



## RESEARCH ARTICLE

# CYBER NOTARY: A NOTARIAL REVOLUTION CHALLENGE FOR TABELLIONIS OFFICIUM FIDELITER EXERCEBO PRINCIPLE

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### ABSTRACT

This study aims to oversee the challenges for Notary, who in their legal standing shall abide towards tabellionis officium fideliterexercebo, but on the other hand faces digital revolution among various aspects that led them to require the methods of cyber notary. This study uses normative approach, historical and legal research methods, including primary, secondary and tertiary sources of legal materials, and uses the snowball samplings that also involves participants, all of whom are Notary. The results of the study show that Notary has always been conventional since the dawn of their time, Roman Republic. Throughout historical records, it is safe to say that both Notary and conventional works are inseparable. Therefore, further regulations, mainly one which stands as sole legal protection for cyber notary, shall be made. Given that, then it is possible for Notary to do cyber notary. Because theoretically speaking, it is very unsafe to consider both Notary and cyber notary to be the same body. This is almost specifically spoken by many notaries, including Notary I Gusti Ngurah Maha Buana and Notary Wirawan. Despite skeptical respond from both, even they would agree that cyber notary is inevitable with the flow of time in the digital revolution era is inevitable.

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## INTRODUCTION

Historical records of Notary have always been intertwined by the needs of service for the people in the name of law, hearing upon the voice of the people into one authentic deed one after another. Their furthest records have been during the Roman Republic, during which they were called scribae ("scribes"), tabellionesforenses, or personae publicae. From that point alone, it was already been established that Notary had long uphold the tabellionis officium fideliterexercebo, which explained that a Notary shall always uphold the conventional methods among the flow of time, especially in tabelliones (paper) works (Bryan A. Garner, 2015).

The office of a public notary is a public office. It has a long and distinguished history. The office has its origin in the civil institutions of ancient Rome. Public officials, called scribae, that is to say, scribes, rose in rank from being mere recorders of facts and judicial proceedings, copiers and transcribers to a learned profession prominent in private and public affairs. Some were permanent officials attached to the Senate and courts of law whose duties were to record public proceedings, transcribe state papers, supply magistrates with legal forms, and register the decrees and judgments of magistrates. They would eventually gained their namesake, Notary, at the last century of Roman Republic. During that time, a writer who adopted the new method was called a *notarius*. Originally, a notary was one who took down statements in shorthand using these notes, and wrote them out in the form of memoranda or minutes.

Later, the title *notarius* was applied almost exclusively to registrars attached to high government officials, including provincial governors and secretaries to the Emperor. The notary remained a figure of some importance in many parts of continental Europe throughout the Dark Ages. As the civil law experienced its Renaissance in medieval Italy from the 12th century onwards, the notary was established as a central institution of that law, a position which still exists in countries whose legal systems are derived from the civil law, including most of Europe and South America. The office of notary reached its apogee in the Italian city of Bologna in the twelfth century, its most distinguished scion being Rolandino Passeggeri generally known as Rolandino of Bologna, who died in 1300 AD, whose masterwork was the *Summa Artis Notariae*.

The separate development of the common law in England, free from most of the influences of Roman law, meant that notaries were not introduced into England until later in the 13th and 14th centuries. At first, Notaries in England were appointed by the Papal Legate. In 1279 the Archbishop of Canterbury was authorized by the Pope to appoint notaries. Not surprisingly, in those early days, many of the notaries were members of the clergy. In the course of time, members of the clergy ceased to take part in secular business and laymen, especially in towns and trading centers, began to assume the official character and functions of a modern common law notary. In the present days, there are numerous changes in history which challenges the position of civil law system for Notary that enacts the Tabellionis Officium Fideliter Exercebo, mainly in Indonesia. This practice seen as global revolution where infrastructures are becoming more and more

dependable upon technologies. Not to mention, there is a major catastrophic event known as COVID-19 pandemic in 2020, which deteriorates the said systems and eventually led cyber notary as a mean of solution for panemicera. Due to the said pandemic, the people becomes more and more dependable towards technologies and because of this, the position of cyber notary becomes inevitable in the distant future.

