup>20</sup> Notary making an authentic deed must also follow the form of the deed that was prescribed by the law, namely for notarial deed is stipulated in the provision of Article 38 para. (1) until para. (4) of the Law No. 30 of 2004 regarding Notary Law which was amended by the Law No. 2 of 2014. The form (structure) of an authentic notarial deed must begin with the beginning of the deed, followed by the body of the deed and finished with the closing of the deed. The structure stipulated in the Notary Law is an arrangement of the characteristics that distinguish it from other ordinary deed. Bachrudin, *Hukum Kenotariatan: Teknik Pembuatan Akta dan Bahasa Akta* (Bandung: PT Refika Aditama, 2019), pp. 72-73.

the deed was made. The Indonesian legal system acknowledges authentic deeds. Making an authentic deed requires a public official, and this requirement pioneered the existence of notaries in Indonesia. Only in 1860, at the time of the promulgation of *Reglement op het Notaris-Ambt in Indonesië* (Ordinance 11 January 1860) *Staatsblad* 1860-3, mb. 1 July 1860 (T. XVIII-25),<sup>21</sup> did authorities attempt to adapt the colony's notary law to the Dutch notary law and replace existing regulations that were deemed disorderly. This Ordinance was implemented from July 1, 1860, and was later replaced by the enactment of Law No. 30 of 2004 regarding the Notary Law.<sup>22</sup>

Until the promulgation of Law No. 30 of 2004 regarding the Notary Law, no single law and regulation pertained to cyber notaries. Only after the promulgation of Law No. 2 of 2014 regarding the Amendment of Notary Law that amended Law No. 30 of 2004 did the term cyber notary emerge for the first time in Indonesian legislation. However, the formulation of cyber notary in Law No. 2 of 2014 appears apprehensive particularly because it is only elaborated in the elucidation part of the provision of Article 15 paragraph (3) of Law No. 2 of 2014 regarding the Amendment of Notary Law.<sup>23</sup> The real irony is that Law No. 2 of 2014, which should be the entry point for cyber notary, does not even regulate it in the main body of the law as it only mentions it in the elucidation. Furthermore, the term is only mentioned in the seemingly shallow elucidation of one article. With regard to the scope of work for cyber notaries, the law merely describes other authorities' power to certify<sup>24</sup> transactions conducted electronically (cyber notary). This description is not even the main scope of a notary's authority, which is to make authentic deeds. We view this limitation from two perspectives: the law granting the notary additional authority as an auxiliary to support other professions and the law preparing to expand the scope of the notary's authority without preparation of the required infrastructure. Regardless of the perspective used, the provision of the law remains the same, and no other law and regulation is introduced to further specify the technical details of the provision. This scenario is rather odd because of the fact that legislations in Indonesia tend to regulate the provisions of laws with other lower hierarchy laws or regulations in accordance with the understanding of Stufenbau theory by Hans Kelsen.<sup>25</sup>

Another legislation that is in line with the implementation of cyber notary is Law No. 11 of 2008 regarding Information and Electronic Transactions, which was later amended through Law No. 19 of 2016.<sup>26</sup> This law clearly strengthens the position of

<sup>21</sup> Dutch East Indies, *Peraturan Jabatan Notaris di Indonesia* (Regulation regarding the Notary Position in Indonesia), Stbl. No. 3 Tahun 1860 (SG No. 3 Year 1860), art. 1.

<sup>22</sup> Freddy Harris and Leny Helena, *Notaris Indonesia* (Jakarta: PT Lintas Cetak Djaja, 2017), p. 29.

<sup>23</sup> Indonesia, *Undang-Undang tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris* (Law regarding the Amendment of Law Number 30 Year 2004 regarding the Notary Position), UU No. 2 Tahun 2014, LN No. 3 Tahun 2014 (Law Number 2 Year 2014, SG No. 3 Year 2014), art. 15 para. (3).

<sup>24</sup> Bahri, Yahanan and Trisaka speculate that the meaning of certify is that the notary has the authority to be called as the party who acts as a certification authority or trusted third party in such manner that notary can issue a product in the form of a digital certificate to the parties. Other functions associated with authentication that has a relationship with the legal aspects that must be fulfilled in the implementation of electronic transactions. Syamsul Bahri, Annalisa Yahanan and Agus Trisaka, "Kewenangan Notaris dalam Mensertifikasi Transaksi Elektronik dalam Rangka Cyber Notary," *Jurnal Repertorium Vol. 8 Issue 2* (November 2019): 144, accessed 20 December 2019, doi: 10.28946/rpt.v%vi%i.356.

<sup>25</sup> Muhtadi, "Penerapan Teori Hans Kelsen dalam Tertib Hukum Indonesia," *Fiat Justitia Jurnal Ilmu Hukum Vol. 5 Issue 2* (September-December 2012): 296, accessed 15 July 2020, doi: <https://doi.org/10.25041/fiatjustisia.v5no3.75>.

<sup>26</sup> Indonesia, *Undang-Undang tentang Perubahan atas Undang-Undang Nomor 11 Tahun 2008 tentang*

electronic information and electronic documents as valid instruments of evidence in the eyes of the Indonesian court of law. However, electronic information and electronic documents as evidence are only valid as long as the information in the electronic system can be accessed, displayed, guaranteed authentic and true, and accounted for so as to explain the circumstances in reality for the processing of proof in the court of law. Despite electronic information or documents being valid legal evidence in the eyes of the law, they present a challenge to notaries because notaries have more or less operated in a traditional and conventional environment. A notary making an authentic deed electronically is deemed to be violating the law because such action has yet to be regulated in the law. Even if this action is allowed, notaries today do not possess the ability, knowledge, resources, and funds to finance the electronic systems needed to produce authentic deeds as valid electronic evidence.

