

Notary's Responsibility in Certification of Electronic Signatures for Discrepancies in Verification of Personal Data of the Owner of the Electronic Signature: Comparative Study between Indonesia and the United States of America

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Abstract. This research aims to determine the legal consequences and responsibilities of notaries for deeds made based on inconsistencies in the verification of personal data of electronic signature owners according to Indonesian and United States law. The type of research used is normative legal research with a statutory, conceptual, and comparative approach. The research results show that notaries in Indonesia are public officials who are state organs equipped with general powers, authorised to carry out part of the state's power to make written and authentic evidence in civil law. At the same time, notaries in the United States are referred to as public notaries, with authority only limited to legalising or said as determining the certainty of the date and signature of the person who affixed it. The legal consequences and legal responsibility for deeds made by notaries that are not based on the suitability of verifying the personal data of the owner of the electronic signature according to Indonesian and United States law, that in Indonesian law, the liability of notaries in certifying electronic deeds refers to the provisions of notary responsibility in doing conventional deeds because the rules related to electronic signatures in Indonesia do not yet exist. Meanwhile, notaries in the United States are fully responsible for authenticated electronic signatures.

Keywords: legal effects; responsibility; notarial act; verification discrepancy; electronic signature.

INTRODUCTION

Along with the times, especially technological developments such as today's, notaries must work more effectively and efficiently in carrying out their duties and authorities by utilising existing technology. There has been a shift from conventional transactions with direct physical interaction to virtual interaction in cyberspace. We Are Social noted that the number of social media users globally continues to increase yearly. In January 2021, the figure reached 4.2 billion or grew 13.2% compared to the previous year's period. Suppose the details are averaged more than 1.3 million new users on social media every day since 2020. This figure equals 155 thousand unique users every second.

On the one hand, the shift from conventional to virtual transactions makes it easier for parties to

make transactions because transactions take place without distance (borderless) and can be done quickly and easily without considering aspects of space and time. But on the other hand, virtual transactions are very prone to fraud that can cause losses to the parties to the transaction. The tendency of people to conduct virtual transactions has increased the need for a third party who can be trusted as a neutral party to validate that the proof of the transaction is virtually authentic. The concept of performing notary work almost by utilising technology such as the Internet is known as the Cyber Notary concept.

The country that pioneered the concept of cyber notary is the United States. This concept was originally put forward by the Information Security Committee of the American Bar Association in 1993, which is Cyber Notary, all notary activities that were originally carried out conventionally

with physical meetings between the parties was changed to be carried out virtually by utilising existing technological developments (Nurita, 2012). Nowadays, many countries have tried to adopt this concept, as it is proven to increase the efficiency and effectiveness of notaries in carrying out their duties to serve the public.

One of the countries that are currently in the process of implementing a cyber notary is Indonesia, where presently, several things related to document authentication can be done virtually. Regarding applying the concept of a cyber notary in Indonesia, full adoption of cyber notary practices in the United States cannot be done. This is because the idea of a notary from these two countries differs. America is a country that adheres to the Common law system, while Indonesia adheres to the Civil law system [1]. In Common law countries, notaries are known as a notary public, so they are not responsible for accuracy or legality. Therefore deeds made by notaries do not have perfect evidentiary power in court when a dispute occurs.

In practice, the principle of notary accuracy when making conventional deeds still often causes disputes at a later date because it turns out that the notary needs to be more careful in verifying the deed of the applicant who comes to him. Especially when discussing digital signature authentication that is done virtually, where the act of forgery will be easier to do than when it is done physically because a notary does not meet directly with the applicant, signature affixation is essential in making an agreement document or authentic deed. In an original act, the signature means giving information and statements in writing, namely what is written on the signature. The affixing of signatures is one of a series of deed inaugurations.