Despite the increased demand for changes, it is still questionable if cyber notary can be applied, especially in civil law countries. In Indonesia, for example, this practice have been regulated, but not fully explained, in Article 15 verse (3) of UJUN (Indonesian Law of Notary's Post). Further regulations are also uncertain, leading to the regulations being considered as "blurred/uncertain norms". As a result, the practice of cyber notary are considered as "inapplicable". Previous studies related to the elaboration of Cyber Notary, which provides space for the notaries to exercise their authority through an electronic system, have been carried out relatively on the same topic. These studies include the study by: (1)I Dewa Gede Cahaya Dita Darmaangga and I Dewa Ayu Dwi Mayasari in 2021 emphasizes the study of legality and legal consequences of formalizing notary deed based on cyber notary through zoom conference media (IDGCD Darmaangga and IDAD Mayasari, 2021); and (2)I Dewa Gede Agung Putra Diatmika, Ni Ketut Supasti Dharmawan and Putu Aras Samsithawrati (2023) emphasizes the authority of Notary withib cyber notary, and found lack of legal basis. Therefore, the focus of this study differs due to the goal of this article being reconstruction of law, continuing what hasn't been done previously. Further, itraces back historical records of Notary as a comparison for reconstruction in the present day, because cyber notary will be a major setup for the future that may or may not defy the practical elements of *Tabellionis Officium Fideliter Exercebo*. Also, this research was made through using interviews, that are linked towards cyber notary.

## MATERIALS AND METHOD

This study employs normative approach, complete with historical and legal research because the focus is on the existence of blurred norms, aiming the reconstruction of law for cyber notary. In addition, the approaches utilize historical approach to trace back how, when and where Notary was first applicated so as to make comparison for the upcoming laws. The sources of legal materials studied in this study are primary, secondary, and tertiary, collected through document and interviews, which would be compared among each other (Peter Mahmud Marzuki, 2008).

## RESULTS

**History of Notary Law:** Around the globe today, there are two major, distinctly different notarial system, each associated with a different kind of Notary. The Civil law notary system of the Latin Nations, whereas the Common law notary system of the English speaking nations. The following selective historical accounts provide illuminating background information on the evolution of the two modern systems of notarization. Ancient Egyptian "sesh" or "scribes," were established in the Old Kingdom and were the earliest known chroniclers of official communications in recorded history. (Tan Thong Kie, 2007)

Notary had existed since as far as Roman Republic, and at the time were known as *scribae* ("scribes"), *tabellionesforenses*, or *personaepublicae*. From that point alone, it was already been established that Notary had long uphold the *tabellionis officium fideliterexercebo*, which explained that a Notary shall always uphold the conventional methods among the flow of time, especially in *tabellionis* (paper) works (Bryan A. Garner, 2015). The office of a public notary is a public office. It has a long and distinguished history. The office has its origin in the civil institutions of ancient Rome. Public officials, called *scribae*, that is to say, scribes, rose in rank from being mere recorders of facts and judicial proceedings, copiers and

transcribers to a learned profession prominent in private and public affairs. Some were permanent officials attached to the Senate and courts of law whose duties were to record public proceedings, transcribe state papers, supply magistrates with legal forms, and register the decrees and judgments of magistrates.

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It appears that cyber notary commonly seen as inapplicable, but in reality of secular world, electronic transaction is growing more than ever. This seek the fulfillment of Notary's Post, as they are seen in service of public, therefore Cyber Notary is yet have implementing regulations that regulate it(Intan Nur Baiti and Siti Malikhatun Badriyah, 2023)