According to Izenic, the notarial style can be classified into two main groups, namely, *notariat fonctionnel* and *notariat professionnel*. In *notariat fonctionnel*, the authorities of the government are delegated (*gedelegeerd*) such that the product of a notary contains truth in its substance and has formal proofing strength and the power to execute. By contrast, *notariat professionnel* does not have certain causes related to the truth in its substance, proofing strength, or executorial power in their deeds.<sup>27</sup> Indonesia's notarial system falls within *notariat fonctionnel*. Hence, the notary in Indonesia is authorized to make authentic deeds with perfect proofing strength before the court of law. In Law No. 11 of 2008 regarding Information and Electronic Transactions, which was amended by Law No. 19 of 2016, specifically in the provision of Article 5 paragraph (4),<sup>28</sup> the valid electronic evidence requirements include to as not a letter which according to the law must be made in written format and not a letter and documents which according to the law must be made in the form of a notarial deed or land registrar's deed (either way they are authentic deeds). At present, all deeds regarding certain activities must be made into notarial deeds without the option to perform the task electronically or in cyberspace as the law does not identify such an approach as a part of the notary's authority.

Existing laws seem to overlap that they have become too controversial, problematic, and unclear for the implementation of cyber notary. As long as the law does not undergo further changes and no new laws are introduced, notaries in Indonesia will perform their duties as usual. The paradox in the legislation regarding cyber notary is that notaries in Indonesia will never fully transform into cyber notaries for good. Notaries in Indonesia will be a living monument of past professions that remain relevant until today despite drastic changes in their environment.

Notaries in Indonesia work in an authorized office area determined by the government; this area is referred to as *wilayah jabatan*. The determination of this authorized office area by the government is stipulated in the provision of Article 18 of the Notary Law.<sup>29</sup> The rationale for determining the authorized office area is

*Informasi dan Transaksi Elektronik* (Law regarding the Amendment of Law Number 11 Year 2008 regarding the Information and Electronic Transaction), UU No. 19 Tahun 2016, LN No. 251 Tahun 2016 (Law Number 19 Year 2016, SG No. 251 Year 2016), art. 5 para. (1) and para. (2).

<sup>27</sup> Andasasmita, *op.cit.*, p. 4.

<sup>28</sup> Indonesia, Undang-Undang tentang Perubahan atas Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik (Law regarding the Amendment of Law Number 11 Year 2008 regarding the Information and Electronic Transaction), UU No. 19 Tahun 2016, LN No. 251 Tahun 2016 (Law Number 19 Year 2016, SG No. 251 Year 2016), art. 5 para. (4).

<sup>29</sup> Indonesia, *Undang-Undang tentang Jabatan Notaris (Law regarding the Notary Position)*, UU No. 30 Tahun 2004, LN No. 117 Tahun 2004 (Law Number 30 Year 2004, SG No. 117 Year 2004), art. 18 para. (2).



established by the virtue of the provision of Article 1868 *Burgerlijk Wetboek voor Indonesië*, that is, an authentic deed needs to be made by a public official authorized at the place where the deed was made.<sup>30</sup> In the provision of Article 15 paragraph (3) of Law No. 2 of 2014 regarding the Amendment of Notary Law, the cyber notary's scope of work, among others, includes the authority to certify transactions conducted electronically.<sup>31</sup> The definition of "electronic transaction" from Article 1 and Article 2 of Law No. 11 of 2008 regarding Information and Electronic Transactions, as amended by Law No. 19 of 2016, states that electronic transactions under this law includes those within and outside the jurisdiction of Indonesia.<sup>32</sup> It is a clear violation of the principle of notaries working within a certain authorized office area.

Another constraint to the implementation of cyber notary is the obligation of a notary to read an authentic deed in the direct presence of (face to face) at least two witnesses in accordance with the provisions of Article 16 paragraph (1) letter m of the Notary Law.<sup>33</sup> In this case, implementing a cyber notary becomes meaningless if the parties still need to be present before the notary. Despite their convenience of not requiring the direct presence of parties before notaries, can cyber notaries guarantee the validity and authenticity of the parties? This question is a major dilemma that is still left unanswered. The research results by Wijanarko showed that a cyber notary's deed lacks the perfect proofing strength of an authentic deed because an electronic deed does not meet the requirements of authenticity stipulated by the law.<sup>34</sup>

Another initiative for cyber notary is Habib Adjie's idea for notaries to think progressively.<sup>35</sup> Such idea involves implementing technological and communication developments in the process of making authentic deeds according to the needs of the society. A progressive notary is one with a progressive mindset, that is, the notary is not limited by positive legal norms and is thus open to exploring various forms of legal actions that can be set forth or formulated in the form of an authentic deed. The presence of a notary benefits the public and not the other way around. A notary must be able to provide the best services and maximum satisfaction to the community in accordance with the demand of the times as a form of implementation of the pattern of action of professionalism of the notary.<sup>36</sup>

<sup>30</sup> Indonesia, *Burgerlijk Wetboek voor Indonesië* (The Indonesian Civil Code), Stbld. No. 23 Tahun 1847 (SG No. 23 Year 1847), art. 1868.

<sup>31</sup> Indonesia, *Undang-Undang tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris* (Law regarding the Amendment of Law Number 30 Year 2004 regarding the Notary Position), UU No. 2 Tahun 2014, LN No. 3 Tahun 2014 (Law Number 2 Year 2014, SG No. 3 Year 2014), art. 15 para. (3).

<sup>32</sup> Indonesia, *Undang-Undang tentang Perubahan atas Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik* (Law regarding the Amendment of Law Number 11 Year 2008 regarding the Information and Electronic Transaction), UU No. 19 Tahun 2016, LN No. 251 Tahun 2016 (Law Number 19 Year 2016, SG No. 251 Year 2016), art. 1 and art. 2.

<sup>33</sup> Tegas Hari Krisyanto, Zainul Daulay, and Benny Beatrix, "Strength of Evidence of Notarial Deed in the Perspective of Cyber Notary in Indonesia," *International Journal of Multicultural and Multireligious Understanding Vol. 6 Issue 3* (June 2019): 783, accessed 23 December 2019, doi: <http://dx.doi.org/10.18415/ijmmu.v6i3.906>.