Actually, in Indonesia, to support the sustainability of the concept of a cyber notary and maintain the security of digital transactions, Law No 19 of 2016 concerning Amendments to Law No 11 of 2008 concerning Electronic Transactions, from now on referred to as the ITE Law. Regarding electronic signatures, Article 1 No 12 of the ITE Law provides a definition of electronic signatures which reads: "Electronic Signature is a signature consisting of Electronic Information attached, associated or related to other Electronic Information which is used as a verification and authentication tool".

Based on the article above, it is known that in electronic transactions, electronic signatures (digital signatures) can be used to start replacing signatures on paper. An electronic signature is undoubtedly needed to maintain an electronic document's authenticity. However, in its development, it was found that there were many cases of signature forgery which resulted in losses to one of the parties to the transaction. Especially at this time, Indonesia is a country with digital security that is still developing.

Various cases of public data breaches remind me of how easy it is for digital data to be stolen and misused. In addition, the government must improve the digital security of the community. Notaries are also responsible for creating a safe transaction environment for the parties. However, this will be very difficult to do when no rule explicitly regulates the responsibility of a Notary in the event of problems resulting from his negligence or intent in authenticating digital signatures.

Based on the description above, the formulation of the problem is how is the comparison the legal system governing the position and responsibility of notaries for the deeds they make in Indonesian and United States law and how are the legal consequences and legal obligations for acts made by notaries that are not based on the suitability of verification of personal data of electronic signature owners according to Indonesian and United States law?

METHOD

This research uses normative legal investigation, which means research on a problem that will be seen from its legal aspects, namely by examining primary and secondary legal materials and associating them with existing problems [2]. This normative legal research examines the comparison of legal systems governing the position and responsibilities of notaries, the legal consequences of deeds made by notaries and the responsibility of notaries for acts made based on inconsistencies in the verification of personal data of electronic signature owners according to Indonesian and United States law.

The research method develops science, technology, and art [3]. The approach method in this research uses three kinds of approach methods: the statutory approach, which examines all laws and regulations related to the legal issues being ad-

dressed [3]. A conceptual approach is an approach taken by identifying and understanding all legal concepts found in the doctrines and views of scholars. A comparative approach is an approach taken by conducting a comparative study of law. Comparative study of law is an activity to compare one country's laws with another.

Comparison of Legal Systems Governing the Position and Liability of Notaries for Deeds Made in Indonesian and United States Laws

Position and Responsibility of a Notary for Deeds Made in the Indonesian Legal System. Law in Indonesia adheres to the civil law system because the Indonesian legal design is influenced by the Dutch, who adhere to the same legal system. A notary in Indonesia is a public official who is a state organ equipped with general powers, authorised to exercise part of the state's power to make written and authentic evidence in civil law [4].

Notaries adhere to a civil law legal system where the notary is only a party that applies the rules. The government appoints Notaries as people who become "servants" of the community. As a party the state sets, the notary becomes a state representative. The state delegates authority to the notary to carry out recording, determination, and legal awareness to the public, especially regarding civil matters such as making agreements or cooperation [3].

Notaries authorise officials to make written evidence through authentic deeds with compelling evidentiary properties. Notarial deeds have formal, material evidence and, even for certain legal acts, have executorial power. In addition to traditional and earthly evidentiary power, notarial deeds have outward evidentiary power [5]. The outward evidentiary force means that the act from its "birth" can prove itself as a deed indicating that its words come from a public official, so it must be recognised as an authentic deed until proven otherwise. The formal evidentiary power provides proof of the truth of what the notary witnessed and did to guarantee the date, signature, identity of the person present and the place where the deed was made, as well as ensuring that it is true that the parties explained as stated in the act. Regarding the material evidentiary power, it guarantees that the contents of the deed are proven true against every person who orders the deed to be made.

According to the provisions in Article 1, paragraph 1 of the UUJN, a notary is a public official authorised to make authentic deeds and other authorities as referred to in this law. Although according to this definition, it is emphasised that a notary is a public official, not an employee, according to the law or civil service regulations. He does not receive a salary but gets the public [6].