**Regulations of Notary's Post:** Article 1 point 1 of the Law of Notary's Post declared that a Notary is a board who has the authorization of owning. Furthermore, Article 1 Point 7 of the Law of Notary's Post states that a Deed is an authentic deed drawn up by or before a Notary in the form and procedure stipulated in this Law. The provision of Article 16 (1) and (11) of the Amendment to Notary Official Law still implies that Authentic Deeds must be made in physical form and then bound in one book (Herlien, 2014). Conventionally, an authentic deed must be made in paper form and the minutes of the deed are stored in a place or room. Even though there is still a strong nuance of the obligation to make Authentic Deeds in physical paper form, but in truth, Indonesia had been advanced in the digital technology era in relation to the Notary's authority in providing services as stipulated in Article 15(3) of the Law of Notary's Post and its elucidation. The authority of a Notary in relation to digital technology, based on the provisions of Article 15(3) is known as "Other authorities possessed by a Notary" which later describes by its elucidation as among others, the authority to certify transactions

carried out electronically (cyber notary). Through observation of the sad law, it is safe to say that conducting a cyber notary had been made possible. Thus, the meaning of certification in relation to a notary is that a notary has the authority to act as a Certification Authority or a Trusted Third Party. Therefore, the notary identifies and verifies the parties to then be able to proceed to the stage of issuing a product in the form of a digital certificate to interested parties (Syamsul Bahri, Annalisa Yahanan, and Agus Trisaka, 2019).

This means that the authority of a notary to certify transactions made electronically (cyber notary) is different from the authority of a notary to make authentic deeds electronically including its electronic storage. Notaries in relation to their authority to certify, act as registration authorities to assist Indonesian certification bodies in registering parties as stipulated in Article 20(1) of the Minister of Communication and Informatics Regulation Number 11 of 2022 on Governance for Electronic Certification. In making an authentic deed, the notary in Indonesia shall refer to Article 38 of the Amendment to Notary Official Law which regulates the anatomy of the deed which consists of the beginning, the body, and the closing part of the deed. The notary confirms the empirical facts submitted by the parties to become legal facts, then puts the will of the parties into an authentic deed. According to Article 16 (1) (m) of the Amendment to Notary Official Law and its elucidation, the notary must be physically present and sign the deed in the presence of the appearers and witnesses. Such physical presence requirement constitutes an obstacle to the practice of making authentic electronic deeds remotely, especially in reading and signing it electronically via video conference. Video conferencing is a technology that allows users who are in different locations to hold face-to-face meetings online via electronic media without having to be in the same location (Rahmat Hidayat, 2020). However, presence via video conferencing should also be interpreted as physical presence, that someone is physically present but through the use of a video conferencing application. However, in practice to avoid problems, reading and signing should still be carried out conventionally, so the notary must be able to provide a tool for electronic signatures, such as notaries in France who have their own electronic signature tools with guaranteed reliability (Edmon Makarim, 2020).

**Urgency for Legal Protection of Cyber Notary:** Centuries before the coming of digital revolution, Notary or their staffs manually typed the deeds which was made through typing machine. Nowadays, it becomes more advanced with the invention of computer. Great Indonesian Dictionary (KBB) defines Draft as letters or whatsoever. Historically speaking, the tools of these instruments had changed and perhaps re-define the original meanings. Notary also safe kept the deeds, as according to Article 1 number 8 of the Law of Notary's Post (Regina Natalie Theixar and Ni Ketut Supasti Dharmawan, 2021)

Implementation of cyber notary within upholding the position of a notary in the time of a health emergency COVID-19 is currently still causing debate among notaries. Mainly because, some consider that the use of the internet network to sending emails and conducting video conferences, as well as telecommunication channels connected to mobile phones are part of a cyber notary, so that in its application every appearer who intends to meet and take legal action must be preceded by making an appointment to meet by telephone, then the required documents are sent via email, and will only meet in person if they are going to carry out the contract by implementing health protocols (washing hands and wearing masks and/or face shields) until finally the deed is read and signed on the spot by appearers, notaries, and witnesses. While on the other hand by some Notaries, cyber notaries are considered as an inseparable unit between information systems and technology which because currently cannot be accommodated, in any form the means used to facilitate the work of Notaries cannot be considered as cyber notaries.