<sup>34</sup> Fahma Rahman Wijanarko, Mulyoto, and Supanto, "Tinjauan Yuridis Akta Notaris terhadap Pemberlakuan Cyber Notary di Indonesia menurut Undang-Undang Nomor 2 Tahun 2014," *Jurnal Repertorium Vol. II Issue 2* (December 2015): 18-19, accessed 23 December 2019, url: <https://www.neliti.com/id/publications/213169/tinjauan-yuridis-akta-notaris-terhadap-pemberlakuan-cyber-notary-di-indonesia-me>.

<sup>35</sup> Habib Adjie, *Sanksi Perdata dan Administratif terhadap Notaris sebagai Pejabat Publik* (Bandung: PT Refika Aditama, 2008), p. 114.

<sup>36</sup> Widya Sujud Nadia, "Kekuatan Hukum Cyber Notary Menurut Sistem Hukum di Indonesia," *Jurnal Civil Law Vol. 1 Issue 4* (2019): 13, accessed 23 December 2019, url: <https://jurnal.usu.ac.id/index.php/>

However, notaries are also required to uphold the law and legal principles in performing their duties and exercising their authorities. Hence, notaries still remain in the corridor of the law and do not practice their authorities unlawfully. After all, the authority of a notary arises from the law itself and not vice versa. The action of a notary that exceeds the limits of his authority constitutes misuse and abuse of authority, which can diminish the level of trust and respect from the members of the public.

### III. CHALLENGES IN IMPLEMENTING CYBER NOTARIES IN INDONESIA AND THEIR COMPARISON WITH CYBER NOTARIES IN OTHER COUNTRIES

#### A. Contemporary Challenges in the Implementation of Cyber Notaries

As described previously, the paradox in the laws remains a firm barrier in the implementation of cyber notaries. Law No. 2 of 2014 regarding the Amendment of Notary Law, which is deemed as the entry point and legal basis of cyber notary regulations, only regulates cyber notaries in an unwilling and unclear manner and with a narrow scope. Meanwhile, Law No. 11 of 2008 regarding Information and Electronic Transactions, as amended by Law No. 19 of 2016, still requires several private activities to be made in writing and/or made in the form of a notarial deed or a land registrar's deed by virtue of the law. No other law has been introduced to specify or provide technical details regarding the implementation of cyber notaries; hence, the concept of notaries going cyber is an opportunity for us but is far from becoming a reality.

A cyber notary can be interpreted as a notary who performs his duties or exercises his authority, especially in the making of authentic deeds, on the basis of information technology. The concept of cyber notary is to provide a legal framework so that parties and the notary need not meet physically in a particular place.<sup>37</sup>

For notaries in Indonesia, one principle remains well-known, that is, the *tabellionis officium fideliter exercebo* principle. The *tabellionis officium fideliter exercebo* principle means that the notary must exercise his authorities and perform his duties traditionally (the notary must work traditionally). Strictly speaking, the purpose of the principle is for notaries to be able to maintain the formal truth, which is a responsibility entrusted by the government.<sup>38</sup> This principle is the ultimate challenge in transforming notaries into cyber notaries in Indonesia. For notaries to work in a traditional way means being closed to all things that are modern, such as asking the involved parties to show the original documents directly and not through electronic media or other electronic devices. This principle mitigates the risks of document forgery or document manipulation. Of course, this principle is not flawless, but it has been taught for years as part of the effort to instill a sense of prudence toward Indonesian notaries through traditional and conventional ways of working.

[civil\\_law/article/view/23850](http://civil_law/article/view/23850).

<sup>37</sup> Dewa Ayu Widya Sari, R. A. Retno Murni, and I Made Udiana, "Kewenangan Notaris di Bidang Cyber Notary Berdasarkan Pasal 15 ayat (3) Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris," *Jurnal Acta Comitatus Vol. 2 Issue 2* (2017): 222-223, accessed 23 December 2019, doi: <https://doi.org/10.24843/AC.2017.v02.i02.p06>.

<sup>38</sup> Viva Justicia Law UGM, "Konsep Dasar Cyber Notary: Keabsahan Akta dalam Bentuk Elektronik" <https://vivajusticia.law.ugm.ac.id/2018/11/29/konsep-dasar-cyber-notary-keabsahan-akta-dalam-bentuk-elektronik/>, accessed 16 July 2020.

Through their position, notaries can influence their clients in making decisions with legal impact. In reality, notaries are not only able to exert an influence as they themselves can also be influenced by external factors. Although notaries are expected to perform their duties in a conservative and pragmatic manner, which calls for prudence and minimal risk taking, their influence on clients may be deemed more or less dependent on their knowledge and personal character. As public officials and members of the public, notaries cannot be separated from society. The society continues to change, and the changes can affect notaries. Globalization causes the world order to change, thereby directly and indirectly influencing notaries. Although the laws and regulations can be changed and adjusted according to the development of this era, the changes and adjustments cannot guarantee the behavior of notaries in performing their duties. This behavior is regarded by members of the public as a trademark of what notaries are.<sup>39</sup> After all, according to Lawrence Leff, a cyber notary is someone who specializes in the field of law and computers.<sup>40</sup>

The process of making authentic deeds through an online system or through cyberspace without the need for parties to meet directly can only be implemented by removing the requirements that relate to such need.<sup>41</sup> Realizing this objective is difficult because of the fact that even when made in a direct meeting, a notary's authentic deeds may still be questioned in practice. Nevertheless, removing the requirement of a direct meeting between parties must be supported by technological sophistication, such as modern teleconferencing facilities that allow deeds to be read by a notary through the media platform and heard and witnessed by the parties online. However, the truthfulness of the parties involved remains doubtful in a teleconferencing setting. In a teleconference, one cannot guarantee that the parties are not under any pressure to express their agreement with the legal transaction. In addition to teleconferencing records, authenticity must be verified, and any possible forms of falsification in the process must be halted. System reliability is another challenge to overcome. At present, several technologies have been developed to manipulate facial patterns. The use of these technologies is described as "deepfake." Deepfake is a cybercrime that has become a strong nemesis of cyber notaries because of the fact that notaries work in an authentic environment, whereas cybercrimes involve forging information and manipulating data to mislead cyber notaries.