The law provides the burden of liability or responsibility for the acts committed. However, it does not mean that every loss to third parties is entirely the notary's responsibility. The law itself provides limits or signs of the liability and responsibility of the notary. This is known in legal science as a form of legal protection for Notaries as public officials tasked with providing public services [7].

The liability of a Notary arises due to an error committed to performing the duties of the office, and the error causes harm to the person requesting the service (applicant) of the notary as well as other people who later have a dispute with the applicant. In other words, every duty or obligation based on legitimate authority, either from the law or an agreement, can lead to responsibility for the executor of the task or obligation.

According to Wawan Setiawan, every grant or existence of authority is always followed by obligations and/or responsibilities. Because the notary is given the power to do authentic deeds, the notary concerned is obliged to fulfil all predetermined requirements, especially in the making of the act, so that the deed made qualifies as a valid, authentic deed so that it can be used as definitive evidence in a case. As a consequence, the notary, as a public official who is authorised to do authentic deeds, must be responsible if there are deviations and/or violations of the deed-making requirements, which will result in the invalidity of the act made by the Notary [4].

Notary responsibility occurs to implement duties and obligations imposed on Notaries based on the authority granted by law. The realisation of this form of responsibility is the maximum efforts of a Notary to produce an authentic deed that is legally recognised. This responsibility is not only in the process of doing an original deed until the realisation of the genuine act but also arises at the time after the authentic deed is formed, which raises legal issues due to the invalidity of the deed.

b. Position and Liability of Notary Public for Deeds Made in the United States Legal System

In the standard law legal system, which refers more to the rules of custom, this also affects the role of the Notary Public in the United States. A notary is a person appointed by the state government (for example, the governor, lieutenant governor, secretary of state, or in some cases, the state legislature) and whose primary role is to serve the public as an impartial witness when important documents are signed [8].

In the Common Law legal system, the term is Notary Public or Notary as a public official performed by a legal expert. Whereas in the United States, the authority of a Notary Public is no more than the making of limited certificates, and the authority cannot be expanded. So the duties of a Notary Public are only to legalise dates and signatures.

Notaries in the United States do this work by lawyers (counsellors at law and attorneys). Attorneys and counsellors at law can be appointed as a notary public without any education required. The secretary of state appoints them for a maximum term of two years and may be reappointed each time (Article 130 New York Executive Law). The appointment is made after the secretary of state:

- a) The applicant is of good moral character;
- b) The applicant has an education equivalent to "a common school education";
- c) The applicant is familiar with the work and responsibilities of the notary public.

The duties of the notary public according to Section 135 New York Executive Law are:

- 1) to administer oaths and affirmations. Notary public takes commitments or promises and makes certificates stating that;
- 2) to take affidavits and depositions. Depositions are writings/statements under oath (or promise) given by a person (witness).
- 3) to receive and certify acknowledgements. Certifying the truth that on a specific date, a document has been signed by a particular person as described above;
- 4) to demand acceptance or payment of foreign and inland bills of exchange etc. The notary public makes a certificate stating, for example, that he has offered a bill of exchange on a specific

date; the notary public protests a payment which has been refused payment for some reason.

Based on the above article, the notary public's authority is no more than making certificates, as mentioned above, which cannot be extended. A notary public's duties are limited to legalisation (determining the date and signature of the person who affixed it).

Notaries in the United States are tasked with providing advice and drafting documents, especially for foreign treaty relations. Specifically, the authority of a Notary Public in America is regulated in Section 135 of the New York executive Law, namely:

- 1) Take an oath or promise and make a certificate stating it;
- 2) Depositions are writings/statements under oath or promise given by a witness;
- 3) Providing testimony of the truth that on a specific date by a particular person, a document has been signed as described above;
- 4) Making a certificate explaining that he has offered a bill of exchange on a specific date and protesting a payment which has been refused payment for particular reasons and so on.