Notarial Deed made through the use of cyber notary at the time of health emergency lack the essence for legality. This is mainly due to lack of legal instruments in cyber notary in the implementation of notary positions, except in the implementation of the General Meeting of Shareholders of Limited Liability Companies and in the

administration of registration and ratification of legal entity status. Therefore, it is highly recommended for the reconstruction of law (Rezky Aulia Yusuf, 2021)

Notaries implements cyber notary as fellowship with Ministri of Law and Human Rights, in regards towards news publication, submission of the use of private companies and more. Notary shall requires further regulations regarding it, and therefore reconstruction of law is mandatory and urgent (Indah Aulia Putri, 2021)

According to discussion with Notary I Gusti Ngurah Maha Buana, Notary shall always uphold the principle of *Tabellionis Officium Fideliter Exercebo*. However, such principles becomes a burden for the application of cyber notary, and vice versa. In order to compromise with the cyber notary, there shall be a specific regulations which differs from orthodox Law of Notary's Post.

Notary I Gusti Ngurah Maha Buana further explained that, Notary and cyber notary are two different positions. Law of Notary's Post are not meant for cyber notary, rather it was made specifically for orthodox Notary. This statement was relevant towards Article 1868 of Regulations for Civil Law's Book (KUHPerdata), which verses "authentic deeds are made that are made by and/or in front of public official where the deeds are made". The verses implies that physical presence is mandatory, as explained by "in front".

This is further supported by Notary Wirawan's statement, that cyber notary can be far too risky to be applied. However, he explained that a new regulation could make the application possible. Not to mention, Notary Wirawan also said that since digital revolution is inevitable, it is only a matter of time until the said law will be made.

According to both Notaries, it is mandatory for a new regulation for cyber notary to be made. Further regulations can ensure the application of cyber notary by Notary, especially with the existence of Article 15 verse (3) of the Law of Notary's Post.

Apart from that, the Notary should have started discussing it application of the cyber notary concept in carrying out his special position in the construction of the deeds. This urgency is not limited COVID-19 currently, but rather to anticipate emergencies As it is safe to say, that COVID-19 is just one of the possible emergency situation where cyber notary had becomes sole solution. Furthermore, technologies nowadays has been very advancing and supporting, even though it is a concept. This cyber notary itself does not yet have its own legal protection,, because the existence of the ITE Law and the Explanation in Article 15 paragraph (3) UUJN-P is felt not enough to legalize cyber notaries in Indonesia. Therefore, it becomes highly necessary to carry out in-depth studies so that cyber notary can be implemented immediately implemented in Indonesia as a whole.

Electronic signatures (e-sign) in the Netherlands places, had regulated the existence of signs e-sign and is recognized as the same as a traditional signature through rules called *richtlijnen elektronische handtekeningen* or electronic signature instructions (Irma Devita, 2010). Other than that, USA also regulates that e-signs are as valid as signshand on paper (Ninik Suparmi, 2009). In this case, it is safe to assume that these regulations can be applicable for cyber notary as responsive law which was saw regulations as subordination for principles and acts (Philip Nonetand Philip Selznick, 2003)

Factor behind the meaning of "essence" of authentic deeds, communication tools and internet networks were not evenly distributed, prone to abuse and the existence of conflicting norms between UUJN and UU TE as reason that Cyber Notary could not be applied. Opportunities for implementation of Cyber Notary are very open but contraned about regulation of Cyber Notary has not been further regulated so implementaton of Cyber Notary has not been perfect. Should it be analyzed with reference to Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (UUJN) and is linked to Law Number 1 of

2024 concerning the Law of Electronic Informatic and Transaction (UU ITE), we are unable to obtain authentic deeds made into electronic form due to lack of regulations and normalization regarding cyber notary (Intan Nur Baiti and Siti Malikhatus Badriyah, 2023)

## CONCLUSION

Notary has always been conventional since the dawn of their time, Roman Republic. Throughout historical records, it is safe to say that both Notary and conventional works are inseparable. Therefore, further regulations, mainly one which stands as sole legal protection for cyber notary, shall be made. Given that, then it is possible for Notary to do cyber notary. Because theoretically speaking, it is very unsafe to consider both Notary and cyber notary to be the same body. This is almost specifically spoken by many notaries, including Notary I Gusti Ngurah Maha Buana and Notary Wirawan. Despite skeptical respond from both, even they would agree that cyber notary is inevitable with the flow of time in the digital revolution era is inevitable. The availability of arrangements in accordance with the development of the digital era is necessary for notaries in ensuring the implementation of notary authority. This is also in providing legal certainty guarantees for the parties.

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