The security of data and documents also poses a threat to cyber notaries. As a person entrusted with confidential information, a notary needs to guarantee the security and safety of the data they are provided with. However, not all notaries today are experts in information technology. "The state of Indonesia already poses Public Key Information known as SiVion which has passed ISO 27001/ISMS Certification with international standards to support the application of cyber-notary."<sup>42</sup> Is this

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<sup>39</sup> Herlien Budiono, *Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan: Buku Kedua* (Bandung: PT Citra Aditya Bakti, 2013), pp. 283-284.

<sup>40</sup> Edmon Makarim, "Modernisasi Hukum Notaris Masa Depan: Kajian Hukum terhadap Kemungkinan Cybernotary di Indonesia," *Jurnal Hukum & Pembangunan Vol. 41 Issue 3* (July-September 2011): 472, accessed 23 December 2019, doi: <http://dx.doi.org/10.21143/jhp.vol41.no3.287>.

<sup>41</sup> Luthvi Febryka Nola, "Peluang Penerapan Cyber Notary dalam Peraturan Perundang-undangan di Indonesia," *Jurnal Negara Hukum Vol. 2 Issue 1* (June 2011): 91, accessed 23 December 2019, doi: <https://doi.org/10.22212/jnh.v2i1.187>.

<sup>42</sup> Swante Adi Krisna and Hari Purwadi, "Utilization of Public Key Infrastructure to Facilitate the Role of Certification Authority in Cyber Notary Context in Indonesia," *International Journal of Multicultural and Multireligious Understanding Vol. 5 Issue 2 (April 2018): 346*, accessed 23 December 2019, doi: <http://dx.doi.org/10.18415/ijmmu.v5i2.392>.

specification sufficient to safeguard the security of data? Notary laws in Indonesia tend to impose responsibilities related to data security on notaries themselves. Hence, cyber notary regulations in the future can be easily expected to demand notaries to safeguard, guarantee, and maintain the security of the data entrusted to them.

Another challenge to the implementation of cyber notaries includes the obligation of notaries to read authentic deeds with the attendance of at least two witnesses in accordance with the provisions of Article 16 paragraph (1) letter m of the Notary Law.<sup>43</sup> A cyber notary needs to figure out how to provide at least two witnesses as this step will impact the perfect proofing strength of the authentic deed as evidence. The need for at least two witnesses is also a fulfillment of the legal principle *unus testis nullus testis*. Are the testimonies of witnesses who have not been directly seen and heard credible in the eyes of the law? After all, if a cyber notary makes an authentic deed via electronic means, no one will actually see, hear, and witness the deed firsthand. The same applies to witnesses.

The perception of the people is also an obstacle in the implementation of cyber notaries, especially in Indonesia. Thus far, a common perception in Indonesia is that electronic documents lack strong evidentiary power. Trying to change the conventional paradigm into an electronic and thus invisible paradigm is challenging to do. Public distrust in electronic documents is also exacerbated by the attitude of law enforcement, such as the police, prosecutors, and judges, who tend to refuse to use electronic documents as court evidence.

For notaries in Indonesia to become cyber notaries, they need to be fully connected to the internet. They must also retain a digital signature and a digital identity system and purchase proper software and hardware. To read data, they require digital data capture/reading devices. Applications must be forwarded to a certification authority in order to be identified and certified. Moreover, electronic systems must be periodically renewed and upgraded to ensure their reliability. These additional instruments and procedures increase the overhead cost for notaries. Hence, overall costs become burdensome and expensive for notaries in Indonesia.

The obstacles and challenges in implementing cyber notaries in Indonesia are summarized below.

1. The paradoxes in Indonesian positive laws, namely, Law No. 2 of 2014 regarding the Amendment of Notary Law and Law No. 11 of 2008 regarding Information and Electronic Transactions (and its amendment under Law No. 19 of 2016), present obvious challenges.
2. Notaries in Indonesia have long been educated and trained strictly under the *tabellionis officium fideliter exercebo* principle. This principle is ingrained in notaries, which thus find difficulties in becoming dynamic, especially amid the changes brought about by highly disruptive electronic technology and information.
3. A cyber notary can be described as a notary who performs his duties or exercises his authority, especially in the making of authentic deeds, on the basis of information technology. In a pragmatic sense, many of a notary's main duties and authority are more paper-based than digital-based.

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<sup>43</sup> Indonesia, *Undang-Undang tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris* (Law regarding the Amendment of Law Number 30 Year 2004 regarding the Notary Position), UU No. 2 Tahun 2014, LN No. 3 Tahun 2014 (Law Number 2 Year 2014, SG No. 3 Year 2014), art. 16 para. (1).