In the United States, a notary public's certification powers are limited and cannot be extended. In the United States, a notary public is a person appointed by a state government, for example, the Governor, Lieutenant Governor, Secretary of State, or in some cases, the state legislature, and whose primary role is to serve the public as an impartial witness when important documents are signed. Since notaries are state officials, the duties of notaries can vary significantly from state to state. In most cases, notaries are only allowed to act outside their home state if they also have a commission.

Notaries are given full authority to judge whether or not a person is deemed fit to do a deed or to authenticate their signs. This rule also states that notaries do not need mental health or criminology expertise to determine whether a person is fit. This rule only states that notaries must exercise proper judgment in their duties. The authorisation of notaries in rejecting applicants who want to use their services is because they are fully legally responsible for the deeds made and the signatures authenticated.

Legal Consequences and Legal Responsibility for Deeds Made by Notaries Which Are Not Based on the Suitability of Verification of Personal Data of Electronic Signature Owners According to Indonesian and United States Law.

Indonesia. Seeing some of the obstacles notaries face in conducting electronic signatures on notarial deeds, the government must develop and certify the above challenges by clarifying and strengthening the law and supporting facilities, infrastructure, and supervision. The UUJN authorises notaries to be able to approve transactions carried out by cyber notaries. The term certification comes from the English word 'certification', which means information or endorsement (John M. Echols and Hassan Shadily). The definition of certification itself is a procedure where a third party provides written assurance that a product, process or service has met specific standards based on an audit carried out with agreed procedures [9].

Considering that notaries are public officials who are held accountable for the deeds they do, the liability of notaries refers to conventional legal rules of liability.

Based on the notarial law applicable in Indonesia, if a deed made by a notary turns out to cause a dispute in the future, this needs to be questioned: is this deed the fault of the notary or the responsibility of the parties who did not provide documents truthfully? Or did the confronting party provide incorrect information outside the knowledge of the notary? Or was there an agreement between the notary and one of the confronting parties that resulted in an authentic lousy deed? Suppose the act made by the notary contains legal defects due to the notary's fault, either due to negligence or intentionality of the notary himself. In that case, the notary must provide moral and legal responsibility [10].

In practice, it is often found that the parties or other parties dispute an authentic deed. In this case, the notary can be drawn as a party who commits or assists in committing a criminal offence, namely, making or providing false information in the authentic deed he made. In this case, it can be seen that the notary is not an office immune to the law.

Notaries can be subject to sanctions if they are proven to have made mistakes that tarnish their professionalism as deed-making officials, such as making mistakes in making deed formats (juridical

aspects) which make the deed questionable in its authenticity, as a form of responsibility a notary can be sued by parties who feel aggrieved and ask for compensation (civil sued) this is a form of commitment. Moreover, suppose the notary is found to have intentionally jointly with the parties/applicants to do a deed with the intent and purpose to benefit the party or applicant, which causes harm to the other party. In that case, the notary can be criminally liable [11].

A Notary can be held liable if it can be proven that the notary is guilty. Concerning the notary's fault, the term used is *Beroepsfout* [7]. *Beroepsfout* is a Dutch term that means mistakes made by professionals with specialised positions, namely doctors, advocates, and notaries. These mistakes are made in exercising their authority in these positions. The term fault in *Beroepsfout*'s concept is objective because it addresses professionals performing their functions.

In the making of an authentic deed, the notary must be responsible if the act he makes contains an error or violation that is intentional by the notary. Conversely, suppose the error or violation occurs from the confronting parties. In that case, as long as the notary exercises his authority by the regulations, the notary concerned cannot be held liable because the notary only records what the parties convey to be poured into the deed. The electronic signature used by the parties in doing the notarial act is the responsibility of the parties. This applies if all verification provisions stipulated in Article 2, paragraph 2 of the Regulation of the Minister of Law and Human Rights No 9 of 2017 concerning the Application of the Principle of Recognising Service Users for Notaries in which it has been regulated that requires Notaries to apply the principle of recognising their service users to ensure the truth of the data or information.