4. Notaries work strictly in an authorized working area (somewhat like a jurisdiction), which differs from that offered by cyberspace (or cyber realm). Cyberspace has an unlimited and vast area and is not limited by time, space, jurisdiction, and national boundaries; this phenomenon is usually referred to as *detrterritorialization*<sup>44</sup> or cross-border sovereignty of the law.
5. Notaries are susceptible to errors and may have limited knowledge despite their trainings and education, especially in other disciplines that do not call for the expertise of civil law notary.
6. The law requires authentic deeds to be made by and/or before a notary, as specified precisely in the provision of Article 1868 of the Indonesian Civil Code. Thus, cyber notaries will never be fully realized if this provision remains unchanged.
7. Notaries attempting to transform into cyber notaries will initially face difficulties in verifying the identities and/or authenticity<sup>45</sup> of the parties involved without access to the proper facilities. Moreover, not meeting the parties directly while still being able to fully identify them is easier said than done especially because traditional notaries are not experts in the cyber realm. Moreover, notaries in Indonesia are not equipped with the skills needed to verify data and identities electronically.
8. Cyber notaries rely heavily on effective systems. Hence, protecting such systems presents another challenge as systems operating in cyberspace are prone to cyber crimes, such as deepfake, which enables the manipulation of human facial patterns.
9. The obligation of a notary to read the authentic deed in front of at least two witnesses, in accordance with the provisions of Article 16 paragraph (1) letter m of the Notary Law, also poses another challenge to the implementation of cyber notaries. The need for at least two witnesses is a fulfillment of the legal principle *unus testis nullus testis*. If a cyber notary finds difficulties in verifying the identities and/or authenticity of the parties involved in the cyber realm, then how reliable will the testimonies of the witnesses be?
10. The use of electronic media, such as video calls, by cyber notaries dehumanizes the process of authentic deed making. Hence, the process will lack the emotional factor (human factor) and intuition applied by traditional notaries.
11. Public distrust in electronic documents may also be a challenge in the implementation of cyber notaries. Electronic documents may be regarded as equivalent to written instruments for proofing purposes,<sup>46</sup> but whether they possess the proper attributes to be considered as authentic deeds requires proper

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<sup>44</sup> *Deterritorialization* causing a sense of loss of boundaries of a certain country because the virtual world (internet) does not recognize these boundaries. This form of communication has an improbable effect or is at least difficult to determine with certainty whether a particular person has committed a particular action or where the action was carried out. Herlien Budiono, *Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan: Buku Kesatu* (Bandung: PT Citra Aditya Bakti, 2016), p. 212.

<sup>45</sup> Post truth is a phenomenon in the current digital world, where information flows so fast that the verification and authentication process becomes difficult. At the end, the truth becomes very biased.

<sup>46</sup> In general, the form of agreement is free which can be made orally or in writing, except by virtue of law which requires the making of agreement in certain forms, such as must be made in writing or made with authentic deed. The provision of Article 164 H.I.R., Article 284 Rbg. *juncto* Article 1866 of the Indonesian Civil Code only mention written instrument as one of the five known evidences for proofing in the civil law. Of course electronic documents that contain letters that's coded electronically regarding a particular subject matter can be considered as a form of letter or written instrument for evidence and proofing.

regulations.

12. Adequate and proper software and hardware are essential to cyber notaries. The challenge in this regard is the high cost of procuring and maintaining these requirements.
13. In making authentic deeds, notaries require education and expertise based on their intuition and experience. Hence, completely replacing the role of notaries with cyber technology is not possible because each case faced by a notary has its own specifications that require thought, ethics, honesty, and spirituality from the notary. Human resources that are not driven by thoughts and emotions may indeed be replaced with technology, but humans' intelligence and emotional traits will remain irreplaceable.
14. A common notion is that technological advancements may render the position of notaries obsolete. Hence, the rising fear is that these advancements could possibly eliminate the authorities of civil law notaries in Indonesia.

## B. Cyber Notaries in Other Countries

In the United States of America, notary public and certification authority are almost similar that they are referred to as "cyber notary." Both of them are products of the following statute: "The state of Florida has even adopted the country's first statute to create the amended notary commission for notaries who wish to become qualified to perform electronic notarizations by signing with their digital signatures registered to a Florida certification authority."<sup>47</sup> Notary public and certification authority possess the legal duty to accurately identify document signers. Similar to the traditional notary, they play a critical role in business transactions wherein a third party is needed to authenticate signatures. The difference between notary public and certification authority is that notary public is a commissioned public official (hence referred to as notary public and not notary private) and a certification authority may come from a private background.

Civil law notary in Germany offers an additional layer of protection for transactions that require notarial participation. Unlike notaries in common law systems, civil law notaries in Germany are "highly qualified legal professionals who advise their clients on all legal aspects of transaction and draft necessary documents as well as taking care of procedural requirements that the transactions requires." The historic core of the notary is to accurately witness legal and factual proceedings and produce high level of tamper resistance. "This imbues the documents with enhanced evidentiary value, thus granting a basis of trust beyond mere trusted third party."<sup>48</sup> German civil law notaries play an active role in introducing cyber notaries by highlighting the need for electronic signatures. The introduction of the first electronic signature act in 1997 proved to be too expensive for common people; hence, the legislature relied

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<sup>47</sup> John C. Anderson, "Document Authentication in Electronic Commerce: The Misleading Notary Public Analog for the Digital Signature Certification Authority," *The John Marshall Journal of Information Technology & Privacy Law* Vol. 17 Issue 3 (Spring 1999): 855, accessed 20 December 2019, url: <http://repository.jmls.edu/jitpl/vol17/iss3/5>.

<sup>48</sup> Gisela Shaw, "The German Notariat and the European Challenge," *International Journal of the Legal Profession* Vol. 10 Issue 10 (2003): 44, accessed 15 July 2020, doi: <https://doi.org/10.1080/0969595032000083155>.

on private certification authorities.<sup>49</sup> *Bundesnotarkammer*<sup>50</sup> decided to pursue this by founding a licensed certification authority for the purpose of issuing qualified signature certificates to German notaries.<sup>51</sup> German notarial law has also recognized deeds in electronic form since mid-2006. “Regulations enable notary to produce certified electronic copy of his paper-based document.”<sup>52</sup>

Notaries in Austria are a combination of cyber notaries and traditional notaries. This practice appears to be an act of transitioning from traditional notaries to cyber notaries. “It is estimated that until all citizens have been furnished with a digital signature, which will took 2 to 3 years, then all documents have to be archived in paper form as well.” Unlike those in Indonesia, paper documents in Austria can be scanned and archived along with paper forms. Paper and electronic forms of notarial documents are considered to be originals in Austria. All electronic documents are stored in cyberDOC. This electronic archive proves to be advantageous as it provides permanent storage, protection, and fast access and does not require any transfer upon a notary’s retirement or death.<sup>53</sup>