However, if the applicant deliberately manipulates the data or information system so that it cannot be detected by the notary and at a later date this becomes a dispute, the notary only must provide information in court and is not civilly or criminally liable.

United States of America. The application of cyber notaries in the United States is a breakthrough to increase the effectiveness and efficiency of notaries in carrying out their duties in serving the public. In United States law, as the author has previously described, authentication or verification of signatures can be done electronically by

utilising technological advances. Still, it must be remembered that the notary has full responsibility for this authority. To prevent falsification of data brought by the applicant to the notary, section 8 of the Notarial Act of the United States regulates that a notary can refuse to perform his duties if:

- 1) The applicant is deemed incompetent to do a deed or sign a deed either in person or electronically;
- 2) The applicant is deemed to have intentionally forged his/her signature.

Based on the above rules, it can be seen that a notary has the right to refuse to perform his duties if the applicant who comes to use his services is considered incompetent and has the potential to harm himself or others if the notary performs his duties. This rule also states that:

"Satisfaction as to the competency or capacity of the individual making the record or with the fact that the signature is knowingly and voluntarily made are matters within the proper judgement of the notarial officer. No expertise on the part of the notarial officer as to those matters is required to refuse to perform the notarial act" (Section 8 Notarial Act of the United States).

Based on the above rules, the notary is given full authority to assess people worthy of authenticating their signatures. This rule also states that notaries do not need mental health or criminology expertise to determine whether someone is fit. This rule only states that notaries must make proper judgements in their duties.

Based on the above description, a notary public in the United States is fully responsible for the authenticated electronic signature. Suppose there is misconduct in authentication as stipulated in the Notarial Act of the United States above. In that case, the verified signature will be dismissed in court if used as evidence. Meanwhile, notaries who commit misconduct will be tried by the ethics committee if proven to have committed an unintentional violation. They will be punished with temporary or permanent dismissal and also the imposition of fines. Meanwhile, notaries proven to have committed a crime by verifying forged signatures will be dismissed from their position as a notary public. In addition, no-

taries can be prosecuted and punished for committing federal crimes and obstruction of justice.

CONCLUSIONS

A comparison of the legal systems governing the position and responsibility of notaries for the deeds they make in Indonesia and the United States shows that notaries in Indonesia are public officials who are state organs equipped with general powers, authorised to carry out part of the state's power to make written and authentic evidence in the field of civil law. Meanwhile, notaries in the United States are referred to as public notaries who have authority only limited to legalising or said to be determining the certainty of the date and signature of the person who affixed it.

The legal consequences and legal responsibility for deeds made by notaries that are not based on the suitability of verifying the personal data of the owner of the electronic signature according to Indonesian and United States law, that in Indonesian law, the liability of notaries in certifying electronic deeds refers to the provisions of notary responsibility in doing conventional deeds because the rules related to electronic signatures in Indonesia do not yet exist. So that based on the existing legal rules, notaries can be held liable if the authentic deed they make contains elements of falsehood or is not by the original if the notary knowingly and intentionally, together with the applicant, falsifies the contents of the deed. In addition, the notary must also be responsible if he makes an authentic deed that is defective (both juridical and material) because he does not heed the principles of prudence and professionalism, so three forms of responsibility can be imposed on the notary if he is proven to have done this, namely civil accountability, administrative burden and criminal responsibility. Meanwhile, notaries in the United States are fully responsible for authenticated electronic signatures. If there is misconduct (unintentional) in authentication as stipulated in the Notarial Act of the United States, the verified signature will be dismissed in court if used as evidence. Meanwhile, notaries who commit misconduct will be tried by the ethics committee if proven to have committed an unintentional violation. They will be punished with temporary or permanent dismissal and fines.

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