Notaries in England and Wales have also taken steps toward electronic sealing and signing; the process is often called e-notarization. “This bold move to move into the arena of cyber-notary requires the development of sophisticated and trustworthy electronic system which will enable notary to provide services in an electronic environment.” The promulgation of the Electronic Signatures Act 2002 (Statutory Instrument 2002 No. 318) provides the necessary legal framework. “A company called the Cyber Notary Association (UK) Limited in 1996 was also established with the main purpose to license and administer the profession of cyber-notary. A pilot project that begun at 2002 to develop and test software to enable notaries to prepare and notarize electronic notarial acts.”<sup>54</sup>

In France and Italy, cyber notaries are equipped with smart cards that contain their digital signatures. They are entrusted with smart cards due to the fact that they are professionals in the management of documents and are perfectly capable of mastering the digital signature system. “Notaries in Italy have eliminated paper usage into virtual realm especially in real estate conveyances, mortgages and incorporation of companies. French real-estates documents are also digitally transmitted to public offices.” Notaries in France and Italy are also known to rely on working digital signatures, and they do not require electronic legalization because of Apostille (The Hague Convention Abolishing the Requirement for Legalization for Foreign Public Documents).<sup>55</sup>

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<sup>49</sup> Dominik Gassen, “A System of Trust: German Civil Law Notaries and Their Role in Providing Trustworthy Electronic Documents and Communications,” *Digital Evidence and Electronic Signature Law Review* 3 (2006): 69, accessed 23 December 2019, url: <https://sas-space.sas.ac.uk/5557/>.

<sup>50</sup> *Bundesnotarkammer* is the German Federal Notary Chamber.

<sup>51</sup> *Ibid.*

<sup>52</sup> Dominik Gassen, “Introducing and Working with Electronic Signatures in Mass Applications: Notaries and the German Commercial Register,” *Digital Evidence and Electronic Signature Law Review* 5 (2008): 69, accessed 23 December 2019, url: <https://sas-space.sas.ac.uk/5457/>.

<sup>53</sup> Friedrich Schwank, “CyberDOC and E-government: The Electronic Archive of Austrian Notaries,” *Digital Evidence and Electronic Signature Law Review* 1 (2004): 30-31, accessed 23 December 2019, url: <https://sas-space.sas.ac.uk/5332/>.

<sup>54</sup> Michael Lightowler, “E-commerce for Notaries in England & Wales,” *Digital Evidence and Electronic Signature Law Review* 4 (2007): 42, accessed 23 December 2019, url: <https://sas-space.sas.ac.uk/5462/>.

<sup>55</sup> Bernard Reynis and Ugo Bechini, “European Civil Law Notaries Ready to Launch International Digital Deeds,” *Digital Evidence and Electronic Signature Law Review* 4 (2007): 16-17, accessed 23 December

#### IV. PECULIARITY OF IMPLEMENTATION OF CYBER NOTARIES IN INDONESIA (MARGINAL COMPROMISES TO FIND EQUILIBRIUM)

A thin line differentiates cyber notaries and notaries that use cyber technology. “When a notary harness the use of teleconference for shareholders who cannot attend the meeting directly, then he is a notary that uses cyber technology not a cyber-notary. Simply because the power of attorney have to be provided to notary and the endorsee must be present before the notary.”<sup>56</sup> This confusion is common in practice. A cyber notary is a notary who can verify and certify documents electronically. In every step of exercising his authority, a cyber notary needs to perform all tasks digitally in order to be called a cyber notary. Moreover, a cyber notary needs to be equipped with an electronic signature or digital signature.

The provision of Article 77 paragraph (1) Law No. 40 of 2007 regarding Limited Liability Company states that the general meetings of shareholders can be conducted via teleconference media, video conferences, or other electronic media facilities that allow all participants to see and hear one another directly and partake in the meeting actively.<sup>57</sup> In these meetings, notaries are mandated to take the minutes, which need to be signed by all participants either physically or electronically. The notarial deed of an electronic transaction is made with the use of video conferencing. The process of making a notarial deed electronically is almost the same as making a conventional deed. After the draft of the deed is prepared, the notary reads the contents of the deed to be understood by the parties. The parties can then see and read the draft on their computer screens or other media provided. After the parties agree on the contents of the deed, the notary invites all related parties to sign it. This scenario illustrates a notary who appears to perform his duties and authority as a cyber notary but is actually not a cyber notary as he only performs his duties and authority by utilizing technological devices. The completion of an authentic deed is still done manually with a signature process in accordance with the laws that have been known so far. In this case, the notary’s authorized office area also becomes a problem as it affects the authentic deed’s proofing strength.

Notaries in Indonesia have utilized the electronic application from the Legal Entity Administration System<sup>58</sup> as stipulated in the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia No. 4 of 2014 regarding Procedures for Filing Requests for Legal Entity Approval and Approval of Amendments to the Articles of Association and Submission of Notification of Amendments to the Articles of Association and Amendments to Limited Liability Company’s Data.<sup>59</sup> “The prospect

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2019, url: <https://sas-space.sas.ac.uk/5581/>.

<sup>56</sup> Harris and Helena, *op.cit.*, p. 202.

<sup>57</sup> Indonesia, Undang-Undang tentang Perseroan Terbatas (Law regarding the Limited Liability Company), UU No. 40 Tahun 2007, LN No. 106 Tahun 2007 (Law Number 40 Year 2007, SG No. 106 Year 2007), art. 77 para. (1).

<sup>58</sup> Tanty Maharani, Lalu Parman, and Lalu Muhammad Hayanul Haq, “Cyber Notary System in the Order of Norms in Indonesia and Australia (Comparative Study in Notary Service Improvement Strategies),” *International Journal of Scientific Research and Management Vol. 5 Issue 05* (2019): 35, accessed 23 December 2019, doi: <https://doi.org/10.18535/ijstrm/v7i5.lla03>.

<sup>59</sup> Indonesia, *Peraturan Menteri Hukum dan Hak Asasi Manusia Republik Indonesia tentang Tata Cara Pengajuan Permohonan Pengesahan Badan Hukum dan Persetujuan Perubahan Anggaran Dasar serta Penyampaian Pemberitahuan Perubahan Anggaran Dasar dan Perubahan Data Perseroan Terbatas* (Regulation of the Minister of Law and Human Rights of the Republic of Indonesia regarding Procedures for Filing Requests for Legal Entity Approval and Approval of Amendments to the Articles of Association and Submission of Notification of Amendments to the Articles of Association and Amendments to Limited Liability



of a Cyber Notary in the notary profession is strategic, in order to realize the legal certainty of the parties and legal protection, even as an important indicator in realizing a perfect deed, minimizing negligence and accommodating the efficiency and effectiveness of notary services in the future.”<sup>60</sup> Such description is applicable as long as the technology can be relied upon.

Another example of the use of electronic facilities for notaries in Indonesia to perform their duties and exercise their authority is the utilization of an online system for sending monthly notary public reports. The examples herein show that the Directorate General of General Law Administration has made considerable innovations by implementing online systems in public services. This effort is due to the government’s intention to become an e-government. Notaries can send a list of deeds relating to a will or a zero list to the Testament Center via online facilities while asking questions about whether or not a will was made by the testator before making a notary’s certificate of inheritance.<sup>61</sup>

Another example of a notary in Indonesia performing his duties by utilizing electronic media is the notary who records the minutes of an auction through the internet (e-auction). In this case, the notary acts as a Class II Auction Officer. However, the convenience provided by e-auctions is only limited to bidders who do not need to attend the auction directly to bid. Nevertheless, if a bidder wins and wants to retrieve his/her Quotations of the Auction Minutes, then this bidder must go through the conventional auction process by visiting the Office of State Assets and Auction Services directly (Quotations of the Auction Minutes cannot be automatically downloaded via the internet). The examples above are only a few of the many marginal uses of electronic and internet facilities in the delivery of government services and bureaucracy in Indonesia.<sup>62</sup> What we are seeing in the implementation of cyber notaries in Indonesia is merely the tip of the iceberg; much is left for us to exploit. In the current scenario, the potential of the internet and electronic facilities has yet to be maximized. For us, it is a marginal compromise to prevent the position of notaries in Indonesia from becoming obsolete. As reflected in this work, we are simply scratching the surface of this topic, and much is to explore.

Civil law notaries in Indonesia have also begun to get used to scanning and storing all minutes of deeds in electronic format. Can this transition be called a cyber notary implementation? We are skeptical about this label because the transfer of electronic data storage can only serve as a backup for the notary’s convenience in anticipation of unforeseen mishaps<sup>63</sup> and not as an archived copy with binding legal force in the

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Company’s Data), Permenkumham No. 4 Tahun 2014, BN No. 392 Tahun 2014 (Regulation of The Minister of Law and Human Rights of the Republic of Indonesia Number 4 Year 2014, OG No. 392 Year 2014), art. 2 para. (1).

<sup>60</sup> Syamsir, Elita Rahmi, and Yetniwati, “Prospek Cyber Notary sebagai Media Penyimpanan Pendukung Menuju Profesionalisme Notaris,” *Recital Review Vol. 1 Issue 2* (2019): 144, accessed 23 December 2019, url: <https://online-journal.unja.ac.id/RR/article/view/7458>.

<sup>61</sup> Herlien Budiono, *Demikian Akta Ini: Tanya Jawab Mengenai Pembuatan Akta Notaris di Dalam Praktik* (Bandung: PT Citra Aditya Bakti, 2018), p. 294.

<sup>62</sup> Tomy Indra Sasongko, “Kewenangan Notaris dalam Pembuatan Akta Risalah Lelang Pasca Berlakunya Peraturan Menteri Keuangan Nomor 90/PMK.06/2016 tentang Pedoman Pelaksanaan Lelang dengan Penawaran Secara Tertulis Tanpa Kehadiran Peserta Lelang Melalui Internet,” *Lex Renaissance Vol. 3 Issue 1* (2018): 219, accessed 22 January 2020, doi: <https://doi.org/10.20885/JLR.vol3.iss1.art9>.

<sup>63</sup> Desy Rositawati, I Made Arya Utama, and Desak Puti Dewi Kasih, “Penyimpanan Protokol Notaris secara Elektronik dalam Kaitan Cyber Notary,” *Jurnal Akta Comitatus Vol. 2 Issue 2* (August 2017): 177, accessed 23 December 2019, doi: <https://dx.doi.org/10.24843/AC.2017.v02.i02.p01>.

eyes of the law. Furthermore, the Notary Law still requires notaries to keep their original minutes of deeds physically as an archive. "The laws have not set out firmly the possibility of storing and maintaining notary's protocols electronically."<sup>64</sup>

The examples provided above show the peculiarity and marginal compromises made by notaries in Indonesia to find a balance in this volatile environment and prepare themselves for the upcoming and inevitable blows of cyber technology in this ever-changing world. Moreover, these compromises highlight the uniqueness of Indonesian ways of dealing with the exposure to cyber technology. That is, people learn from experience slowly but surely.

## V. PRAGMATIC RECOMMENDATIONS FOR THE READINESS OF CYBER NOTARY IMPLEMENTATION IN INDONESIA

The current conflicting laws create a climate that preserves the traditional work behavior of notaries in Indonesia. This environment seems to indicate protectionism for notaries so that civil law notaries in Indonesia would never change. This protectionism creates an atmosphere of exclusivity for notaries in such a way that they would never become cyber notaries. Cyber notaries are indeed not perfect. Several examples from other countries have proved that the effective and comprehensive implementation of cyber notaries can benefit the notaries themselves. Through this implementation, a notary's performance will be quick, effective, and efficient. The encryption of cyber notaries' documents also offers protection against forgery or data manipulation. Cyber notaries' digital archives tidy up their archiving systems and prevents overloading. However, none of these changes will be realized if the relevant laws are not changed to support the implementation of cyber notaries in Indonesia.

Changes that occur in the use of modern technologies by notaries in Indonesia have not been followed by adequate amendments to the legal-technical procedures for making notarial deeds electronically and for the full implementation of cyber notaries. Cyber notaries in Indonesia must be implemented in stages. As the Information and Electronic Transactions Law has authorized the use of electronic signatures as valid signatures in Indonesia, then the first step is to equip cyber notaries in Indonesia with digital signatures so that their functions as certification authorities in authenticating documents will be preserved. The implementation may be supervised by the Directorate General of General Law Administration, which is the government body in charge of notaries in Indonesia. The exclusive use of digital signatures for notaries in Indonesia may increase their familiarity with working in a cyber and virtual environment. Digital signatures also serve as a safe way to protect authentic deeds from forgery of signatures or office seals.

The government should also promulgate a new law or regulation that will cite its expectations from cyber notaries in a detailed and technical manner. This law or regulation need not be complicated; essentially, it should provide legal certainty so that notaries can confidently act as cyber notaries without the fear of breaking the law. The legislature can also introduce new laws that strengthen the use of electronic documents as evidence so as to change people's perception of the strength of evidence

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<sup>64</sup> Restu Abiranda Bimarani and Munsharif Abdul Chalim, "Legal Review on Prospects for Filling in the Form of Notary Protocol in Electronic Form and Legal Power," *Jurnal Akta Vol. 6 Issue 1* (March 2019): 69, accessed 23 December 2019, url: <http://jurnal.unissula.ac.id/index.php/akta/article/download/4245/2986>.

based on electronic documents. In this regard, the government can use electronic documents to increase its familiarity with such instruments.

Changes to the Notary Law are also recommended, especially in the case of notaries' authority and duties that can be performed electronically. For example, the certification of true copies of documents and the legalization of documents may be implemented electronically so that notaries can smoothly transition into being cyber notaries. Students may also be offered courses that introduce cyber notaries.

This work further suggests that the government, in cooperation with the Indonesian Notary Association, develop an electronic filing system under its control so that the deeds made by notaries can be stored safely and away from the dangers of loss, damage, or natural disasters. The laws need to firmly set out the possibility of storing and maintaining notaries' protocols electronically to prevent the possibility of human errors in the storage and transfer processes.

Finally, the government should consider providing sufficient training in cyber notary implementation so that notaries can familiarize themselves with new technologies. Notaries are expected to be able to continue applying the *tabellionis officium fideliter exercebo* principle despite the conveniences provided by existing technologies.

## VI. CONCLUSION

Similar to other sectors, the laws are also affected by advancements in technology. Every sector needs to adapt to this changing environment in order to survive and stay relevant within the society. Despite these technological advancements, legal professionals such as civil law notaries do not seem to be changing significantly. The cyber notary was introduced formally to the Indonesian positive law only after the promulgation of Law No. 2 of 2014 regarding the Amendment of Notary Law. The introduction of Law No. 11 of 2008 regarding Information and Electronic Transactions, which was amended by Law No. 19 of 2016, has strengthened the position of electronic documents as valid instruments for evidence in the eyes of the Indonesian court of law.

As a result of the promulgation of Law No. 11 of 2008 regarding Information and Electronic Transactions and Law No. 2 of 2014 regarding the Amendment of Notary Law, the discourse about cyber notaries has become active again. However, existing laws seem to overlap that they have become too controversial, problematic, and unclear for the implementation of cyber notary. The formulation of cyber notary in Law No. 2 of 2014 seems to be apprehensive because cyber notary is only elaborated in the elucidation part of the provision of Article 15 paragraph (3) of Law No. 2 of 2014 regarding the Amendment of Notary Law.<sup>65</sup> The same law restricts Indonesian notaries to reading deeds directly to parties in the presence of at least two witnesses. Notaries are also limited to operate in authorized work areas. This provision certainly limits the authority of cyber notaries. Furthermore, the research results by Wijanarko indicate that a cyber notary's deed lacks the perfect proofing strength of an authentic deed because an electronic deed does not meet the requirements of authenticity

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<sup>65</sup> Indonesia, *Undang-Undang tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris* (Law regarding the Amendment of Law Number 30 Year 2004 regarding the Notary Position), *UU No. 2 Tahun 2014, LN No. 3 Tahun 2014* (Law Number 2 Year 2014, SG No. 3 Year 2014), art. 15 para. (3).

stipulated by the law.<sup>66</sup>

Law No. 2 of 2014 regarding the Amendment of Notary Law, which is deemed as the entry point and legal basis of cyber notary regulation, only regulates cyber notaries in an unwilling and unclear manner and with a narrow scope. Meanwhile, Law No. 11 of 2008 regarding Information and Electronic Transactions, which was amended by Law No. 19 of 2016, still requires several private activities to be made in writing and/or made in the form of a notarial deed or a land registrar's deed by virtue of the law. No other law has been introduced to specify or provide technical details regarding the implementation of cyber notaries; hence, the concept of notaries going cyber is an opportunity for us but is far from becoming a reality.

The implementation of cyber notaries involves a number of challenges, including the *tabellionis officium fideliter exercebo* principle, the paradox in the laws, the knowledge of the notaries themselves, the security of data and documents, cyber crimes, the proofing strength of cyber notaries' deeds, the perception of the people about electronic documents having weak evidentiary power in Indonesia, and the increase in the overhead cost for notaries. Several countries have also shown evidence of early successes in cyber notary implementation. Indonesia has its own unique way of dealing with the exposure to cyber technology in the field of cyber notaries. Cyber notaries in Indonesia must be implemented in stages. The first major step is to equip cyber notaries in Indonesia with digital signatures so that they could function as certification authorities capable of authenticating documents. Changes to the Notary Law are also recommended, especially in the case of notaries' authority and duties that can be performed electronically.

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<sup>66</sup> Wijanarko, *loc.cit.*

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